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NEW YORK STOCK EXCHANGE

11 WALL STREET
NEW YORK, N. Y. 10005

Tell Pollack to arrange to meet with Bishop et al. We have ample power under the 34 Act to deal with any problem

S 510
Takeover Bids

October 1, 1968

34-14(d)
13(d)

The Honorable Manuel F. Cohen
Chairman
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Dear Chairman Cohen:

I am writing to you because of the apparent difference of opinion which has arisen over the applicability of the tender offer provision of Public Law 90-439 (new Section 14(d) of the Securities Exchange Act of 1934) to the "Special Bid" procedure provided for in detail in our Rule 391.

It has always been our understanding that Section 14(d) would have no application to a "Special Bid". Our review of the new law and its legislative history confirms this understanding. To our mind that legislative history makes clear that the "tender offer" which was the concern of the legislation was a technique quite different from an "Exchange bid". Thus, both the House and Senate Reports (House Report No. 1711 from the Committee on Interstate and Foreign Commerce and Senate Report No. 550 from the Committee on Banking and Currency) refer to a "tender offer" as one in which the offeror "obligates himself to purchase all or a specified portion of the tendered shares <u>if certain conditions are met</u>". (Emphasis added) The existence of those "certain conditions" is one of the distinguishing features of the tender offer which is the subject of the new Section 14(d). As you stated in your appearance before the Senate's Subcommittee on Securities of the Committee on Banking and Currency on March 21, 1967:

> "A tender offer is quite different from the ordinary market transaction with which the average investor is familiar. Insofar as it is an offer at all it is subject to complex and sometimes deceptive conditions. Rather it is an invitation to the public security holder who tenders his security to give the other party an option -- to be exercised only if

certain minimum shares are tendered within a specified time and perhaps specifying a maximum which the original offeror is prepared to take --but giving him discretion to accept a lesser or larger amount or to extend the time limits. Tendering in response to such an offer involves deposit of the public security holder's shares or obtaining a guarantee from a stock exchange member or other financially responsible person that they will be deposited. Some conditions of this character may well be a practical necessity. Otherwise, there would be no inducement to the originator of the tender offer to pay above the current market price.

"But what has developed is a one-sided document. An early response may prevent the unwary investor from taking advantage of a later and better offer -- or put him in the position of having given an option on his shares for a substantial period of time without any assurance that the deal will go through, or, if it does, that there will be no unfair discrimination in the acceptance of shares."

The nature of the "tender offer" which is the subject of 14(d) is also indicated clearly in the Commission's General Counsel's remarks before the Association of the Bar of the City of New York, on April 14, 1967. In those remarks, which are included among the material furnished by the Commission to the Subcommittee on Securities to assist it in its consideration of S. 510, Mr. Loomis stated:

"Many of the procedural problems arise from the fact that an offeror seldom simply offers to buy all the shares tendered. He usually puts both a minimum and a maximum limitation on his offer in order to avoid either getting a few shares, which will simply make him a minority stockholder, or at the opposite extreme being obligated to buy more shares than he is in a position to pay for."

Mr. Loomis further stated:

"These and some other problems spring from a rather basic characteristic of the average tender offer. The shareholders are asked, in effect, to give the offeror an option to buy. They may be bound when he is not. To some degree this is a necessary feature of tender offers, but it seems to me that it can be carried too far. There is a tendency for offerors to reserve the maximum freedom of action. I suspect that this may be traceable not so much

> to the fact that the offeror doesn't know what he wants to do but rather that his counsel drafts the papers so as to provide for all possible contingencies. Thus in a case of a company with say one million shares outstanding, the offer may provide that the offeror is not bound to take any shares unless at least 100,000 are tendered but may take a lesser number, and that if more than 100,000 are tendered he will take at least that number, but shall not be obligated to take more than say 400,000 but can take all tendered shares if he wants to. Although all this latitude is attractive from the offeror's viewpoint, it creates considerable uncertainity for stockholders and investors generally and may introduce an elaborate guessing game as to what the offeror's real intentions are. A reasonable maximum period and a reasonable withdrawal period seem justified in order to reduce this inequality and to avoid a situation where tendering shareholders are left for an extended period in a state of uncertainty as to whether and how many of their shares are going to be taken up."

While the characteristics referred to in the above quotations are typical of tender offers as generally understood -- and as apparently understood by the witnesses who appeared before the Congressional Committees in connection with S. 510 -- they are not descriptive of an "Exchange Bid" under Exchange Rule 391.

