

June 4, 1987

To Our Clients

State Takeover Statutes

With the revival of interest in state takeover statutes as a result of the Supreme Court decision in the Indiana case, Delaware and other states are being urged to enact statutes modeled on Indiana. The Indiana statute trades an extra 25 days before a tender may be closed for a procedure, including a mandatory shareholder meeting, that heavily favors raiders and which will encourage rather than discourage abusive takeover tactics.

Rather than the Indiana-type statute, we recommend the New York-type statute (which Indiana also has) and that part of the Ohio statute that reaffirms the traditional role of directors in determining the destiny of a corporation. The Ohio statute provides that for the purpose of performing his duties to the corporation:

"a director, in determining what he reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following:

- (1) The interests of the corporation's employees, suppliers, creditors and customers;
- (2) The economy of the state and nation;
- (3) Community and societal considerations;
- (4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation."

The model on which the New York statute is based is attached.

M. Lipton

[NEW SECTION]. REQUIREMENTS RELATING TO CERTAIN BUSINESS COMBINATIONS - (a) For the purposes of this section:

(1) "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified person.

(2) "Announcement date," when used in reference to any business combination, means the date of the first public announcement of the final, definitive proposal for such business combination.

(3) "Associate," when used to indicate a relationship with any person, means (A) any corporation or organization of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities, (B) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (C) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person.

(4) "Beneficial owner," when used with respect to any stock, means a person:

(A) that, individually or with or through any of its affiliates or associates, beneficially owns such stock, directly or indirectly; or

(B) that, individually or with or through any of its affiliates or associates, has (i) the right to acquire such stock (whether such right is exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the beneficial owner of stock tendered pursuant to a tender or exchange offer made by such person or any of such person's affiliates or associates until such tendered stock is accepted for purchase or exchange; or (ii) the right to vote such stock pursuant to any agreement, arrangement or understanding (whether or not in writing); provided, however, that a person shall not be deemed the beneficial owner of any stock under this clause (ii) if the agreement, arrangement or understanding to vote such stock (X) arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act and (Y) is not then reportable on a Schedule 13D under the Exchange Act (or any comparable or successor report); or

(C) that has any agreement, arrangement or understanding (whether or not in writing), for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in clause (ii) of subparagraph (B) of this paragraph (4)), or disposing of such stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock.

(5) "Business combination," when used in reference to any corporation and any interested stockholder of such corporation, means:

(A) any merger or consolidation of such corporation or any subsidiary of such corporation with (i) such interested stockholder or (ii) any other corporation (whether or not itself an interested stockholder of such corporation) which is, or after such merger or consolidation would be, an affiliate or associate of such interested stockholder;

(B) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) to or with such interested stockholder or any affiliate or associate of such interested stockholder of assets of such corporation or any subsidiary of such corporation (i) having an aggregate market value equal to 10 percent or more of the aggregate market value of all the assets, determined on a consolidated basis, of such corporation, (ii) having an aggregate market value equal to 10 percent or more of the aggregate market value of all the outstanding stock of such corporation, or (iii) representing 10 percent or more of the earning power or income, determined on a consolidated basis, of such corporation;

(C) the issuance or transfer by such corporation or any subsidiary of such corporation (in one transaction or a series of transactions) of any stock of such corporation or any subsidiary of such corporation which has an aggregate market value equal to 5 percent or more of the aggregate market value of all the outstanding stock of such corporation to such interested stockholder or any affiliate or associate of such interested stockholder except pursuant to the exercise of warrants or rights to purchase stock offered, or a dividend or distribution paid or made, pro rata to all stockholders of such corporation;

(D) the adoption of any plan or proposal for the liquidation or dissolution of such corporation proposed by or on behalf of such interested stockholder or any affiliate or associate of such interested stockholder;

(E) any reclassification of securities (including, without limitation, any stock split, stock dividend, or other distribution of stock in respect of stock, or any reverse stock split), or recapitalization of such corporation, or any merger or consolidation of such corporation with any subsidiary of such corporation, or any other transaction (whether or not with or into or otherwise involving such interested stockholder), which has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of stock or securities convertible into stock of such corporation or any subsidiary of such corporation which is directly or indirectly owned by such interested stockholder or any affiliate or associate of such interested stockholder, except as a result of immaterial changes due to fractional share adjustments; or

(F) any receipt by such interested stockholder or any affiliate or associate of such interested stockholder of the benefit, directly or indirectly (except proportionately as a stockholder of such corporation) of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through such corporation.

