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Chairman of the Board

March 2, 1983

Linda C. Quinn, Esq.
Associate Director
Corporate Finance Division
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: SEC Advisory Committee on Tender Offers

Dear Ms. Quinn:

This is in response to Chairman Shad's letter of February 18. The preliminary outline included with that letter does an excellent job of laying out the issues, and I have only two suggestions. Because of the breadth of the central topic itself, I wonder whether item I.D concerning a coordinated approach addressing tax, banking, antitrust laws, etc. should not be eliminated as going too far afield. Similarly, coverage of a broader class of activities, such as proxy contests (item II.A), may not be feasible for the Committee.

In response to Chairman Shad's request, I enclose a brief summary of my views on tender offers and a list of my areas of interest.

I look forward to working with you on the work of the Tender Offer Advisory Committee.

Sincerely,

Edward L. Hennessy, Jr.

SEC ADVISORY COMMITTEE ON TENDER OFFERS

Overviews - Edward L. Hennessy, Jr.

The present system of tender offer regulation has served to regulate transactions of far greater size and complexity than could have been anticipated by the drafters of the Williams Act. The Securities and Exchange Commission deserves great credit for effectively administering the law under difficult conditions.

Much of the recent dissatisfaction with tender offers results from economic factors not directly related to the system of regulation. These factors include the public's traditional mistrust of very large accumulations of corporate assets under a single management, the recent state of the economy in which severe unemployment and high interest rates appeared to be aggravated by large mergers financed with borrowed money, and a few hotly contested acquisitions in which tactics employed drew wide and critical attention. Despite recent criticisms, the present tender offer system is strong and effective.

There are, nevertheless, opportunities for improvement. The present system favors professional investors at the expense of the public and bidders over target companies. The knowledge that a tender offer at a premium over the current market price probably will succeed has placed too much emphasis on transitory share values and caused company managements

to focus their efforts on short-term profits. The costs of the present system to both bidders and target companies, which are heavy, could be reduced without sacrificing necessary investor protection. Finally, target company management's responses to tender offers is a subject that needs review, although successful regulation in this area is difficult because of the need to preserve management's freedom to act in the shareholders' interests.

Strengths of the Present System

Neutrality as between bidders and target companies is an important principle and should be preserved. Neutrality promotes the free movement of corporate assets from less to more efficient management and also furthers the liquidity of investment assets. A low level of government participation (for example, the absence of a requirement for prior SEC clearance of tender offer documents) is also a strength of the present system; the increasing complexity of acquisition transactions suggests that market forces should continue to dominate in regulating tender offers. It is true that strongly contested acquisitions have generated government participation in the form of litigation. However, as long as new developments in acquisition techniques proceed at their recent pace, this may be inevitable.

Interest of Public Shareholders

Despite the Commission's action late last year prohibiting the use of short proration periods, many public investors continue to be excluded from the front end of a two-tier acquisition because they are not able to react quickly enough. They are forced to accept the back-end securities. Lengthening the minimum offering period from the present 20 business days would place all target company shareholders on a more equal footing. So also would adoption of price or other proscriptions on two-tier offers, or adoption of something like the British system under which purchase of a specified percentage of a company's shares within a given period would require an offer to all shareholders at the same price.

Neutrality as Between Bidders and Target Companies

Under the present system the bidder has the advantage of long preparation and surprise over the target company. This encourages hasty evaluation of the offer and available responses that is not in the interest of target company shareholders. The knowledge that a company may be vulnerable through depressed market prices for its securities or the attractiveness of its assets inevitably affects the way in which managements operate. Although management usually is aware that long-term growth is in the shareholders' interest, the pressure to produce short-term profits is difficult to resist. A longer response time would better enable management to communicate

with its shareholders in order to address those aspects of the offer and possible alternatives that are less immediately apparent than offering price versus current market price.

Prior Approval of Bidder's Shareholders

An element of the bidder's advantage under the present system is the rapidity with which large amounts of credit may be obtained. While government regulation of the extension of credit for acquisitions (as for most other purposes) would be unwise, it may be that shareholders of the bidder should have a voice at certain levels of magnitude. The present distinction between equity and debt for purposes of shareholder approval may be based upon notions concerning the availability of credit that are no longer valid. Approval by the bidder's shareholders of a borrowing could be obtained within the extended period advocated for consideration by shareholders of the target, and publicly available information concerning the target should suffice for purposes of the bidder's proxy statement.

Cost Effectiveness

The costs to both bidders and target companies under the present system are heavy. Legal and printing expenses could be lowered by reducing the volume of information provided to investors, especially in merger proxy statements. Offering documents are notorious for their often (at least to the ordinary investor) scarcely comprehensible boiler-

plate and financial statements that go beyond the needs of all but a few professionals. Allied Corporation received communications from a number of its shareholders complaining about the length of our merger proxy statement for the Bendix-Martin Marietta transaction. Perhaps, as one shareholder suggested, the full-blown disclosure document could be filed with the Commission and furnished on request to others, along the lines of existing short-form registration procedures under the 1933 Act.

Management Opposition

Actions taken by target company managements in resisting unwelcome acquisition proposals have generated public comment and criticism. Management opposition is an area that needs review. However, as the variety and novelty of target company responses listed in the Commission Staff's outline attest, this has been an area of rapid development. The fact that existing corporation laws establishing standards of management conduct have not produced results satisfactory to all observers is not conclusive evidence of the need for regulatory action. In evaluating the propriety of measures such as a severance pay arrangement that may arguably discourage tender offers, much depends upon the circumstances of the particular case. Management needs the freedom to act

in what it believes to be the best interest of the shareholders. Existing law recognizes that management will not be protected from liability for actions taken primarily to entrench itself in office. It is premature to conclude that the existing legal framework cannot deal effectively with management behavior that violates established principles.

Edward L. Hennessy, Jr.

March 2, 1983

SEC ADVISORY COMMITTEE ON TENDER OFFERS

Areas of Interest - Edward L. Hennessy, Jr.

1. Does the present scheme protect the interests of public shareholders as compared to those of professional investors? Should there be price or other proscriptions on two tier offers?

2. Is the present regulatory scheme neutral as between bidders and target companies and what are its effects on target company managements?

3. Would a requirement of prior approval of major tender offers and the attendant financings by the bidder's shareholders be in the best interests of all shareholders?

4. What is the cost effectiveness of the present scheme?

5. Should management's opposition to tender offers, and use of corporate funds, be regulated?

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