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To Our Clients:

Substitutes for State Takeover Statutes

Recent federal court decisions enjoining enforcement of the state takeover laws of various states, and upholding SEC tender offer rules which require prompt commencement of a tender offer, indicate that there is very little vitality left to the state statutes, at least as they delay commencement of an offer. (For a detailed discussion of these recent decisions, see our memorandum of January 21, 1981.) Unless and until the Supreme Court checks the trend of these decisions, the lower federal courts are increasingly committed to the view that the state statutes impermissibly conflict with the Williams Act and the SEC rules. Just a few days ago, in a decision arising out of the Kennecott/Curtiss-Wright matter, the federal district court in New Jersey broadly invalidated the New Jersey statute. Kennecott Corp. v. Smith (Civil No. 80-3770, Jan. 30, 1981).

From the perspective of target companies, this judicial trend means that they will no longer have additional time made available by the statutes to use either in seeking a better offer or fending off the raider. Accordingly, target companies would be wise at this juncture to take stock of the defenses that may be available to them under other state laws, or to consider seeking enactment of legislation which might give them additional time to respond to an offer but would not run afoul of federal law.

Companies engaged in certain businesses traditionally regulated primarily by the states (e.g., banking and insurance) already have some protection under state laws mandating advance state approval of changes in control of such companies, by means of tender offer or otherwise. While these regulatory laws of course do not help target companies not active in the particular regulated businesses, it is noteworthy that in recent years several states have considered, and at least one state (Louisiana) has enacted legislation giving similarly broad "change-in-control" protection to "natural resource companies," i.e., companies whose business activities have a significant impact on the natural resources of a state. Such companies, and perhaps others whose activities have a very clearly identifiable impact on an area of strong historic state concern, might now consider seeking enactment of legislation requiring pre-acquisition approval.

The SEC tender offer rules do not preclude such legislation (so long as it does not delay commencement of an offer) and the recent federal court decisions do not call into question such traditional state regulation.

But for the broad range of target companies, attempts to obtain state legislative protection against minimum-period offers -- if such protection is available at all -- will require new approaches not yet tested. The legislative effort would be directed at identifying interests of specific state concern and protecting them by means which are not inconsistent with federal statutes or rules. For example, the possibility exists that, to advance the state's interest in full communication by target management with its shareholders, a state could validly enact a statute applicable to target companies incorporated under its laws which would mandate thorough communication of the target's views to its shareholders and require that offers be held open for the full 60-day period contemplated by the federal withdrawal provisions -- so that shareholders would have the full 60 days to consider both the offer and the position of the target company. We are presently giving consideration to the legal and constitutional questions raised by such legislation.

Turning to the raider's perspective, the trend of recent federal court decisions enjoining the existing state statutes indicates that pre-commencement delay is now most unlikely. However the raider will probably have to commence federal court litigation invoking a federal right to proceed promptly in order to be assured of protection against state court proceedings under the relevant state statute or statutes.

Less clear is whether the raider can avoid the expense and other problems of a state hearing under those statutes which authorize them. The SEC position, in several recent amicus curiae briefs, has been that it will not oppose such state hearing requirements so long as any hearing is completed no later than at the termination date of the offer. On the other hand, in the recent Kennecott and Hi-Shear/Raybestos situations, raiders successfully took the more extreme position that such hearings are objectionable altogether.

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