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UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
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OFFICE OF ASSOCIATE DIRECTOR  
DIVISION OF CORPORATION FINANCE

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 your request for comments for the Advisory Committee on Tender Offers, I have enclosed an outline of those tender offer issues which may be germane to this committee's work. As you know, these views are personal and do not necessarily represent the views of Morgan Stanley.

I look forward to our meeting March 18.

Yours truly,

*Robert F. Greenhill*

Robert F. Greenhill  
Managing Director

Enclosure

Outline of Tender Offer Issues

I. Basic Premises

- Tender offers are an efficient means of allocating economic resources to their highest and best uses. Any regulatory scheme should not impede the efficient functioning of the market for control of corporate assets.
- The integrity of the capital markets depends on the perception by shareholders that they are fairly treated.
- Corporate management must be allowed to exercise its business judgment in running the corporate enterprise.
- Efficient functioning of the capital markets depends also on the ability of all investors, including market professionals, to carry out their investment decisions in a relatively unfettered manner.

II. Economic Efficiency of the Regulatory Scheme: Premises and Issues

- Premise: Regulation alone cannot encourage tender offers which are otherwise not economically sensible, but it can have the effect of discouraging desirable tender offer activity.
- Issue: Does the existing regulatory scheme excessively inhibit the making of tender offers which are in the overall economic interest?
  - o Buyer/seller balance: does the present scheme provide target managements with so many opportunities to oppose takeovers that initial bidders are discouraged?
  - o Buyer/buyer balance: does the present scheme so heavily favor initial bidders that second bidders who may be willing to pay more cannot reasonably participate?
- Premise: The regulatory scheme must balance the costs of regulation against its benefits.
  - o "Costs" of regulation include both (a) actual transaction costs, (b) opportunity costs of lost economic activity, and (c) reduced market liquidity for controlling shareholders.
  - o "Benefits" of regulation include (a) the increased value shareholders place on financial assets as a result of their having greater confidence in the system, and (b) the enhancement of "fairness" in the tender offer process.

- Issue: Has the regulatory scheme burdened tender offers with transaction costs far beyond the benefits of regulation?
- Premise: The tender offer process is affected by other federal and state regulatory systems, which have varying objectives. The substantive content of such laws or regulations and the procedures they prescribe can make the tender offer process less efficient and/or fair.
- Issue: Can one better coordinate other regulatory processes with those of the tender offer process?
  - o Generally speaking, the appropriate focus of SEC regulation is the functioning of the national securities marketplace. To the extent that state corporation law bears upon the regulation of substantive matters of corporate governance, including management discretion and business judgment in tender offer situations, such laws may interfere with the functioning of the tender offer process.
  - o Furthermore, state takeover laws, such as Ohio's new one, should not be allowed to impair the free functioning of the national securities marketplace and the tender offer process.
  - o Other federal and state regulatory programs (banking, insurance, antitrust, communications, etc.) also deserve scrutiny regarding their impact on the functioning of the tender offer process.
- Issue: Is there any reason for hostile offers to be treated differently from friendly ones as a matter of SEC policy?
- Changes in tax laws can both promote and discourage various types of mergers. However, a detailed investigation of this area is beyond the appropriate mandate of this committee.
- Issues of credit availability and its allocation to tender offers are also beyond this committee's appropriate mandate.

### III. Issues Relating to Fair Treatment of Shareholders

- Is current tender offer disclosure sufficient? Are disclosure requirements excessive or burdensome? Should there be a Rule 415-equivalent to facilitate exchange offers on a time schedule as speedy as cash tender offers?

- Is the current timing system appropriate? Do shareholders have sufficient time to make an informed decision regarding a tender offer? Do targets and second bidders have sufficient time to respond to an offer?
- To what degree should regulation strive for equal treatment of all target shareholders?
  - o Should professionals be put on a par with small shareholders?
  - o Should price protection for early tenderors be maintained?
  - o Should a "British system" governing transfers of control be adopted? How would this affect partial offers, open market purchase programs and proxy contests?
  - o Should "creeping tenders" be regulated?
- To what degree should the SEC regulate pricing? Should two-tier offers be prohibited?

#### IV. Management Premises and Issues

- Premise: Management requires the protection of a business judgment rule in order to be able to take any real action in a tender offer context. Any limits on management action should therefore be carefully defined.
- Issue: Do tender offers discipline management? Does the threat of a hostile offer alter management's pursuit of short-term and long-term objectives? If so, are such alterations economically desirable?
- Issue: Are federal standards necessary to govern target management actions, including the use of:
  - o Defensive tactics, such as "lockups" and "crown jewel" sales;
  - o Shark repellent charter provisions;
  - o Extraordinary compensation arrangements (e.g., golden parachutes);
  - o Stock repurchases at a premium from a single shareholder?
- Should additional approvals by a corporation's outside directors or shareholders be required for defensive actions such as those listed above, or for initiating major acquisitions via tender offer?

V. Issues Relating to Market Professionals

- What is the appropriate balance between incentives necessary to allow professionals to function as generators of liquidity and efficient pricing in the capital markets, and the need to be fair to non-professional shareholders?
  - o What does this balance imply in the way of regulation for specific areas of market activity, including risk arbitrage, short tendering and trading of options?