May 23, 1984

Writer's Direct Dial No. 256-7751

Dana Abrahamsen, Esq.
Federal Trade Commission
Premerger Notification Office
7th and Pennsylvania Avenue
Room 301
Washington, D.C. 20580

Dear Mr. Abrahamsen:

This is to confirm our conversation of May 22, 1984, regarding the following interpretations of the Federal Trade Commission's Premerger Rules pursuant to the Hart-Scott-Rodino Act. Of course, the Premerger Rules provide that an asset acquisition is valued at the greater of "acquisition price" (equaling all consideration for the assets, including liabilities assumed), if determined, and fair market value. Both of the following interpretations concern calculation of the acquisition price of assets to be acquired pursuant to Premerger Rule §801.10, based, in part, on the value of certain liabilities to be assumed in connection therewith:

1. Company A is purchasing assets from Company B. As part of the asset purchase agreement, Company A has agreed to assume an employment contract to which Company B is a party. Thus, Company A will retain the employee covered by this contract and make payments to that employee under the contract. You explained that Company A's agreement to assume such contract does not constitute part of the acquisition price under the Hart-Scott-Rodino Act. Since Company A is gaining the benefits of the employee's services as well as the obligation to pay him for those services, the assumption is not viewed by the Federal Trade Commission as part of the consideration for the assets acquired by Company A, and, therefore, is not part of the acquisition price.

2. Under the same fact situation as presented above, Company A has also agreed to assume certain contingent liabilities of Company B as part of the consideration for the assets it is acquiring. Of course, since these liabilities are contingent, they do not possess a definite value. Company A can only estimate the value of these liabilities.

Dana Abrahamsen, Esq.
Page Two
May 23, 1984

You indicated that the following two principles apply to any valuation of these liabilities. First, the fact that these contingent liabilities do not have a definite value as of the date of the transaction means that the acquisition price is "not determined" within the meaning of Premerger Rule 801.10(b). For this reason, pursuant to Rule 801.10(b), the size of the transaction is calculated based upon a good faith estimate by Company A's Board of Directors (or by persons to whom the duty of making such estimate is delegated) of the fair market value of the assets being acquired by Company A.

Alternatively, if one were to argue (contrary to your statements) that the acquisition price must still be calculated in this situation, you explained that the contingent liability should be valued according to Company A's best good faith estimate thereof. Therefore, the applicable figure for the acquisition price in this transaction would include such good faith estimate. The size of the transaction would then equal the greater of Company A's good faith estimate of the fair market value of the assets acquired or the acquisition price.

If the foregoing does not comport with your views, please notify me by May 29. If I do not receive any notification by that date, I will assume that the foregoing represents your views of the proper interpretation of the Hart-Scott-Rodino Act and Premerger Notification Rules under these facts.

Sincerely,

Volume One, No. 2
A report on current contests for corporate control

# CORPORATE CONTROL ALERT

A publication of The American Lawyer

## STRATEGIES

### THE CARTER HAWLEY DONNYBROOK: MORE THAN JUST A FLOM-LIPTON SLUGFEST

Watching Joe Flom (of takeover specialists Skadden, Arps, Slate, Meagher & Flom) and Marty Lipton (of Wachtell, Lipton, Rosen & Katz) switch their accustomed sides and go at it this time with Lipton as the raider (for The Limited) and Flom as the defender (for Carter Hawley Hale Stores) was fun for takeover ringsiders. It had all the drama of an Ali-Frazier fight, with each champion freely, though not for attribution, giving his prognosis to *Times* and *Journal* reporters between rounds, and with the ever-confident Flom telling his client, his partners, and his friends the morning after a federal judge enjoined his side's critically important open-market purchases that he was so confident the SEC-instigated, headline-making injunction would be quickly lifted—which it was—that he'd slept calmly the night before and wasn't even planning to go back to L.A. for the court battle to get the injunction overturned.

