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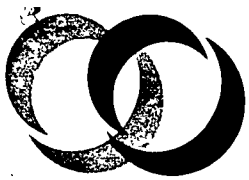

ORION CAPITAL CORPORATION 30 Rockefeller Plaza, New York, N.Y. 10112 (212) 541-4646

ALAN R. GRUBER
Chairman
&
Chief Executive Officer

March 1, 1983

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

Dear Ms. Quinn:

In response to Chairman Shad's letter of February 18th re the SEC Advisory Committee on Tender Offers, I'm pleased to submit herewith the requested markup of the preliminary outline of issues and a somewhat overlapping (and also preliminary) summary of some of my general and particular views on tender offers.

I look forward to working with the Committee members and the Commission staff. The subject is of considerable importance and - happily - I believe that some of the key issues are of the type which can be dealt with usefully by our Committee. (Contrast with a Committee trying to find a viable basing scheme for the MX Missile!)

Please let me know if you want elaboration now on any of my comments. I plan to be present at the meeting in Washington on March 18th.

Sincerely yours,

Alan R. Gruber

ARG:soc

Enclosure

ALAN R. GRUBER

SEC ADVISORY COMMITTEE ON TENDER OFFERS MARCH 1, 1983

Very Preliminary Outline of Issues*

Objectives: To review tender offer practices and regulations in terms of the best interests of all shareholders (i.e., shareholders of all corporations, whether potential bidders, target companies or bystanders); and to propose specific regulatory and legislative improvements for the benefit of all shareholders.

I. Tender Offer Scheme

A. The present regulatory scheme is intended to be neutral (neither promote nor discourage tender offers), subject to providing adequate time and disclosure to target company shareholders.

1. Is the present regulatory scheme neutral?

Yes

2. Is neutrality in the best interests of all shareholders?

Bidder shareholders in hostile situations are frequently harmed by the poor result. Likelihood of acquisition success is enhanced by access to the acquiree, as in a negotiated merger.

3. Do tender offers discipline management and facilitate the transfer of corporate assets, in the best interests of all shareholders?

4. Does the threat of tender offers focus management's efforts on short term profits, rather than on long term goals, to the detriment of all shareholders?

See memo

5. Are tender offers the result of undervaluation of target shares in the market?

Yes — as well as of the availability of financing.

6. To what extent are tender offers a by-product of corporate investment programs?

Modestly

B. Would a requirement of prior bidder shareholder approval of major tender offers and the attendant financings be in the best interests of all shareholders?

NO, except as required by state corporate law or corporate charter. Cash offers and financings generally should be left to the Board of Directors.

* Advisory Committee members are requested to comment or edit this outline as they deem appropriate and return a copy by March 4, 1983 to Linda Quinn, Associate Director, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street., N.W., Washington, D.C. 20549.

C. What have been the economic effects of the current regulation on the interests of all shareholders?

Not out of line with complexity and values involved.

1. Can a conclusion be reached as to the amount of litigation brought and its relation to the interests of all shareholders?

Tends to increase the cost.

2. What is the effect of the regulatory scheme on the cost of shares acquired?

Unanswerable.

3. What is the impact of present regulations on the number and size of tender offers?

acceptable costs, No cost to arbitrageurs except risk.

4. What are the effects of current regulations on the cost incurred by: (i) bidders; (ii) target companies; (iii) investors; and (iv) arbitrageurs?

5. What are the offsetting benefits to the foregoing? Shareholders of target are more likely to receive adequate price -- public and professional investors tend to receive equal treatment.

D. Under current laws, there are separate regulations, with varying objectives, affecting tender offers (e.g., tax, banking, antitrust, ERISA, federal securities laws, state and federal laws applicable to regulated industries, state securities and corporate laws).

See memo

1. What is the proper relationship between the federal securities laws and other regulatory systems?

No

2. Can and should there be a coordinated substantive or procedural regulatory response?

Clarification of preemption uncertainties (see memo).

3. What changes would be in the best interests of all shareholders?

II. Nature of the Regulatory Response

A. Definition of the activity to be regulated (should the regulatory response be limited to contested tender offers or should it be an integrated response to a broader class of activities, e.g., acquisitions of control, proxy contests?).

Present system is generally adequate.

B. With respect to securities and corporate law issues, who should be protected by government regulation, and what should be the purpose of the regulatory response?

