W/ ⟩HTELL, LIPTON, ROSEN & KATZ August 5, 1976

To Our Clients

Tender Offers - Proposed SEC Rules

The following summarizes the major provisions of the proposed new SEC tender offer rules:

1. Open market purchases. The SEC has specifically decided not to define "tender offer" and has embraced the "impact test". Accordingly, open market purchases to accumulate a more than 5% block which purchases do not "impact" the market will continue to be permissible. In view of the proliferation of state takeover regulation, open market purchases have assumed greater and greater importance and it will be of considerable significance that they have in effect been countenanced by the SEC.

2. Stockholders lists. A bidder would be entitled to the target's stockholder list on two-days' notice. If a list is demanded by a bidder, then the bidder would be required to mail the offer to all stockholders.

3. Publication. In addition to mailing and the present type of long-form newspaper publication, a bidder would be permitted to use a summary newspaper publication similar to the tombstones now in use for "friendly" offers which are mailed.

4. Management recommendations. A new Schedule 14D-4 would be substituted for present Schedule 14D but otherwise no major change in the present requirements would be made.

5. Offer and withdrawal periods. The seven-day Saturday Night Special would be banned by increasing the minimum offer period to 15 days. The withdrawal period would be increased from seven to ten days. In addition, if a competing offer is filed, a new seven-day withdrawal period for shares not then accepted would arise.

6. Disclosure requirements. A new Schedule 14D-1 would be substituted for Schedule 13D. None of the disclosure provisions in the new 14D-1 departs materially from current practice, except for a specific requirement for the bidder's audited S-X financials, "if an average, prudent investor ought reasonably to be informed of such information." A welcome change would, if the bidder is a reporting company, confine disclosure to the "executive" officers of the bidder and controlling persons.

7. Filing of Schedule 14D-1. In addition to the SEC and the target, a Schedule 14D-1 would have to be filed with the appropriate exchange for a listed target or the NASD for an OTC target.

8. Post-offer purchases. Purchases during the 40 days after the end of a tender offer would in effect be prohibited except for a second tender offer at no less than the original tender price.

9. Creeping tender offers. The SEC has invited comment on whether there should be a 40 day rule for pretender offer purchases.

10. Preemption of state statutes. The SEC has not done anything affirmatively to preempt the state takeover statutes. However, philosophically and literally the new rules are antithetical to the state statutes and bolster the argument that the Williams Act preempts the state statutes.

M. Lipton