MEMORANDUM

November 27,
1964

TO: Ralph S. Saul, Director
Division of Trading and Markets

FROM: William T. Dolan

SUBJECT: Purchase by a Corporation of its Own Shares

Limitations of Power to Purchase

The limitations upon a corporation's power to purchase its own stock vary from the almost complete prohibition of the practice, which has long been the English rule and is retained by several states, to its permissive authorization (if the shares are paid for out of 'surplus' or 'earned surplus'), which is now the rule in a majority of states.

The English rule was established in 1887 by the case of Trevor v. Whitworth.[1] In that case the defendent corporation became insolvent and was forced to liquidate after paying out over 20% of its capital to reacquire publicly held shares for the purpose of keeping the corporation a family one. A former shareholder sued to recover the price of shares sold by him to the corporation. The House of Lords held that purchases by the corporation of its own stock were ultra vires because they were not germane to the business purpose of the defendant manufacturing corporation, and therefore denied the plaintiff relief. If shares were purchased with an intent to resell them, said the court, the corporation would be "trafficking in its own shares," an unauthorized line of business: if the intent were to retire the shares, that would be an indirect reduction of capital in violation of statutory safeguards.

In the majority of states the strict English rule has been abandoned in favor of a prohibition of only such purchases as would impair capital. In those states, which have adopted the majority position, either by statute or decision, a corporation's power is variously limited to purchases out of surplus or out of earned surplus: several states simply prohibit purchases "which would cause any impairment of the capital."[2] If no impairment of capital will result, the majority of states will permit a corporation to purchase its own shares, regardless of the element of "trafficking" or speculation which may be involved. The latter question in most states is one of propriety of the purchase considered in its factual setting and not, as in England, one of the power of the company to indulge in the practice. However, in this connection it should be noted that at least one state, North Carolina, has provided by statute that advance shareholder approval must be obtained before the corporation can purchase its own shares on a non-pro rata basis even if out of surplus: and prior to obtaining such approval the specific purpose of the acquisition must be disclosed to the stockholders.[3] The majority American rule has been codified, with some modifications, in the Model Business Corporation Act, whereby purchases of its own shares may be made by a company out of "unreserved and unrestricted earned surplus;" or, if its articles of incorporation permit or with the approval of at least two-thirds of all shares entitled to vote thereon, to the extent of "unreserved and unrestricted capital surplus."[4]

How a Corporation is Affected by Purchase of Treasury Shares

Irrespective of the management's motive, the purchase of a corporation's own shares results in a reduction of its assets by the amount of the purchase price, which means a reduction in the resources available for the production of income. It also diminishes the number of shares outstanding, and as a result each non-selling shareholder usually retains a larger interest in a smaller total of assets.[5] Voting control is also affected if the shares purchased are voting shares. These issues will be discussed more fully below.

The nature of the treasury stock purchase transaction is such that it results in the shareholder giving up an asset (viz., his stock) although the corporation does not acquire one. It is apparent that its own shares are of no value to it until resold or otherwise disposed of,[6] and proper accounting procedure dictates that instead of reflecting treasury shares as an asset they should be handled in the following way: (i) credit, i.e., reduce, cash in the amount of the purchase price, and debit treasury stock; (2) restrict earned surplus by an amount equal to the balance in the treasury-stock account, the restriction to be removed and the surplus restored upon resale (to the extent the amount received covers what has been paid to re-acquire the shares), or upon retirement of the shares.[7]

Criticism of Such Purchases

The legal writers have long been opposed to the majority rule, and their criticisms of the practice have focused on four problem areas; (1) the indirect reduction of capital which may be effected thereby; (2) the alteration of voting control; (3) the prejudicial withdrawal of assets (including surplus) from the prosecution of the business; and (4) the manipulation of the market price of the security.

