ADVICE MEMORANDUM

July 31, 1985

TO	:	The Commission
FROM	:	The Division of Corporation Finance
SUBJECT	:	Review of Preliminary Proxy Material Involving or Relating to Exchange Offers to be Registered under the Securities Act.
RECOMMENDATION	:	Unless the Commission should direct otherwise, the Division proposes to review preliminary proxy material involving or relating to business combinations irrespective of whether the transaction relates to a merger transaction or an exchange offer.
TRIGGER DATE	:	August 9, 1985
VIEWS OF OTHER OFFICES OR DIVISIONS CONSULTED	:	None
PRIOR COMMISSION ACTION	:	None
PERSONS TO CONTACT	:	William C. Wood Ernestine M.R. Zipoy Joseph G. Connolly Jr.

I. Summary

During the past two weeks, the Division has received filings for two actual exchange offer transactions and several general questions which raise an issue as to the review process for certain preliminary proxy materials. Because this processing issue has significant ramifications for tender offer practice, the Division wishes to bring it to the Commission's attention and seek the Commission's advice as to how processing should proceed.

All materials must be filed before the review process takes place rather than being processed in draft form. But the review process accorded proxy material differs from that accorded both Securities Act registration statements and Williams Act filings in the critical respect that proxy review takes place before the document is public. Because proxy material must be filed in preliminary form before it may be used, and preliminary material is not public, the review process takes place before the material is public. Registration statements and Williams Act filings, on the other hand, are public immediately upon filing, so the review process occurs with respect to a public document. The practical

application of this process to business combinations is: (1) mergers, typically subject to the proxy rules, are filed and processed in non-public preliminary proxy form and, if securities are to be issued, the registration statement (usually containing little that is new) is filed at the conclusion of the process and becomes effective almost immediately; (2) tender offers are reviewed after filing and thus as public documents -- in the case of cash offers this is also after commencement, but in the case of exchange offers the entire review process takes place after the offer has been made public but prior to commencement (which occurs at effectiveness).

The recent filings at issue are filings of preliminary proxy materials, each relating to both a proxy solicitation and an exchange offer. The processing question which must be decided is whether these materials should be processed in non-public form as preliminary proxy material or whether, because they relate to an exchange tender offer under the Williams Act, they should not be subject to the review process until public, i.e. when filed as part of a Securities Act registration statement.

The Division has considered three alternative courses of action. All three have significant practical and policy downsides. On balance, the Division has concluded that, unless the Commission otherwise instructs, the least objectionable course would be to process such preliminary proxy material as filed, but to limit the non-public review process to that material which constitutes disclosure required under the proxy rules.

II. Discussion

A. The Transactions

The two transactions involve the solication of shareholders of issuers subject to Section 14(a) of the Exchange Act and Regulation 14A thereunder. Each transaction eventually will involve the making of an exchange offer subject to the registration provisions of the Securities Act to be filed on Form S-4. One solicitation relates to the need for the issuer's shareholders to approve an increase in the number of authorized shares of the bidder to permit the making of the exchange offer. 1/ The second solicitation relates to a request by the bidder for shareholders of the target company to call a special meeting to rescind certain anti-takeover charter provisions in order to facilitate the making of the exchange offer. Although the objective of neither proxy solicitation is itself a business combination transaction, a significant portion of the two proxy statements will include disclosure identical to that requred in the S-4 registration statement which ultimately will be filed for the exchange offers to which they relate.

1/ Under these circumstances, such a vote is tantamount to seeking shareholder approval of the acquisition and accordingly full disclosure of the terms of the transaction and its effects on shareholders as well as business and financial information for the target are required in the proxy statement.

B. Background

Prior to the adoption of Form S-4, merger tansactions subject to Rule 145 of the Securities Act were generally filed on Form S-14, the form specifically adopted for such transacitons. Since this Form was a combined registration/proxy statement form, it was not uncommon for the disclosure material relating to the subject transaction to be initially filed with the Commission as preliminary proxy material pursuant to the Commission's proxy regulations. Shortly after Rule 145 became effective in 1973, the Division determined that it would process the preliminary proxy material of any issuer, where the solicitation is subject to the provisions of Section 14, even though the materials subsequently would be the subject of a registration statement. The election to file such materials initially as preliminary proxy soliciting material was available under the rules. 2/ This procedure provides several advantages to the filng person. First, the proxy material remains non-public during the review process. Thus, the details of the business combination including the specifics of the merger agreement remain non-public until the registration statement is filed. Second, the public filing need be made only after the review process has been completed. Third, the registration statement is generally declared effective promptly after receipt (frequently within 24 hours after filing). With the adoption of Form S-4, the Division determined that there was no reason to change this practice and procedure for processing merger transactions registered on Form S-4. Accordingly, the Division has continued to receive and process such merger transactions in preliminary proxy form.

