

ADVICE MEMORANDUM

January 3, 1983

TO : The Commission

FROM : The Division of Corporation Finance

SUBJECT : Requests for no-action letters regarding the exclusion under Rule 14a-8 of a shareholder proposal relating to certain issuers' lobbying efforts on mideast policy issues.

RECOMMENDATION : Unless one or more Commissioners wishes to have this matter considered by the full Commission, the Division intends to issue the attached letter to Deere & Company and to take the positions indicated with respect to the letters submitted by other issuers.

TRIGGER Date : January , 1983

VIEWS OF OTHER OFFICES OR DIVISIONS CONSULTED : None

PERSONS TO CONTACT : Linda C. Quinn - X22579
William E. Morley - X22573
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Background

On November 17, 1982 the Division received a letter, submitted on behalf of Deere & Company ("Deere") pursuant to Rule 14a-8(d), informing the staff of Deere's intention to omit a shareholder proposal from its proxy statement and form of proxy for its 1983 annual meeting of shareholders. The proposal involved a request for a special report to shareholders relating to Deere's lobbying efforts in connection with the sale of AWACS planes to Saudi Arabia and Mideast policy issues in general. The proposal was submitted by one of Deere's shareholders, Lori Amer, who requested that all further correspondence regarding the matter be directed to Mr. Will Maslow, General Counsel of the American Jewish Congress. By letter dated December 6, 1982, Mr. Maslow responded to Deere's contentions that the proposal was properly excludable under the cited provisions of Rule 14a-8.

The text of the shareholder proposal and the statement of support read as follows:

Shareholder's Resolution on Corporate Lobbying
On Mideast Policy Issues

Whereas, Deere & Company, engaged in 1981 in extensive lobbying in support of the proposal to sell American Airborne Warning and Control System planes (AWACS) to Saudi Arabia, and

Whereas, similar Mideast policy issues will be presented to Congress in the next twelve months with respect to which Deere & Company may engage in similar lobbying, and

Whereas, such intervention in foreign policy issues has not been authorized by the shareholders, and

Whereas, such lobbying cannot generally be justified as advancing the corporate interests of Deere & Company

Now therefore be it resolved, that the shareholders of Deere & Company hereby request the Board of Directors to report to the shareholders in its next quarterly report or as soon as reasonably practicable after this meeting.

- 1) The concrete steps taken by the corporation to influence members of Congress and public opinion generally in support of the AWACS deal.
- 2) Approximately how much money was expended in 1981 by the corporation in direct lobbying or in efforts to influence public opinion generally in support of the AWACS deal.
- 3) Approximately how much money was expended in 1982 by the corporation in direct lobbying or effort to influence public opinion on Mideast policy issues.
- 4) What part of such lobbying expenditures will be claimed as tax deductible.
- 5) What present expectations does management have that they will engage in lobbying or efforts to influence public opinion on Mideast policy issues in the next twelve months.
- 6) How, in the view of management, has such lobbying or efforts to influence public opinion in 1981 and 1982 advanced the interests of the corporation.

STATEMENT IN SUPPORT OF SHAREHOLDER'S RESOLUTION

The recent controversy about the proposed sale by the U.S. Government of AWACS Planes to Saudi Arabia witnessed a gigantic effort by American corporations to lobby on behalf of such sale. It is the purpose of the Resolution to obtain a detailed report from our company about the extent of its participation in such lobbying, the cost thereof, management's view of how such lobbying advanced corporate interests, and whether management is likely to engage in such lobbying on Mideast policy issues in the coming year.

Corporate efforts to influence public opinion on foreign policy issues usually constitutes a waste of corporate funds, especially since the Internal Revenue Code does not allow the deduction of such expenditures as ordinary business expense. What is worse, corporations take positions on controversial issues without even consulting the shareholders and often in contradiction to their views. There is no greater threat to the integrity of our political institutions than the ability of executives of our giant corporation to influence public opinion by the expenditure of millions of corporate dollars.

