Remarks of

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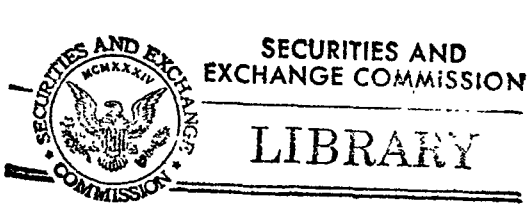

Before the

American Society of
Corporate Secretaries

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SOME DISCLOSURES ABOUT DISCLOSURE

The Commission and the regulatory statutes it administers were created as a result of the economic conditions that existed in this country and abroad during the late 1920's and early 1930's. The purpose of these statutes was primarily to restore investor confidence in the public securities markets in this country and to provide a comprehensive regulatory scheme designed to further the protection of investors and the public interest. The result of this regulatory scheme has been, I believe, very successful. Despite unsettling economic and political conditions from time to time during the past 35 years, we believe that the regulatory scheme has, overall, produced the fairest and most orderly public securities markets in the world and has enabled individuals and institutions to invest in these markets with confidence in their basic integrity.

The statutes administered by the Commission encompass a host of activities including such diverse entities as the industrial companies, the nation's stock exchanges and over-the-counter markets, securities brokers and dealers, investment advisers, public utility holding companies and the mutual fund industry. Unlike other federal agencies, we have the responsibility to investigate public violations of the laws we administer and to enforce those laws. Our investigatory powers are extremely broad and include full subpoena power. The Commission's enforcement proceedings may be conducted in the federal courts or we may proceed administratively.

To a considerable extent, the SEC makes and administers the rules by which you and your colleagues, the men who manage productive enterprises, must abide. While they may not always be followed, I want each of you to know that we at the Commission welcome, indeed solicit, your views on what we do and propose to do. Your comments and suggestions about our work have been of great value to us.

There must continue to be meaningful discussions between regulatory agencies such as the SEC and business groups such as the American Society of Corporate Secretaries. That is why I would like to visit with you today about those aspects of the Commission's daily work which touch most directly on your daily work. Number one, of course, is that word "disclosure" and our function -- and it is the Commission's original function -- of watching over and enforcing the adequacy of the stream of information flowing from corporate enterprises to present and prospective investors. Since you as corporate secretaries play such a major role in assembling and presenting the information for which the Commission asks, the disclosure process is one which you and we should be discussing continuously.

Congress gave the Commission broad authority and wide discretion in the disclosure field. Indeed, one might say that what Congress really did in 1933 and 1934 was to say to the Commission: "Commission, the task before you is to see to it that investors have the information they need in order to make informed decisions. Go ahead and see that they get it."

Let us take those documents on which both you and I spend a good deal of our time, prospectuses under the Securities Act of 1933. Congress went into great detail as to what ought to be in these. If you look at Schedule A of the Securities Act, you'll find 32 paragraphs replete with detailed prescriptions. But if you look elsewhere in the Act you will find that the Commission is authorized to ask for "such other information . . . accompanied by such other documents" as we determine to be "necessary or appropriate in the public interest or for the protection of investors." We can ask for more than Congress chose to describe. We can also dispense -- or at least permit issuers to dispense, with some of what the Congress of 1933 thought ought to be there as a general rule. Finally, the Commission is authorized to classify prospectuses "according to the nature and cirumstances of their use

or the nature of the security, issue, issuer, or otherwise . . ." and to prescribe for each class "the form and contents which it may find appropriate and consistent with the public interest and the protection of investors."

Turning to what today may well be the even more important area of continuous disclosure under the Securities Exchange Act of 1934, we find that no attempt was made to specify in the Exchange Act itself the appropriate disclosures as was done the year before when the Securities Act was enacted. With respect to periodic reports, we can ask for such reports as may be "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." Our discretionary authority over the content of the proxy-soliciting materials is just as broad.

In exercising these discretionary powers in the disclosure field the Commission has ever since its creation been doing what might be called a balancing act. It will be engaged in that act as long as it exists, for that balancing function is inherent in the job that Congress gave us. We must always weigh the utility and the materiality to investment decision of some particular type of information against the burden that a requirement that such information be disclosed would impose not only on business enterprise generally, but on individuals, like yourselves, who have to prepare it and present it in readable and understandable form. Balancing these considerations is a difficult job. We need all the help we can get. Even with it we would not expect to please even fifty percent of the people fifty percent of the time.

