NEWS

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549
(202) 755-4846

REMARKS TO
AMERICAN ASSEMBLY OF COLLEGIATE
SCHOOLS OF BUSINESS
THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, D.C.
JULY 17, 1979

"REGULATORY REFORM: GOVERNMENT RENEWAL OR ROUT?"

BY: ROBERTA S. KARMEL, COMMISSIONER
SECURITIES AND EXCHANGE COMMISSION

THE FORM OF POTOMAC FEVER CURRENTLY REACHING EPIDEMIC PROPORTIONS IN WASHINGTON IS A DEREGULATION BUG. THE PRESIDENT, CONGRESS AND EVEN SOME OF THE REGULATORY AGENCIES ARE VYING TO DEVELOP NEW REGULATORY PROGRAMS FOR DECREASING REGULATION.

PRESIDENT CARTER HAS REAFFIRMED THE TRADITIONAL LIBERAL NOTION THAT:

> MUCH OF FEDERAL REGULATION IS VITALLY IMPORTANT TO MODERN SOCIETY. GOALS SUCH AS EQUAL OPPORTUNITY, A HEALTHY ENVIRONMENT, A SAFE WORKPLACE, AND A COMPETITIVE AND TRUTHFUL MARKETPLACE CANNOT BE ACHIEVED THROUGH MARKET FORCES ALONE. 1/

NEVERTHELESS, THE PRESIDENT HAS MADE REGULATORY REFORM A PRINCIPAL TENET OF HIS ADMINISTRATION AND HAS PROPOSED SWEEPING REGULATORY REFORM LEGISLATION. 2/ PRESIDENT CARTER HAS EXPRESSED HIS VIEW THAT SUCH REFORM IS "A CALL FOR COMMON SENSE," AND HE HAS CRITICIZED THE AMERICAN IMPULSE TO "THROW ANOTHER LAW OR ANOTHER RULE AT EVERY PROBLEM IN OUR SOCIETY WITHOUT THINKING SERIOUSLY ABOUT THE CONSEQUENCES." 3/

1/ PROPOSED REGULATORY REFORM MESSAGE FROM THE PRESIDENT - PM 46, 125 CONG. REC. S. 3327, MARCH 26, 1979.

2/ S. 755 WAS INTRODUCED IN THE PRESENT SESSION OF CONGRESS FOR THE ADMINISTRATION BY SENATOR RIBICOFF.

3/ RATTNER, "CARTER ANNOUNCES LEGISLATIVE PLAN TO REVISE U.S. REGULATORY PROCESS," NEW YORK TIMES, MARCH 26, 1979, P. A-1, COL. 1 (QUOTING PRESIDENT CARTER).

CONGRESSIONAL INTEREST IN REGULATORY REFORM IS BEST DEMONSTRATED BY ITS LEGISLATIVE AGENDA. BY MY OWN COUNT, THERE ARE AT LEAST TEN MAJOR REFORM BILLS WHICH HAVE BEEN INTRODUCED IN THIS SESSION OF CONGRESS, AND SEVERAL OF THESE HAVE WIDESPREAD SPONSORSHIP. 4/ MANY OF THESE BILLS CONTAIN SIMILAR PROPOSALS, THE MOST IMPORTANT OF WHICH CAN BE CATEGORIZED AS FOLLOWS: (1) LEGISLATIVE VETO; (2) SUNSET; (3) COST/BENEFIT OR ECONOMIC IMPACT ANALYSIS; (4) MORE EFFICIENT HEARING PROCEDURES; AND (5) PUBLIC INTEREST REPRESENTATION.

IN MY OPINION, REGULATORY REFORM IS AN URGENT NATIONAL NEED. UNFORTUNATELY, THE NATION'S CURRENT ANTI-REGULATORY MOOD DOES NOT ALWAYS DISTINGUISH BETWEEN GOOD AND BAD REGULATION. ALTHOUGH I AM A STRONG ADVOCATE OF REGULATORY REFORM, I ALSO BELIEVE IN GOVERNMENT INTERVENTION IN THE ECONOMY FOR THE PURPOSE OF ACHIEVING BOTH SPECIFIC AND GENERAL POLICY OBJECTIVES.