Subsequently, four additional companies submitted letters pursuant to Rule 14a-8(d) informing the staff of their intention to omit a proposal identical to the one received by Deere. These companies and the dates of their letters are as follows: FMC Corporation, December 13, 1982; Westinghouse Electric Corporation, December 13, 1982, United Technologies, December 16, 1982; and GTE Corporation, December 20, 1982. All of these shareholder resolutions have been submitted by different individual shareholders who have requested that future correspondence be directed to Mr. Maslow of the American Jewish Congress. / On the basis of information contained in the materials accompanying these proposals, the Division understands that a total of twenty five (25) companies will receive this shareholder proposal regarding lobbying efforts on behalf of the sale of AWACS planes and Mideast policy issues in general.

Because of the controversial nature of the proposal and the number of registrants that are involved and apparently will be involved, the Division feels that it is appropriate to inform the Commission of the position it intends to take on this matter.

Discussion

Pursuant to the provisions of Rule 14a-8, Deere has informed the staff that it believes the proposal is excludable on the basis of

/ To date Mr. Maslow has not responded to the submissions made by these four issuers.

paragraphs (c)(3) and (c)(5) / of the Rule. The other provisions of Rule 14a-8 that have been suggested by the issuers listed above as bases for the exclusion of the proposal are paragraphs (c)(4), (c)(6) and (c)(7) of Rule 14a-8. / The purpose of this memorandum is to address the arguments both for and against exclusion of the proposal and to indicate the position intended to be taken by the staff and the reasons therefor. The memorandum first discusses the grounds for exclusion that are raised in the Deere letter; it then addresses the bases for exclusion that have been raised by the other issuers. /

A. Paragraph (c)(3) - False and Misleading

As indicated, Paragraph (c)(3) of Rule 14a-8 allows the omission of proposals that are "contrary to any of the Commission's proxy rules and regulation, including Rule 14a-9." Deere and each of the other

/ Rule 14a-8(c)(3) permits the omission of proposals or of supporting statements if they are "contrary to any of the Commission's proxy rules and regulations including Rule 14a-9 which prohibits false or misleading statements in proxy soliciting materials". Rule 14a-8(c)(5) provides for the exclusion of a proposal that "deals with a matter that is not significantly related to the issuer's business."

/ Rule 14a-8(c)(4) permits the exclusion of a proposal that "relates to the enforcement of a personal claim or the redress of a personal grievance against the issuer or any other person." Rule 14a-8(c)(6) provides for the omission of a proposal if it "deals with a matter that is beyond the issuer's power to effectuate". Finally, Rule 14a-8(c)(7) provides that a proposal may be omitted if it "deals with a matter relating to the conduct of the ordinary business operation of the issuer."

/ It should be noted that in responding to letters under Rule 14a-8, the staff considers only those bases for exclusion advanced by the issuer in its letter.

companies that have submitted letters regarding their intention to exclude the proposal allege that the proposal and supporting statement contain material misstatements of fact and omissions of material facts that render the proposal and the supporting statement false and misleading in violation of Rule 14a-9 of the Commission's proxy rules.

In responding to letters under Rule 14a-8, as with any preliminary proxy material, it is the staff's practice to give the proponent the opportunity to amend a proposal to correct problems under Rule 14a-8 except where it is clear that the proposal and supporting statement in their entirety are so misleading or otherwise so vague and ambiguous that the issuer and its security holders would not be able to determine what action the proposal is contemplating. Although the staff believes that there is merit to some of the allegations based on Rule 14a-9, it does not believe that the instant proposal in its entirety is false or misleading or inherently vague. Consequently, the staff intends to concur in some of the contentions based on paragraph (c)(3) of Rule 14a-8, but will allow the proponent an opportunity to revise the proposal and supporting statement to correct these problems. Assuming the proponent promptly amends the proposals, the staff intends to take the position that the proposal may not be omitted in its entirety on the basis of Rule 14a-8(c)(3).

B. Paragraph (c)(5) - Not significantly related to the issuer's business

Deere, as well as two of the other issuers that have made submissions thus far, has argued that the proposal may be omitted under Rule 14a-8(c)(5)

because it is not significantly related to its business. Deere and FMC assert that none of their products were involved in the AWACS and that the amount of money involved in their lobbying efforts on behalf of the sale and other Mideast policy issues was minimal or nonexistent. Specifically, Deere states that the compensation earned by company personnel involved in its lobbying effort on behalf of the AWACS sale amounted to less than \$1,000 and that the only amount of out of pocket expense it incurred was the postage affixed to a letter from management that was sent to twenty-three Senators, which letter urged tht the sale be approved. It further states it has done nothing else to influence public opinion on the AWACS sale or Mideast policy issues in general. Deere indicates that the lobbying efforts it undertook in support of the AWACS sales, which efforts it describes as "negligible," were with the belief that the sale of AWACS would "be in the general interest of the company in its efforts to do business in Saudi Arabia" (Sales by Deere to Saudi Arabia accounted for four tenths of one percent of company sales in 1981).

