Excerpts from Statement of A. A. Sommer, Jr.,
Alliance for Corporate Growth

Before the Securities and Exchange Commission

Regarding the Issuance of Dual Class Common Stock

December 17, 1986

Mr. Chairman, Commissioners, my name is A. A. Sommer, Jr. I'm a partner in the law firm of Morgan, Lewis and Bockius. I am representing here this morning The Alliance for Corporate Growth, consisting of some 14 corporations having an interest in this issue.

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The power that the Commission is being called upon to exercise in this case was granted to it by the Amendments to the Securities Act in 1975. At that time I was a member of this distinguished body.

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At no time can I recall in the legislative history, in the hearings, in the discussions of the Commission, the Staff, with the people on the Hill, or anyone else, a suggestion that this was a means by which the Commission could go through the back door and do something that it has assiduously avoided in the past - namely, substantively take action with regard to corporate governance.

Now the Commission has been circumspect with regard to matters of corporate governance. True, it has done studies, Commissioners have made speeches - I made a few myself - and has done other things but it has always carefully avoided a substantive approach to corporate governance because it has very wisely concluded that it is not a super-state legislature, it is not a super-Commissioner of Corporations, it is a Federal agency with a well-defined function, one that does not embrace directly or indirectly through the exchanges, becoming the arbiter of corporate governance issues.

If the Commission were to refuse approval of the Exchange's rule, it would obviously place the Exchange in a very unsatisfactory competitive position. The only way the Commission could remedy that would be for it to compel the other exchanges through the power that it has under Section 19(c) of the '34 Act, compel them to adopt similar requirements. If the Commission does that, where is it going to stop the process of involving itself in corporate governance?

Is it then going to require all of the markets to have two directors, outside directors, as the New York Stock Exchange does? Is it going to require all of the markets to have audit committees of independent directors as the Exchange does? Is it going to require that all of the exchanges adopt the New York Stock Exchange requirements with regard to shareholder votes on a variety of proposals?

It seems to me the Commission should long pause before it embarks upon a course that may have consequences from which it will have a great difficulty disassociating itself. One of the fundamental matters to be borne in mind here is that historically the relationship between equity and vote has been a matter of state law. That goes back to the very beginnings of this republic.

And all of the states have allowed a great degree of flexibility in how the entrepreneurs, the shareholders, and others involved with corporations relate equity to shareholder votes. This flexibility has been important because times change, companies are different, none of them are cast in the same mold, and the mold with regard to voting that suits in one time may not be suitable in another time.

The emotional dedication that a lot of people have with this issue, I think, stems from the fact that they make a political analogy that's totally inappropriate; to use one simple example, the fact of the matter is that when you are outvoted in the political election you live with what the majority has decided. If you don't like what a majority of shareholders do, you sell your stock.

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It is important to remember that they are proposing in the interests of the shareholders to take away from the shareholders an important right that they have, namely, the right to vote their own voting structures in their corporation. No corporation, no publicly held corporation, has adopted a two-tier voting structure without the vote of the shareholders, and the New York Stock Exchange clearly provides that those not associated with management, a majority of those not associated with management, will make that decision.

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