4/ H.R. 1306, "SMALL BUSINESS IMPACT STATEMENT ACT OF 1979" (REP. SCHULZE); H.R. 1745, "SMALL BUSINESS REGULATORY RELIEF ACT" (REP. IRELAND AND 84 COSPONSORS); H.R. 65, "LEGISLATIVE OVERSIGHT ACT OF 1979" (REP. DERRICK AND 41 COSPONSORS); S. 445, "REGULATORY REFORM ACT OF 1979" (SENATORS PERCY AND BYRD); H.R. 2364, "REGULATORY REFORM ACT OF 1979" (REP. ANDERSON AND 40 COSPONSORS); S. 262, "REFORM OF FEDERAL REGULATION ACT OF 1979" (SEN. RIBICOFF AND 17 COSPONSORS); S. 755, "REGULATION REFORM ACT OF 1979" (SEN. RIBICOFF); S. 1291, "ADMINISTRATIVE PRACTICE AND REGULATORY CONTROL ACT OF 1979" (SENATORS KENNEDY, METZENBAUM AND RIBICOFF); S. 2, "SUNSET ACT OF 1979" (SEN. MUSKIE AND 62 COSPONSORS); S. 382, "COMPETITION IMPROVEMENTS ACT OF 1979" (SEN. KENNEDY AND SIX COSPONSORS)

INDEED, MY COMMITMENT TO REGULATORY REFORM IS BASED, IN PART, ON MY SENSE THAT ESSENTIAL PUBLIC TRUST AND CONFIDENCE IN REGULATORY AGENCIES IS BEING ERODED BY A GROWING CONSENSUS THAT REGULATORS ARE INSENSITIVE AND INSUFFICIENTLY ACCOUNTABLE. THIS DISTRUST OF GOVERNMENT HAS BEEN FUELED BY LEGITIMATE ARGUMENTS BY THE BUSINESS COMMUNITY THAT FEDERAL REGULATORY REQUIREMENTS HAVE IMPOSED EXCESSIVE DIRECT AND INDIRECT COSTS ON SOCIETY GENERALLY, CONTRIBUTING TO INFLATION AND IMPEDING BUSINESS PRODUCTIVITY AND PROFITABILITY.

THE BROAD GOALS OF REGULATORY REFORM -- TO IMPROVE THE EFFICIENCY AND EFFECTIVENESS OF REGULATORY PROGRAMS, TO REDUCE THE COSTS WHICH REGULATIONS IMPOSE, AND TO OPEN THE REGULATORY PROCESS TO GREATER PARTICIPATION -- ARE IMPORTANT AND WORTHWHILE. PROPOSALS TO ACHIEVE THESE GOALS ARE NUMEROUS AND VARIED.

SOME PROPOSALS HAVE MERIT. BUT SOME OF THE SOLUTIONS PROPOSED TO RID US OF OVERREGULATION WOULD SHACKLE THE GOVERNMENT WITH THE SAME KIND OF REGULATORY APPARATUS WHICH THE BUSINESS COMMUNITY HAS FOUND SO OBJECTIONABLE. THERE MAY BE A KIND OF ROUGH JUSTICE IN THIS DEVELOPMENT. BUT I DO NOT BELIEVE THE PUBLIC INTEREST WILL BE BEST SERVED BY THE IMPOSITION OF ELABORATE AND BURDENSOME PROCEDURAL REQUIREMENTS WHICH WILL ONLY FURTHER EXPAND THE FEDERAL

BUREAUCRACY AND FURTHER REDUCE THE EFFICIENCY OF THE REGULATORY AGENCIES.

ILL-CONCEIVED REGULATORY REFORM WILL ITSELF CREATE OBSTACLES TO GOOD GOVERNMENT. I BELIEVE THAT REAL REGULATORY REFORM REQUIRES THE REASSESSMENT OF THE OBJECTIVES AND CONTINUING RELEVANCE OF SPECIFIC AREAS OF GOVERNMENT REGULATION, AND A DETERMINATION OF WHETHER PARTICULAR REGULATIONS DO MORE HARM THAN GOOD. THIS IS A PROCESS WHICH MUST BE UNDERTAKEN WITH A RATIONAL, MEASURED APPROACH WHICH RECOGNIZES THAT THERE WAS AND PROBABLY STILL IS A VALID REASON FOR THE LAW IN QUESTION, AND ITS REGULATORY IMPLEMENTATION. NEVERTHELESS, WE SHOULD REVIEW WHETHER THAT REASON STILL SUPPORTS THE EXPENSE AND EFFORT NECESSARY TO COMPLY WITH THE LAW.