(6) "Common stock" means any stock other than preferred stock.

(7) "Consummation date," with respect to any business combination, means the date of consummation of such business combination.

(8) "Control," including the terms "controlling", "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person's beneficial ownership of 10 percent or more of the voting power of a corporation's outstanding voting stock shall create a presumption that such person has control of such corporation. Notwithstanding the foregoing, a person shall not be deemed to have control of a corporation if such person holds voting power, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of such corporation.

(9) "Exchange Act" means the Act of Congress known as the Securities Exchange Act of 1934, as the same has been or hereafter may be amended from time to time.

(10) "Interested stockholder," when used in reference to any corporation, means any person (other than such corporation or any subsidiary of such corporation) that

(A)(i) is the beneficial owner, directly or indirectly, of more than 10 percent of the voting power of the outstanding voting stock of such corporation; or

(ii) is an affiliate or associate of such corporation and at any time within the five-year period immediately prior to the date in question was the beneficial owner, directly or indirectly, of 10 percent or more of the voting power of the then outstanding stock of such corporation; provided that

(B) for the purpose of determining whether a person is an interested stockholder, the number of shares of voting stock of such corporation deemed to be outstanding shall include shares deemed to be beneficially owned by the person through application of paragraph (4) of this subsection (a) but shall not include any other unissued shares of voting stock of such corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

(11) "Market value," when used in reference to property of any corporation, means:

(A) in the case of stock, the highest closing sale price during the 30-day period immediately preceding the date in question of a share of such stock on the composite tape for New York Stock Exchange-listed stocks, or, if such stock is not quoted on such composite tape or if such stock is not listed on such exchange, on the principal United States securities exchange registered under the Exchange Act on which such stock is listed, or, if such stock is not listed on any such exchange, the highest closing bid quotation with respect to a share of such stock during the 30-day period preceding the date in question on the National Association of Securities Dealers, Inc. Automated Quotations System or any system then in use, or if no such quotations are available, the fair market value on the date in question of a share of such stock as determined by the Board of Directors of such corporation in good faith; and

(B) in the case of property other than cash or stock, the fair market value of such property on the date in question as determined by the Board of Directors of such corporation in good faith.

(12) "Preferred stock" means any class or series of stock of a corporation which under the by-laws or articles of incorporation of such corporation is entitled to receive payment of dividends prior to any payment of dividends on some other class or series of stock, or is entitled in the event of any voluntary liquidation, dissolution or winding up of the corporation to receive payment or distribution of a preferential amount before any payments or distributions are received by some other class or series of stock.

(13) "Stock" means:

(A) any stock or similar security, any certificate of interest, any participation in any profit sharing agreement, any voting trust certificate, or any certificate of deposit for stock; and

(B) any security convertible, with or without consideration, into stock, or any warrant, call or other option or privilege of buying stock without being bound to do so, or any other security carrying any right to acquire, subscribe to or purchase stock.

(14) "Stock acquisition date", with respect to any person and any corporation, means the date that such person first becomes an interested stockholder of such corporation.

(15) "Subsidiary" of any corporation means any other corporation of which voting stock having a majority of the votes entitled to be cast is owned, directly or indirectly, by such corporation.

(16) "Voting stock" means shares of capital stock of a corporation entitled to vote generally in the election of directors.

(b) Notwithstanding anything to the contrary contained in this chapter (except the provisions of subsection (d) of this section), no domestic corporation shall engage in any business combination with any interested stockholder of such corporation for a period of five years following such interested stockholder's stock acquisition date unless such business combination is approved by the board of directors

of such corporation prior to such interested stockholder's stock acquisition date.

(c) Notwithstanding anything to the contrary contained in this chapter (except the provisions of subsection (d) of this section), no domestic corporation shall engage at any time in any business combination with any interested stockholder of such corporation other than a business combination specified in any one of paragraphs (1), (2) or (3):

(1) A business combination (A) approved by the board of directors of such corporation prior to such interested stockholder's stock acquisition date or (B) with an interested stockholder whose acquisition of stock making such person an interested stockholder was approved by the board of directors of such corporation prior to such stockholder's stock acquisition date.

(2) A business combination approved by the affirmative vote of the holders of two-thirds of the voting stock not beneficially owned by such interested stockholder at a meeting called for such purpose no earlier than five years after such interested stockholder's stock acquisition date.