(1) Indirect Reduction of Capital

As I have indicated above, the majority American rule prohibits purchases of treasury stock which will reduce or impair capital, the theory being that reductions of capital should be made only in conformance with the prescribed statutory method. In most states that requires one or more of the following steps: (1) the amendment of the corporate charter; (2) an approval of shareholders; or (3) the filing of a certificate with, and approval of, a state official.[8] These safeguards protect creditors' and preferred shareholders' rights by insuring a degree of financial responsibility of the corporation and a margin of safety behind preferred shares. Despite the prohibition of unauthorized reductions of capital, in a number of states which require certain formalities for a statutory reduction a company may effectively reduce its capital without compliance with the statutory method by purchasing its own shares. It has been held in these latter states that a purchase without retirement is not a reduction of capital.[9] And impairment may in fact result if the corporation treats the purchased shares as retired but does not formally reduce capital, or merely refrains from re-selling the shares, or if the corporation is unable to resell the shares or can sell them only at a lower price (in which case the impairment may be only part of the amount which the company paid). [10]

(2) Alteration of Voting Control

Probably the most obvious effect of a non-pro rata purchase by a company of its own shares is its effect upon voting control. Allegedly to rid the corporation of a "troublesome" shareholder, or a group of shareholders, or because the stock is "underpriced," or in anticipation of future acquisitions or some other corporate use the directors may employ the corporation's funds to perpetuate their control of the enterprise by purchasing outstanding stock and removing it from a voting position. A minority can thereby be converted into a majority and their control extended indefinitely.[11] If a sufficient number of publicly held shares is purchased the management may even withdraw a portion of its own capital contribution without reducing its proportionate voting power.

(3) Prejudicial Withdrawal of Assets

Since few purchase plans involve a pro rata purchasing from all shareholders, there is a potential preference to favored shareholders involved in such a plan---permitting them to withdraw their contributions at an advantageous price or when the shares may be otherwise impossible to sell.[12] Even if no impairment of capital results in the purchase the corporation is deprived of operating funds which the shareholders justifiably could expect would be used in prosecuting the business and not in the rearrangement of control or to serve the personal interests of management.[13]

(4) Manipulation of Market Price

The manipulation and "pegging" potential involved in large-scale purchases by a corporation of its own shares is great. Although most of the purchase programs observed by the staff are still in operation, and therefore the effect of the corporations own purchases cannot be accurately estimated, there is no doubt that purchases by the issuer constituting over 50% of the total number of the issuer's shares purchased during a three month period on the New York Stock Exchange (Ling-Tempen-Vought) or over 90% of shares purchased during a period of approximately one month (Merritt, Chapman & Scott Corp.) have an effect on market price. A more informed picture of price reaction to a corporation's own purchases will be possible after receipt of the completed questionnaires from selected issuers.

Shareholders' Remedies

If a corporation's purchases, even though out of surplus, are made for an improper motive, the advocates of the majority rule contend, shareholders are adequately protected under state law by their right to sue management for a violation of its fiduciary duties. But given an improper motive of management, while the purchase might be attacked under the majority rule as a violation of management's fiduciary duties, the effect of the rule is "to make the purchase prima facie valid and to impose on an objecting shareholder the difficult burden of proving that the purchase involved a violation of the duty of loyalty."[14] In this connection, however, it should be noted that the Illinois Appellate Court has imposed a much stricter fiduciary obligation upon a corporation in purchasing its own shares than is imposed upon an individual officer or director engaging in such transaction.[14a] And a recent line of decisions of the Court of Chancery of the State of Delaware has held that where control is involved in purchases by the corporation of its own stock the burden is on the management to show that such purchases are primarily in the corporate interest.[15]

Tax Treatment of Treasury Stock

(a) Purchases

Under the Internal Revenue Code of 1939 a corporation's purchases of its own stock for cash were governed by the general rule that only realized gains are taxable and only realized losses deductible. Such a purchase was considered a capital transaction not resulting in gain or loss, the taxable event being the disposition of the stock thus acquired.[16]

If the shares were purchased for property other than cash the tax treatment under the 1939 Code varied depending on whether the transaction was a purchase of stock, a sale of property, or a non-taxable reorganization exchange. If a purchase, the transaction was treated as though payment had been in cash, i.e., no gain or loss recognized at the time of purchase. If considered to be a sale of assets then gain or loss was recognized to the extent that the present value of the acquired shares exceeded, or was less than, the cost price of the assets given in exchange. And if the transaction fell within one of the reorganization sections no gain or loss was recognized.[17]

Sec. 317(b) of the 1954 Code provides that stock is treated as "redeemed" by a corporation if it is acquired by the corporation from the shareholder in exchange for property (including cash), regardless of whether the stock is subsequently cancelled, retired or held as treasury stock.[18] Under Sec. 311(a) or the 1954 Code a corporation realizes no gain or loss upon receipt of its own stock by way of "redemption" because Sec. 302(a) and (d) treats the redemption as a distribution taxable to the distributee.[19] Therefore under most circumstances a purchase by a corporation of its own shares is non-taxable under the 1954 Code.