Time is on tight side for public street-name holders.

1. Disclosure: Under the Williams Act and the rules and regulations thereunder, the purposes of the regulatory response are to assure that target company shareholders have the time and disclosures to make informed investment decisions.

Generally. a. Are these purposes achieved by the current regulatory system?

Generally b. Are they in the best interests of all shareholders?

Yes c. Should time and disclosure to target company shareholders continue to be the primary objectives of the regulatory response?

d. If time and disclosure to target company shareholders are to be the primary objectives, is there a need for changes in the current laws and regulations?

Yes (1) Do the benefits of the time and disclosure required, justify the cost of such regulations?

Simplification is desirable, but may not be achievable. (2) Are the information dissemination and timing requirements (e.g., proration, withdrawal and minimum offering period) in the best interests of all shareholders; do they achieve their regulatory purposes; can the purposes of such regulation be achieved by less burdensome, simpler requirements?

No. Target participation not practical (if I understand thrust of question). (3) Should the bidder and target company be required to pre-file tender offer materials prior to delivery to shareholders?

Generally, although time is tight. (4) Do bidders and target companies have sufficient direct access to shareholders to communicate in an efficient, timely manner which benefits all shareholders?

2. Target Shareholder Equality: Under the current regulatory system, equality has a limited role (e.g., prorationing, best price).

More -- though present regulations are responsive to the major problems. a. Should equality of treatment of public shareholders vis-a-vis professionals (e.g., risk arbitrageurs) be a more or less dominant objective of regulation?

Yes b. Should there continue to be "best price protection" in all tender offers, including Dutch auctions?

c. Examples of regulatory equality:

Worth serious consideration. (1) British type regulation - purchase of 30% of a target company's outstanding shares within twelve months generally requires an offer to all the shareholders at the same price.

Not practical. Nothing inherently wrong with negotiated block purchases at reasonable premiums to market.

(2) If an issuer repurchases a specified percentage of its outstanding securities, should it be required to make the same offer to all its shareholders (impact on Icahn type strategy).

3. Substantive Fairness of Acquisitions

Under current law, an unaffiliated tender offer does not generally have to provide investors with "fair" consideration.

No

a. Should the price paid for shares acquired in a tender offer have to be "fair"? By whose determination?

Yes – see memo

b. Should there be price or other proscriptions on two tier offers?

No

c. Should state law rights of appraisal be incorporated in federal law? And applied to partial tender offers?

4. Auction Market

No. Best only for the last people who happen to be shareholders of the target. See memo re I,A,3

a. Should the regulatory response have as an objective assuring an opportunity for an "auction" of the target?

"

b. Would this be in the best interests of all shareholders, shareholders of bidders, or shareholders of targets?

5. Market Activities

a. Is there a need to regulate:

Hard to define and regulate beyond present regulations such as 13D filings.

(1) Risk arbitrage;

(2) Short tendering, hedge tendering, etc.; (what are the benefits and disadvantages of such practices to non-professional investors);

?

(3) Options (e.g., are existing remedial procedures established by clearing corporations adequate to address "short squeezes" caused in part by uncovered call writing during complex tender offers?);

(4) Tender guarantees as a mechanism to prevent overtendering.

b. Should the Commission facilitate use of depository book entry systems and/or encourage clearing corporations to maintain continuous netting programs during tender offers and to adopt uniform close-out and liability notice programs?

6. Target Company Responses

See memo. The notorious extreme cases don't justify new regulations on Boards of Directors' business actions. (It is only the extreme cases which fall naturally into these categories.)

Under the current system, while there are general corporate duties limiting target company managements' responses to tender offers, as a practical matter, there appears to have been little restriction on their defensive strategies.

Should managements' opposition to tender offers, and use of corporate funds be regulated? For example, should there be substantive regulation or required shareholder approval of:

a. "PAC man" defenses;

b. Sales of "crown jewels";

c. Target tender offers for their own shares;

d. "Scorched earth" policies;

Regulated by ERISA — e. Use of employee benefit plans to acquire shares;

See memo — f. "Golden parachutes" and "silver wheelchairs" (i.e., employment and severance provisions which take effect upon a change in control);

g. Lock-ups with "white knights" (e.g., sales of blocks or options on sufficient shares to frustrate bidders);

Limitations on two tier pricing would be useful — h. "Shark repellent" (charter and by law amendments to discourage take-over attempts);

i. Other defensive tactics.