IN ORDER TO PUT REGULATORY REFORM INTO ITS PROPER CONTEXT, WE MUST RECOGNIZE THAT OUR PRESENT CONDITION OF GOVERNMENT OVERREGULATION IS A POLITICAL PHENOMENON. THE REGULATORY AGENCIES ARE NOT THE PRODUCT OF SOME HOSTILE POWER. THEY WERE CREATED AND HAVE BEEN SHAPED BY DULY ELECTED GOVERNMENTS. IF THE AGENCIES HAVE GONE OUT OF CONTROL, THEY MUST ULTIMATELY BE MADE ACCOUNTABLE BY THE ELECTORATE.

AS WAS POINTED OUT IN AN EDITORIAL IN THE WASHINGTON POST A FEW MONTHS AGO:

> LIKE THE GESTURES OF HIS PREDECESSORS, MOST OF MR. CARTER'S PROPOSALS DEAL WITH THE SYMPTOMS OF OVERREGULATION,

> NOT ITS CAUSE. THREE THOUSAND PAGES OF REGULATIONS AND INTERPRETATIONS CONCERNING A SINGLE PIECE OF LEGISLATION DO NOT SPRING FROM SOME MALEVOLENT BUREAUCRATIC PLOT. THEY ARE A DIRECT RESULT OF THE WAY CONGRESS DRAFTED THE LAW. 5/

ANOTHER CRITIC, WHO IS A FORMER REGULATOR, HAS SIMILARILY OBSERVED THAT "UNTIL CONGRESS MAKES BASIC CHANGES IN THE WAY IT WRITES THE LAWS, THE HOPES OF REGULATORY REFORM WILL BE LITTLE MORE THAN A MIRAGE." 6/

I WILL TURN NOW TO AN EXAMINATION OF SOME OF THE LEGISLATIVE PROPOSALS DESIGNED TO CURE OVERREGULATION. AND I WILL SUGGEST THAT THESE PRESCRIPTIONS ARE OF THE SAME VARIETY WHICH HAVE BROUGHT US TO OUR PRESENT CONDITION OF "HYPERLEXIS," OR TOO MUCH LAW.

ONE POPULARLY PROPOSED CURE FOR OVERREGULATION IS THE LEGISLATIVE VETO. ALTHOUGH THERE HAVE BEEN VARIOUS PROPOSALS MADE, THEY ALL INVOLVE A DELAY IN THE EFFECTIVENESS OF REGULATIONS ADOPTED BY EXECUTIVE AND INDEPENDENT AGENCIES IN ORDER TO GIVE ONE OR BOTH HOUSES OF CONGRESS THE OPPORTUNITY TO NULLIFY THE REGULATION, EITHER BY ACTION OR INACTION. THERE ARE SERIOUS CONSTITUTIONAL QUESTIONS

5/ "REGULATION REGULATION REGULATION," THE WASHINGTON POST, APRIL 2, 1979, P. A-20, COL. 1 (EMPHASIS IN ORIGINAL).

6/ QUARLES, "RUNAWAY REGULATION? BLAME CONGRESS," THE WASHINGTON POST, MAY 20, 1979, P. B-8, COL. 1.

RAISED BY SOME OF THESE PROPOSALS, 7/ BUT I WILL NOT DISCUSS THESE QUESTIONS TONIGHT. RATHER, I WILL POINT OUT THE ADVERSE EFFECTS WHICH I BELIEVE AN ACROSS-THE-BOARD USE OF THE LEGISLATIVE VETO WOULD HAVE ON THE SEC, AND OTHER INDEPENDENT AGENCIES.

DELAY IS ONE OF THE PRINCIPAL OBSTACLES TO A SMOOTH-WORKING REGULATORY PROCESS. FURTHER, SOME OF THE REGULATORY REFORM PROPOSALS MADE BY CONGRESS ARE SPECIFICALLY ADDRESSED TO THE PROBLEMS OF REGULATORY DELAY. YET, USE OF THE LEGISLATIVE VETO WILL INEVITABLY RESULT IN DELAY OF THE REGULATORY PROCESS. CLOSELY RELATED TO THE PROBLEM OF DELAY IS THE UNCERTAINTY THE LEGISLATIVE VETO WOULD GENERATE AS TO WHETHER AN AGENCY ACTION IS FINAL AND HOW THE USE OF THE VETO WOULD AFFECT INTERRELATED RULES. 8/

I BELIEVE THAT THE LEGISLATIVE VETO WOULD RESULT IN THE SUBSTITUTION OF POLITICAL POWER FOR AGENCY INDEPENDENCE AND EXPERTISE. WHILE IT MIGHT BE USEFUL TO INTERJECT GREATER POLITICAL ACCOUNTABILITY INTO THE REGULATORY PROCESS, I BELIEVE THIS CAN AND MUST BE ACCOMPLISHED THROUGH THE APPOINTMENT PROCESS RATHER THAN THROUGH A DEVICE LIKE THE LEGISLATIVE VETO. CONGRESS IS INCAPABLE OF DEALING WITH THE THOUSANDS

7/ SEE THE LEGISLATIVE VETO, 34 THE RECORD 208 (1979).

