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August 9, 1983

The Honorable John S. R. Shad
Chairman
Securities and Exchange Commission
Judiciary Plaza
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Advisory Committee on Tender Offers

Dear Mr. Chairman:

Having reviewed the Advisory Committee's Report on Recommendations, I thought it might be of some benefit if I conveyed my thoughts to you. For personal reasons, I do not intend to give my thoughts any significant public dissemination beyond this letter, of which I do not intend to distribute copies.

For the most part, I thought the Committee's recommendations were well put and desirable modifications to the system, although I did not find them remarkable. Perhaps that is, at bottom, the result of my view that the present system appears to work reasonably well.

In some significant respects, however, I have serious concerns that the Committee's recommendations reflect a disconcerting departure from the historical disclosure focus of the securities laws, and, if taken seriously, a dangerous step toward precisely the wrong kind of encroachment by the federal governnment into substantive corporate regulation. My specific concerns follow (in the order of their priority).

Sale of Control (Recommendation 14). I find this recommendation, requiring a tender offer prior to the purchase of more than 20% of an issuer's securities, particularly offensive. The Committee asserts, without authority, that such transactions "wrongfully" permit a controlling shareholder to sell a "corporate asset" -- control. I disagree with the recommendation in as many ways as is possible, although I am perfectly willing to agree that in the ordinary case the better, more ethical course is to make the same offer to all shareholders.

First, this is an area of substantive corporate law, traditionally governed by the several states as they see fit. I see no basis for selecting this topic as one that deserves federal regulation.

Second, the issue has been debated for some thirty years since the initial articles by Professors Jennings (U. of Cal. L. Rev.), Leach (U. of Penn. L. Rev.) and Andrews (Harvard L. Rev.). No court has yet decided, although many cases have been brought, that the "naked" premium for purchase of control (i.e., without "looting" or other "special facts") is improper. Why, now, should this substantive state law conclusion be altered by federal fiat as a part of improving the tender offer process?

Third, it is postulated by the Committee, without argument or evidence that control is a "corporate asset." That is, at best, unproven. If I own 100% of a corporation and sell 40% to the public, I assume (if control carries a premium) that this minority interst sells at a discount to reflect my control. If the next year I am offered a premium price for my 60% position, why should the minority, who never "paid" for the control asset, participate in the benefit from selling it?

Fourth, the recommendation would also prohibit market accumulations beyond the 20% point. What is the objection in that case? No seller of control is receiving a premium. No sellers are being "stampeded" into a sale with inadequate information. I see no objection, yet the market accumulation would be prohibited by the recommendation.

Repurchases (Recommendation 43). Again, I see no basis for this to be a matter of federal concern. There are unquestionably instances in which we all are offended by this practice. There are also instances in which it is the sensible thing to do for the corporation. Mandating shareholder approval of such transactions strikes me as likely to (1) be ineffective in most cases, (2) increase expenses significantly for issuers, since litigation is likely under such circumstances and (3) encroach, again, on the proper realm of state law.

Rule 10b-13 (Recommendation 26). Nobody has ever articulated to my satisfaction a jusification for Rule 10b-13 or, before it was adopted, the application of Rule 10b-6 in such cases. If there are people who want to sell in the market during a tender offer, who thereby elect not to receive the protections of the tender offer rules (withdrawal rights, etc.), why should the offeror -- and only the offeror -- be prohibited from purchasing? What is the social policy behind protecting only the arbitrageurs? I would probably suggest a repeal of Rule 10b-13.

Advisory Votes (Recommendations 37-38). I view this process as wasteful and dangerous. If such votes are truly advisory, they are meaningless. And I don't want any of my clients to spend years in litigation to find out whether such votes are truly "advisory" or whether directors have some fiduciary duty under state law to abide by them.

Issuances of Stock More than 15% (Recommendation 41). We have stock exchange rules, state law and, perhaps, federal law (Mobil v. Marathon) on the topic. We don't need further federal encroachment.

Anti Take-Over Provisions (Recommendations 37-38). Again, this is an area traditionally of state law concern. In general, I don't approve of such provisions, but I see no need for federal law to enter the area.

Rule 10b-4 (Recommendations 44-47). I have no objection to the attempt to make the "short tendering" limitation work. I tend, however, to doubt the ultimate efficacy of the proposals, and have some fear that Rule 10b-4 will become unduly complex while the suggested amendments will not prove effective.

I suspect that in the foregoing I am objecting to the only proposals that will prove at all controversial. But it should not go unsaid that I generally find the remaining proposals (particularly the facilitating of exchange offers as an alternative) beneficial.

I hope this may prove of some use to the analytical process.

Best regards.

Yours sincerely,

Simon M. Lorne

SML/bd