Exchange offers, however were not permitted on Form S-14 because they did not relate to a transaction specified in Rule 145(a). As such, exchange offers were generally filed on Form S-1, public immediately upon filing with the Commission and thus public during the staff review process. Additionally, unlike the Form S-14 which specifically accomodated both a securities offering under the Securities Act and a proxy solicitation under the Exchange Act, the Form S-1 related solely to the registration of securities. It did not contemplate multiple regulatory uses of one document.

While it has always been possible for an issuer to attempt to couple its exchange offer with a separate proxy solicitation under Section 14(a), and file what would later become the bulk of an S-1 registration statement as non-public preliminary proxy material, the Division is not aware of any effort on the part of

---

2/ The staff however has refused to undertake the review of preliminary proxy or information statement material that would subsequently be the subject of a registration statement where the transaction was not subject ot Section 14(a) or 14(c) of the Exchange Act because such a review would be tantamount to the examination of the draft of a registration statement.

issuers to use this procedure in the past. One reason for this simply may be the fact that exchange tender offers have been few in number. 3/ With the adoption of Form S-4, however, the two types of business combination transactions -- mergers and exchange offers -- may now be filed on the same registration form. Accordingly, the Division must determine at this time whether the review procedure for preliminary proxy materials involving the two types of business combination transactions registerable on Form S-4 should be different.

C. Possible Courses

The alternatives available to the Division are: 1) not to review any preliminary proxy material which relates to or involves a business combination transaction which ultimately will be subject to registration; 2) process those preliminary proxy filings relating to a business combination specified in Rule 145(a) (e.g., mergers), but not to process such material on a preliminary (non-public) basis if it relates to a transaction which subsequently will be filed as an exchange offer under the Williams Act; or 3) process all preliminary proxy filings relating to business combination transactions to the extent such material constitutes disclosure required by the Commission's proxy regulations.

The Division believes that the first alternative is unacceptable because it would reverse a processing prcedure which was established by the Division with the adoption of Form S-14, has worked well, and has become established practice. Moreover, it would cause a problem as to how to process cash mergers, where the proxy material is the only Commission filing because no Securities Act registration is involved. In such cases, the preliminary proxy presents the only opportunity to review the material because the proxy rules allow the definitive proxy to be mailed after the preliminary has been on file with the Commission for 10 days. But preliminary (non-public) review of cash mergers but not of mergers involving the issuance of securities would impose a new administrative distinction.

The second alternative would allow the Division to preserve its longstanding practice of not accepting draft registration material and on not reviewing materials relating to a tender offer in a non-public form. It would also allow the Division to treat cash and securities mergers consistently in the review process. But it would require the Division to establish procedures for filing and review of material relating to business combination transactions which differentiate between types of proxy materials and result in inconsistent treatment of merger and exchange offer transactions.

3/ For example, during fiscal years 1983 and 1984 the staff received only seven exchange offers subject to the tender offer provision of Section 14(d). As of the first nine months of fiscal 1985, the staff has received nine exchange offers. And most of these have involved oil and gas limited partnership "roll-up" offers.

The third alternative would result in more consistent processing treatment of business combination transactions that are registered under the Securities Act. While the Division believes this alternative to be the least objectionable, this alternative presents significant downside considerations. First, processing treatment would differentiate among types of exchange offers -- if an exchange offer does not also involve a proxy, the filing would only be reviewed when the registration statement is filed, and thus allow some to proceed faster than others. This, in turn, may encourage greater gamesmanship in tender offer practice, inspiring bidders to add otherwise unnecessary proxy solicitations in order to come within the non-public review process. Second, this approach may be viewed by certain parties, particularly unfriendly targets, as the de facto adoption by the Commission of the substance of Recommendation 12 of the Tender Offer Advisory Committee; 4/ In this regard, criticism may arise in light of the position of the House Committee on Energy and Commerce in its Report on H.R. 5693 (Equity in Foreign and Domestic Credit and Tender Offer Reform) that the Commission should defer adoption of Form S-4 pending additional Congressional hearings. It was the Committee's view that the Form S-4 would result in acceleration of the tender offer process, a reduction of information and time for the average shareholder to evaluate and understand the offer, and ultimately a tilting of the careful balance of the Williams Act in favor of the bidder. The Committee further directed the Commission to defer adoption of Recommendation 12 because in their view, shareholders subject to an exchange offer are confronted by a range of complex valuation issues that are not present in a cash offer. Finally, this approach could be viewed as staff review of draft tender offer material, which would be contrary to the legislative history of the Williams Act. At the 1968 hearings, the Commission had testified that the staff should be be able to review tender offer material before it is made public, 5/ but Congress chose not to adopt this position, on the basis that it was not necessary and created a risk of market disruption as a result of premature disclosure.