8/ II STUDY ON FEDERAL REGULATION, S. DOC. 26, 95TH CONG., 1ST SESS. 115-22 (1977).

OF REGULATIONS WHICH ARE PROMULGATED BY ADMINISTRATIVE AGENCIES EVERY YEAR. AND IT IS UNREALISTIC TO ASSUME THAT THE EXISTENCE OF A LEGISLATIVE VETO WOULD DECREASE THE NUMBER OF REGULATIONS PROPOSED. WITHOUT ADEQUATE TIME TO CONSIDER FULLY ALL OF THE ISSUES INVOLVED IN A REGULATORY PROGRAM, SPECIAL INTEREST LOBBYING IN CONGRESS COULD UNDERMINE AGENCY EXPERTISE AND INDEPENDENCE. REGULATORY DECISIONS WOULD NO LONGER HAVE TO BE BASED ON A RECORD OPEN TO PUBLIC SCRUTINY AND PARTICIPATION. INSTEAD OF ENHANCING PUBLIC CONFIDENCE IN GOVERNMENT, SUCH CONFIDENCE WOULD BE FURTHER IMPAIRED.

SUNSET MECHANISMS ARE ANOTHER REGULATORY REFORM MEASURE WITH WIDESPREAD APPEAL. PERSONALLY, I AM AN ADVOCATE OF REGULARIZED REVIEW OF REGULATORY PROGRAMS BY CONGRESS, POSSIBLY IN COOPERATION WITH THE EXECUTIVE, AND AN ADMINISTRATIVE AGENCY. THE SEC IS NOW COMMITTED TO SELF REVIEW IN SEVERAL KEY AREAS. FOR EXAMPLE, WE ARE STUDYING THE EFFECTS OF THE COMMISSION'S RULES ON THE ABILITY OF SMALLER ISSUERS TO RAISE CAPITAL AND WE HAVE REVISED EXISTING REGULATIONS AND PROMULGATED NEW REGULATIONS IN ORDER TO EASE THE REGULATORY BURDENS WE IMPOSE ON SUCH ISSUERS.

NEVERTHELESS, I AM OPPOSED TO THE SUNSET PROVISIONS OF SOME OF THE REGULATORY REFORM BILLS NOW PENDING IN CONGRESS BECAUSE THEY WOULD OPERATE TO ARBITRARILY TERMINATE AN AGENCY'S REGULATIONS, OR IN SOME CASES AN ENTIRE AGENCY, IF CONGRESS FAILS TO ACT TO REAUTHORIZE A REGULATORY PROGRAM.

DETAILED SCRUTINY OF FEDERAL PROGRAMS AND AGENCIES SHOULD BE CONDUCTED ON A MORE RATIONAL BASIS, WITH GREATER CONGRESSIONAL ACCOUNTABILITY. PRESUMABLY, FEDERAL PROGRAMS AND AGENCIES WERE ORIGINALLY ESTABLISHED BECAUSE CONGRESS BELIEVED THERE WAS A DEMONSTRATED NEED FOR THEM. BUT MANY "SUNSET" PROPOSALS COULD RESULT IN TERMINATION OR DISRUPTION OF THESE PROGRAMS OR AGENCIES WITHOUT ANY DETERMINATION THAT PRIOR CONSIDERED CONGRESSIONAL JUDGMENTS ARE NO LONGER VALID. 9/

SUNSET, LIKE OTHER REFORM MECHANISMS, ALSO CAN BE EXPENSIVE AND TIME CONSUMING. THE GENERAL COUNSEL OF THE COMMODITY FUTURES TRADING COMMISSION DURING THAT AGENCY'S RECENT REAUTHORIZATION AND APPROPRIATION HEARINGS COMMENTED THAT:

> THE COMMISSION PAID A SIGNIFICANT PRICE IN TERMS OF ITS RESOURCES IN UNDERGOING THIS SUNSET PROCESS. COMMISSIONERS THEMSELVES APPEARED 18 DIFFERENT TIMES AT VARIOUS CONGRESSIONAL HEARINGS. ... FOR A PERIOD

9/ SEE E.G., SECTIONS 101 AND 102, H.R. 2; SECTIONS 101 AND 201, H.R. 65; AND SECTION 6, H.R. 2364 (ALL 96TH CONG., 1ST SESS.).

