

STATEMENT OF HERMAN C. BIEGEL AND JOHN A. CARDON,
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This memorandum is submitted by Herman C. Biegel and John A. Cardon in opposition to Section 2 of H.R. 14475 and S. 510 as pending before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce.

The undersigned are members of the law firm of Lee, Toomey & Kent, 1200 18th Street, N.W., Washington, D.C. 20036, and have for over 25 years specialized in the Federal income tax and other legal aspects of pension, stock bonus and profit sharing plans. During that period we have handled all types of legal problems for employers, both large and small, representing a cross-section of American industry.

In view of this experience we desire to bring to the attention of the Committee certain aspects of the proposed legislation which we feel will be detrimental to pension, profit sharing and stock bonus plans if adopted in their present form.

PURPOSE OF THE PROPOSED LEGISLATION

The Bill, S. 510, as introduced in the Senate, was intended primarily to regulate the acquisition of large blocks of the stock of publicly held companies, when control of such companies might be at stake. In particular, the purpose was to regulate efforts to gain control of such companies through tender offers made without sufficient disclosure of the purposes, background, and resources of the persons making the offer. As a corollary, measures were also proposed to regulate counter efforts of corporate insiders to prevent loss of control, by causing their companies to acquire their own stock.

As introduced in the Senate, S. 510 contained no reference to employee benefit plans. In testifying before the Senate Committee on Banking and Currency, Manuel F. Cohen, Chairman, Securities and Exchange Commission, pointed out the problems concerning SEC when issuers reacquire their own securities and then observed that:

"... purchases ... by a welfare or pension fund subject to the influence of the issuer's management, give rise to similar problems. . . ." (Hearings, p. 28)

Section 2 of S. 510 as reported by the Senate Committee on Banking and Currency and Section 2 of H.R. 14475 as introduced in the House of Representatives propose to amend Section 13 of the Securities and Exchange Act of 1934 by adding a new subsection (e). Paragraph (1) of the proposed subsection (e) provides that issuers of equity securities may purchase such securities only upon compliance with rules prescribed by the Securities and Exchange Commission. Paragraph (2) of proposed subsection (e) defines "issuer" for this purpose to include

"* * * any bonus, profit sharing, pension, retirement, thrift, savings, incentive, stock purchase, or similar plan of the issuer."

SEC PROPOSED RULE 10b-10

Although the legislation has not been adopted, the SEC has proposed a rule, designated as Rule 10b-10, to implement the power which would be granted to it by the legislation. Since the full implication of proposed subsection (e) (2) of Section 13 of the Securities and Exchange Act of 1934 can be seen only by an examination of the rules the SEC proposes to issue thereunder, it is relevant at this point to examine briefly the SEC requirements:

(1) *Disclosure*.—Within a reasonable time before any securities are purchased, the issuer must furnish to security holders, or make publicly available, information about: reasons for the purchase, the number of shares to be purchased, the method of purchase, whether purchases will be made from insiders, and whether any prior arrangement exists for the purchase.

(2) *Price*.—If the purchase is made on a national exchange, or the principal market for the security is a national exchange, the price must not exceed the higher of (a) the highest current independent bid price, or (b) the last sale price on the exchange. If neither the specific purchase nor the principal market is on a national exchange, the price must not exceed the highest current independent bid in the existing principal market.

(3) *Volume*.—If the purchase is made on a national exchange, the total volume purchased may not exceed either 10% of average weekly volume on the exchange for the four calendar weeks preceding that of the purchase, or