This is by no means a question of bureaucrats against businessmen or government against free enterprise. Far from it. Many of you may think we ask for too much, that some of what we now require is of dubious relevance to the investment process. But most security analysts and many people in other

areas of the investment business fault us for asking for too little, for being satisfied with what they deem inadequate material, for failing to supply them with this key ratio and that crucial fact.

The two key points about the extent and the importance of the Commission's discretionary powers under the disclosure provisions of the securities laws are these:

1. Securities law is living law. What we ask for, what we deem essential and the degree of detail that we seek, change from time to time in the light of changes in the climate of investor opinion, changing techniques of security analysis, the progressive evolution of the art of accounting (I would hesitate to call it a science), and the lessons of economic history.

2. Absolutely essential to the performance of the Commission's job in the disclosure field are the suggestions it gets from the bar, the accounting profession, the securities industry, and the business community. When you tell us what you think our rules ought to say and what our forms ought to ask for, you may often be thinking of your own or your company's self interest. But you are also rendering an extremely valuable service to the broader public interest.

Let us now descend from broad questions of public policy to the humbler but every bit as significant questions with which both of us have to grapple day in and day out. I am talking about what we at the Commission call "processing" but for which you on the outside undoubtedly have other and

more colorful names. Why does it take so long to get something through? Why do they have to "examine" all this paper? Why do they nit-pick filings to death? Why can't they just let us file it, use it, and assume responsibility for it?

Such questions are far from frivolous. They are good questions.

What we call processing causes delay and delay has been a sore point from the beginning. At times the problem of our backlog of unprocessed paper has been acute. At other times it has been somewhat less acute. But the problem has always been there. I regret to say that it has grown ever more vexatious in recent years. It bothers the Commission every bit as much -- and perhaps a good deal more -- than it bothers you.

Yet I must confess to you that the Commission could promptly solve the problem of delay if it really wanted to. Delays stem from the review process. If we eliminated review, if we converted our Division of Corporation Finance into a vast filing cabinet into which companies dropped disclosure material in a fashion much the same as that in which people drop deeds, mortgages, and other types of documents into a public recordation office, there would be no delays.

However, the Commission has never viewed itself as a mere repository. It has thought that it has an affirmative responsibility to see to it that the disclosure material deposited with it and supplied to investors is complete enough and informative enough to attain the objectives Congress had in mind when it passed the laws that it administers.

Now there is nothing in the law that expressly requires the Commission to review the material filed with it. In this connection, however, I should note in passing that the Securities Act does empower the Commission to issue refusal orders if it appears to it that "a registration statement is on its face incomplete or inaccurate in any material respect." This certainly sounds as though the Congress of 1933 envisioned some sort of pre-effective review. And as I suppose most of you know, careful, painstaking pre-effective review by the Commission's staff has from the very beginning played a key part in the registration process.

That kind of review takes manpower, and it takes time. And there are those of the bar and in business, as well as some at the Commission, who question the value of pre-effective examination.

It seems to me that reasonable staff review of disclosure material is a good thing. As is true of other good things, there can, of course, be too much of it. The review process has been overdone at times. There have even been instances in which the Commission's letters commented on the prose style of the registration statement and where it was suggested that paragraph fifteen should be paragraph fourteen. That sort of thing happens and is regrettable. On the whole, however, we feel we have an excellent staff and that their examination and review have performed a very useful purpose. Over the years the staff's pre-effective review work has done much to raise disclosure standards and to inform the holder or buyer of securities as to just what the securities are. I feel satisfied that it has contributed to the result which has made the public willing to provide the capital to finance American business.

Recent events remind us that security prices go down as well as up and that those prices can go very far down indeed. At such times I suspect it is a great comfort to

an issuer, to its controlling persons, and to its executives -- including its secretary -- to know that all of its filings with the Commission were shipshape and that investors who guessed wrong have not the slightest reason to complain of having been misled. Often that comfort stems in large measure from our staff's disinterested study of filed material, from its insistence on a fair presentation of the risk aspects of a particular offering, and from the Commission's proverbial aversion to the undue accentuation of the positive that may perhaps be good salesmanship in certain other contexts but has no proper place in the marketing of securities.