4/ Recommendation 12 provides that bidders should be permitted to commence their tender offers upon the filing of the registration statement with the Commission and be permitted to receive tenders prior to the effectiveness of the filing. While review of preliminary proxy materials which will be filed as an exchange offer is not within the precise wording of Recommendation 12, it could be argued that it reaches a similar result in that the date of commencement for an exchange offer would occur shortly after the public filing and therefore exchange offers would be on a substantially similar timetable to cash tender offers.

5/ Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 21 (1968)

The Division believes, however, that the reasons for the third alternative, continuing the preliminary proxy review procedure irrespective of whether the transaction is a merger or exchange offer, outweigh the downsides. First, Section 14(a) and the Commission's proxy rules require that proxy soliciting material be filed in preliminary form prior to its use. Under the proxy rules, ten days after such filing an issuer is free to mail its soliciting material. 6/ In light of these provisions in the proxy rules, the Division is concerned that, without a review of the preliminary proxy materials, it may find itself in the undesirable and vulnerable position of discovering significant disclosure problems in the subsequently filed S-4 registration statement that are identical to disclosures in the previously filed proxy material which it did not review, but which has already been mailed to shareholders.

Second, the adoption of Form S-4, while it may have been the catalyst for the concept of combining a proxy solicitation and an exchange offer, was never intended to alter the Division's longstanding practice in the area of mergers.

Third, the main objection of the House Committee to the adoption of Recommendation 12 was that an exchange tender offer should not be permitted to commence prior to staff review of the offering materials. This would not be the case under the Division's proposed procedure. Unlike what would be the case under implementation of Recommendation 12, the Division would be reviewing and commenting upon the related exchange offer material prior to commencement of the tender offer, albeit in a non-public setting. The tender offer could still not commence until the S-4 filing was made, the Division was satisfied with the filing, and had declared the registration statement effective.

Finally, with respect to the legislative history point, the third alternative is not contrary to that history. The Division is not suggesting a requirement for pre-filing of tender offers, but rather is discussing the processing appropriate once the equivalent of such a filing has voluntarily been made. Moreover, to the extent there is a risk of premature disclosure (but the Division notes the lack of problems in the merger context), that risk is one undertaken at the bidder's initiative.

Assuming that the Commission agrees with the Division's proposed course, an ancillary issue presented by the recommendation is the timing of effectiveness of these filings once the Form S-4 is received. With the exception of Rule 145(a) transactions, the Division's policy is that an initial registration statement must be on file with the Commission for a minimum of 48 hours prior to being declared effective. As a result of the mandatory proxy solicitation period for a transaction on Form S-14 (usually 20 days) the Division's 48 hour rule was not deemed necessary. Accordingly, many S-14 merger transactions initially received in

---

6/ See Rule 14a-(6) of Regulation 14A.

preliminary proxy form became effective within 24 hours after filing. Because an exchange offer must comply with the Commission's tender offer regulations (including a minimum offering period of 20 business days), the Division would take a similar approach for exchange offers. Upon receipt of a registered exchange offer, a substantial portion of which was initially received as preliminary proxy material, the staff will review all previously unreviewed portions of the filing. 7/ However, since the main core of the filing will have been previously reviewed, 8/ the staff anticipates that a review generally will take only one or two days. Under the circumstances, and unless instructed to do otherwise by the Commission, the Division generally would expect to accelerate the effectiveness of these filings promptly after the completion of the review and the receipt of a request for acceleration.

III. Conclusion

Unless one or more Commissioners request on or before August 9, 1985 that this matter be considered by the full Commission at a formal meeting, the Division intends to process all preliminary proxy materials received irrespective of the form of the subject transaction.

7/ The Division is not proposing to alter its currently applicable selective review criteria. Under this procedure, all exchange tender offers are reviewed or monitored by the staff while not all Rule 145(a) merger transactions are selected for review.

8/ Examples of the type of disclosures which would not be reviewed include the exhibits and undertakings required by Part II of the Form S-4 and any disclosure material relating to the exchange offer, such as terms, conditions, time periods, and recommendations.