OF MORE THAN 6 MONTHS THE FORWARD MOTION OF THE COMMISSION'S ACTIVITIES WAS SLOWED DOWN CONSIDERABLY, IF NOT AT SOMETIMES STOPPED ... 10/

SOME OF THE SUNSET PROVISIONS OF PENDING LEGISLATION COULD BE USEFUL, HOWEVER. REGULARIZED AND THOUGHTFUL REVIEW OF AN AGENCY'S PERFORMANCE AND OF THE CONTINUED NEED FOR AN AGENCY'S EXISTENCE, BY THE CONGRESS OR THE EXECUTIVE, OR BOTH, CAN BE A HEALTHY DISCIPLINE. 11/ GOVERNMENT SHOULD BE REQUIRED TO JUSTIFY ITS CONTINUED EXISTENCE PERIODICALLY. MECHANISMS WHICH EXPAND OVERSIGHT BEYOND THE PARTICULAR CONGRESSIONAL OVERSIGHT COMMITTEE OF A PARTICULAR AGENCY AND WHICH SUBJECT SIMILAR OR OVERLAPPING PROGRAMS OR AGENCIES TO CONCURRENT REVIEW, MIGHT ASSIST CONGRESS IN REACHING A COMPREHENSIVE AND WORKABLE APPROACH TO NATIONAL PROBLEMS. 12/ INCREASED APPROPRIATIONS FOR REVIEW FUNCTIONS WOULD ASSIST REGULATORS AND LEGISLATORS WHO MUST ATTEND TO A WIDE RANGE OF MATTERS IN GIVING REGULATORY REFORM THE ATTENTION IT DESERVES.

ANOTHER REGULATORY REFORM IDEA WHICH I GREET WITH GREAT SKEPTICISM IS THE COST/BENEFIT OR ECONOMIC IMPACT ANALYSIS. MOST OF THESE PROPOSALS WOULD REQUIRE AGENCIES TO ENGAGE IN DETAILED QUANTIFICATION AND REPORTING OF THE OBJECTIVES, IMPACTS, DUPLICATIONS, AND COSTS OF FEDERAL

10/ GAINE, "THE 1978 SUNSET REVIEW OF THE CFTC: ANALYSIS AND COMMENT," 34 THE RECORD 290, 293 (1979).

11/ SEE E.G., SECTION 6, S. 382, 96TH CONG., 1ST SESS.

12/ SEE E.G., SECTION 502, H.R. 2, 96TH CONG., 1ST SESS.

PROGRAMS AND ACTIVITIES. I CERTAINLY SUPPORT IMPROVED MANAGEMENT AND PLANNING EFFORTS BY MY OWN AGENCY AND OTHERS. AND I BELIEVE THAT SENSITIVITY TO THE COSTS OF REGULATION IS VERY IMPORTANT. HOWEVER, I OPPOSE THE GENERAL REQUIREMENT OF A QUANTIFICATION OF THE COSTS AND BENEFITS OF A PROPOSED COMMISSION REGULATION BECAUSE I THINK SUCH STUDIES WOULD BE UNDULY BURDENSOME AND IMPRACTICABLE. THE PROBABLE RESULT IN MANY CASES WOULD BE ROTE AND ROUTINE FINDINGS WHICH WOULD BE TIME CONSUMING AND EXPENSIVE TO GENERATE.

ANY COST/BENEFIT ANALYSIS BY GOVERNMENT IS CONDUCTED IN A POLITICAL ARENA. THE RESOLUTION OF CONFLICTING POLICY CONSIDERATIONS -- MINIMIZING THE DIRECT AND INDIRECT COSTS OF GOVERNMENT AND MAXIMIZING THE BENEFITS OF A STATUTORY SCHEME -- MUST, IN THE LAST ANALYSIS, BE LEFT TO THE GOOD JUDGMENT OF POLICY MAKERS.

A COMMON ADVERSE EFFECT WHICH I BELIEVE THE LEGISLATIVE VETO, SUNSET AND COST/BENEFIT ANALYSIS REQUIREMENTS WOULD HAVE IS THAT AGENCIES WOULD TURN AWAY FROM RULEMAKING PROCEEDINGS AND FORMULATE REGULATORY PROGRAMS THROUGH AD HOC ADJUDICATIONS AND SETTLEMENTS. AS IT IS, THE SEC IS FREQUENTLY CRITICIZED FOR FORMULATING REGULATORY POLICY BY WAY OF ENFORCEMENT CASES RATHER THAN RULEMAKING PROCEEDINGS. 13/ MY OWN PREFERENCE IS TO "MAKE" NEW LAW BY WAY OF INTERPRETATIVE

13/ FINAL REPORT OF THE SEC MAJOR ISSUES CONFERENCE, JANUARY 13-15, 1977, WASHINGTON, D.C., P. 1.

