AMERICAN STOCK EXCHANGE

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March 10, 1967

Mr. Robert Block
Chief Counsel
Division of Trading and Markets
Securities and Exchange Commission
__ North Capitol Street, N. W.
Washington, D. C. 20549

Dear Mr. Block:

We appreciate the opportunity to make a preliminary review of the proposed Rule 10b-10 enclosed with your letter to us dated February 28, 1967. Within the very limited period available we have not been able to evaluate the possible impact of such a Rule or to discuss the proposal with the Board of Governors.

General Comments

There are certain general comments we feel should be made with respect to the regulation of corporate reacquisitions:

(1) The proposed Rule would be adopted under Section 10(b) of the Exchange Act which relates to the prevention of fraudulent, manipulative or deceptive practices. Rules adopted under this section must be related to the prevention of such practices. As you know, violations of rules under this section would expose issuers and broker-dealers to civil and criminal liabilities. Moreover, broker-dealers would be subject to the sanctions of suspension or revocation in their registrations for violations.

We emphasize these consequences of the proposed rule to indicate the need for showing a direct relation between the conduct proscribed by the proposed Rule and the prevention of manipulation. To the extent that such showing may not be made for particular provisions of the proposal, we think that Section ___ would not provide a basis for the particular provision. In this connection we have not had an opportunity to analyze the proposal in relation to S. 510 which, as you know, covers many of the matters in the rule proposal.

(2) It would appear to us that some of the objectives sought in the proposal might be obtained through means other than a fraud rule which is designed to deal with flagrant situations. Periodic reporting requirements under Section 13 of the Exchange Act, the proxy rules, the registration process and exchange listing agreements could provide means for

obtaining many of the disclosures sought in the proposal and we think that each of these vehicles should be fully explored before resorting to a fraud rule. To this end we suggest that representatives of the self-regulatory agencies, other industry groups and the Commission confer to devise a cooperative program to deal with the complex matters covered by the proposal.

Proposed Rule

Insofar as the proposed Rule regulates company purchases on the exchanges, it appears to be largely based on the restrictions set forth in the consent judgment in the George-Pacific case which we understand stemmed from evidence of alleged manipulation. Whether the conclusions reached in that case warrant similar restrictions being applied to all company purchases -- without regard to the motive or objective of the particular issuer -- is a matter which may call for further study. We would like to see more evidence on this question, to be in a position to distinguish between the legitimate method and the improper technique of company purchases. I think you will agree that the provisions of any regulations or policies on this subject should not interfere with the exercise of business judgment by company managements as to the amounts of stock to be repurchased when the action is not related to raising the price of the stock, or when the action does not interfere with the functioning of orderly markets.

Our specific comments with respect to the proposed Rule are as follows:

1. Since Section 10 of the Securities Exchange Act relates only to transactions involving "the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange", it would appear that the scope of any rule adopted pursuant to that section should be similarly limited. It is noted that other rules adopted under Section 10 are so omitted.

2. We note that by the terms of paragraph (a) the proposed Rule applies only to purchases by the company which has issued the securities and also does not apply to purchases by a successor corporation of bonds issued by its predecessor prior to a merger, consolidation, etc.

3. We think the notice requirements of paragraph (a) may be unduly _ensome in the case of infrequent or isolated transactions involving purchases small amounts of securities. Such transactions might not have sufficient news value to be carried by the financial press, and in these circumstances questions would be raised as to whether the information given by the issuer to the press had been "made publicly available". Notice to security holders in each instance could be very expensive and time consuming. Perhaps any notice requirement should be limited to purchases in excess of a specified percentage of the outstanding securities during a stated period of time.

4. We query as to the advisability or need of the second sentence of paragraph (a) of the proposed Rule reading as follows:

> "If the purchases are to be made otherwise than through the solicitation of tenders, the information furnished to security

> holders or made publicly available shall also state that such purchases will be made in compliance with the provisions of Rule 10b-10 which are intended to prevent the issuer from raising the market price of the security by imposing restrictions as to the volume of purchases and the price which may be paid."

