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December 31, 1987

David B. Brown, Esquire
Secretary
Council of the Corporation Law
Section of the Delaware Bar Association
c/o Potter Anderson & Corroon
350 Delaware Trust Building
Wilmington, Delaware 19801

Re: Proposed New Section 203 of the
Delaware General Corporation Law

Dear Mr. Brown:

I have been asked by one of my corporate clients incorporated in Delaware to comment upon the revised draft of proposed new Section 203 of the Delaware General Corporation Law (the "Proposed Statute"). While this proposal, in my view, represents a significant improvement over the earlier exposure draft, there are still several issues that require further attention.

The 85% threshold contained in paragraph (a) of the Proposed Statute is tied to the number of shares outstanding at the time a transaction is commenced. While this protects a bidder against issuances of stock by a target corporation after an offer is commenced, the 85% level may be virtually impossible to achieve if the target corporation repurchases a substantial amount of its stock as a defensive measure. For example, if the target corporation had 1,000,000 "disinterested" shares outstanding at the time a tender offer commences, the bidder would need to get 850,000 of those shares in order to avoid the effects of the Proposed Statute. Thus, if the target company repurchases more than 150,000 of its shares after the commencement of the offer, the bidder can never obtain the requisite 85% to make §203 inapplicable to a subsequent merger. I think it would be

more appropriate to tie the 85% threshold to the lesser of the number of "disinterested" shares outstanding at either the commencement or the consummation of the offer. In my example, assuming the target repurchased 200,000 of its shares, such a revision would mean that the bidder would need to obtain 85% X 800,000 = 680,000 shares in order to make the statute inapplicable.

In my view, the provisions of subparagraph (b)(3) of the Proposed Statute would provide substantially equivalent protection to shareholders from "abusive" takeover tactics, while preserving the flexibility to consummate a transaction which is in the best interests of shareholders, if (a) the period prior to effectiveness of the amendment were 6 months, (b) the vote required was a two-thirds vote, and (c) the amendment applied to a person who was an interested stockholder on or prior to the date the amendment was adopted. In addition to being overly restrictive, this provision seems somewhat inconsistent with subparagraph (a)(3) of the Proposed Statute which permits transactions with interested stockholders if they are approved by the Board of Directors and a two-thirds vote of the outstanding shares (other than shares owned by the interested stockholders). If a bidder is able to secure a two-thirds vote (not including its shares) in favor of opting out of the statute in order to effect a proposed transaction, and if the bidder is willing to wait out a six-month "suspension," the requirement of Board approval effectively imposed by the interplay of subparagraphs (a)(3) and (b)(3) of the Proposed Statute does not seem to be advisable or necessary to protect shareholders.

The presumption of control by a 20% stockholder contained in subparagraph (c)(4) of the Proposed Statute is troublesome and, in my view, unnecessary. In many cases involving public companies, a 20% block is by no means a control block in the context of the types of transactions intended to be covered by the Proposed Statute. Since the existence of control is inherently a factual question which can only be determined on a case-by-case basis, I would oppose creating a statutory presumption of control at any particular level.

It is not clear how the provision in subparagraph (c)(5) of the Proposed Statute relating to a person who becomes a 15% holder as a result of actions taken by the company relates to the 85% threshold in subparagrpah (a)(2) of the Proposed Statute. If a person becomes a 15% owner as a

result of action taken by the company, and subsequently commences an offer in which more than 85% of the "disinterested" shares are acquired, I believe that the statute should be inapplicable. The wording of subparagraph (c)(5) of the Proposed Statute, however, is less than clear that the statute would be inapplicable in this case.

While the specific suggestions described above address my principle concerns relating to the Proposed Statute, I continue to believe that the Delaware Bar Association should reconsider whether any legislation is necessary or desirable at this time and reassess the goals of any such legislation.

The views expressed in this letter are mine and those of my client and do not represent the position of Ropes & Gray as a firm.

Sincerely,

David C. Chapin/pac

David C. Chapin

DCC/eem