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June 19, 1987

Senator Richard C. Shelby  
Securities Subcommittee to the Senate  
Committee on Banking, Housing and  
Urban Affairs  
313 Hart Senate Office Building  
United States Senate  
Washington, D.C. 20510-6075

Dear Senator Shelby:

During the June 17, 1987 hearings before your Securities Subcommittee regarding the proposed "Insider Trading Proscriptions Act of 1987" (the "Act"), you inquired whether the use of a presumption in the Act would raise constitutional questions, as this legislation, if enacted, would form the basis for criminal prosecutions, as well as civil litigation and enforcement proceedings. Your concerns are well founded. There are many judicial decisions examining the constitutional validity of presumptions within criminal statutes. (See, e.g., County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970); Leary v. United States, 385 U.S. 6 (1968); Tot v. United States, 319 U.S. 463 (1942).) For your reference, I am planning to forward to you a memorandum which discusses the relevant cases and analyzes the language of the proposed bill against the constitutional standards articulated by the Supreme Court. While I believe that the bill accommodates even the most cautious Supreme Court articulations regarding such presumptions, your concern that the statute would be challenged aggressively from the moment of its adoption is surely a concern shared by those of us who drafted the proposed bill.

In response to your concern that the creation of a criminal presumption would lead to immediate litigation, and because we share the goal of simplifying the articulation of the offense to clarify the law of insider trading rather than create new ambiguities, we have redrafted subsection (b) of the Act to provide an even clearer definition of the offense. As you will note in reading the attached copy of the redrafted bill, the requirement of proof that the defendant actually used the material nonpublic information regarding the securities in effecting the purchase or sale of the securities would be eliminated entirely. Instead, the crime of insider trading would be established when a defendant purchases or sells securities while in possession of material nonpublic information. Subsection (b), as revised, would then establish an affirmative defense for non-natural persons which is similar to the express provision rebutting

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the presumption which appeared in the first draft of the Act. This balance captures the intentions of the original proposed Act while eliminating the criminal presumption which otherwise might have encouraged constitutional challenge.

I am looking forward to discussing the attached draft of revised subsection (b) with members of your Subcommittee and I urge you to contact me with any questions or comments you might have.

Sincerely,

Harvey L. Pitt

Enclosures