

OPEN MEETING OF THE SECURITIES AND EXCHANGE COMMISSION

Thursday, January 9, 1986 - 10:06 A.M.

COMMISSIONERS PRESENT:

John S.R. Shad, Chairman  
Charles C. Cox  
Aulana L. Peters  
Joseph A. Grundfest  
Edward H. Fleischman

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Mr. Huber, Director, Ms. McCoy, Associate Director, and Mr. Connolly, of the Division of Corporation Finance; Mr. Ketchum, Director, and Mr. Bergmann, of the Division of Market Regulation; Mr. Davis, Director, of the Directorate of Economic and Policy Analysis; Ms. Quinn, Executive Assistant to the Chairman; and Mr. Goelzer, General Counsel, and Ms. Walter, Associate General Counsel, of the Office of the General Counsel, were present.

The Chairman welcomed Commissioner Fleischman to the Commission on the occasion of his first Open Commission Meeting and noted that his arrival complements the Commission's membership.

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Mr. Huber, Director, Ms. McCoy, Associate Director, and Mr. Connolly, of the Division of Corporation Finance; Mr. Ketchum, Director, and Mr. Bergmann, of the Division of Market Regulation; Mr. Davis, Director, of the Directorate of Economic and Policy Analysis; Ms. Quinn, Executive Assistant to the Chairman; and Mr. Goelzer, General Counsel, and Ms. Walter, Associate General Counsel, of the Office of the General Counsel, were present.

The Commission deferred consideration of whether to adopt amendments to Rule 13e-4 and adopt proposed Rule 14d-10 under the Securities Exchange Act of 1934 ("Exchange Act") providing that a tender offer must be open to all holders of the class of securities subject to the tender offer.

The Commission unanimously approved, for publication, a release proposing for comment amendments under the Exchange Act to the tender offer rules, as follows:

- (1) To Rule 13e-4 and 14d-10, providing that all security holders to whom a tender offer is made must be paid the highest consideration paid to any security holder;
- (2) To Rules 13e-4 and 14e-1(b), providing that a tender offer must remain open for ten business days upon announcement of an increase or decrease in the percentage of securities being sought or consideration offered by the offeror;
- (3) To Rules 13e-4 and 14d-7 providing that either:
  - (a) upon announcement of a decrease in the percentage of securities being sought or consideration offered, additional withdrawal rights attach for ten business days, or in the alternative,
  - (b) withdrawal rights extend throughout the period of the offer.

(See Release 34-            dated January    , 1986.)

The Commission unanimously approved, for publication, a release under the Exchange Act announcing the adoption of amendments to Rule 13e-4 that conform most of the time periods governing issuer tender offers to those governing third party tender offers.

Among other things, the amendments require the same offering period (twenty business days), withdrawal rights (fifteen business days, ten business days after competing bids) and proration rights (throughout the period the offer remains open) as third party tender offers.

(See Release 34-            dated January    , 1986.)

The Commission, with respect to whether to continue to apply its previously articulated best-price-offered position pending adoption of any rule amendment to this standard following notice and comment, agreed that its earlier interpretive position would be used as the standard and that the Divisions of Corporation Finance and Market Regulation will consider the best-price-offered provision on a case-by-case basis in the interim period.

The Commission voted on whether to instruct the staff to prepare legislative proposals, rule proposals, concept releases, or otherwise pursue matters to reflect the Commission's consideration this date with respect to a number of matters relating to takeover developments.

The Commission took the following actions:

- (1) A majority of the Commission (Chairman Shad and Commissioners Cox and Grundfest) voted to propose legislation requiring that a Schedule 13D be filed no later than two business days after the five percent threshold is reached (instead of the current ten calendar days). Commissioners Peters and Fleischman voted to support the Commission's earlier legislative proposal which would have authorized the Commission, pursuant to rulemaking authority, to require immediate public announcement of a triggering

acquisition, to specify the time, after acquisition of a five percent interest, for filing a statement and to specify a length of time, not to exceed two business days after filing, for which additional purchases may be restructured.

- (2) A majority of the Commission (Chairman Shad and Commissioners Cox, Fleischman and Grundfest) voted against a proposal to require further disclosure and a standstill period (such as twenty days) following the acquisition of a specified percentage of an issuer's securities (such as twenty percent). (In light of the Commission's decision to propose legislation closing the 13D window to two days instead of closing it entirely, Commissioner Peters voted in favor of soliciting comments on the need for a standstill provision. Commissioner Peters noted that she would not be in favor of a standstill provision if a Schedule 13D were required to be filed immediately upon reaching the five percent threshold. Commissioner Fleischman indicated that he might agree to a modified standstill proposal but did not suggest a specific alternative.)
- (3) A majority of the Commission (Chairman Shad and Commissioners Fleischman and Peters) voted to issue a concept release with respect to whether there should be a requirement that once a conventional tender offer has commenced, acquisitions of a significant amount of the target company's stock (such as ten percent) by any other person (including the target) may only be made by means of a tender offer. (Commissioners Cox and Grundfest voted not to issue the release.)
- (4) A majority of the Commission (Chairman Shad and Commissioners Cox, Grundfest and Peters) voted to include in a concept release the issue of whether poison pill security plans should be subjected to a shareholder vote. (Commissioner Fleischman voted not to issue such a release, voicing strong concerns with respect to preemption of state law.)
- (5) A majority of the Commission (Chairman Shad and Commissioners Cox, Fleischman and Grundfest) voted to incorporate in a concept release the proposal that a target company be permitted to "opt out" of any "all holders" requirement that is adopted by the Commission, and be allowed to commence an exclusionary issuer tender offer if a charter