(b) Sales and other dispositions

The 1939 Code did not specifically treat the problem of disposition of treasury stock, but the Regulations under the 1939 Code provided that gain or loss on the acquisition or disposition of treasury shares depended upon all the facts and circumstances; if a corporation dealt in its own shares as it might do in the shares of another corporation, the gain or loss was to be determined in the same manner as if the shares dealt in were shares of another corporation.[20]

For years the Tax Court and the Circuit Courts were in disagreement as to the meaning of the Regulations' standard of whether the corporation was dealing in its own shares "as it would in the shares of another corporation." Shortly before the enactment of the 1954 Code, however, the Tax Court appeared to adopt the view of the majority of Circuit Courts that "regardless of the original purpose of the corporation in purchasing its shares, if the corporation does not actually cancel and retire the shares so purchased but later sells them, irrespective to whom they are sold, the corporation has sold an asset in the same way as when it sells the shares of another corporation which it might own, and that any resulting gain is the same type of taxable income as would result from a profit derived from the sale of any other asset."[21] The Revenue Service, in interpreting a 1955 Supreme Court decision under the 1939 Code[22] indicated that at least where the acquisition and disposition of treasury stock is limited to a solely intracorporate purpose with no element of speculation or gain envisioned, it does not constitute dealing by the corporation in its own shares within the meaning of the Regulations.[23]

Whereas the conflict of authorities under the 1939 Code left the tax status of corporate dispositions of treasury shares in doubt, the 1954 Code in Sec. 1032(a) specifically provides that "no gain or loss shall be recognized to a corporation on the receipt of money or other property in exchange for stock (including treasury stock) of such corporation." The Regulations, in Sec. 1.1032-1, eliminated the standard developed under the 1939 Code, for they expressly provide that "the exchange or sale by a corporation of its own shares for money or other property does not result in taxable gain or deductible loss, even though the corporation deals in such shares as it might in the shares of another corporation."

Applicable Provisions of the Federal Securities Laws

Sections 9(a)(2) and 9(a)(6) of the Exchange Act.

Sec. 9(a)(2) of the Exchange Act prohibits "any person" from effecting "a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others." In enacting this subsection Congress intended to prohibit "any series of transactions effected with the specific intent of raising or depressing the price" of a security.[24] According to the House Report, "this provision catches the rigging and jiggling of the market, and "prevents the marking up or down of prices by pools."[25] In addition to pool operations, it also was intended to outlaw "every other device used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage."[26]

Section 9(a)(6) of the Exchange Act makes unlawful any series of transactions effected "for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe." According to the Senate Report "pegging is left to regulation by the Commission under paragraph (6), as it may deem necessary," which indicates that "pegging" is not covered also by Section 9(a)(2).

Purchases by a corporation of its own shares are not mentioned in the legislative history of Section 9(a)(2) or 9(a)(6). But it appears that either section, under certain circumstances, could be violated by such purchases. The elements of a Section 9(a)(2) violation, however, include proof of a specific intent to induce others to purchase the security; and the presence of a bona fide intracorporate purpose may preclude a finding of the necessary intent. It has been this Division's position, for example, that no violation of Section 9(a)(2) is committed by large purchases to maintain a stock's price in order to prevent a loan which was collateralized by the stock from being called. The purpose of such transactions was "to prevent the sale of the shares held as collateral, rather than to induce the purchase or sale of shares by others" and consequently no violation of Section 9(a)(2) could be found.[27]

Although that case did not involve purchases by a corporation of its own shares, it seems that in all but the most exceptional cases an intracorporate purpose could be shown sufficient to put the activity outside the Section 9(a)(2) proscription.[28]

With respect to Section 9(a)(6), its provisions are violated only if transactions are effected in contravention of rules and regulations prescribed by the Commission. No rule has been adopted which specifically prohibits or restricts a corporation's pegging, fixing or stabilizing activities in relation to its own stock and although Rule 10b-7 would be applicable to such activities, it extends only to transactions engaged in for the purpose of facilitating a distribution.

