November 2, 1936.

Prof. Abe Fortas,
Yale Law School,
New Haven, Connecticut.

Re: Deposit Agreement v. Proxies

Dear Abe:

Sam Lovy has prepared a draft of the subsection in Section II of Part I, entitled Deposit Agreements. The gist of this is a presentation of how the use of deposit agreements gives the dominant committee enormous leverage on the security holder. He ended his draft subsection with a part dealing with deposit agreements versus proxies. He attempted to sum up in this part of this of the subsection the pros and the cons of deposit agreements and proxies. I started to rework the conclusion of the subsection but got diverted to other things in the great pressure of work down here. Hence, I did not finish with my rather extensive revision. But I enclose herewith the draft that I started to work on because now I have a little different ideas as to the way in which it should be handled and I think you will be best prepared and equipped to do it.

My idea is to defer a consideration of the pros and cons of deposit agreements and premise until the end of Part I. Much of the valuable proxy material from our record will appear in your chapter or section on independent committees. A discussion of proxies versus deposit agreements prior to a consideration of the techniques of independent committees come to me a little premature. I think it profitable to have a discussion of that important problem against the background of the entire Part I. None of us is as familiar with the independent committee problem as you are. Hence, I am venturing to put this on your desk.

Furthermore, I would like to have you do it for the reason that I am in substantial agreement with your letter of a few weeks ago, which you wrote me, expressing your view on this. I would, I believe, state the conclusion a little differently. I would go so far as to outlaw deposit agreements except on certain stated and definite contingencies. I do not know if I can offhand enumerate all of those contingencies, but I think that they will readily occur to you. Among them would be included (a) cases where a municipal protective committee, in order effectively to institute mandamus proceedings, would have to be trustee of an express trust; (b) cases where the committee would have the bonds in order to buy in the property at judicial sales; (c) cases where the committee would have to have the bonds in order to bring other kinds of suits; and perhaps (d) cases

where it was absolutely essential to the existence of the committee that it have bonds in its possession which it could pledge for loans.

I think the statutory system of control should require a clear affirmative showing of such needs. I think (a) and (b) will probably be almost exclusively the situations where real need can be demonstrated. Furthermore, I think that if deposit agreements are used even in those limited cases that the deposit agreements permitted should be extremely limited in scope and nature so as to eliminate the large variety of sledge hammer provisions which we discuss in Part I.

I think this is substantially the point of view which you earlier expressed. I would suggest that you take this material which I am enclosing and at your next breathing spell try to work it up in the form of a detailed and well-rounded discussion of all the pros and cons. I would use record material liberally, quoting from various authorities. I would weigh the various arguments and come out with a recommendation of the foregoing general nature.

In view of your work on independent committees, you may disagree with me as to the place in Part I where this material belongs. Also you may be so completely swamped as not to be able to tackle it. If you can’t, let me know and I will arrange to have it done down here.

Yours faithfully,

William O. Douglas
Commissioner.