

July 8, 1980

To Our Clients

Takeovers

The SEC has taken the position in the Marshall Field case that if the management of a company adopts a policy that it will resist "any and all" takeover efforts because the management believes that the company should remain independent, then such policy would be a material disclosure item. While it is not clear whether the SEC position would require disclosure only in the face of a proposed tender offer, as is the Marshall Field case, or generally even in the absence of a tender offer or takeover proposal, as a practical matter the literal SEC position is not very meaningful in that very few companies would decide to reject "any and all" tender offers no matter what the price and no matter what the circumstances of the company.

The majority of companies follow a general policy of preferring to remain independent. That is a valid and legal policy. It does not in any way negate the good faith of the board of directors. Absent such a policy companies would constantly be in play. They would spend an inordinate amount of time considering takeover or liquidation proposals. They would have serious employee, customer, supplier and community problems. Long-range planning would be very difficult. It is a reasonable business judgment for the management of a company to take the position that the company wishes to remain independent and will not pursue takeover or liquidation proposals. This position should not, and in our opinion does not, require special disclosure.

However, if a company adopts a policy to resist "any and all" takeovers no matter what the price and no matter what the circumstances, then special disclosure may be required. In addition, in order for such a position to meet the business judgment test it would be necessary for the board of directors to have reached that position on a justifiable basis, i.e., the good-faith belief that the business of the company would be affected adversely in the absence of such a position. Where a business is heavily dependent on maintaining stable relations with employees, customers, suppliers or others such a good-faith belief may be demonstrated. Each such situation should be approached on a case-by-case basis.

The SEC position is consistent with my article, "Takeover Bids in the Target's Boardroom", 35 The Business Lawyer, p. 101 (Nov. 1979) and that article continues to provide the essential guidelines for takeover responses and policies.

M. Lipton