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May 2, 1984

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The Honorable John S.R. Shad
Chairman
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Dear Chairman Shad:

I read with great interest your March 28, 1984 statement to the House Subcommittee on Telecommunications, Consumer Protection and Finance with respect to the recommendations of the Advisory Committee on Tender Offers. At the outset, I commend the Commission for respecting the fundamental role of state law in regulating the conduct and responsibilities of corporations and their managements. The Commission's affirmation that substantive corporate law is an area of state, rather than federal, regulation is an important contribution to improving its relationships with the states.

In light of your testimony and its recognition of the fundamental role of state corporation law, however, I

wish to direct the Commission's attention to one important area in which, in my opinion, it is acting inconsistently with this principle; that is, the Commission's endorsement of the Advisory Committee's Recommendation 22. That Recommendation proposes amendments to the Commission's proxy and tender offer rules to require that a target corporation provide an "acquiror" with the corporation's stockholder list upon receipt of the acquiror's "bona fide" request. The text of Recommendation 22 is as follows:

> The Commission should require under its proxy and tender offer rules that a target company make available to an acquiror, at the acquiror's expense, shareholder lists and clearinghouse security position listings within five calendar days of a bona fide request by an acquiror who has announced a proxy contest or a tender offer. The Commission should consider prescribing standard forms (written or electronic) for the delivery of such information.

Hence, Recommendation 22 proposes to require, as a matter of federal law, a corporation to turn over its stockholder list without regard to whether the person who requested it would be entitled to the list under state law. This would be, in my view, a most unfortunate and unnecessary precedent.

Consistent with its mandate to ensure adequate disclosure to investors, the Commission has a clear interest in ensuring that a target corporation's stockholders will receive the information necessary to make an informed voting

or investment decision. On the other hand, it is state law that determines who may have access to a corporation's stockholder list. Heretofore, the Commission has taken a balanced approach that satisfied its interest in ensuring that such information will be disseminated without overriding the state law governing access to stockholder lists. Under the Commission's current proxy and tender offer rules, specifically Rule 14a-7 and Rule 14d-5, a corporation must elect either to mail materials for one making a tender offer or soliciting proxies or to provide that person with a stockholder list. Since the corporation may choose to avoid turning over its stockholders list under the Commission's current rules by mailing the materials itself, these rules do not preempt state law by forcing the corporation to turn over the list to a person not entitled to it under state law. Nor, for that matter, is a person whose materials are mailed by the corporation under the Commission's rules precluded from also pursuing any state law right he may have to the stockholder list. See, Wood, Walker & Co. v. Evans, 300 F. Supp. 171 (D. Colo. 1969), aff'd, 461 F.2d 852 (10th Cir. 1972); Securities Act Release No. 6158 (November 29, 1979).

Significantly, unlike many Advisory Committee recommendations that the Commission found to infringe on state law, questions regarding the access of interested persons to stockholder lists are among the few subjects appar-

ently addressed universally by state common law and statutes. Moreover, a review of the commentaries does not reveal any state in which stockholders are deprived of a right, upon a proper showing, to inspect a corporation's stockholder list. Indeed, many states, including Delaware, entitle any stockholder to a stockholder list so long as he has a proper purpose, a term which is liberally defined to mean any purpose reasonably related to his interest as a stockholder, and even places the burden on the corporation to prove that the stockholder has an improper purpose. Under state law, the conduct of a proxy contest or a tender offer has generally been found to be a proper purpose for obtaining a stockholder list.

In the Advisory Committee's report, the purpose of Recommendation 22 is given as follows:

> The Committee believes that the current rules requiring a target company either to turn over the shareholder list or to mail for the acquiror have failed to assure that shareholders have speedy and complete dissemination of the acquiror's disclosure documents. The discretion given to the target company to mail for the acquiror severely restricts the ability of the acquiror to have free and easy access to shareholders. Moreover, the potential for abuse through slow mailings is substantial. The Committee recommends that the Commission require that the target company provide its stockholder list to the acquiror upon request. (footnote omitted).

I do not believe there is sufficient evidence that a pattern of fraud or abuse exists so as to justify, under the standards of the Securities Exchange Act, the Commission's preemption of a body of state law which reaches back nearly a century. Although I closely follow this area of the law and have represented both bidders and targets, I am not aware of a single instance in which the state law governing access to stockholder lists has prevented a proxy contest or tender offer from going forward. Nor did the Advisory Committee refer to any instance in which a proxy contest or tender offer was stymied by a state law-imposed restriction on an interested person's ability to disseminate information to stockholders.

To the contrary, I believe the facts support the conclusion that, as a result of the rights afforded by both state law and the Commission's Rules 14a-7 and 14d-5, there has been no meaningful difficulty in disseminating proxy and tender offer materials to stockholders. In this regard, I am not aware of any instance where the Commission found it necessary to take legal action to enforce Rule 14a-7 or Rule 14d-5 to ensure that stockholders will receive materials that they otherwise would not have received, let alone any instance in which the Commission (or a bidder or proxy contestant) succeeded in such a proceeding under federal law but was nonetheless frustrated in accomplishing its objective by state law. Indeed, notwithstanding the fact that

Rule 14a-7 and Rule 14d-5 have been regularly employed and the fact that contests for control are among the most litigious events in our society, only a handful of cases have been brought alleging violations of these rules. It was not until very recently that the courts even considered whether a private right of action exists under Rule 14a-7. See, Haas v. Webolt Stores, Inc., No. 85-2069 (7th. Cir. January 12, 1984), [1983-1984 Tr. Binder] Fed. Sec. L. Reptr. (CCH), ¶99,624. These facts, in themselves, give evidence that there has not been a pattern of fraud or abuse adequate to justify the extreme act of overriding state law.

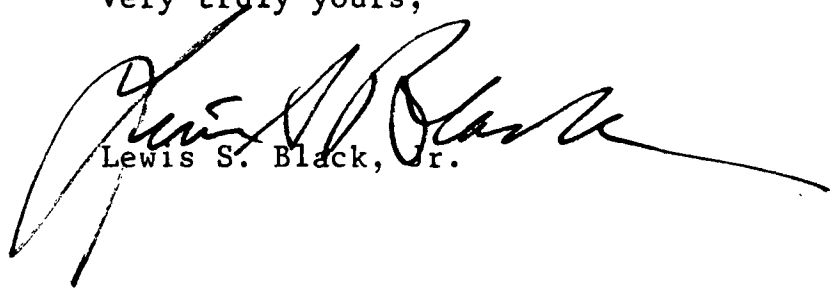
The Commission is being asked to climb the slippery slope. Once having preempted state law in this case, the Commission as an institution will be less able to resist calls for even greater preemption, perhaps involving the most fundamental tenets of state law. This is a path, I believe, which would inevitably lead to a perception that the Commission is arrogant or disdainful of state interests and a resulting conflict with the states that is not in the Nation's ultimate best interests.

From your March 28, 1984 testimony, it is clear that the Commission comprehends the importance of respecting the fundamental role of state corporation law and the dangers inherent in overriding them. Therefore, it would be especially ironic if the Commission now embarks upon the unfortunate road of preemption not in response to a wide-

spread significant misuse of corporate power, but over the mechanics of distributing materials to stockholders, an area where there has not been a serious pattern of fraud or abuse, and where, I submit, the interests to be served can be traced to a handful of professionals.

I hope you will find these thoughts helpful. I have taken the liberty of sending copies of this letter to the members of the Commission and Messrs. Goelzer and Huber of the staff.

Very truly yours,



Lewis S. Black, Jr.