(3) A business combination that meets all of the following conditions:

(A) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of common stock of such corporation in such business combination is at least equal to the higher of the following:

(i) the highest per share price (including any brokerage commissions, transfer taxes and soliciting dealers' fees) paid by such interested stockholder for any shares of common stock of the same class or series acquired by it (X) within the five-year period immediately prior to the announcement date with respect to such business combination, or (Y) within the five-year period immediately prior to, or in, the transaction in which such interested stockholder became an interested stockholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which such highest per share acquisition price was paid through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the

market value of any dividends paid other than in cash, per share of common stock since such earliest date, up to the amount of such interest; and

(ii) the market value per share of common stock on the announcement date with respect to such business combination or on such interested stockholder's stock acquisition date, whichever is higher; plus interest compounded annually from such date through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since such date, up to the amount of such interest.

(B) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of stock, other than common stock, of such corporation is at least equal to the highest of the following (whether or not such interested stockholder has previously acquired any shares of such class or series of stock):

(i) the highest per share price (including any brokerage commissions, transfer taxes and soliciting dealers' fees) paid by such interested stockholder for any shares of such class or series of stock acquired by it (X) within the five-year period immediately prior to the announcement date with respect to such business combination, or (Y) within the five-year period immediately prior to, or in, the transaction in which such interested stockholder became an interested stockholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which such highest per share acquisition price was paid through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of such class or series of stock since such earliest date, up to the amount of such interest;

(ii) the highest preferential amount per share to which the holders of shares of such class or series of stock are entitled in the event of any voluntary liquidation, dissolution or winding up of the corporation, plus the aggregate amount of any dividends declared or due as to which such holders are entitled prior to payment of dividends on some

other class or series of stock (unless the aggregate amount of such dividends is included in such preferential amount); and

(iii) the market value per share of such class or series of stock on the announcement date with respect to such business combination or on such interested stockholder's stock acquisition date, whichever is higher; plus interest compounded annually from such date through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since such date, up to the amount of such interest.

(C) The consideration to be received by holders of a particular class or series of outstanding stock (including common stock) of such corporation in such business combination is in cash or in the same form as the interested stockholder has used to acquire the largest number of shares of such class or series of stock previously acquired by it.

(D) The holders of all outstanding shares of stock of such corporation not beneficially owned by such interested stockholder immediately prior to the consummation of such business combination are entitled to receive in such business combination cash or other consideration for such shares in compliance with subparagraphs (A), (B) and (C) of this paragraph (2).

(E) After such interested stockholder's stock acquisition date and prior to the consummation date with respect to such business combination, such interested stockholder has not become the beneficial owner of any additional shares of stock of such corporation except

(i) as part of the transaction which resulted in such interested stockholder becoming an interested stockholder;

(ii) by virtue of proportionate stock splits, stock dividends or other distributions of stock in respect of stock not constituting a business combination under subparagraph (E) of paragraph (5) of subsection (a) of this section;

(iii) through a business combination meeting all of the conditions of subsections (b) and (c) of this section; or

(iv) through purchase by such interested stockholder at any price which, if such price had been paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of such purchase, would have satisfied the requirements of subparagraphs (A), (B) and (C) of this paragraph (2).

(d)(1) Unless the certificate of incorporation provides otherwise, the provisions of this section shall not apply:

(A) to any business combination of a corporation that does not have a class of voting stock (i) registered or traded on a national securities exchange or (ii) registered with the Securities and Exchange Commission pursuant to section 12(g) of the Exchange Act; or

(B) to any business combination with an interested stockholder who was an interested stockholder on _____, 198_, unless subsequent to _____, 1985, such interested stockholder increased such interested stockholder's proportion of the voting power of the corporation's outstanding voting stock to a proportion in excess of the proportion of voting power such interested stockholder held prior to _____, 198_.

(2) The provisions of this section shall not apply:

(A) to any business combination of a corporation the certificate of incorporation of which contains a provision, or which adopts an amendment to the corporation's by-laws prior to _____, 198_, expressly electing not to be governed by this section; or

(B) to any business combination of a corporation with an interested stockholder of such corporation which became an interested stockholder inadvertently, if such interested stockholder (i) as soon as practicable divests itself of a sufficient amount of the voting stock of such corporation so that it no longer is the beneficial owner, directly or indirectly, of 10% or more of the voting power of the outstanding voting stock of such corporation, and (ii) would not at any time within the five-year period preceding the announcement date with respect to such business combination have been an interested stockholder but for such inadvertent acquisition.