Because of the proliferation of open market purchases intended to create trading activity or to affect the price of a security under circumstances which did not relate to facilitating a distribution, (and therefore were not covered by Rule 10b-7) the Commission, on November 30, 1959, proposed an amendment to Rule 10b-7 (SEA Rel. 6127). The amendment prohibited "any person" from effecting a stabilizing transaction "(1) which is not for the purpose of facilitating a particular distribution of securities. . ." The proposed amendment has not been adopted.

While is appears to be within the power of the Commission to adopt a rule under Section 9(a)(6) governing stabilizing by issuers,[29] as well as by others (and indeed the proposed amendment to Rule 10b-7 was to be made under both Section 9(a)(6) and Section 10(b)), such a rule would probably be ineffective in eliminating abuses involved in the purchasing of treasury stock. For under the statute the rule could do no more than prohibit transactions effected for the purpose of pegging, fixing, or stabilizing the price of the security. And unlike the activities of broker-dealers, control persons, or others, the issuer's purchases could in most cases be supported by reference to an intracorporate purpose such as employee stock purchase and bonus plans, contemplated acquisitions, buying out disgruntled stockholders or reducing dividend payout.

In absence of any rule or regulation under Section 9(a)(6) and the inability to reach treasury stock purchases under Rule 10b-7 unless made to facilitate a distribution, we must look to Rule 10b-6, which prohibits, among other things, purchases effected to peg, fix or stabilize the price of any security.

RULE 10b-6

Rule 10b-6 is only applicable to cases involving an actual or contemplated distribution of a security. Employee stock purchase and stock option plans, which are "distributions" under the rule even though serviced by open market purchases, are under certain circumstances exempted by para. (e) from the operation of the rule. Therefore, purchases made to service such plans, and purchases made to service certain employee savings, investment, or stock purchase plans, are usually not covered by the rule. The reason for the paragraph (a) exemption appears to be that employee purchase plans "generally involve regular purchases over long continuing periods. Since the same amount of buying power regularly reoccurs the buying for the plans usually has a minimal effect on the market. It is only when a second distribution coincides with the employee plan that purchases to service the employee plan become violations of the Rule."[30]

A problem is presented, then, if the issuer engaging in purchases which are ordinarily exempt under paragraph (e) has convertible securities or warrants outstanding, or has filed a shelf registration or proposes to solicit an exchange of shares in a contemplated acquisition. Similarly if an issuer proposed a public offering of its securities the exemption would be unavailable. Under these circumstances, however, the Commission has granted numerous requests for an exemption under paragraph (f) of Rule 10b-6[31] where the issuer imposes certain prescribed anti-manipulative safeguards upon its purchases. In some cases (e.g. General Motors in February, 1955 and Standard Oil of New Jersey in November-December, 1957), where a new public offering is involved, the Commission has required issuers to discontinue open market purchases for its employee plans for a specified time prior to the effectiveness of the registration statement, and for the duration of the offering. But in other cases, notably those in which the offering was made on behalf of separate entities not in control of the issuer (e.g., the offering of General Motors stock in April, 1958 for the Alfred P. Sloan Foundation, and the March, 1959 offering of Ford Motor Company stock owned by the Ford Foundation) the issuer was not required to discontinue its purchases for any length of time.[32]

In most cases involving applications to exempt issuer purchases for employee plans, when a second distribution occurs (whether it be a new offering, or the existence of a shelf registration or other continuing distribution) the Commission attempts to minimize manipulative potential by imposing conditions upon the grant of the exemption. These conditions with respect to exchange transactions are usually to the following effect: they (1) limit the issuer's purchases to a percentage of total trading on the exchange for any one day and to a smaller percentage of trading in any one week; (2) require that such purchases be effected through no more than one broker at a time; (3) prohibit the issuer from "reaching" for stock or from purchasing the opening block on any day; and (4) prohibit bids or purchases made for the purpose of creating actual or apparent trading in, or raising the price of, the stock. With respect to non-exchange transactions the Commission usually has exempted unsolicited privately-negotiated purchases of 1,000 shares or more.[33]

Numerous exemptions under paragraph (f) have also been granted to broker-dealers soliciting shares in connection with exchange offers. Additional cases in which an exemption has been granted under paragraph (f) relate to exchange offers by the issuer during the effectiveness of a shelf registration statement.