After indicating that it neither manufactures nor sells any products involved in the AWACS sale, FMC stated that in response to a request by the Reagan Administration, it reviewed the circumstances surrounding the AWACS transaction and concluded that it would not endanger the security of Israel ("with whom the Company long has maintained good commercial relationships") and that it was vital to U.S. interests. Based on those conclusions FMC sent mailgrams to twenty-one Senators, its Vice President

for Government affairs met with four Senators and its Chairman sent a letter in support of the sale to fifty-four Senators. The letter from FMC states that the company took no action to influence public opinion on the matter. According to its letter, the total direct and indirect costs incurred by FMC in connection with the transaction amounted to less than \$2,500. In the opinion of FMC, there is no significant economic or noneconomic relationship between the proposal and the company's business. No information was submitted concerning FMC's sales of other products to Saudi Arabia and other Middle East countries.

Westinghouse claims that the funds it expended in lobbying for the sale of its electronic equipment that was included in the AWACS sale was de minimus (it did not disclose an amount) compared to total company sales of \$2.3 billion by its Public Systems Division (which produces the equipment involved in the AWACS). The company points to the proposed revision of paragraph (c)(5) to include an economic threshold and states that its lobbying efforts did not meet this threshold level. It further claims that the matter of Mideast policy is related to the company's ordinary business and that its role in the AWACS transaction was limited to promoting the sale of its products that are incorporated in the AWACS planes. No specific information was provided with respect to the dollar amount of Westinghouse sales attributable to AWACS in particular or the Mideast in general.

In response to the argument raised by Deere, Mr. Maslow points out that although sales by Deere to Saudi Arabia in 1981 were only four tenths of one percent of total sales, this amounts to \$21.6 million,

"a far from insignificant amount" and does not include sales to other Arab countries. According to Mr. Maslow, the company admits to the significance of its business interest in Saudi Arabia by stating that it acted upon the belief that the sale of the AWACS would be in the general interest of the company in its efforts to do business in Saudi Arabi. Mr. Maslow states that the Commission itself has recognized the fact that the existence of a significant relationship does not depend on arithmetic alone. Finally, Mr. Maslow points to the qualitative importance of the support of a \$5.4 billion company in response to Deere's claim that less than \$1,000 of costs were involved.

In analysing proposals in which lobbying efforts are the focus, the Division generally will determine the applicability of the various provisions of Rule 14a-8 on the basis of the underlying subject matter of the lobbying activities. / Where the subject matter of the lobbying

/ There have not been a great many letters on this subject in the past. Two instances in which the staff did address the issue of lobbying activities occurred in 1978. The first concerned a proposal submitted to American Cyanamid which requested the company to support legislation to disallow 50% of the cost of business meals and to bar altogether tax deductions for club membership dues. The support was to take the form of public testimony before Congressional hearings. In concurring with the management's determination to omit the proposal the staff said

"The Company is primarily engaged in the manufacture and sale of chemical products. The tax legislation which is the focus of this proposal does not seem to be directly related to the chemical industry. Therefore, it does not appear that officers supporting this tax legislation would be engaged in a matter that is significantly related to the manufacture and sale of chemicals. As such we do not believe that support activities engaged in by management would be significantly related to the Company's business."

(Footnote Continued On Next Page)

effort is significantly related to the issuers' business, whether because of the economic value of the business involved or because it involves policy issues / of significance to the issuer with respect to some facet, however small, of its business / then the Division would not issue a no-action letter with respect to the exclusion of the proposal on the basis of Rule 14a-8(c)(5). Where the lobbying effort does not relate to a

(Footnote Continued)

/ The second proposal in 1978 relating to lobbying activities was submitted to General Motors. The proposal would have directed management to join in asking Congress to replace "the present average-miles-per-gallon new car regulations with a flat per-gallon motor vehicle fuel consumption penalty." The staff agreed with management's view that the proposal could be omitted under Rule 14a-8(c)(7) saying

"The proposal would appear to direct management to take action with respect to a matter relating to the conduct of the ordinary business operations of the Company (i.e., communication, directly or indirectly, with governmental units concerning legislative matters relating to the Company's products.)"