The Exchange Bid procedure, among other things, is for a fixed number of shares at a fixed price and is so announced over the ticker. The bidder may not impose the many and elaborate conditions typical of the tender offer. He may not retain the option to reject all stock offered if less than a stated minimum is offered. He may not tie up the offered stock for an extended period of time, during which the offering stockholder does not know whether, or how much of, his stock has been purchased.

In addition, in the Exchange Bid, the bidder is required to bid initially for all of the stock he intends to bid for within a reasonable time (NYSE Rule 391(c)(2)). Thus, he does not have the option of purchasing shares offered in excess of the amount stated in his bid.

The Exchange Bid is open for a minimum of 15 minutes during which orders to sell in response to the bid are collected. At the end of this period, if the aggregate of sell orders is less than or

equal to the amount bid for, all sell orders are executed against the bid. If less than the total amount sought in the bid is offered during the first 15 minute period, the bidder may leave his original bid open for an additional period in order to acquire the total amount bid for. If this happens, stock offered in response to the bid during the additional period is immediately sold to the bidder until he acquires the total amount originally bid for. At that point the Exchange bid is terminated.

If more than the amount bid for is offered during the first 15 minutes the bid is effective, the bid is terminated at the end of the initial period and all stock offered is purchased by the bidder pro rata from each offeror.

Also, soliciting material, so often troublesome in past tender offers, has no place in an Exchange Bid.

For all of these reasons, it is clear that the "Exchange Bid" procedure is far removed from the typical tender offer. The "one-sided document" which, all too often, the tender offer became, cannot exist under the detailed provisions of Rule 391.

In none of the testimony of any of the witnesses on S. 510 is there the slightest suggestion that the tender offer provisions if adopted would apply to techniques such as the Exchange Bid. It seems apparent that no witness felt that the various block acquisitions procedures which had been developed by registered exchanges would be affected by the tender offer provisions. Had it been expected the new law would preclude these special procedures of long standing, surely some mention of this result would have been made. Clearly, the new Section 14(d) requirements could not be met by any Exchange Bid, if only because paragraphs (5) and (6) of Section 14(d) are wholly incompatible with any transaction consummated on a national securities exchange.

The Exchange, of course, has long had both Rule 391 and policies relating to tender offers. In fact, much of the Exchange's tender offer experience and practice is reflected in the new law itself. At no time has the Exchange considered that its tender offer policies had any application in the Exchange Bid area.

The draftsmen of Public Law 90-439 recognized, of course, that not all acquisitions are effected by tender offers. Acquisitions in the open market or privately negotiated were also contemplated by the draftsmen of the new law. But, as to such acquisitions, new Section 13(d) of the 1934 Act rather than Section 14(d), may be

applicable. Thus we understand a person who acquires sufficient stock through Exchange transactions, including acquisitions through one or more "Exchange Bids" would be subject to the reporting requirements of new Section 13(d). It seems clear to us that the draftsmen of Public Law 90-439 recognized a clear distinction between exchange transactions and privately negotiated transactions on the one hand and tender offers on the other.

The Commission's Release No. 8392 under the Securities Exchange Act of 1934 is, we believe, most unfortunate, because of the strong position it appears to take on this matter. We think it imperative that tender offers as referred to in Sect on 14(d) be clearly distinguished from transactions on the floor of a national securities exchange. We feel strongly that the Section was never intended to apply to such transactions and we foresee very serious problems unless it is made clear that the Section does not so apply.

Nevertheless, the Exchange appreciates that some of the evils aimed at by Section 14(d) could, under certain circumstances, be present in an Exchange Bid under our Rule 391. Consequently, we recognize the desirability of studying that Rule and incorporating any justified changes. As you know, the Rule was worked out some fifteen years ago with the close cooperation of the Commission and its staff, and we would hope that in light of developments since then, and in light of new Public Law 90-439, the Exchange staff might discuss with your staff whether any changes to the Rule might be appropriate, such as limiting the price at which a Special Bid could be made or the amount of the security bid which might be purchased by means of the Special Bid. There may be other areas of the Rule which deserve our attention and we would, of course, be happy to discuss them at your convenience. However, in the meantime, we strongly urge that tender offers as referred to in the new Law not be confused with Exchange transactions.

I look forward to hearing from you with respect to this matter at your earliest convenience.

Sincerely yours,

/s/ ROBERT M. BISHOP

Robert M. Bishop
Vice President