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Linda C. Quinn, Esq.
Associate Director
Corporation Finance Division
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D. C. 20549

Dear Linda:

I would appreciate it if you would send me a copy of the Staff's recommendations with respect to the Advisory Committee Report.

I enclose a copy of the Lipton 10% proposal. I continue to believe that if it were to be adopted almost all of the Advisory Committee recommendations would be subsumed and we would have a simple and cogent remedy for most of the abuses.

Sincerely,

Marty

ML:jm

Enclosure

cc: Honorable John S. R. Shad

PROPOSED AMENDMENT TO THE WILLIAMS ACT
REQUIRING "FOLLOW-UP" BID FOR ALL OUTSTANDING SHARES

Introduction

The problems caused by accumulations of stock in open market and private transactions have been recognized for some time. Section 13(d) of the Securities Exchange Act of 1934 reflected the effort of Congress and the Securities and Exchange Commission to address one aspect of the problem: inadequate disclosure of accumulations of shares of publicly held corporations. Prior to the enactment of Section 13(d), stockholders had no ready means to learn of changes in control of a corporation through open market and private purchases. Section 13(d) requires persons accumulating stock to provide certain information with respect to, among other things, the amount of stock held and any plans to increase that amount.

The problems inherent in open market purchase programs have, however, evolved far beyond mere disclosure problems. Extremely rapid accumulations of stock on a large scale are now being effected by groups of investors despite the strictures of disclosure-oriented securities laws and antitrust waiting period requirements. In some cases, investors with access to large amounts of capital have acquired a sufficient number of shares to cause an effective transfer of control of a publicly held corporation before any compliance with securities law disclosure requirements, or antitrust waiting period requirements, is triggered. The Securities and Exchange Commission's Advisory Committee on Tender Offers addressed some of these issues in its July 1983 report. The Committee found that "the requirements to report the acquisitions of more than 5% of an outstanding class of an issuer's equity securities adopted under Section 13(d) of the Exchange Act have failed to give adequate notice to shareholders and the market at large of potential changes in control of the issuer."

Proposed Legislation

To address these problems, as well as certain disruptive and inequitable tactics which have become common in corporate takeover practice, it is proposed that the Securities Exchange Act of 1934 be amended. The proposed legislation would prevent the acquisition of more than 10% of the outstanding shares of voting stock of a publicly held corporation unless the acquiring person offers to purchase all of the shares of common stock of the corporation in a tender offer. The offer would be for cash at the highest price paid by the acquiring person for any shares of common stock during the preceding twelve months or, if no shares of common stock were acquired during the twelve-month period, for cash, securities or a combination of cash and securities (so long as equal value is offered for each share).

The object of the proposed legislation is to ensure that, if control of a publicly held corporation is to be acquired, all of its stockholders have an opportunity to share in the premium that generally attaches to a sale of control. The proposed legislation would afford all stockholders access to the "control premium" by requiring the follow-up bid to be by means of a tender offer.

Under the proposed legislation, once 10% of the voting stock of a corporation has been acquired, all holders of common stock must be given the opportunity to sell their shares. As a result of the proposed legislation, stockholders of a corporation who are close to the market, such as market professionals, would enjoy no advantage over the rest of the stockholders once 10% of the voting stock has changed hands.

The requirement that the follow-up bid be for all of the outstanding shares at a single price would eliminate the pressure to sell caused by a partial bid, which may stampede a corporation's stockholders into tendering their shares due to the uncertainties of remaining minority stockholders. It would also eliminate "two-tier" pricing, which occurs when one price is offered in a tender offer for a controlling block of stock, and then a much lower price is paid for the remainder of the outstanding stock in a subsequent business combination.

Two-tier pricing is designed to stampede stockholders into tendering their shares out of concern that they would be forced, if enough shares were tendered to enable the would-be acquiror to accumulate a majority of the shares, to accept the lower price paid in the second-step merger. The proposed legislation should put an end to these disruptive and inequitable tactics.

Comparison to Advisory
Committee Recommendations

The Tender Offer Advisory Committee developed two recommendations directed specifically at abuses which occur in connection with open market and private accumulations of stock. The first recommendation would eliminate the so-called "10-day window period" between the acquisition of more than 5% of a corporation's shares and the obligation to file a Schedule 13D, by requiring that a Schedule 13D be filed at least 48 hours <u>prior</u> to the acquisition of more than 5% of the shares. Although closing the 10-day window period is a desirable technical amendment, it merely eliminates an obvious loophole in a system of regulation premised upon adequate disclosure.

The Committee's second recommendation would go beyond disclosure to regulate the means by which holdings in excess of 20% of the outstanding shares may be accumulated.