But there was more to the slugfest than simple sport. In many ways this was a seminal battle, likely to be remembered as a harbinger of new moves and a reminder of mistakes that others shouldn't repeat.

**The Value Of Having Shark Repellents In Place:**

Much of what CHH had to do to defend itself that has now attracted so much criticism, such as its open-market purchase of its own stock and its sale of a special preferred stock to General Cinema, would have been unnecessary had CHH put shark repellents in place at its shareholders meeting a year ago. To be

*(Continued on the following page)*

### CALMING THE HYSTERIA

In the weeks ahead the business press will continue to be filled with stories about legislative "reform" proposals from the SEC and others, such as Congressman Timothy Wirth, aimed at curbing supposed management abuses in takeover defense tactics. But should any of the proposals seem to be gathering steam, look for lobbyists representing big business and the investment banking community to counterattack. And look for their arguments to be convincing—because lost amid what one top M&A investment banker calls "the post-Carter Hawley Hale mass hysteria" is the fact that there's much to be said for man-

*(Continued on page 3)*

### DOW ENTERS THE BEAT-THE-HART-SCOTT SWEEPSTAKES

A current Dow Chemical stock purchase "program" may be the latest entry in the Beat-The-Hart-Scott filing requirements sweepstakes—a game being played with increasing daring by companies seeking to avoid filing a Hart-Scott-Rodino Premerger Notification Form with the FTC when they go over the $15-million mark for acquisition of a target's stock.

The federal Hart-Scott-Rodino Act requires that a company (or group of companies if acting as a group) file before buying more than either $15 million or 15% of another company's stock—*except*, it can go over the $15-million mark and up to 10% if the stock purchases are "solely for the purpose of investment." The Beat-The-Hart-Scott game is well worth playing, since once a filing is made, the would-be acquirer must

*(Continued on page 3)*

### SHELL: BANKERS' FEUD FUELS PARENT-CHILD RIFT

What started as a friendly offer from Royal Dutch Petroleum to merge its American subsidiary, Shell Oil, has grown into a dispute that has splashed across the front pages of newspaper business sections, engendering bad blood between corporate parent and child, as well as between both sides' investment banking houses, which put the price tags on the shares of stock for sale. Royal Dutch's investment banker, Morgan Stanley, put a $53-per-share price on Shell's stock (which Royal Dutch later raised to a $58-per-share tender offer); Goldman, Sachs, the banker for

*(Continued on page 4)*

### GOOD TRACK RECORD ON FAIR PRICE AMENDMENTS

According to a study recently completed by Kidder, Peabody & Co., there is no evidence that adoption of a classic shark repellent—"fair price amendments," which effectively prevent consummation of a merger unless certain price and other requirements are met—has a negative effect on stock prices. The 141 companies included in the study mailed proxy statements to shareholders in 1983 to obtain a fair price amendment and obtained shareholder approval. The study used three measures of price effects: (1) absolute price changes from 60 days prior to the shareholder meeting date to 60 days after; (2) price performance relative to Standard & Poor's 500 Index from 60 days before to 60

*(Continued on page 5)*

the buyer won't want to buy it. . . . And the irony is that when the raiders go into court to try to get the judges to stop that, the courts are saying they don't want to interfere that way either." □

### Dow Enters The Sweepstakes

*(Continued from page 1)*

wait 30 days before it can buy any more stock, and must serve notice on the target.

On April 9 Dow filed three 13D statements with the SEC. All are identical, word for word. (Indeed, end-of-line word breaks are even the same.) According to the statements, Dow has decided to put nearly $150 million into the stock market (all out of working capital) "for investment purposes." In its April 9 filings, Dow says it "invested" $72.2 million in Morton Thiokol, Inc., close to $42 million in Millipore Corporation, and $33.6 million in Rorer Group.

