M E M O R A N D U M

TO: The Members of the SEC Tender Offer Committee

May 16, 1983

FROM: Martin Lipton

I recognize that I was in a small minority at the meeting on May 13. However, I continue to be very concerned with the approach taken by the Committee with respect to:

(1) open market purchases,

(2) partial and front-end loaded offers,

(3) advisory votes with respect to super-majority charter amendments, standstill agreements and golden parachutes.

1. Open market purchases (creeping tender offers).

I believe the subcommittee recommendation of a 15 or 20% threshold is too complex and would, in many cases, also fail to enable targets and the market to adjust and react to non-tender offer takeover attempts. I think that a 15 or 20% holding in aggressive hands is the end of independent company status in most cases. I think having a 15 to 20% threshold is an invitation to more takeovers rather than protection for shareholders or assurance of equality of treatment of shareholders.

I recommend that we stay with the present Schedule 13D system with the following changes:

A buyer who purchases other than through a tender offer must file a 13D before crossing 5%. This 13D must disclose intention to cross 10% or to solicit proxies. This disclosure would be made by checking a box so that there could be no argument as to whether the disclosure was in fact made.

If the initial 13D does not disclose intention to cross 10% or solicit proxies then neither may be done until 180 days after amending the 13D to disclose such intent.

Whether or not the initial 13D disclosed intention to cross 10%, buyer may not cross 15% until 60 days after amending the 13D to disclose intention so to do, which amendment may not be filed until after buyer owns more than 10%. This would give the market time to react and give the target time to take such steps as it deems appropriate to protect its shareholders by finding a white knight before the raider has too great an advantage or to retain its independent status by such means as its board determines in the exercise of its business judgment.

The present requirement for amending a 13D to disclose each 1% addition to a 5% holding should be strengthened to make it clear that it must be done forthwith on the day following the purchase.

There should be no need to wait to cross the 10 or 15% thresholds if the further purchases are by tender offer for all the outstanding shares.

I would further discourage creeping tender offers by providing that a tender offer by a bidder who has or has the right to acquire more than 10% of the stock of the target must be open for 60 days instead of the normal 30 days. This would also discourage lock-ups.

2. Partial tender offers and front-end loaded deals.

The basic recommendation by the unanimous committee to equalize cash and securities tender offers combined with the preservation of the right to make non-tender offer purchases (although subject to the waiting periods set forth above) seem to me to negate any reason to preserve partial tender offers or front-end loaded offers. In many cases they are coercive and unfair. They have led to "Pac Man" and the other tender practices that have raised public and congressional questions as to the whole process. They should not be encouraged. Since there may be some usefulness that we cannot now foresee, they could be preserved, but substantially handicapped so that as a practical matter they would not be frequently used.

I recommend that partial offers or partial offers that are part of front-end loaded offers be required to be open for 60 days instead of the normal 30 days.

Combination, package, two-step and similar offers where the cash and securities (first step and second step) are substantially (not necessarily exactly) equal would be normal 30 day offers.

3. Advisory votes.

I think advisory votes would undermine the business judgment rule and result in a major change in our corporate governance system. I think they are a threat to the continuance of the corporate system as we know it today. I am unalterably opposed to them. However, I am in substantial agreement as to the substantive objectives of eliminating supermajority charter provisions, standstill agreements and, if deemed necessary, golden parachutes. I think there are ample bases on which to do so without mandating advisory votes.

(a) Supermajority and vote-depriving charter provisions (shark repellants). If partial, front-end loaded, and creeping tender offers are handicapped as recommended above and cash and securities are put on an equal footing, there is no real justification for fair price, supermajority and similar charter provisions and they could be viewed as state action preempted by the Supremacy and Commerce Clauses just like the state takeover laws. The SEC could also take the position that any corporation with such provisions would not be eligible for trading in the national market system after say a two-year grace period. Staggered board provisions would not be considered as shark repellants.

(b) Standstill agreements. In addition to the ineligibility for national market system approach, the SEC, under the proxy provisions of the 1934 Act and the proxy rules, could invalidate any agreement with a life of more than nine months that restricts voting or participating in a proxy solicitation. The SEC could also interpret standstills as inconsistent with equity accounting. In other words, there are several ways to proscribe standstills without resort to advisory votes.

(c) Golden parachutes. If public perception requires their demise -- which I doubt, but which I accept -- rather than require advisory votes, I would prefer that golden parachutes be defined as 14(e) violations both before and after a tender offer. I would make it clear that employment contracts that protect executives from change of duty, status, salary, etc. are not golden parachutes; only those that give the executive the unilateral right to terminate and collect substantial severance pay following a takeover.

4. General approach.

Absent the changes suggested in this memorandum, I believe that the Committee's recommendations are pro tender

offer and tip the balance very sharply against the target company. I continue to doubt the overall economic and social desirability of hostile takeovers and I oppose making it more difficult for target companies to remain independent. I think the directors of a takeover target, upon the exercise of their business judgment, should have as much of an opportunity to preserve the target as an independent company as the raider has to take it over or force it into a deal with a white knight.

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