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September 2, 1971

Mr. Peter Flanigan
The White House
Washington, D. C.

Dear Peter:

We have recently been retained by a group of New York Stock Exchange member-firms who have agreed to band together in support of the recommendations contained in Bill Martin's recent report. We have good reason to believe that in addition to the fifteen firms presently in the group there will be added at least twenty more, and it is entirely possible that there will be as many as forty. With some notable exceptions -- for example, Paine, Webber; Clark, Dodge; W. E. Hutton and Pershing -- they are regional firms whose home offices are located outside of New York who find their very existence threatened by the prospect of the abrupt abolition of the agency market for securities which we have known for two centuries. I would expect that the members of the group -- which we have decided to label the "Committee for the Martin Report" -- have total assets in the many hundreds of millions of dollars with many thousands of registered representatives and with offices in at least forty states.

I believe that the first time I met you in your office in the White House I presented the view that the most crucial matter to be decided by the Securities and Exchange Commission and the Congress was the applicability of the antitrust laws to the securities industry. My own research had led me to believe many years ago that Congress never intended the nation's antitrust statutes to apply to matters and organizations later made subject to Securities and Exchange Commission oversight, and this is particularly so with relation to the Securities Exchange Act of 1934. Here, Congress conveyed to a registered national securities exchange the authority and obligation to make certain rules and regulations to govern the conduct of its membership, and delegated to the Securities and Exchange Commission the power of oversight in the public interest. As Bill Martin has crisply

pointed out, it is simply illogical to suppose that having gone through this statutory procedure the Exchange is then subject to prosecution and civil suit for violations of the Sherman and Clayton Acts. And if I may raise a specter which has not been considered by the advocates of antitrust liability -- how do you enforce the Robinson-Patman Act on a twenty-six million share day?

I am enclosing a copy of Bill Martin's discussion of the antitrust laws and his recommendations concerning exemption therefrom. As counsel for the Committee for the Martin Report, we shall, of course, be advancing this position. I believe that the Administration has a big stake in the outcome of these recommendations, since the entire direction of the securities markets in the years to come will depend upon its resolution. With this in mind, I should like to get together with you sometime during September to present the viewpoint recommended by Bill Martin, together with our own thoughts as to how the Administration might participate if the decision is made to do so.

Quite apart from all of this, I look forward to renewing our personal relationship. I think Bill Casey is a great choice and is doing an exceptional job.

Sincerely,

Charles H. Morin

CHM/pao
Enclosure

Exemption From Anti-trust Laws

Under the Securities Exchange Act of 1934, Congress has delegated regulatory responsibility to the national securities exchanges that register under the Act. The Securities and Exchange Commission is given broad supervisory and regulatory powers over the registered exchanges. Although the Exchange Act specifically contemplates collective action by exchanges and their members in establishing and enforcing rules, no express exemption from the anti-trust laws is provided. The legislative history of the Exchange Act sheds no light on this matter. It should be noted, however, that at the time that Congress was enacting the Exchange Act, the applicable court decisions suggested that stock exchanges were not in interstate commerce, and, therefore, it may have been thought unnecessary to provide specific anti-trust exemption.

It was not until 1963 that the question of reconciliation of the Exchange Act and the anti-trust laws was first considered by the United States Supreme Court. The Court held that actions taken by an exchange to effectuate self-regulation were subject to anti-trust challenge where the Exchange Act made no provision for Securities and Exchange Commission review. The Court expressly left open the question as to the extent of anti-trust protection afforded by the existence of the Securities and Exchange Commission. This 1963 case is the only decision by the Supreme Court on this question. The recent decision by the Seventh Circuit Court of Appeals held that even where an exchange's self-regulatory activity was subject to overall supervision of the Securities and Exchange Commission, and the Securities and Exchange Commission had the power to order changes in an exchange's rule, an exchange was nevertheless subject to anti-trust liability unless it could affirmatively show that the particular rule challenged was "necessary to make the Exchange Act work."

The Court decisions to date leave the question of anti-trust exemption for exchanges far from clear. Consequently, exchanges face the choice of either regulating at their peril, or not regulating at all. This is an untenable position for the exchanges which are required to regulate their members under the Securities Exchange Act of 1934. This dilemma is an obvious deterrent to effective self-regulation which must be remedied.

A reorganization of the New York Stock Exchange substantially along the lines of the plan herein proposed will properly reflect the Exchange's quasi-public nature and qualify it for exemption from the anti-trust laws. Accordingly, it is recommended that the Exchange ask the Congress to enact legislation granting all registered national securities exchanges certain immunity under the anti-trust laws. The scope of the immunity granted to the exchanges should be coexistent with the scope of the Securities and Exchange Commission's control of the exchanges under the Exchange Act, so that no action or omission by a registered national securities exchange in performing any of its duties of self-regulation under the Exchange Act which are subject to review by the Securities and Exchange Commission could give rise to any claim under the anti-trust laws.