RELEASES OR OTHER RULE-MAKING ACTION, AND I DO NOT BELIEVE THAT LEGISLATION WHICH WOULD GIVE AN IMPETUS TO REGULATION BY PROSECUTION WOULD BE A STEP TOWARD REFORM. WHERE REGULATION IS FORMULATED IN PARTICULAR CASES THERE IS NO OPPORTUNITY FOR AN OPEN DIALOGUE ON THE ISSUES BETWEEN THE REGULATORY AGENCY AND EITHER REGULATED ENTITIES OR THE GENERAL PUBLIC.

I SHOULD NOTE THAT MANY OF THE REGULATORY REFORM BILLS UNDER CONSIDERATION CONTAIN PROPOSALS -- TOO NUMEROUS TO ADEQUATELY DISCUSS TONIGHT -- FOR EXPEDITING ADMINISTRATIVE PROCEEDINGS. SOME OF THE PROPOSALS GIVE MORE AUTHORITY AND FLEXIBILITY TO THE PRESIDING OFFICIAL AT AGENCY HEARINGS; 14/ OTHERS WOULD GOVERN THE APPOINTMENT, EVALUATION, DISCIPLINE AND REASSIGNMENT OF ADMINISTRATIVE LAW JUDGES. 15/ MY OWN VIEW IS THAT ENHANCING THE STATURE AND COMPENSATION OF ADMINISTRATIVE LAW JUDGES WOULD BE A MORE EFFECTIVE MEANS OF CURTAILING ADMINISTRATIVE DELAY THAN CREATING NEW HEARING PROCEDURES. IN ANY EVENT, ADMINISTRATIVE DELAY IN FORMAL ADJUDICATORY PROCEEDINGS HAS NOT BEEN AS SERIOUS A PROBLEM AT THE SEC AS IT HAS BEEN AT OTHER AGENCIES WHICH CONDUCT A GREATER PROPORTION OF THEIR BUSINESS BY WAY OF SUCH PROCEEDINGS.

14/ SEE E.G., SECTIONS 201, 202, 203, S. 262; SECTIONS 201, 202, S. 755, 96TH CONG., 1ST SESS.

15/ SEE E.G., SECTION 208, S. 262; SECTION 211, S. 755, 96TH CONG., 1ST SESS.

ONE PROBLEM WHICH DOES TROUBLE ME IS THE INCREASING JUDICIALIZATION OF INFORMAL RULE-MAKING, A COMMON TYPE OF SEC PROCEEDING. THIS HAS RESULTED FROM THE IMPOSITION OF PROCEDURAL REQUIREMENTS BY THE COURTS, WHICH HAVE BEEN CONCERNED ABOUT THE OPENNESS OF THE COMMENT AND DECISION MAKING PROCESS OF AGENCIES. 16/ IN THIS REGARD, IT MAY BE APPROPRIATE TO CLARIFY THE PROCEDURES APPLICABLE TO INFORMAL RULEMAKING IN REGULATORY REFORM LEGISLATION. 17/

REGULATORY REFORM LEGISLATION ALSO HAS BEEN ATTACKING THE PROBLEM OF OPENING UP AGENCY ACTION TO GREATER PUBLIC SCRUTINY AND PARTICIPATION. ONE MECHANISM SUGGESTED IS THE GRANT OF FINANCIAL ASSISTANCE TO CERTAIN PERSONS FOR THE COSTS OF PARTICIPATION IN AGENCY PROCEEDINGS. THE DECISION TO EXPEND FUNDS FOR THIS PURPOSE WOULD BE MADE EITHER BY AN

16/ SEE E.G., HERCULES, INC. V. EPA, NOS. 77-1248, 77-1349 (D.C. CIR. NOV. 3, 1978); WEYERHAEUSER CO. V. COSTLE, 590 F.2D 1011 (D.C. CIR. 1978); UNITED STATES LINES, INC. V. FMC, 584 F.2D 519 (D.C. CIR. 1978); ASSOCIATION OF NAT'L ADVERTISERS V. FTC 460 F. SUPP. 996 (D.D.C. 1978). SEE ALSO BARR, "JUDICIAL REVIEW OF INFORMAL RULEMAKING PROCEDURE: WHEN MAY SOMETHING MORE FORMAL BE REQUIRED," 27 AM. UNIV. L. REV. 781 (1978).

