

FEDERAL RESPONSE TO DEFENSIVE
CHARTER AMENDMENTS

By DONALD A. SCOTT *

The Delaware decision in *Seibert v. Gulton Industries, Inc.*¹ has been followed by the Massachusetts Supreme Judicial Court.²

I would just comment briefly on defensive charter provisions which have been looked upon with a jaundiced eye by a number of authorities. The New York Stock Exchange in 1969 announced—and this was before the momentum really built on these provisions—that it was going to consider delisting companies that adopted super-majorities. After three months, the flood of complaints from the listed companies was so great that it withdrew its proposal. As of now, the only type of defensive charter provisions that the stock exchange will question are those in which a preferred class is given a very large vote on a very small investment—in other words, a power of veto. The stock exchange will raise questions about such types of provisions because of the affect on the shareholders' democratic process.

The SEC staff is also monitoring this area. They came out with Release No. 15,230³ in 1978, which is similar to the one we discussed before on the Oppenheimer transaction. This release states the SEC's views on how disclosures should be made when you ask for a shareholder vote on these types of charter provision changes.

The SEC stated that the disclosure should be in either the notice or fore-part of the proxy statement; that all the defensive proposals should be together, with no separation, in a prominent place; that the reasons for the adoption and the bases for the reasons be given; that you should identify any efforts being made to take over the company that are known to management; that you should list other anti-take-over provisions that are already in the charter or are expected to be proposed; that you should give the effects of the proposal on management tenure, on what would happen with mergers with people who come in in takeovers, the advantages and disadvantages, how the pro-

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1. *Seibert v. Gulton Industries, Inc.*, C.A. 5631 (Del. Ch. June 21, 1979), *aff'd without opinion*, 414 A.2d 822 (Del. 1980).

2. *Seibert v. Milton Bradley Co.*, 405 N.E.2d 131 (Mass. 1980).

3. Exchange Act Release No. 15,230 (Oct. 13, 1978), *reprinted in* [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,748.