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March 1, 1984

Chairman John S.R. Shad
Commissioner James C. Treadway, Jr.
Commissioner Charles C. Cox
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Re: Enforcement Activity with Respect to the Filing of Late Forms 3 and 4

Gentlemen:

We have been retained to represent Messrs. Irwin Harvey, Robert Izard, Bobby Mosteller, Donald Jacobs and Garland Headrick in connection with your stated intention to commence an enforcement proceeding against them because of alleged failures to timely file Forms 3 and 4.

We understand that the Commission has authorized actions to be filed pursuant to Section 21(e) of the Securities Exchange Act of 1934 (the "Exchange Act") against as many as 34 individuals. We submit this request for reconsideration because we believe that the Commission's action in authorizing such enforcement actions would be patently unfair and totally inconsistent with nearly 50 years of Commission behavior and because such proceedings would raise important legal and policy considerations which would be of serious concern to the Commission, the Courts and members of the bar.

It is not our intention to dispute the proposition that anyone who fails to make a timely filing of a Form 3 or a Form 4 is in technical violation of the Exchange Act. However, in the almost 50-year history of the Commission, to the best of our knowledge, no one has been the subject of a complaint solely for a failure to file on a timely basis a Form 3 or a Form 4. Consequently, it is clear that the newly adopted Commission policy to bring selective actions against persons delinquent in filing Form 3 and Form 4, without any

publication of its intention to change its enforcement policy in this regard, constitutes a radical departure from previous practice.

Why this change of enforcement policy has been wrought is not clear, although it does appear, at least judging by chronology, to have been stimulated by criticisms of the Commission's Section 16(a) enforcement activities by Ralph Nader. See BNA Securities Regulation & Law Report, Vol. 15, No. 48, p.2237, (Dec. 9, 1983).

We would not quarrel with the desirability of the Commission paying closer heed to the filing practices of officers, directors and 10% shareholders of companies registered under the Exchange Act. However, we seriously question the wisdom of the Commission -- whose reputation as a tough, but fair, enforcer of the federal securities laws is well established -- embarking on a program of selective prosecution without any indication that it will, indeed without any reasonable possibility that it can, prosecute all persons who have been delinquent in filing Forms 3 and 4. Such a course, in our estimation, runs totally contrary to what has been the salutary and constructive practice of the Commission in the past, namely, in the case of persons appearing to be in good faith, using means other than the enforcement mechanism initially to secure compliance.

This reliance of the Commission upon means other than enforcement dates back to the very beginning of the Commission's administration of the Securities Act of 1933. The Commission under that Act was given the power to commence stop order proceedings against registration statements which were regarded as delinquent or deficient in disclosure. The Commission, using constructive and sensible imagination, conceived of the process of issuing comment letters rather than relying upon stop order proceedings to secure compliance with the disclosure requirements of the Act. That practice has worked so successfully over the years, and continues to work so successfully now, that the Commission has seen fit to forego the examination of many registration statements.

Applying these principles and historical experiences to the matters at hand, it would appear clear that the Commission, were it to conform to past practice, would at a minimum publish its determination to bring actions against delinquent

filers and urge such persons to bring their filings up to date. There is no question that this sort of urging by the Commission would have significant consequences. When the Commission in 1975 urged that American corporations undertake voluntary internal investigations of their conduct overseas, over 400 companies voluntarily disclosed improper conduct overseas; this suggests that many more than that number made such investigations since many conducted investigations and found no misconduct.

Similarly, the Commission in 1970 published a release urging corporations to make timely disclosures with regard to material occurences, even though the Commission in that release tacitly acknowledged that the Commission probably had no power to compel such disclosure. Securities Act of 1933 Release No. 5092 (Oct. 15, 1970). It is the universal experience of persons familiar with corporate disclosure practices that this urging by the Commission has had a significant effect.