17/ SEE MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION TO THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS ON S. 262 AND S. 755, 96TH CONG., 1ST SESS. AT 31-32 (JUNE 6, 1979). SEE ALSO THE PROPOSED REQUIREMENT THAT AGENCY DECISION MAKERS KEEP A RECORD OF ALL COMMUNICATIONS RECEIVED FROM PERSONS OUTSIDE OF THE AGENCY AFTER THE PUBLICATION OF A PROPOSED "SIGNIFICANT RULE," SECTION 103, S. 1291, 96TH CONG., 1ST SESS.

ADMINISTRATOR SUBJECT TO EXECUTIVE CONTROL 18/ OR BY AN AGENCY ITSELF. 19/ WHETHER PROCEDURAL DEVICES MANDATING GREATER PUBLIC PARTICIPATION IN HEARINGS ARE IMPOSED BY THE COURTS OR CONGRESS, DELAY IN DECISION MAKING IS INEVITABLE. AND WHILE GOVERNMENT AGENCIES HAVE NO MONOPOLY ON PERCEIVING OR ARTICULATING THE PUBLIC INTEREST, THEY ARE CHARGED BY CONGRESS WITH THE RESPONSIBILITY FOR ASCERTAINING WHAT THE PUBLIC INTEREST IS. I THINK WE SHOULD BE CAUTIOUS ABOUT ALLOWING PRIVATE ORGANIZATIONS WHICH ARE NOT ACCOUNTABLE TO THE ELECTORATE, BUT WHICH CLAIM TO REPRESENT THE PUBLIC INTEREST, TO USE GOVERNMENT FUNDS TO PROMOTE THEIR IDEAS.

ONE REASON I AM CRITICAL OF SO MANY OF THE PROVISIONS OF LEGISLATION WHICH IS BEING PROPOSED AS REGULATORY REFORM IS THAT I BELIEVE SUCH PROPOSALS COULD BE COUNTER PRODUCTIVE. MECHANISMS FOR EFFECTIVE OVERSIGHT OF THE REGULATORY AGENCIES DO EXIST. IF SUCH MECHANISMS ARE NOT BEING ADEQUATELY UTILIZED NOW, ADDING TO THE NUMBER AND COMPLEXITY OF SUCH MECHANISMS IS UNLIKELY TO SIMPLIFY OR EASE THE BURDENS OF OUR PRESENT SYSTEM OF GOVERNMENT REGULATION.

18/ SECTION 403, S. 262, 96TH CONG., 1ST SESS. (PRESIDENT MAY REMOVE ADMINISTRATOR FOR "INEFFICIENCY").

19/ SECTION 302, S. 755, 96TH CONG., 1ST SESS.

EACH BRANCH OF GOVERNMENT HAS THE OPPORTUNITY TO EXERCISE SOME OVERSIGHT TODAY OVER AN INDEPENDENT AGENCY LIKE THE SEC. THE PRESIDENT APPOINTS COMMISSIONERS TO HEAD THE AGENCY. THERE ARE FIVE COMMISSIONERS WITH STAGGERED FIVE YEAR TERMS, AND SO THE PRESIDENT HAS THE OPPORTUNITY ONCE A YEAR TO MAKE A NEW APPOINTMENT. THE COURTS, THROUGH THEIR REVIEW OF AGENCY ACTIONS UNDER THE ADMINISTRATIVE PROCEDURE ACT OR OTHERWISE, PROVIDE A SIGNIFICANT CHECK UPON AGENCY ABUSES. IN PARTICULAR, THE COURTS HELP TO ASSURE THAT AGENCY REGULATIONS OR ENFORCEMENT ACTIONS DO NOT EXCEED THE BOUNDS IMPOSED BY AN ENABLING STATUTE. THE PRESENT SUPREME COURT HAS SHOWN NO RETICENCE IN TELLING THE SEC TO STAY WITHIN DEFINED STATUTORY BOUNDARIES.