The inclusion of such a statement in the notice to stockholders may reflect on the integrity or intentions of company management. It may also be misleading to investors in that it may infer that purchases in compliance with the Rule will have no effect on the market. The statement would also seem unnecessary if the Rule in tact accomplishes its objective.

5. We think the exemption afforded by paragraph (b)(5) might be intended to bond purchases made by a company for the purpose of satisfying its banking fund obligations. The likelihood of such purchases being made for manipulative purposes seems remote.

6. With respect to paragraph (c)(1) in connection with purchases on the exchange, we think that limiting the amounts of permissible purchases to fixed percentages of previous levels of activity may preclude or unduly restrict purchases, particularly of blocks, at depressed prices. It may well be, however, that some set standard is necessary in order to accomplish the purposes of the Rule. What set standard should be, how it is applied and what further standards might be appropriate, should, we believe, be a matter for further study with industry representatives. In any event, we think that if any numerical standard is to be fixed, the percentage limitations in clause (C) in relation to weekly and daily amounts of purchases should be the same, and the references to volume of trading should be a reported volume.

We think the following words in paragraph (c)(1)(C):

> "and the broker employed to effect the purchase is instructed to endeavor to keep the amount of securities purchased on such exchange during the current week equal to or below 10% of the current week's volume of trading in such security on such exchange, and to keep the amount of securities purchased during the day equal to or below 15% of the day's volume of trading on such exchange"

can give rise to considerable uncertainty and may confront the broker with difficult problems of responsibility. Unlike most of the other provisions of the proposed ____, the quoted language does not provide a definite standard and seems to rest on some best efforts duty.

We think that the proviso at the end of clause (C) on page 4 may be unnecessarily restrictive. In Georgia-Pacific the corresponding provision permitted purchases of three units of trading.

7. With respect to paragraph (C)(2), the measuring standard in clause (C)(ii) on page 5 appears to be unduly complex. We think that if a numerical standard is to be fixed in this connection, it might be preferable to base the measuring standard on the amount of securities outstanding.

8. With respect to paragraph (c)(3), we question the advisability of restricting an issuer in all instances from purchasing its securities in privately negotiated transactions at a price above the current exchange or over-the-counter market price, when such privately negotiated purchases do not offset currently made purchases in the market by the other party to the private transaction. In some cases legitimate and desirable corporate purpose may be served by the issuer purchasing a block of its own securities in a privately negotiated transaction which would not have any material effect on the public market for such securities, e.g., the purchase of stock owned by a principal officer who is leaving the issuer to become employed by a competitor. Moreover, we think the proposed Rule should not prevent an issuer from using a broker as a finder in such privately negotiated purchases.

9. With respect to paragraph (c)(4), we think clause (C) is vague and could give rise to controversy. If clause (C) has a specific purpose, we think the provision should be clarified.

10. We do not understand the purpose of the words “and ending _____ days after all purchases have been made pursuant thereto” at the end of clause (D) at the bottom of page 6 and the top of page 7.

11. With respect to paragraph (d) on page 7, we are inclined to ____ that where the investments of a pension, etc. fund are made by a trust company and the plan does not provide for control by the issuer or its representatives over such investments, paragraph (d) should not apply to purchases of securities of the issuer.

In addition to the above, and with reference to the fourth paragraph of your letter of February 28th, we think that if the proposed Rule 10b-10 is adopted, Rule 10b-6 should be amended to exempt stock purchases by an issuer having outstanding convertible securities or warrants, within a period ending reasonably prior to the maturity date of the convertible securities or the expiration date of the warrants. We also think that purchases by an independent trustee of a pension, etc. plan should be exempted from Rule 10b-6 and, as we have indicated in item 11 above, we think such purchases by an independent trustee should not be deemed purchases by the issuer for the purpose of the proposed Rule 10b-10.

As we pointed out above, these comments are only preliminary. We feel it is important that industry and Commission representatives meet at an early date to discuss an approach to this entire question.

Sincerely,

Allan Roth