WACHTELL, LIPTON, ROSEN & KATZ

July 31, 1977

To Our Clients

Takeovers

1. New Schedule 14 D-1. The SEC has promulgated a new Schedule 14 D-1 which becomes effective August 31 for tender offers made thereafter. The new Schedule 14 D-1 expands the required disclosures, but essentially does not go beyond current disclosure practice. A specific requirement for the bidder's financial statements -- if the bidder's financial condition is material to a decision by security holders of the target whether to tender, sell or hold -- has been added but unaudited financials will suffice if audited financials are not available or obtainable without unreasonable expense.

2. State Takeover Laws. The July 13, 1977 decision by the Wisconsin Commissioner of Securities in Elkhart Lake's Road America, Inc. contains a number of interesting holdings under the Wisconsin Takeover Law:

(a) The raider is free to choose a filing date and make such other decisions with respect to procedure and terms as will give the raider the greatest tactical advantage. "A takeover offer, by its very nature, is adversary in its objectives. There is nothing unethical or nefarious in acting, consistent with the law, in such a way as to give the other side fewer advantages."

(b) Where a tender offer is made for a target which does not have an established public market for its shares, "the field of information material to the tender offer expands to include more data concerning the offeror than would otherwise be required."

(c) An offer for less than all the shares of the target does not result in an expansion of disclosure about the raider, if the shareholders of the target have a public market in which to sell if they do not wish to hold. The decision rejects the argument that a partial offer per se expands raider disclosure requirements because some shareholders must continue as shareholders of the target.

(d) The raider does not have to disclose its valuation of the target's assets.

(e) "[A]n offeror need not tell more than he knows about his plans if he succeeds in gaining control. Furthermore, there is no requirement that he formulate any such plans. But if he has plans for the target, whether or not they are completely developed and formally approved, they must be revealed."

(f) A tender offer, even a partial tender offer, that might result in the target losing a franchise or valuable right is not for that reason alone unfair. Disclosure of the potential loss is all that is required.

(g) "Where financial information about an individual offeror is material, as where the shares to be acquired have no ready market and the shareholders will therefore face the decision of whether or not to become minority shareholders (perhaps indefinitely) of the offeror's company, some general statement of the offeror's net worth should be included in the offer. The statement need not be precise, but might be on the order of "[The offeror] has a net worth, as of the date of this offer, in excess of $_____." Such a statement should be supportable by a current personal balance sheet prepared in accordance with generally accepted accounting principles, although it need not be included in the offer. We would regard this as providing full and fair disclosure in such circumstances. There may be other acceptable means as well.

With respect to a statement relating to the source and amount of funds for the offer required by Form TO-1 and Wis. Adm. Code section SEC 23.01(3)(d), an offeror might choose to satisfy this requirement by stating he has escrowed the required cash, specifying the amount and general source, in a designated financial institution solely for purposes of the transaction. If borrowings are used or contemplated in connection with any part of the offer, including the purchase of shares in excess of the proposed minimum, a description of the loan transaction and parties is necessary."

(h) Where persons participate in the planning of a tender offer and it is intended that they be officers of the target if control is obtained, such persons are participants in the takeover offer and disclosure with respect to them is required.

(i) The Commissioner refused to pass on fairness of the tender offer price, holding that even where there is no public market for target shares, "the shareholders are free to make the decision and the Commissioner should not substitute his judgment." The opinion states:

"Road America reads the phrase 'market mechanism' too narrowly. Market mechanism refers not only to an actual trading marketplace in which buying and selling of shares occur over a period of time, but also to the marketplace for corporate control, where individuals and companies in search of established firms which will complement and improve their present business operations evaluate prospects and employ a variety of techniques to acquire control of them. The latter marketplace exists entirely independent of the former. Hence, at this very moment, someone may be formulating a plan to make a tender offer for Road America's shares at $350 or $400 per share. Someone else may be considering the possibility of approaching Road America's management with an exchange offer in which Road America shareholders might receive the equivalent of $500 worth of another firm's common stock for each of their shares. And the possibilities are endless.

The point is, control of Road America is a commodity for which a market presently exists and will always exist as long as the firm survives. That market can be relied on to establish a fair price for the commodity. In a cash tender offer situation, we are inclined to rely on that market.

It must be recalled that the proposed transaction is voluntary so far as Road America shareholders are concerned. They need not tender their shares. If they believe $310 does not adequately compensate them for their equity in the company, they will refuse the Offer. If they believe they will ultimately realize more than $310 per share from appreciation of Road America's real estate, or from future dividends, or from sale of their shares in a trading market if one develops, or from some competing tender offeror, they will hold their shares. We will not substitute our subjective evaluation of the shares' worth for that of the market."

(j) "We find nothing in the Wisconsin Corporate Take-Over Law or the cited authorities that would lead us to relate the management experience or competence of a would-be take-over offeror to the concept of 'fairness,' and we decline to do so. The ethics and integrity of the offeror's management can be a matter of required disclosure. See S.E.C. v. Kalvex, Inc., CCH Fed. Sec. L. Rep., para. 95,226 (S.D.N.Y. 1975) involving kick-backs and reimbursements for personal expenses which should have been disclosed in a proxy statement."

(k) The standard disclaimer of offer in states where illegal, does not violate requirement that all shareholders of target be treated equally and there is substantial doubt as to constitutionality of a state requiring shareholders in other states be able to tender despite the laws of such states.

(l) Publication rather than mailing does not render a tender offer "unequal" because some shareholders of the target may not learn of it.

(m) "It should be noted that the statute does not prescribe disclosures, it prescribes conduct. Thus, the granting of proper withdrawal and proration rights, regardless of what is stated in the offering document, would be compliance with the statutory provision (although the disclosure might be misleading). On the other hand, improper employment of proration and withdrawal procedures, though properly described in the offer, would probably violate both disclosure and substantive provisions."

(n) Open market purchases after an aborted tender offer and prior to a new tender offer may be a "tender offer".

M. Lipton