FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

NOV 14 1983

The Honorable John S. R. Shad
Chairman
Securities and Exchange Commission
Washington, D.C. 20549

Re: SEC Advisory Committee on Tender Offers

Dear John:

Thank you for the copy of the "Report of Recommendations of the Advisory Committee on Tender Offers." I compliment the members of the Committee on the speed and thoroughness of their work. The Report highlights the multitude of complex issues involved in the tender offer process.

I agree with the basic premise of the Report: that the free market approach embodied in the U.S. securities markets works reasonably well. The market for corporate control should be allowed to operate as freely as possible. Any regulation of the process, of necessity, imposes costs on the economy. Agencies such as the SEC and the FTC should impose additional regulation (or recommend legislative changes) only where the benefits of such action clearly outweigh the costs imposed.

From this perspective, I would like to address briefly the Advisory Committee's recommendations that specifically involve the Hart-Scott-Rodino Act. When Congress enacted the Hart-Scott-Rodino Act it was careful not to upset the waiting periods already in place under the Williams Act. The two statutes seem to have worked reasonably well together thus far.

Only a small percentage (as explained below, roughly five percent) of the filings reported under Hart-Scott-Rodino are tender offers subject to the Williams Act. The Hart-Scott-Rodino

Act establishes shorter waiting periods for cash tender offers than does the Williams Act. Despite this, the antitrust enforcement agencies have thus far been able to review adequately the relatively few tender offer filings that have been received. If the longer tender offer waiting periods for the Williams Act suggested in Recommendation 17 of the Report (30 calendar days for an initial bid) are adopted, our experience indicates that a corresponding change will not be necessary in the Hart-Scott-Rodino waiting periods now in effect (15 calendar days for an all-cash tender offer, and 30 calendar days for all other tender offers).

Following Recommendation 50 there is a discussion of a proposal to harmonize the ends of the Hart-Scott-Rodino Act and Williams Act waiting periods when the Hart-Scott-Rodino waiting period has been extended by a so-called "second request." The proposal suggests implementing a system whereby the bidder could take down shares, subject to a hold-separate order, even though the extended Hart-Scott-Rodino waiting period had not expired.

The situation addressed by this proposal occurs very infrequently -- only when a second request has been sent to one or more of the parties to a tender offer. While we have no precise data on this category of cases, my staff estimates that based on filings received from January, 1982, to May, 1983, roughly five percent of Hart-Scott-Rodino filings involved tender offers. Moreover, second requests are issued only in that small percentage of transactions in which the antitrust reviewing agency has concerns about the legality of the merger. In 1982, for example, second requests were issued by the FTC or the Justice Department in only about four percent of all reported transactions. (See the Federal Trade Commission's Sixth Annual Report to Congress on Hart-Scott-Rodino, Appendix A). According to an informal survey of the tender offer filings received between January 1, 1982, and May 3, 1983, only seven second requests were issued by the agencies in the 73 tender offer transactions reported, constituting roughly ten percent of all tender offers filed over this period. Thus, it appears that the changes discussed in Recommendation 50 would affect a relatively small number of transactions.

In those situations in which a second request and a tender offer are both involved, the hold-separate proposal presents some difficult questions. As Assistant Attorney General Baxter

remarked to the Advisory Committee on June 2, hold-separates are difficult to administer; do not always preserve the competitive status quo; and are costly to the enforcement agencies, the courts, and the parties. I agree with Mr. Baxter that hold-separates are in general not very satisfactory from the antitrust enforcement perspective. The fact that a large number of shares may have to be liquidated has affected judicial decisions on whether an antitrust violation has taken place and what relief is appropriate. However, in a tender offer when shares rather than assets are being acquired, some of the drawbacks associated with hold-separate arrangements are not so severe. Thus, I recommend careful consideration of proposals such as this one designed to make the market for corporate control work more effectively. Even though it will affect a relatively small number of transactions, this proposal should enhance the incentives for those seeking to find companies that are appropriate for acquisition and it should strengthen the discipline that the market for corporate control provides for management to adhere to the interests of shareholders.

The SEC now embarks on the difficult task of reviewing the proposals of the Advisory Committee, the laws governing tender offers, and the various political and policy issues raised by changes in corporate control. If we at the FTC can assist in that task in any way, please do not hesitate to call upon us. I look forward to continued close work with you in these areas of utmost importance.

Again, thank you for your courtesy in sending me a copy of the Advisory Committee's Report.

Sincerely yours,

James C. Miller III
Chairman