The Supreme Court's subsequent decision in First National Bank v. Bellotti, 435 U.S. 765 (1978) raised questions regarding the applicability of the provisions of Rule 14a-8 to shareholder proposals relating to corporate political activities. As a result, for a period of time following that decision the Division declined to express any view with respect to the few proposals involving such matters. At this time, however, the Division is of the view that it is appropriate to issue letters in connection with proposals which involve corporate lobbying activities based on an analysis that considers the underlying subject matter of the lobbying activities.

/ Such policy issues might include the manufacture and distribution of infant formula, trade with Communist countries or nuclear power.

/ The proposal would be excludable if the issuer does no business.

significant economic aspect of the issuers' business or raise a policy issue then the actual dollar amount involved in that effort would be considered. If that amount is insignificant then Rule 14a-8(c)(5) would provide a basis for the exclusion of the proposal.

In the instant case, the primary issues are whether the subject matter of the lobbying effort, for which a report is requested, raises a policy issue of the nature of infant formula or trade with Communist countries or involves an economically significant aspect of the issuers' business. / It appears to the Division that the concerns expressed in the proposal are analogous to those raised in the proposals relating to trade with Communist countries, and therefore raise significant policy issues so as to be found significantly related to the issuers' if the issuer is engaged in any trade with Saudi Arabia.

The letter submitted on behalf of Deere indicates that none of its products are included in AWACS, but the letter does state that the basis for the company's involvement in the lobbying effort was to foster the company's business with Saudi Arabia, a business which brought the company over \$22 million in sales in 1981. In light of that statement and the general position with respect to the policy aspects of the proposal

/ These letters do not raise the further questions or problems that would arise in considering a proposal that would require a company to undertake a lobbying or political effort, and those issues are not addressed here. In our view, these letters would not be determinative of those issues.

discussed above, the Division intends to inform Deere that it does not believe that the Company may rely on Rule 14a-8(c)(5) as a basis for excluding the proposal.

FMC states in its letter that it has no products incorporated into AWACS, and that letter does not discuss the level of FMC's sales in Saudi Arabia and other Arab countries. The staff will request such information before issuing a response to FMC. If FMC indicates that it does any business with such countries, the Division would propose to indicate that it does not believe that Rule 14a-8(c)(5) provides a basis for the omission of the proposal in light of the policy issues involved.

Westinghouse indicates in its letter that its Public Systems Division does produce equipment and services incorporated into the AWACS Aircraft. The company also indicates that the reason for its lobbying efforts on behalf of the AWACS was "its desire to see the U.S. Government engage in transactions that widen the market for its products." On the basis of the above information, the Division intends to inform Westinghouse that it does not believe that the Company may use Rule 14a-8(c)(5) as a basis for excluding the proposal.

C. Paragraph (c)(4) - Personal claim or grievance

All of the letters received by the staff, except the letter from Deere, have expressed the view that the proposal may be omitted under Rule 14a-8(c)(4) because it relates to a personal claim or grievance. The basis for this argument is that the proposal received by the individual companies is part of a larger effort organized by the American Jewish Congress ("AJC") to further the interests of the State of Israel. The companies have pointed to the fact that each proposal is identical and that each proponent requests that further correspondence be directed to Will Maslow, General Counsel of the AJC. The November-December 1982 Boycott Report (published by the AJC) states that the AJC "has launched a nationwide campaign to ascertain the extent of corporate lobbying during the 1981 AWACS campaign and on other Mideast issues." It then lists twenty-five companies that will have the resolutions submitted by leaders of the AJC. An article which appeared in the Washington Post on December 7, 1982 quotes the president of the AJC as stating that he does not expect the proposal to be approved by the shareholders, but that he hopes that the effected companies will make "an agreement (that) they will not in the future spend corporate funds for efforts of this

kind." The companies indicate that the AJC is an organization "committed to the unity, security, dignity and creative survival of Jews in Israel, the U.S.S.R. and wherever they may be threatened (as quoted from the Encyclopedia of Associations, 17th Edition-1982).

