WACHTELL, LIPTON, ROSEN & KATZ

January 2, 1979

To Our Clients

Creeping Tender Offers; Regulatory Approval of Takeovers; Antitrust Policy

The Christmas season witnessed three developments with potential for great significance in 1979.

In S.G. Securities, Inc. v. Fuqua Investment Co., Civ. No. 78-2392-S (D. Mass. Dec. 19, 1978) the court held that stock accumulations through other than a conventional tender offer, can be tender offers within the Williams Act. The test formulated by the court is that there is a tender offer where there is:

> "(1) a publicly announced intention by the purchaser to acquire a substantial block of the stock of the target company for the purposes of acquiring control thereof; and
>
> (2) a subsequent rapid acquisition by the purchaser of large blocks of stock through open market and privately negotiated purchases".

This test clearly excludes the Sun-Becton, Dickinson type of accumulation in that there is no public announcement prior to the purchase of large blocks from a limited number of holders and may exclude the slow accumulation following the filing of a Schedule 13D disclosing that the purchaser may seek to acquire control. The stress on the public announcement of intention to acquire a substantial block reflects adoption of the impact test and raises the question of the desirability of buying as much as possible in the ten-day period between crossing the 5% filing threshold and the date when the Schedule 13D must be filed.

In Seaboard Coast Line Industries, Inc. v. Southern Pacific Co., Finance Docket No. 28811 (ICC Dec. 14, 1978) the ICC rejected a voting trust as a device to permit accumulation of a large block of stock of a target prior to obtaining the requisite approval of change of control. It is understood that the Federal Reserve Board takes the same position under the Bank Holding Company Act. There is no indication that the FCC has changed its attitude which would permit the trust device. With the increased interest in takeovers of regulated

companies, the attitude of the regulatory agencies will be crucial in many takeover situations. Careful planning and checking with the agencies in advance is the only advice that one can give at this time.

Despite the decision in Carrier Corp. v. United Technologies Corp., it must be assumed that the pendulum will start to swing against big conglomerate mergers. The courts generally are responsive to the mood in Congress and the intention of the FTC and the Antitrust Division to bring more of these cases will give the courts an opportunity to make new law. The intention of the Antitrust Division to seek a new statute absolutely prohibiting big conglomerate acquisitions coupled with Senator Kennedy's interest in new antitrust legislation and the possibility of change in attitude by courts, leads to the conclusion that 1979 may be the last year for big acquisitions. Those major companies that wish to diversify through a large acquisition are well advised to do so now before the window closes.

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