III. Interrelationship Between State and Federal Regulation

No — see memo A. Can and should there be state regulation of third party acquisitions of securities from shareholders (e.g., the new Ohio statute)?

It is appropriate

B. At present, bidders' activities are principally subject to federal regulation, and targets' responses are principally subject to state regulation. Is this appropriate? If not, what should be done about it?

IV. Financing

Credit can be misused for many purposes;

What is the impact upon shareholders of the credit used to finance tender offers? Should the extension of credit for tender offers be regulated for the benefit of all shareholders? no additional regulation needed.

V. Accounting

No major changes needed.

What changes in the accounting treatment of acquisitions by tender offers or other means would be in the best interests of all shareholders?

VI. Additional Issues

See the additional issues raised by 12 members of the Senate Banking Committee in the attached letter.

Attachment

Most of these issues are paraphrases or duplicates of those raised in this outline. I'd like to comment here on the quotation at the top of page 3 of the Committee's letter. Use of money in a tender offer "to purchase stock, when it doesn't help build one new factory" doesn't take the money out of our economic system. The shareholder who sells to the bidder will usually reinvest — and some new factory may be built somewhere with part of his investment.

Preliminary Summary of Some Personal Views on Tender Offers and Particular Areas of Interest

I approach the question of possible "improvements" in tender offer regulation from a general belief that our economy works best if we err in favor of under-regulation instead of over-regulation. I am not especially offended by some of the widely-reported egregious excesses of the recent past because they are not significant in overall economic terms, because corporate behavior is probably already influenced by public reaction to these excesses, and because conventional remedies are available for dealing with such matters as waste of corporate assets. Moreover, any drastic changes in regulatory structure could have market impact of unknown magnitude--as the existence of today's complex regulatory framework is one of the countless elements which combine to create the market's valuations. I believe that the present emphasis of the securities regulations on assuring that target company shareholders have the time and disclosures to make informed investment decisions is correct, although the time limitations are possibly a bit too tight for public street-name holders. The system works reasonably well.

With regard to some of the specific questions in the outline:

I.A.3&4:

Tender offers don't discipline management to be managers. They do create a climate of extreme management concern regarding market price of their company's shares. The transfer of corporate assets facilitated by tender offers is frequently not in the best interests of the bidder's shareholders, in that competitive zeal tends to pricing excesses which make the winner become the loser. Target shareholders are benefitted--at least those who happen to be shareholders at the right time (e.g., the arbitrageurs).

The threat of tender offers is but one of the factors tending to focus management's efforts on short term profits. More generally, managements of widely-held public companies play to an audience of institutional investors who are themselves increasingly oriented toward short-term performance. The intense competition among pension fund managers to achieve superior quarterly performance (plus the advantages of negligible transaction costs, instant communications and insensitivity to taxes) has turned pension fund managers into gunslingers with short attention spans.

I.D.1 and III.A:

One of the most nettlesome and least discussed important areas of concern is the relationship between federal securities laws and other regulatory systems. It seems unreasonable to me that antitrust laws can preempt federal securities laws in tender offer situations while state laws concerning regulated industries (e.g., banking and insurance) are at best in a grey area. On the other hand, I do not see any useful purpose in state regulation of securities acquisitions (as under the new Ohio statute).

II.B.3.b.:

There should be price proscription on two tier offers. Since many institutional and other "active" investors are opposed to charter amendments which might lower the front end price they could achieve, this is a suitable area for regulatory action in the interests of shareholders generally.

II.B.6.f.:

The "golden parachutes" descriptor is pejorative and should not be applied to all employment contracts which give managements some guarantees which can be tripped by a change of control. The guarantees can help assure target shareholders of a better price than might be attained if the vulnerable members of management are unduly concerned with their future relationships with a possibly hostile Board of Directors. Since a normal employment agreement is based in part on the notion that the Board is a known quantity, it is not unreasonable that special guarantees be tripped by a replacement of the Board after a company is taken over. Excessive "golden parachute" arrangements are susceptible to the same remedies as are excessive salaries and other forms of corporate waste. The existence of excessive arrangements can also be an important negative factor in proxy contests (e.g., Gulf Resources). The present disclosure system seems adequate.

New York, New York

March 1, 1983

Alan R. Gruber