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SEC Advisory Committee on Tender Offers
Agenda of Issues

Objectives: To review techniques for the acquisition of control of public companies ("takeovers") and the laws applicable thereto in terms of the best interests of all shareholders (i.e., shareholders of all corporations, whether potential acquirors, target companies or bystanders) and to propose specific legislative and regulatory improvements for the benefit of all shareholders.

I. Definition of Activities to be Reviewed.

The Committee has determined that, given the interrelationship of the various techniques to acquire control and the consequences of regulating one method of acquisition without taking into account the effect of such regulation on the relative advantages and disadvantages of other acquisition methods, it is necessary to consider the whole spectrum of acquisition techniques. The Committee recognizes, however, that given the anticipated date of its report to the Commission, it may not address in detail the full range of regulations, state and federal, applicable to proxy solicitations and mergers, but rather may focus on those issues that are common to such transactions and acquisitions of control through purchases of equity from investors.

II. Economics of Takeovers and their Regulation.

A. What is the economic effect of takeovers on:

1. acquirors and their shareholders - for example, what happens to an acquiror's financial condition, results of operations and stock price following an acquisition?

2. target companies and their shareholders - for example,

a. do takeovers provide a useful means of providing better management; and

b. does the prospect of takeover cause management to emphasize short-term results at the expense of long-term growth?

B. What is the relative effect of the following factors on the size and number of takeovers:

1. credit availability and policies;

2. tax policies;

3. antitrust policies;

4. market conditions;

5. general economic conditions;

6. accounting requirements (e.g., pooling, purchase, consolidation and equity accounting requirements);

7. laws applicable to change in control of regulated industries;

8. state takeover laws;

9. federal securities laws;

   a. 1933 Act (required registration of exchange offers)

   b. Williams Act

   c. other

10. state corporate law (e.g., fiduciary obligations); and

11. other?

C. What are the anticipated economic effects on acquirors, target companies, and the number and size of takeovers of adopting British type regulations that restrict or prohibit the ability of acquirors to:

   1. use two-tier pricing;

   2. engage in partial offers; and/or

   3. engage in open market accumulation programs at some defined level?

D. What is the economic effect on acquirors, target companies, their shareholders, and the number and size of takeovers of a regulatory environment that permits or encourages "auctions" of a target company?

E. What is the impact upon shareholders of the credit used to finance takeovers? Should the extension of credit for takeovers be regulated for the benefit of all shareholders?

III. Basic Objectives of the Federal Securities Laws Applicable to Takeovers.

The following issues are to be considered as an integral part of the Committee's consideration of the issues arising under captions IV, V, VI and VII.

Who should be protected under federal securities laws, what should the objectives of such regulation be and what premises should govern the balancing of these objectives?

A. Protection of shareholders (e.g., disclosure, proration, equality of treatment, substantive fairness).

B. Preservation of flexibility of business judgment for both the acquiror and target company.

C. Auctions of target companies.

D. Unfettered transfers of control.

E. Market liquidity and depth, efficiency in pricing. (Should takeovers be considered another dimension of market liquidity and thereby promoted under a mandate to extend market depth with full disclosure, promptness and reasonable cost?)

F. Ability of management to find alternative to takeover partners.

G. Neutrality (i.e., that the law have neither as its objective or effect, taking into account other regulatory objectives, the deterrence or promotion of takeovers).

IV. Regulation of Acquirors of Control.

A. To what extent can the procedures specified by law be made more uniform so that the current distinction between cash transactions and those using securities may be minimized? To what extent can the concept of integration of the 1933 and 1934 Acts be applied in the takeover area (where shareholders are compelled to make an investment decision) to streamline the procedures and disclosure required in connection with exchange offers and mergers?

B. Disclosure.

The primary purposes of the Williams Act are to assure that target company shareholders have the time and information to make informed investment decisions.

1. Are these purposes achieved by the current regulatory system?

   a. Is the current required disclosure meaningful and of use to most shareholders?

   b. Can some disclosure be eliminated or streamlined without lessening its effectiveness?

2. Should time and information continue to be the primary objectives of the law? Do such requirements serve the best interest of all shareholders?

3. What changes should be made in current disclosure requirements if disclosure continues to be a primary objective? For example:

   a. Should pro forma information be required in partial or proposed multiple step transactions?

   b. Should the accounting requirments with respect to purchase and pooling, consolidation and equity reporting be revised?

   c. Should tax disclosure be expanded and opinions of counsel on tax matters be required?

   d. Should projections of the target company given to the acquiror be required to be disclosed in its disclosure materials?

   e. Should tender offer materials be reviewed by the Commission prior to use as are proxy soliciting materials and registration statements used in connection with exchange offers and mergers?

