WACHTELL, LIPTON, ROSEN & KATZ

March 20, 1978

To Our Clients:

Creeping Tender Offers

The consistent failure for the past three years of raiders to acquire targets through tender offers has given rise to the bear-hug approach and the approach of purchasing either privately or in the market a significant controlling interest in the target. While the undersigned originally questioned both the legality and policy desirability of the private or market purchase approach, the legislative history of the Williams Act and such cases as Nachman v. Halfred (substantial purchases from 40 persons some of whom were sophisticated shareholders and some of whom sold in the open market) and D-Z Investment Co. v. Holloway (12% acquired by soliciting 24 sophisticated shareholders and concurrent open market purchases) made it clear that anything short of a formal tender offer or activity that was virtually the equivalent of a formal tender offer was not a "tender offer" within the meaning of the Williams Act. In the Nachman case the court said "To characterize [the defendant's] negotiations with a relatively small and powerful group of shareholders as a tender offer or tender offers would not serve the purposes of §§ 14(d) and (e). In fact, to so extend the application of these sections would have a disruptive effect upon private negotiated purchases which Congress probably did not intend . . . ." Indeed, the refusal of the SEC to take action in the Talcott National and General Host cases and the refusal of the SEC to define "tender offer" confirmed that at the very least open market purchases in ordinary brokerage transactions and private purchases from sophisticated holders, either singly or in combination, were not "tender offers" within the Williams Act. (It should be noted that certain state takeover statutes specifically define "tender offer" or "takeover" or enumerate exemptions in a manner that indicates a broader scope to the term than under the Williams Act.)

The claim by the SEC that the Sun Company's private purchases of 34% of Becton Dickinson from 20 sophisticated holders was a tender offer and the recent speeches by members of the Staff of the SEC to the same effect and to the effect that lawyers who give opinions contrary to those held by the SEC Staff act improperly, reflect a decided change in position by the SEC. It is now clear that the SEC Staff takes the position that private purchases at a premium and market purchases that are solicited from a substantial number of holders are "tender offers". Basically, the emerging SEC position appears to be that control of a target can only be obtained

through a formal tender offer that complies with the Williams Act. The undersigned believes that the SEC position is legally wrong. Moreover, the attempt through speeches by the SEC Staff to deter lawyers from giving honest opinions based on clear legislative history and direct precedents in the federal courts is contrary to the proper functioning of the legal system and a free society.

While as a policy matter the undersigned believes that the English approach of requiring an any-and-all offer if the raider acquires more than 30% of the target is the right approach and should be adopted in the United States by legislation, that is not the law today and, absent legislation, the SEC does not have the power to make it, or anything like it, the law. Presumably the Becton Dickinson case will provide clarification as to what is a tender offer. Pending such clarification, it continues to be the opinion of the undersigned that private purchases, whether or not at a premium, and ordinary brokerage transactions effected without active wide solicitation (except that a broker or investment adviser may contact his clients no matter how numerous) are not "tender offers" within the Williams Act. However, companies wishing to make acquisitions and their investment bankers must recognize that despite such opinion by the undersigned, the SEC is very likely to attack private or market purchases for the purpose of control, and given the delicacy of a takeover transaction from the business standpoint, this added legal problem tips the scale against the transaction.

Whither thou goest from here? See the attached articles.

M. Lipton

Financial Times Wednesday March 8 1978

Australians propose new company takeover rules

BY JAMES FORTH

SYDNEY, March 7.

THE AUSTRALIAN associated stock exchanges to-day put forward a number of proposals designed to improve the existing rules governing company takeovers. The suggestions followed mounting criticisms of flaws in the present legislation and exchange listing requirements which enable unfair treatment of some shareholders.

The AASE announced last November that they were working on proposed changes and that they wanted back-up legislation from the State governments. The main criticism has been of partial and "creeping" takeovers and followed a number of cases where control of listed companies was obtained through on and off-market purchases, often by a non-listed purchaser, without a comparable offer being extended to all holders.

The proposals put forward by the AASE borrow from both the London City Code and the rules applying in the U.S.: if adopted they will substantially curtail the ability of intending bidders to build up large advance strategic stakes in a target company. They will also prohibit "escalation clauses" under which sales are made on the condition that the seller will receive any higher prices which may subsequently eventuate through a takeover bid.

The proposals would phohibit agreements for the purchase of securities in a target company where the monetary terms and conditions of the offer were not "precise sums certain" but allow the purchasing of options over securities provided all the terms and conditions were fixed and disclosed to the market.

This would effectively prevent escalation clauses, which are actually illegal if it can be proved there was an intention to make a formal offer under the Companies Act. Because of this difficulty escalation clauses have flourished.

Another proposal would change the definition of a substantial shareholder from 10 per cent. to 5 per cent. during the currency of a takeover offer.

Acknowledgement of a substantial shareholding would have to be made to the company and the stock exchange by 10 a.m. the following day which would also apply when shares were bought which lifted the stake to 15, 20, 25 and 30 per cent.

A person or company would be prohibited from obtaining more than 30 per cent. of a listed company unless a takeover offer was made to purchase the same proportion of shares from all holders and which was free of minimum acceptance conditions if the bidder had bought more than 5 per cent. of the capital within the preceding six months.

If the bidder despatched an offer, then bought on the market and subsequently withdrew its offer, the bidder would be bound to accept all shares offered up to the time that the withdrawal was announced.