"Fraud!" says one takeover defense lawyer, who likens Dow's filings to a shell game: The company invests in several companies at once in order to mask the one it's really interested in taking over. "There's no way they fit the legal standard [laid down by the FTC in the famous O'Connor/Trane letter] that the term 'solely for the purpose of investment' applies 'only to purchasers who intend to hold the voting securities as passive investors,' " this lawyer asserts. But Robert E. Jones, Dow's assistant general counsel, denies any *sub rosa* intent and responds that "the 13Ds say all there is to say."

Just last month, in the Houston Natural Gas/Coastal fight, Coastal chairman Oscar Wyatt, Jr., had his company buy $100 million of HNG stock—and had tender offer papers filed—all the while avoiding the Hart-Scott filing by claiming the purchases were for "investment purposes." So blatant was Wyatt's move that it sent a flurry of rumors through the industry that the FTC had finally been pushed too far and was cracking down on enforcement of the rules.

An FTC Bureau of Competition lawyer emphatically denies that the Coastal gambit resulted in any change in the rules. The O'Connor/Trane letter (written in 1982) has been and still is the standard—but, according to this FTC enforcer, "that letter posts the speed limit at 55 mph, and when you do 60, we get upset. But when you start doing 75 mph [as in Coastal and Dow], the sirens are going to go off."

Watch closely for FTC Hart-Scott action in the near future. . . . Meanwhile, Dow's three picks for investments can only guess which of them may have really been tagged. □

### Calming The Hysteria

*(Continued from page 1)*

agement's side. Conversely, there's less to these alleged abuses by "entrenched management" than meets the eye. Specifically:

1. *Is there really a problem?* According to a just-completed Kidder, Peabody study made available to us, of all unsolicited, non-negotiated takeover offers involving $15 million or more that were initiated between January 1, 1982, and April 25, 1984, 69% succeeded.

2. *Do shareholders of companies that beat back offers really lose?* The Kidder, Peabody study found that of the 49 defeated hostile tender offers (defined in the study as those in which the target company remained independent for at least one year following the initial offer) involving more than $15 million and taking place between 1973 and 1984, 37—or 76%—have since sold at a higher price than the original offer that was rejected by the board. (When adjusted for inflation, the sale price in 61% of these cases was still higher than the rejected offer.)

Another portion of the new Kidder, Peabody data suggests that even the most hated defense tactic—paying "greenmail" to a raider by buying back its shares at a premium—often makes sense for the shareholders. Of all companies that bought back stock blocks at a premium between January 1979 and December 1983, 69% are now selling at a price higher than the premium price paid; 80% are selling at a price higher than the market price at the time the premium was paid. And a third aspect of the Kidder, Peabody study, detailed on page 5, suggests that shark repellents also don't hurt stock values.

All of which suggests that the courts' continued support for the nebulous "business judgment rule" as the only real limit on a board's discretion as to whether to reject a takeover bid may not be as wrong-headed and anti-public-interest as those pushing the reform proposals suggest.

3. *Should a board be stripped of its negotiating power?* Says one top takeover lawyer, "When a raider comes to a target, is the target supposed to roll over and die? If the target board can't do things like self-tender or adopt shark repellents, what you're really saying is that it can't bargain. It can't tell a raider that the individual shares may be selling today for $60 but that, no, $70 isn't a fair price for control of the company. You've got to give a board something to bargain with." Indeed, even the battle that has incited all the recent hysteria—Carter Hawley Hale—saw the board's supposedly extreme resistance tactics raise The Limited's offer for CHH from $30 to $35.

4. *Similarly, why should a target not be able to make use of its assets*—by self-tendering or even paying greenmail—when the raider is using the prospect of those same assets for leverage? In the two recent cases involving the most extreme defense tactics, Carter Hawley and Houston Natural Gas, the raiders (The Limited and Coastal Corp., respectively) were much smaller companies than their targets and they were using the target's balance sheet as their main source of financing. Why shouldn't the target board also be able to use its company's debt capacity?

5. *Don't golden parachutes actually protect the*

*(Continued on the following page)*