TO: J. Flom
R. Rubin

March 30, 1983

FROM: M. Lipton

RE: SEC Committee on Tender Offers,
Basic Objectives Subcommittee

I prepared the attached outline as a framework for discussion of the position paper to be prepared by our subcommittee. It is based on what I thought was the consensus at the March 18 meeting. I suggest that you write your comments in the margin and send a copy to me and the other member of our subcommittee. If it looks like we are in general agreement I will draft a position paper. If we are not in agreement we should meet as soon as possible.

Dear Linda
As per our conversation yesterday
Sincerely
Marty

1. There is no showing that takeovers in general have an adverse impact on the economy or on society.

2. Existing laws adequately protect against monopolization and concentration of power.

3. There does not appear to be any economic or societal reason to restrict size as such.

4. There is no showing that takeovers divert available resources from more productive uses.

5. There is no showing that takeovers have a significant impact on the availability or the cost of capital.

6. There is no showing that takeovers and the associated market activity in the securities of companies that are parties to takeovers have any adverse impact on the securities markets or the participants in the securities markets, including the "small" shareholder.

7. Experience shows that changes with respect to one aspect of takeover regulation are likely to result in changes in takeover practices which were not, and probably could not have been, foreseen at the time of the regulatory changes.

8. There is no reason to restrict innovations in takeover techniques - it is desirable to let them evolve in relationship to changes in the markets and in the economy. Restrictions on innovations in the existing regulatory system that do not provide significant benefits in the form of protecting participants in the markets and the integrity of the markets should be eliminated.

9. Even though regulation may restrict innovations in takeover techniques, it is desirable to have sufficient regulation to insure the integrity of the markets and to protect market participants against fraud, nondisclosure of material information and the creation of situations in which a significant number of small shareholders may be at a disadvantage to market professionals.

10. Since there is no showing that the rejection of a takeover is in the long run detrimental to the shareholders of the target company, there is no basis for changing the existing reliance on the business judgment rule to

regulate the responses of target companies to takeover bids. Within the business judgment rule there is no reason to restrict innovations in responses to takeover bids and no reason to restrict companies from following a policy of remaining independent.

11. The existing takeover regulatory system has evolved during a decade of very high takeover activity into a reasonably balanced and efficient system, but with several significant problems detailed below:

    A. Front-end loaded, two-tier and partial tender offers which result in inequality of treatment of all shares and shareholders.

    B. Open market accumulations which by their nature result in inequality of treatment and which may result in the acquisition of control without the payment of the full control premium that otherwise would inure to the benefit of the shareholders of the target.

    C. It would be anomalous to restrict front-end loaded tender offers and not restrict partial tender offers. Similarly it would be anomolous to restrict partial tender offers and not restrict open market accumulations.

    D. Regulatory discrimination against securities takeovers in favor of cash takeovers which discrimination gives rise to the resort to front-end loaded and other problem takeover techniques.

    E. Lack of clarity and certainty in the regulation of takeover arbitrage activities.

    F. Interference by the states in what is a national market activity that should not be subjected to conflicting regulation.

    G. Proliferation of "shark repellant" charter amendments that may result in significant differences in the application of takeover regulation to similar companies.

    H. Difficulty in communicating with street-name shareholders.

12. Recommended solutions to the above problems are:

A. Prohibit altogether or restrict front-end loaded and partial tender offers by requiring that they remain open and subject to withdrawal for a long period -- say 180 days -- unless there is a firmly committed second step with the same value as the first step. Assure that the value of the second step is equal to the first step in cases where the second step involves a different form of consideration than the first step by requiring affirmation by the board of directors that they have so determined and full disclosure as to how they made that determination.

B. Prohibit open market accumulations of more than 5% by anyone other than a passive investment management institution. Passive investment management institutions would be limited to 10%. Persons who in the aggregate hold more than the 5% limit or the 10% limit could not combine to make a tender offer or conduct a proxy fight until one year after filing to disclose the combination.

C. Put cash and securities offers on an equal footing. Provide for five business days notice for all offers, cash and securities, and clearance within such five days for securities offers by S-3 companies. Use a summary prospectus for S-3 companies.

D. Since partial and front-end loaded tender offers would no longer be a problem, restrictions on short tendering and other takeover arbitrage activities should be eliminated. This would remove uncertainty and benefit small shareholders and the market generally by creating greater liquidity and narrower spreads.

E. Except in 180-day offers, where the intention so to do has been disclosed in the original offer, permit the offeror to buy in the open market at the offer price up 15% of the outstanding shares of the target. This would improve liquidity, assure narrow spreads and

somewhat counterbalance the restriction on preoffer open market purchases.

F. Require the target to give the offeror a shareholder list and access to all "street-name" information.

G. Preempt state takeover statutes and shark repellant charter amendments but preserve traditional state regulation of bank, insurance company, utility, etc. change-of-control and state authorized staggered boards. Require shareholder vote to approve golden parachutes and "ransom" of shares accumulated within past two years. All other defenses and responses to takeover should be left to the directors' business judgment.

H. Make tender offer withdrawal period the same as offer period and proration period.