4. Do acquirors and target companies have sufficient access to shareholders in an efficient, timely manner?

5. Do technological developments need to be taken into account in defining timing and disclosure requirements?

6. Do the current requirements under Section 13d of the 1934 Act need revision? Is the disclosure required in the Schedule 13D useful to shareholders? Should acquirors be permitted to continue to purchase securities before the Schedule 13D is filed after the 5% threshold is reached? Should the criteria for reporting obligations be expanded to include any purchase that is part of an intended acquisition of control.

C. Terms of the Acquiror's Offer.

What substantive regulation should there be of the terms of the offer?

1. Price.

   a. Should it be required to be fair and if so by whose determination?

   b. Should all shareholders accepting the offer be entitled to the highest price paid in the offer?

   c. Should Dutch Auctions be permitted or encouraged?

   d. Should there be a limitation on, or prohibition of, two-tier pricing?

2. Limited Offers.

   a. Should partial tender offers be permitted?

   b. If partial offers are permitted, should shares be required to be accepted pro rata?

   c. Should there be a limitation on open market accumulation programs?

3. Minimum Offering Period.

   Should there be a minimum offering or solicitation period? If so, for what period?

4. Withdrawal Rights.

   Should withdrawal rights be required? If so, on what basis?

5. Should states law rights of appraisal be incorporated in federal law?

D. Approval of Acquiror's Shareholders.

   Should the acquiror have to obtain the prior approval of its shareholders of proposed major acquisitions and attendant financings?

V. Regulation of Opposition to Acquisition of Control.

A. Should state corporate law fiduciary obligations applicable to the board of directors be the principal means by which its activities are regulated? If so, should the "business judgment" rule continue to be the principal applicable standard?

B. If the business judgment rule is the appropriate standard against which to measure the board's actions, should there be different requirements (i.e., restrictions, requirements of shareholder approval or prohibition) with respect to one or more of the following actions:

   1. Pac-man defense;

   2. sales of "crown jewels";

   3. target tender offers for their own shares;

   4. use of employee benefit plans to defeat or deter tender offers;

   5. "golden parachutes" and "silver wheelchairs" (i.e., employment and severance provisions that take effect upon a change in control);

   6. lock-ups; leg-ups (e.g., sales of blocks of shares or options on shares to frustrate takeovers);

   7. "shark repellents" (charter and by-law amendments to discourage takeover attempts);

   8. "scorched earth" policies;

9. litigation; and

10. other defensive maneuvers?

C. Should the repurchase of shares by an issuer at a premium be proscribed?

VI. Regulation of Market Participants.

A. Is there a need to limit or prohibit short tendering, hedge tendering, double tendering?

1. What is the impact on the market and on the tender offer process of such practices?

2. Do such practices inordinately disadvantage the non-professional investor? If so, are there benefits to such investors that outweigh such disadvantages?

3. Is there a need to regulate substantively the tender guarantee mechanism?

B. Options.

Do problems exist in the tender offer process as the result of or because of the options markets? E.g., can and should there be a limitation on or other regulation of uncovered call writing during tender offers?

C. Clearing Systems.

Should regulations be adopted to require the use of depository book entry systems and/or require clearing corporations to maintain continuous netting programs during tender offers and to adopt uniform closeout and liability notice programs?

D. Risk Arbitrage.

Is there a need for substantive regulation of the activities of risk arbitrageurs?

VII. Interrelationship of Various Regulatory Schemes.

A. Should the Committee consider substantive issues with respect to tax, banking, antitrust, ERISA, etc. or limit itself to

considering whether in general the various regulatory schemes eventually should or could be coordinated procedurally and/or substantively?

B. What is the proper relationship of federal and state securities and corporate laws and laws applicable to regulated industries?

1. Should there be state regulation of third party acquisitions of securities from shareholders (e.g., new Ohio statute)?

2. At present acquirors' activities are, as a practical matter, principally restricted by the federal securities laws, while the target's responses are, as a practical matter, principally subject to state regulation. Is this appropriate? If not, what should be done about it? What is the appropriate relationship between the federal securities laws and state laws applicable to changes of control of regulated industries?

VIII. Additional Issues.

A. See the additional issues raised by 12 members of the Senate Banking Committee in the attached letter.

B. What Commission enforcement presence is possible or appropriate, given the timing of control acquisitions? Are changes needed in the applicable laws to permit an effective enforcement presence?

C. To what extent do continuing changes in the law applicable to takeovers create inordinate difficulties for participants and shareholders?