We like to feel that the review process is a service to the business community. It is, however, an expensive service. We now find ourselves unable to give the kind of service that the Commission has traditionally given. For one thing, the traditional painstaking review of every filing is just too costly, much too much of a drain on our resources. Secondly, when the volume of filings is as high as it has been in recent years, the benefits of traditional review procedures are more than offset by the burdensome prolonged delays to which those procedures lead.

Unlike earlier ones, the recent fall in security prices has not been accompanied by a fall in the volume of our business. We still have more business than we can handle. During the year I first joined the Commission, 1964, there were a total of 1,192 registration statements filed under the Securities Act. I watched this number progressively increase to 1,376 in 1965; 1,697 in 1966; 1,836 in 1967; 2,906 in 1968, until it reached a record high of 4,706 in 1969. The number of filings made to date during the current fiscal year is running only slightly behind the pace set last year. Although I feel review of filings by companies which have been to the Commission before should in any event have been lessened, we have, by sheer weight of numbers, been compelled to curtail the scope of the review process. We will have to curtail it even further in the future. So far we have adopted

the so-called "cursory review process" under which every registration statement filed is given a preliminary review by a higher level staff member and one of three possible determinations is made:

1. That the filing is so deficient that a full review would involve an inordinate amount of time and effort on the part of the staff;

2. That only a cursory review will be made; or

3. That the filing will be subject to the regular review process.

A determination by the staff that the registration statement is so deficient that no review will be made is followed by a suggestion to the issuer that consideration be given to the withdrawal of the filing. When it is determined that the filing falls within the second category, the one that warrants only a cursory review on the basis that the document on its face complies with our disclosure requirements, counsel for the company is informed that the statutory burden of full disclosure is on the issuer and that as a matter of law this burden cannot be shifted to the staff. When written representations are furnished to the staff that everyone concerned is aware of their legal responsibilities and that the staff has not made its customary review of the filing, a recommendation that the filing be cleared is then made. A determination that a registration statement comes within either of the first two categories above will, of course, reduce the backlog of pending registration statements since no deficiency letter is furnished in either case.

The Division of Corporate Regulation, which is responsible for the review of filings made by investment companies registered under the Investment Company Act of 1940, has been faced with the same increased workload as the Division of Corporation Finance. At June 30, 1964 there

were 731 investment companies registered with the Commission. As of May 31, 1970, this number had risen to 1,314, an increase of approximately 81% since 1964. Even during the recent market decline Securities Act registration statements filed by investment companies continued at a high level. In fact, since January of this year, 88 registration statements were filed and in March alone 35 statements were filed as compared with 8 in the previous March.

The "crunch" caused by the flood of registration statements has impeded staff review of periodic reports under the Exchange Act. Since registration statements are more of a priority item, and since important financing plans so often turn on their becoming effective within a reasonable time, the staff has had to delay its review of periodic reports. Hence there has been a regrettable but unavoidable rise in the backlog of unreviewed reports. Unfortunately, we have not been able to adopt cursory review procedures here as we were able to do with registration statements. There has been a suggestion that periodic reports be reviewed on a selective or rotating basis. This suggestion, currently being considered by the staff, will of course require careful study since the Commission believes that the more timely information furnished by these continuing reports is at least as important to a security holder as that contained in registration statements.

We know you will continue to work with the Commission and the securities industry to assure that full and fair disclosures are made, in order that our markets for securities will even improve their reputation for being not only the largest but the most honest in the world.

THE PROXY RULES

To vote intelligently one must understand what it is on which he is voting. That means that the proxy statement is as much a disclosure document as the registration statement. Most of the Commission's rules about proxy solicitation long ago ceased to be controversial. Some of them aren't even very interesting any more. But one of those rules has recently come into the limelight. That one is Rule 14a-8, the shareholder proposal rule. Briefly stated, this rule provides that any security holder may, subject to certain prescribed conditions, require the management to include in its proxy material any appropriate proposal which such security holder desires to submit to a vote of his fellow shareholders. I'm sure each of you has followed closely the recent activities in this area as they have involved the General Motors Corporation and many of you, no doubt, are concerned about the future effect of such activities upon your own companies. But before I speak specifically on that matter, I believe a brief historical summary of the events leading up to the adoption of Rule 14a-8 would be in order.

