May 11, 1983

MEMORANDUM TO: Members of the SEC Advisory Committee on Tender Offers

FROM: Alan R. Gruber A.R.G.

RE: COMMENTS ON PRELIMINARY REPORT OF THE JOINT SUBCOMMITTEE ON REGULATION OF ACQUISITION OF CONTROL AND REGULATION OF OPPOSITION TO ACQUISITION (MAY 6, 1983)

Having participated actively in the meetings of the Joint Subcommittee, and recognizing that the product of the committee process is necessarily a compromise, I am generally in agreement with the Preliminary Report. Nevertheless, I believe that some personal observations and comments may be useful toward the Final Report of the Joint Subcommittee.

While Paragraph I-A-2 is an improvement as compared with earlier versions, it continues inappropriately to endow bidders with a uniform nobility of purpose. The transfer of corporate assets facilitated by tender offers is frequently not in the best interests of the bidder's shareholders, in that competitive zeal and management machismo tend to lead to pricing excesses which make the winner become the loser. While "the possibility of tender offers also promotes responsiveness to the market in management decisions", this is a mixed blessing. The threat of tender offers is but one of many factors tending to focus management attention unduly on short-term profits and on short-term stock market performance. More generally, managements of public companies play to an audience of institutional investors who are themselves under increasing pressure for short-term performance. The intense competition among pension fund managers to achieve superior quarterly performance (facilitated by negligible transaction costs, instant communications and insensitivity to taxes) has turned many pension fund managers into gunslingers. My recommendation would be to eliminate I-A-2.

With regard to I-A-3 and to I-A-4, which is written with respect to impact on the bidder, I'd like to add a statement which recognizes that tenders have important consequences for employees, customers, suppliers, communities, etc. We should at least acknowledge the case to be made for non-concentration, for management by persons experienced in a specialized field or industry, and for continuity of management and the consequent ability of management to focus on longer-range objectives.

I continue to believe that I-C-6, eliminating the impact of competing offers on preexisting offers' dates, is too Draconian. I would put a (non-zero) limit on the number of extensions; one extension, or at most two extensions, would seem right. The report's suggested change would put a premium on a potential target's putting defense systems in place and maintaining a standing list of "white knights"; this is hardly a desirable policy. Moreover, the suggested change would all but eliminate the possible use of securities by a competing offeror--an approach which is inconsistent with the Joint Subcommittee's belief that securities offers should be on an equal footing with cash offers.

I am concerned with the report's positions on two-tier pricing (V-A-3) and on two-step acquisitions (V-B-3). I believe that there is an inherent coercive effect in any offer for a controlling position which is for less than all the outstanding shares. A possible protection would be to ban a second-step of a two-step acquisition for a period of time (say one or two years) unless the consideration per share has a value at least as high as paid for the first step.

With regard to "protective" charter amendments (VI-C), I believe that super-majority provisions should require the same percentage of shareholder vote for adoption as called for in the new provision for approval of a possible future transaction. I am opposed to the concept of "advisory votes" (VI-C-3), as I believe that the shareholder should evaluate the performance of a Board of Directors in over-all business terms without undue focus on fashionable issues which tend to come and go from time to time. The same feeling about advisory votes pertains to the other uses suggested in VII and VIII.

I am not happy with VIII-B re "Pac Man" defenses. The discussion in VIII-B-2(b) has an emphasis on protection of non-tendering shareholders which seems specious in that it is not present in the report's earlier suggestions re two-tier and two-step offers. The assertion in VIII-B-2(c) that "No pac-man defense has resulted in serious financial losses to the shareholders involved" is a shaky platform from which to endorse a dubious practice.

cc: Linda C. Quinn, S.E.C.
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