The offer would also have to be on conditions no less favourable than applied to any purchase during the preceding three months unless the bidder agreed to stand in the market for a four week period and purchase all the relevant shares offered at the highest price paid by the bidder during the preceding three months.

If a 30 per cent. interest was held and no bid was made the holder would be prohibited from obtaining any more shares for the next six months. Over the next six months only a further 5 per cent. could be purchased. Then a further six months period of grace would apply before the cycle could be repeated. This would effectively limit the increase in such shareholdings to 5 per cent. a year.

The Washington Post BUSINESS & FINANCE
THURSDAY, MARCH 16, 1978

Will Proxy Fights Replace Tender Bids?

STREET, From C2

a tender bid by Carter Hawley Hale Stores Inc.

After Carter Hawley withdrew its $36 a share offer—following an antitrust suit filed by Marshall Field and its plans to expand into Carter Hawley's territory — Marshall Field shares dropped more than $8 in one day to $19.88. They currently are trading at around $22.

Lipton conceded that "proxy fights have never been terribly successful. They are very expensive, and there is a great reluctance on the part of shareholders to vote against management."

But there are circumstances in which they stand a better chance of succeeding, he noted. These include the aftermath of unsuccessful tender bids when many shares have moved out of the hands of regular shareholders and into the clutches of arbitrageurs who gather in the shares in anticipation of the deal going through.

Another situation is the so-called "bear hug," or take-it-or-leave it approach a company makes to another company in lieu of an actual tender. The purpose of the "bear hug" is to avoid getting entangled in a bidding battle. If such an approach to buy shares at a premium to the market price is rejected by management, a proxy battle could ensue.

"The dynamics of a proxy fight are different after an unsuccessful tender or a rejected bear hug. With frequently 50 percent of the stock in the hands of arbitrageurs, the proxy fight could be successful under those conditions," he noted.

At the same time, the SEC has been contemplating a number of major changes in proxy rules which could facilitate proxy fights. These include proposals to beef up the ability of shareholders to go around management and put motions directly to other shareholders on proxy statements, and to allow shareholders to nominate their own candidates for directors that the company would have to include in a proxy statement and submit to a shareholder vote.

"I don't think companies are suddenly going to stop being acquisitive," Lipton said, and with the SEC making it impossible to do a tender in any but the most expensive way, there will be a need to find either a new method of acquisition or to revive some of the old methods."

PROFITS FALL: The New York Stock Exchange yesterday finally reported member firms earnings for all of 1977. The results showed a 63 percent drop: from $507.5 million in 1976 to $187.5 million last year. Both figures are after taxes.

The big board said that of the 386 firms reporting last year, 285 had profits and 101 had losses.

The 1977 profits represented a 4.8 percent annual return on the member firms' average net worth of $3.9 billion during the year.

In the fourth quarter, the NYSE member firms had an aggregated net profit of $31 million.

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THURSDAY, MARCH 16, 1978

Will Proxy Fights Replace Tender Bids?

By Jack Egan
Washington Post Staff Writer

NEW YORK — The corporate proxy fight may return to vogue because it is becoming increasingly difficult to take over a company through a hostile tender offer.

That at least is the view of New York securities lawyer Martin Lipton, a partner in Wachtel Lipton, Rosen & Katz. Lipton—along with arch rival Joseph Flom of Skadden, Arps, Slate, Meagher & Flom—is considered one of the leading legal experts on takeovers and is usually to be found representing one side or the other in major tender battles.

Lipton believes the effectiveness of the tender offer as an acquisition device has been largely undermined by state statutes against quickie takeovers, the ability of investment banking firms to find a "White Knight" or friendlier alternative bidder for a company that is being attacked, and also by moves on the part of the Securities and Exchange Commission to foreclosure anything but a straightforward—and usually unsuccessful—tender.

"Tender offers are becoming more and more difficult," said Lipton. "In the last three years there have been very, very few instances where the original bidder in a tender was successful in aquiring the target company at the price originally put forward.

"There have been a few cases where the original bidder continued in an auction and finally won out and made the acquisition at a higher price," he added. "But in most the major tender offers, the target company is acquired not by the original bidder but rather by a white knight.'"

Because of these developments, Lipton said that in his view "we'll see more and more instances of companies, raiders, acquiring anywhere from 5 to 20 percent of a target company and then conducting a proxy fight to take control.

"I don't expect to see 50 a year, but I do expect to see a half dozen a year," said Lipton, "either when a raider goes in and acquires a stake and attempts to take control in a proxy fight, or when there are shareholders who are disappointed."

The proxy battle for control was a popular device in the 1950s when the likes of Louis Wolfson and Leopold Silberstein fought eye-gouging, expensive, and often unsuccessful battles to acquire companies by throwing out existing management. In recent years this kind of proxy fight has gone out of style.

But earlier this week Curtiss-Wright Corp., a New Jersey aircraft parts manufacturer, shocked Wall Street when it announced it had bought nearly 10 percent of the shares of Kennecott Copper Corp., a company many times its size. Curtiss-Wright said it was mulling the possibility of a proxy battle to change Kennecotts directors, oust present management and liquidate parts of the company for the benefit of shareholders. Yesterday Curtiss-Wright was still undecided about its next move, and Kennecott was waiting for the other shoe to drop.

There also are reports circulating that disgruntled shareholders in Marshall Field & Co. are considering a proxy challenge to management because of its actions to thwart

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