RULE 10b-5

The problems under Rule 10b-5 regarding purchases of treasury shares fall into the following categories: (1) manipulation of the security's price for the benefit of controlling shareholders; and (2) non-disclosure of material information which may affect the market value of the stock or the selling shareholder's decision to sell.

The manipulation of a security's price through its purchase and sale by insiders engaged in a fraudulent scheme to raise or depress the price of the security has long been held to be violative of Rule 10b-5.[34] The Cady, Roberts & Co. decision (SEA Rel. 6668), carries the clear implication that the anti-fraud provisions contained in Rule 10b-5 are applicable to persons other than officers, directors and controlling shareholders. And in the recent case of Kohler v. Kohler Co.[35] the Court of Appeals for the Seventh Circuit, referring to the underlying anti-fraud provisions of the federal securities laws, said they "apply not only to majority stockholders of corporations and corporate insiders, but equally to corporations themselves. . ." Since many of the considerations applicable to a Rule 10b-5 manipulation have been discussed in connection with Sections 9(a)(2) and 9(a)(6), and Rules 10b-6 and 10b-7, supra, I will proceed to the problem of non-disclosure by the corporation of material information affecting the value of the selling shareholder's stock.[36]

The purchase of its own shares by a corporation is subject to attack for non-disclosure only if the information withheld from the selling shareholder, or misinformation given him, is material, i.e., if it affects either the price he asks for his shares or alters his decision to part with them. Although the application of Rule 10b-5 in the Cady, Roberts & Co. decision was confined to an individual taking personal advantage of inside information, the opinion turns upon the right of the other party to the transactions to be fully informed of any material facts available to the "inside" party. The reasoning of Cady, Roberts, then, seems applicable to a case involving non-disclosure by the issuer when engaging in purchases of its own shares.

Just what information must be disclosed by the corporation is unclear, and depends upon the facts and circumstances of the case, such as the selling shareholder's reasonable access to the information, the reason for the non-disclosure (i.e., was there a "legitimate corporate purpose" for withholding information), the speculative nature of the information, and whether the transaction was an open market purchase or a privately negotiated deal. In the Kohler case, cited supra in note 35, plaintiff, a large stockholder and officer of defendant corporation for over twenty years, was unable to recover from the corporation under Rule 10b-5 for non-disclosure by the corporation's accountant of details of a pension plan and accounting treatment of annuities funding, when it was shown that the plaintiff "had many years of intimate acquaintance with the affairs of the corporation, . . . had extrinsic sources of sound business advice, and . . . was himself promoting a speedy sale." The Court said that a different result may have been reached "if plaintiff had been a novice to stock transactions or the corporation's activities."[37]

There is no certain test of a corporation's compliance with Rule 10b-5, but the court in the Kohler case spelled out the general considerations as follows: "The statute and the rule basically call for fair play and abstention on the part of the corporate insider from taking unfair advantage of the uninformed outsider or minority stockholder. Such a standard requires the insider to exercise reasonable and due diligence not only in ascertaining what is material as of the time of the transaction but in disclosing fully those material facts about which the outsider is presumably uninformed and which would, in reasonable anticipation, affect his judgment."[38]

WTDolan/mgw

---

[1] 12 A.C. 409 (1887).

[2] 8 Del. Code Sec. 1_0.

[3] N.C. Bus. Corp. Act, Sec. 55-52; cited in Kennedy, Transactions by a Corporation In Its Own Shares, 19 Bus. Law 319, 331 (1964)

[4] ABA-ALI Model Bus Corp. Act, Sec. 5 (1933).

[5] Levy – Purchase By A Corporation of Its Own Stock, 15 Minn. L.Rev 1, 27 (1930).

[6] Baker & Cary, Cases on Corporations 1400, 1401.

[7] Rudolph, Accounting for Treasury Shares Under the Model Business Corporation Act, 73 Harv. L. Rev. 323, 325-326 (1959).

[8] Levy, supra note 5, at 27.

[9] Scriggins v. Thomas Dalby Co., 290 Mass. 414, 419-420, 195 N.E. 749, 752 (1935); Winchell v. Plywood Corp., 324 Mass. 171, 85 N.E. 2d 313 (1949); Porter V. Plymouth Gold Mining Co., 29 Mont. 347, 74 p. 938 (1904).

[10] Baker & Cary, op. cit. supra at 1400, 1401.