amendment providing for such a tender offer is approved by the requisite percentage of shareholders under state law. (Commissioner Peters voted against incorporation of this proposal, voicing a concern over the concept of allowing such exemptions from the Commission's rules.)

- (6) The Commission unanimously voted to incorporate in the concept release the issue of whether the above "opt out" procedure should be available with respect to other requirements of the rules underlying the Williams Act amendments to the Exchange Act.
- (7) The Commission unanimously voted to instruct the staff to institute meetings on a limited basis with each Commissioner to determine whether a consensus exists for proceeding to define the term "tender offer."
- (8) In its consideration of developments in offensive and defensive tactics and other takeover practices, the Commission unanimously agreed not to take or recommend any affirmative action with respect to proposals designed to:
  - (a) require that, after a person acquires a specified percentage of an issuer's securities (e.g., twenty percent), any subsequent acquisitions by that person may only be by means of a tender offer;
  - (b) require that, after a person acquires a specified percentage of an issuer's securities (e.g., twenty percent), any subsequent acquisition by that person may only be by means of a tender offer for all of the issuer's remaining securities of that class (the "Lipton Proposal");
  - (c) require that, prior to commencing a tender offer for a target company's securities, the bidder obtain the approval of the bidder's shareholders to proceed with the tender offer;
  - (d) require that, prior to commencing a tender offer for a target company's securities, the bidder obtain the approval of the target's shareholders to proceed with the tender offer. (In this context, the target's board of directors would be required to submit the proposal

to its shareholders, and the board would be prohibited from taking any defensive actions pending the shareholder vote.);

- (e) require that, in the context of partial tender offers, target shareholders be provided with an opportunity to vote for or against the tender offer at the same time that they tender their shares. A majority of the Commissioners (Commissioners Cox, Fleischman and Grundfest) also voted not to issue a concept release on such a proposal.) (Chairman Shad and Commissioner Peters voted to issue such a concept release.);
- (f) prohibit or restrict "two-tier" or partial tender offers;
- (g) prohibit or further regulate the adoption of antitakeover charter and bylaw amendments by issuers;
- (h) prohibit a target company from granting "golden parachutes" once a tender offer has commenced;
- (i) prohibit "lock-up" arrangements between a target company and other persons;
- (j) prohibit issuer repurchases of securities from persons who are, or are perceived to be, attempting to acquire control of the issuer ("greenmail");
- (k) require that a bidder have adequate financing in place prior to commencing a tender offer;
- (l) prohibit or restrict the use of high-yield, below investment grade securities ("junk bonds") to finance tender offers; and
- (m) specifically regulate the activities of arbitrageurs in the context of tender offers.

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Mr. Huber, Director, Ms. McCoy, Associate Director, and Mr. Connolly, of the Division of Corporation Finance; Mr. Ketchum, Director, and Mr. Bergmann, of the Division of

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Market Regulation; Mr. Davis, Director, of the Directorate of Economic and Policy Analysis; Ms. Quinn, Executive Assistant to the Chairman; and Mr. Goelzer, General Counsel, and Ms. Walter, Associate General Counsel, of the Office of the General Counsel, were present.

The Commission approved, for publication, a release announcing the adoption of Rule 0-11 under the Securities Exchange Act of 1934 and amendments to its rules relating to the imposition and collection of filing fees for certain proxy and information filings, tender offers, mergers and similar transactions. The release codifies the Commission's administrative interpretations concerning fees for business combination transactions.

(See Release 34-            dated January    , 1986.)

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Mr. Ketchum, Director, Mr. Chase, Associate Director, and Messrs. Simon and Goss, of the Division of Market Regulation, were present.

The Commission approved, for publication, a release proposing for public comment amendments to Rule 31-1, "Securities Transactions Exempt from Transaction Fees" under the Securities Exchange Act of 1934 (the "Exchange Act") that would exempt transactions in over-the-counter/exchange-traded

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National Market System Securities from payment of fees to the Commission under Section 31 of the Exchange Act.

(See Release 34- dated January , 1986.)

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The meeting was adjourned at 12:00 noon.

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John Wheeler  
Secretary

By: Rosalie C. Moyer  
Recording Secretary