FINALLY, AND PERHAPS MOST IMPORTANTLY, CONGRESS ITSELF HAS THE POWER TO EXERCISE SUBSTANTIAL CONTROL OVER THE ADMINISTRATIVE PROCESS. THE ADOPTION OF NEW LEGISLATION OR THE AMENDMENT OF EXISTING LEGISLATION CAN EXPAND, CONTRACT, OR RENEW AN AGENCY'S MANDATE. POWER OVER AN AGENCY'S BUDGET IS A POWERFUL, AND PROBABLY UNDERUTILIZED, SUNSET TOOL. THE SEC UNDERGOES ANNUAI SCRUTINY BY OUR CONGRESSIONAL OVERSIGHT COMMITTTEES AND BY THE EXECUTIVE OFFICE OF THE PRESIDENT -- NOT ONLY AS TO APPROPRIATIONS BUT ALSO AS TO SUBSTANTIVE ACTIONS AND POLICIES. THIS OVERSIGHT PROCESS WAS HEIGHTENED BY THE IMPLEMENTATION OF ZERO-BASED BUDGETING IN FISCAL 1978.

I BELIEVE THAT GREATER EFFORTS SHOULD BE MADE TO UTILIZE THE EXISTING CONGRESSIONAL REVIEW PROCEDURES WITH SUITABLE ENHANCEMENTS. BECAUSE THE PENDING LEGISLATION I HAVE DISCUSSED TONIGHT WOULD IMPOSE UNKNOWN AND POSSIBLY EXTENSIVE BURDENS ON GOVERNMENT, SUCH LAWS WOULD HOLD OUT A PROMISE FOR REGULATORY REFORM WHICH WOULD BE UNREALIZED.

IN ADDITION, IF REGULATORY REFORM IS TO SERVE MORE THAN SIMPLY AS A RHETORICAL ATTACK ON THE SUPPOSED ILLS OF GOVERNMENT REGULATION, SUCH REFORM MUST BE DIRECTED AT THE REAL OBSTACLES TO ADEQUATE REVIEW. WE MUST ALL STOP MEASURING PRODUCTION IN GOVERNMENT BY THE AMOUNT OF LEGISLATION AND REGULATION PASSED. PLAUDITS SHOULD BE CLAIMED AND GIVEN FOR THOUGHTFUL REPEAL OR AMENDMENT OF BASIC LEGISLATION. HARD POLITICAL DECISIONS SHOULD NOT BE DELEGATED TO REGULATORY AGENCIES WITHOUT ADEQUATE GUIDANCE FROM THOSE WHO ARE DIRECTLY RESPONSIBLE TO THE ELECTORATE. AND REGULATORY AGENCIES MUST CONSIDER THE BROAD PUBLIC INTEREST AND NOT MERELY THEIR SURVIVAL AND EXPANSION. REGULATORY RESTRAINT IS AS IMPORTANT AS REGULATORY REFORM.

AN ASTUTE OBSERVER OF THE REGULATORY SCENE HAS RECENTLY POINTED OUT THAT THE ISSUE AT STAKE IN THE CURRENT DEBATE OVER REGULATORY REFORM IS NOT REALLY PECUNIARY QUANTITIES AND MARKET EFFICIENCIES. RATHER THE ISSUE IS

LIBERAL VALUES. HE STATES:

> CONTRARY TO WHAT NEARLY EVERYONE HAS ASSUMED FOR DECADES NOW, GOVERNMENT REGULATION OF BUSINESS IS NOT A POLITICAL BACKWATER OR PUBLIC-POLICY SIDESHOW, AN AFFAIR OF MERE INTEREST GROUPS AND NARROWLY ECONOMIC CONCERNS. TO THE CONTRARY, IT IS A DIRECT AND CONSEQUENTIAL EXPRESSION OF THE CENTRAL SOCIAL AND POLITICAL CURRENTS OF TWENTIETH CENTURY AMERICAN LIFE. AS SUCH IT RAISES SQUARELY, AND IN A PECULIARLY PUZZLING WAY, THE ULTIMATE ISSUE OF AMERICAN POLITICS: THAT OF THE MEANING AND FATE OF THE IDEA OF LIBERAL DEMOCRACY. 20/

IF THIS ANALYSIS IS VALID, AND I BELIEVE IT IS, WE MUST BEGIN TO VIEW REGULATORY REFORM NOT AS A WAY TO PUNISH OR PREVENT GOVERNMENT EXCESS, BUT RATHER AS A WAY TO BETTER UTILIZE THE RESOURCES OF BOTH GOVERNMENT AND BUSINESS FOR THE GENERAL PUBLIC WELFARE.

20/ WEAVER, "REGULATION, SOCIAL POLICY, AND CLASS CONFLICT," IN INSTITUTE FOR CONTEMPORARY STUDIES, REGULATING BUSINESS, P. 214 (1978).