Under the second recommendation, acquisitions of shares which would result in a person holding more than 20% of the voting power of a corporation's stock must be made by means of a tender offer. As recommended by the Committee, the "follow-up" bid may be a partial one, as long as it is a tender offer. The theory of the Committee's second recommendation is that if control premiums are being paid, requiring purchases to be made by means of a tender offer affords stockholders <u>some</u> opportunity to participate in the premium. The Committee's second recommendation does not, however, address the other half of the open market accumulation problem: the uncertainties faced by a minority stockholder whose shares are only partially bought in a tender offer (due to proration) or who chooses not to tender any shares because the price is not satisfactory.

The proposed legislation would take the Tender Offer Advisory Committee's second recommendation a step further by requiring that the acquiring person purchase <u>all</u> of the remaining outstanding shares in a follow-up tender offer. In addition, the threshold triggering the obligation to make a follow-up bid is set at 10% of the outstanding voting shares in the proposed legislation rather than the 20% level suggested in the Committee's second recommendation. There was considerable disagreement among the Committee members as to whether a 10%, 15% or 20% level should be used.

The proposed legislation uses a 10% threshold on the theory that once the public market becomes aware of accumulations in excess of 10%, massive transfers of shares often occur -- from the general public to professional arbitrageurs -- such that the stockholder body is no longer composed of longer-term equity holders, but rather consists in large part of market professionals. The result, far too often, is that a sale of the corporation is forced merely because the newer stockholders are seeking to turn a quick profit on their investment and not because a sale is in the best interests of those holding a long term equity position. The proposed legislation would alter this process by reducing the arbitrage advantage now available to market professionals who buy and sell in the course of open market purchase programs and allowing all stockholders to participate in the transfer of a control premium.

Proposed Amendment to Section 14 of
<u>the Securities Exchange Act of 1934</u>

Section 14(h).

(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to acquire or agree to acquire any shares of any class of voting equity securities of a corporation registered pursuant to Section 12 of this title, or any shares of any class of voting equity securities of an insurance company which would have been required to be so registered except for the exemption contained in Section 12(g)(2)(G) of this title, or any shares of any class of voting equity securities issued by a closed-end investment company registered under the Investment Company Act of 1940 if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of voting equity securities which would entitle such person to cast at least 10 per cent of the votes that all holders of outstanding voting equity securities would be entitled to cast in an election of directors of the issuer, unless such acquisition shall be by means of a tender or exchange offer for all of the outstanding shares of common stock of the issuer (including all shares of common stock issuable upon conversion or

exercise of outstanding securities, warrants, options or other rights issued or granted by the issuer) either (i) for cash at a price per share equal to the highest price per share (including any brokerage commissions and soliciting dealers fees) paid by such person for shares of common stock of the issuer during the twelve months preceding the date of commencement of the offer, or, (ii) if such person has not purchased any shares of common stock of the issuer during the twelve months preceding the date of commencement of the offer, for cash, or for securities, or for any combination of cash and securities, provided that in any offer in which cash is offered for part of the common stock of the issuer the securities offered for the remaining common stock have a fair market value, on a fully distributed basis, per share of common stock of the issuer at least equal to the amount of the cash offer per share of common stock of the issuer.

(2) For purposes of this subsection, the term "voting equity security" shall mean any equity security of a corporation that entitles the holder thereof to vote generally in an election of directors of the corporation.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, or influencing the management policies of an issuer,

such syndicate or group shall be deemed a "person" for purposes of this subsection.

(4) The provisions of this subsection shall not apply to:

(a) any person that on the effective date of this subsection (the "Effective Date") beneficially owns voting equity securities of a corporation which would entitle such person to cast at least 10 percent of the votes that all holders of outstanding voting equity securities would be entitled to cast in an election of directors of the corporation unless, subsequent to the Effective Date, such person increases its beneficial ownership of voting equity securities of the corporation to a percentage in excess of the percentage of outstanding voting equity securities of the corporation beneficially owned by such person on the Effective Date;

(b) acquisitions of any voting equity security by the issuer of such security;

(c) acquisitions of any voting equity security from the issuer of such security;

(d) acquisitions of voting equity securities pursuant to an agreement with the issuer under which all of the outstanding shares of common stock of the issuer (including all shares of common stock issuable upon conversion or exercise of outstanding securities, warrants, options or other rights issued or granted by the issuer) are to be acquired; or

(e) acquisitions of voting equity securities of any issuer that on the Effective Date is a subsidiary of any other corporation by such other corporation. For purposes of this subsection, "subsidiary" shall mean any issuer as to which another corporation beneficially owns voting equity securities that would entitle such corporation to cast at least 50 percent of the votes that all holders of outstanding voting equity securities of the issuer would be entitled to cast in an election of directors of the issuer.