While obviously every prosecuting agency exercises "prosecutorial discretion" to some extent, the course upon which the Commission now appears to be embarking carries that discretion to a ridiculous extreme. It is not wild speculation to suggest that in the last three years literally hundreds, perhaps thousands, of corporate executives, directors and shareholders have in one degree or another been negligent in filing reports. It is unlikely that in more than a handful of cases has that failure been willful or deliberate. To visit upon a small fraction of these people (or all of them, for that matter) the embarrassment, the humiliation and the potentially severe consequences of being hailed into federal court and branded a lawbreaker is prosecutorial discretion run amok. An injunction or mandate from a federal court is a matter that honest people do not take lightly. Moreover, the legal consequences of such actions can be severe and adversely affect the ability of a defendant to serve on investment company boards, to secure a broker-dealer license, to be associated with a broker-dealer and so on, not to mention the fact that adverse publicity will be generated in local newspapers with corresponding adverse impacts on the selected individuals and their families' standings in the local community.

Moreover, in many instances officers, directors and 10% shareholders have relied upon issuers to prepare the necessary filings for them, and in some cases those issuers have not

been diligent in performing this duty. To penalize these officers and directors may indeed visit punishment unfairly and unjustly. Attached to this letter is a letter written by Mr. Izard which shows the reactions of one well-meaning individual caught up in the Commission's sudden, unannounced dragnet.

In short, the course which the Commission has apparently embarked upon of hit-and-miss selection of targets for enforcement proceedings because of failures to file timely Forms 3 and Forms 4, apparently to teach the corporate community a lesson, is unworthy of the Commission's traditions and constitutes a wholly improper use by the Commission of draconian procedures in a situation where they clearly are not warranted.

We would urge most strongly upon the Commission that it publish a severe warning that it will, commencing with a date specified, conduct an intensive and continuing review of the timeliness of filings under Section 16(a) and that it may be expected that enforcement proceedings will be initiated against those who are thereafter delinquent without excuse in those filings. There is no reason to believe that this combination of warning when coupled with a stepped up enforcement program thereafter will not accomplish just as much as this sudden dragnet activity, and with far less harm to people who have, in a sense, been misled by the Commission's unconcern, evidenced by its failure to bring enforcement actions, with the timeliness of filings. Indeed, we believe based upon our experience, that this type of voluntary compliance program is more likely to enlist the legal and corporate communities in an affirmative effort to correct past deficiencies and to establish adequate procedures than will selective prosecutions.

Finally, the Commission's proposal to proceed solely under Section 21(e) of the Exchange Act to seek "an order" of the type proposed by the Commission's staff raises overriding policy and legal considerations. Section 21(e) is intended to provide a jurisdictional grant to the federal district courts to issue writs of mandamus or mandatory orders compelling persons to bring themselves into compliance with applicable provisions of the Exchange Act or of applicable self-regulatory organizations, <u>not</u> as a basis for ordering compliance with future obligations. <u>See SEC v. Mount Vernon Memorial Park</u>, [1978 Transfer Binder] Fed. Sec. L. Rpt. (CCH) ¶96,526 at 94,065 n.11, <u>rev'd on other grounds</u>,

[1981-82 Transfer Binder] Fed. Sec. L. Rpt. (CCH) ¶98,404. No doubt many of the proposed defendants will ultimately consent to the "order" proposed by the Commission's staff. By this means, the Commission will be establishing precedent which may be cited in the future, that suggests that the Commission is entitled to a "order" which, in effect, is no different than an injunction, without having need to show the "reasonable likelihood" required by the courts under Section 21(d). If this position is correct, Section 21(d) is superfluous and, indeed, is swallowed up by Section 21(e).

We believe that any attempt on the part of the Commission to establish such a precedent would be extraordinarily controversial, unsupported by the legislative history of the 1975 Acts Amendments which revised considerably what are now Sections 21(d) and (e), and, we submit, a perversion of the Congress' carefully crafted legislative scheme. By raising this point, we do not mean to suggest that the appropriate response should be an injunctive action under Section 21(d). We understand that the Commission was seeking something less than an injunction in recognition of the fact that, unlike virtually every other case ever brought by the Commission, these cases do not involve any form of willful or intentional behavior which adversely affects the public interest. We suggest, respectfully, that the legal complications presented by using Section 21(e) to pursue this approach further support our recommendation that the Commission should proceed by more traditional methods discussed above.

Over a period of 50 years the Commission has displayed remarkable skill, finesse, flexibility and ability in securing wide-scale compliance with the federal securities laws on the part of those who have good will. It should not wind up the first half century of its existence and commence the second half century with a radical departure from those policies and practices which have justly earned the high regard in which it is held.

Yours very truly,

A. A. Sommer, Jr.

AAS:sjd