On the basis of the above facts, the companies argue that the proposals are in fact "a tactic by the American Jewish Congress to redress its grievance over the U.S. Government AWACS sale to Saudi Arabia and to further its personal interest in the welfare of the State of Israel." It has been argued further that another purpose of the resolutions is to signal American corporations that business activities deemed inimical to the State of Israel will "provoke" the "submission" of proposals with "the attendant costs in time and money to the corporation." (Letter from Westinghouse at p. 11) Several companies also have pointed to Release No. 34-19135 (October 14, 1982) in which the Commission recognized that Rule 14a-8(c)(4)

"...is not intended to provide a means for a person to air or remedy some personal claim or grievance or to further some personal interests. Such use of the security holder proposal procedures is an abuse of the security holder proposal process, and the cost and time involved in dealing with these situations do a disservice to the interests of the issuer and its security holders at large."

While the issuers' arguments in support of the exclusion of the proposal under Rule 14a-8(c)(4) are not without some substance, the Division does not believe it advisable that the proposal be excluded as relating to a personal grievance. As raised by some of the Commissioners in our discussion of the revisions to Rule 14a-8, there is a fine line between personal interest and personal cause, and reference to personal cause was deleted from the proposed change to Rule 14a-8(c)(4). To distinguish between the sponsors of the instant proposal and the groups sponsoring the infant formula and Communist trade proposals, without finding more of a tangible interest, seems questionable. Accordingly, on the basis of the arguments received to date, the Division does not intend to issue no-action letters under Rule 14a-8(c)(4).

D. Paragraph (c)(6) - Beyond the Issuers Power to Effectuate

The argument has been made by Westinghouse that the proposal is beyond the issuer's power to effectuate and therefore would be excludable under paragraph (c)(6) of Rule 14a-8 because (1) the proposal is so vague and indefinite that shareholders and the Board of Directors would not know with reasonable certainty what material is to be covered by the report, and (2) the proposal deals with a foreign policy determination that can only be made by the government. The Division does not believe that the proposal in its entirety is so vague and indefinite as to be

excludable under Rule 14a-8(c)(6). In addition, in the opinion of the staff the proposal does not require the company to effect foreign policy but merely seeks information regarding company efforts in connection with its lobbying activities, a matter which is clearly within the company's power to provide. Accordingly, the staff intends to disagree with the contention that the proposal can be omitted on the basis that it is beyond the issuers' power to effectuate.

E. Paragraph (c)(7) - Ordinary Business

Three of the issuers that have submitted letters have expressed the view that the proposal may be omitted under Rule 14a-8(c)(7) because it relates to the issuers' ordinary business operations. In this regard, it should be noted that the proposal is in the form of a request for the issuers to provide a special report. As the Commission indicated in Release No. 34-19135, the Division traditionally has taken the position that proposals that request special reports may not be omitted under Rule 14a-8(c)(7). While the Commission did propose that such position be changed, that proposal is still the subject of public comment. In the Division's view it would be inappropriate to change our position in this regard until the Commission has had the opportunity to consider all of the public comments on the proposal. Accordingly, the Division intends to inform the issuers that Rule 14a-8(c)(7) does not provide a basis for the exclusion of the proposal.

RECOMMENDATION

Unless one or more Commissioners request that this matter be considered by the full Commission at a formal meeting, the Division intends to issue the attached letter to Deere & Company and to take the position indicated with respect to the letters submitted by other issuers relating to the shareholder proposal submitted on behalf of the American Jewish Congress.

ATTACHMENTS

- A. Draft response to Deere & Company.
- B. Letter submitted on behalf of Deere & Company, November 16, 1982.
- C. Letter from Westinghouse Electric Corporation, December 13, 1982.
- D. Letter from FMC, December 13, 1982.
- E. Letter from United Technologies, December 16, 1982.
- F. Letter from GTE Corporation, December 20, 1982.
- G. Letter from Will Maslow of the American Jewish Congress, relating to the submission on behalf of Deere & Company, November 30, 1982.