[11] Levy, supra note 5, at 6.

[12] Id. at 7, 8.
[13] Id. at 24.
[14] Dodd, Purchase and Redemption By a Corporation of Its Own Shares, 89 U.Pa. L. Rev. 697, 706 (1941).

[14a] Northern Trust Co. v. Essaness Theatre Corp. 348 Ill. App. 134, 108 N.E. 2d 493 (1952).

[15] See Kennedy, Transactions By a Corporation in Its Own Shares, 19 Bus. Law, 319, 336 (1964) citing Propp v. Sadacca, 175A, 2d 33 (1961) and Mathes v. Cheff, 190A. 2d 524 (Del. Ch. 1963).

[16] Hutchins Lumber & Storage Co. 4 BTA 705, 711 cited in 7 Mertens, Law of Federal Income Taxation, Sec. 38.29 (1956) (hereinafter cited as Mertens).

[17] Mertens, p. 69.

[18] But see Regs. Sec. 1.311-1(e)(1) relating to transactions between a corporation and a shareholder in his capacity as debtor, creditor, employee or vendee.

[19] 4 CCH Stand. Fed. Tax. Rep. para. 4616.

[20] Mertens, p. 72.

[21] Mertens, p. 76.

[22] U.S. v. Anderson, Clayton & Co., 358 U.S. 55, 76 S Ct. 25 (1955).

[23] Rev. Rul. 60-328, C.B. 1960-2, P. 427.

[24] S. Rep. No. 792, 73rd Cong., 2d Sess. (1934), p. 17.

[25] S. Rep. No. 1383, 73rd Cong., 2d Sess. (1934), p. 20.

[26] S. Rep. No. 1455, 73rd Cong., 2d Sess. (1934), p. 54.

[27] See letter from Phillip A. Loomis, Jr. to Paul Windels, Esq., Dec. 12, 1957.

[28] Cf. Nussbaum, Acquisition by a Corporation of Its Own Stock, 35 Col. L. Rev. 971, 1004, (1935). It should also be noted that in the only case in which a violation of Sec. 9(a)(2) was found to exist without an accompanying distribution, Federal Corp., 25 SEC 227 (1947), there was a registration statement pending and a distribution imminent (see Memorandum to Mahlon M. Frankhauser from Richard E. Reckson, March 24, 1964, p. 5).

[29] In Nussbaum, op. cit. supra note 28, at 1004, it is suggested that Sec. 9(a)(6) of the Act "empowers the Commission to make such a rule, since those purchases [by a corporation of its own shares] by their distorting effect upon the market may effect the public interest and imperil investors."

[30] Memorandum from Ralph S. Saul to the Commission, July 15, 1964 (re: Thompson-Ramo-Woolridge, Inc., and Eagle-Picher Co requests for exemption from Rule 10b-6), p. 2.

[31] Rule 10b-6(f) provides that the Commission, upon written request of its own motion, may exempt transactions which it considers non-manipulative, and may specify the terms and conditions for exemption.

[32] According to Edward H. Emerson, the Commission's interpretation of outstanding warrants and convertibles as a "continuing distribution" is largely ignored by companies engaging in purchases of their own stock. Of the hundreds of listed companies purchasing their own shares, many of which have convertibles and/or warrants outstanding, only a very few have requested an exemption from Rule 10b-6. Those not granted an exemption are engaging in continuing violations of the rule, irrespective of the purpose of such purchases. An exception to

Rule 10b-6 to exempt purchases by the issuer during a “continuing distribution” (in connection with warrants or convertibles) was considered by the staff in 1958 but never formally proposed. See Memorandum from Edward H. Emerson to Ralph S. Saul re: Rule 10b-6, September 4, 1964, p. 2.

[33] Cf. Memorandum from Ralph S. Saul to the Commission, op. cit. supra, note 30, at 4, 5.

[34] See Ward La France Truck, Corp., 13 S.E.C. 373 (1943) and Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951).

[35] 319 F2d 634, 638 (7th cir. 1963).

[36] For an excellent discussion of the manipulative and general fraud problems involved in an issuer’s purchase of its own shares see Kennedy, op. cit. supra note 15. My treatment of these issues is to a great degree a summary of that article.

[37] Kohler v. Kohler Co., 319 Fed. 2d 634 at 642 (1963).

[38] Ibid.