I do not feel it necessary to remind you of some of the corporate practices which resulted in the broad grant of power to the Commission in Section 14(a) of the Exchange Act to regulate proxy solicitations. I am sure, however, that the duties of a corporate secretary prior to the adoption of the 1934 Act, at least those involving proxy solicitations, must have been far more enjoyable than they are now. The average solicitation in those days amounted to no more than a postcard, printed in small type, which gave the proxy holders broad, discretionary powers, including the power to take any action that they considered "desirable." Sometimes the proxies were good for a number of years. Shareholders were expected to sign and return, not expected to ask any questions, and comments were definitely not invited. The proxy rules were an attempt by the Congress to restore to shareholders an effective and meaningful voice in the management of their companies.

In endeavoring to fulfill its obligation under the Exchange Act the Commission early took the position that its objective would be to restore through the proxy machinery, as nearly as possible, those conditions for effective self-government which existed at the old type of meeting which was personally attended by stockholders who knew each other as well as their officers and directors. A concern in this general area found expression in a statement of a former SEC Commissioner who commented in 1943 that:

> It seems to me that the heart of the problem lies in the failure of corporate practice to reproduce through the proxy medium an annual meeting substantially equivalent to the old meeting in person. I know that the old-fashioned meeting cannot be revived. Admittedly, that is impossible. It is not impossible, however, to utilize the proxy machine to approximate the conditions of the old-fashioned meeting.

The above principle - that the proxy machinery can and should be utilized to restore so far as reasonably possible the "corporate democracy" which was lost as a result of the wide diffusion of ownership in modern day corporations - has from the beginning guided, and continues to guide, the Commission in the formation and administration of its proxy rules.

The original proxy rules were adopted by the Commission on September 24, 1935, more than 15 months after the passage of the Exchange Act. These rules, which were intended mainly as a stop-gap measure until studies could be made and more comprehensive rules formulated, required few affirmative disclosures. They mainly required a brief description of the matters to be acted upon at the meeting and that the proxy statement should not contain false or misleading statements. There was also a provision requiring a company to mail proxy soliciting material for stockholders who wished to make their own solicitations.

On the basis of the experience gained and studies made of those first rudimentary rules, the Commission announced the adoption of Regulation X-14 in August of 1938. This Regulation, with its Schedule 14-A, itemized the information which was required to be shown when various matters were to be acted upon at a meeting. Among other things, nominees for director now had to be identified, remuneration plans had to be discussed and a shareholder had to be furnished the means to vote against, as well as for, the matters being acted upon.

The Commission continuously reviews its proxy rules to assure that solicitations will be conducted on a fair and equitable basis. In so doing, it is ever mindful of the historical right of management to control its proxy material as well as the equally well established right of a stockholder to participate in the affairs of his company and attempts to resolve any resulting differences. With this problem in mind, the Commission, in 1942, adopted the forerunner of today's Rule 14a-8. The rule provided:

> In the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of the security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal and provide means by which security holders can make a specification.

The rule further provided, just as the present rule does, that if management opposed the proposal the stockholder could submit a 100 word statement in support thereof.

Although opponents of the rule expressed alarm that it would be used by unmanageable numbers of notoriety-seeking persons, this did not prove to be the case. During the first

five years of the rule's operation, a total of 201 proposals submitted by 75 different stockholders were included in the 7,972 proxy statements filed with the Commission. Some problems did arise, however, in connection with the interpretation of the original rule's requirement that the proposal be a "proper subject for action by the security holders." The Commission took the position that the "proper subject" requirement was to be determined by reference to the laws of the state of a company's domicile and this interpretation was publicly announced in a release issued in 1945 by the Director of the Division of Corporation Finance. This release stated that:

> Generally speaking, it is the purpose of (Rule 14a-8) to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation; that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders' actions under the laws of the state under which it is organized. It was not the intent of (Rule 14a-8) to permit stockholders to obtain the concensus of other stockholders with respect to matters which are of a general political, social or economic nature. Other forums exist for the presentation of such views.

This particular interpretation was codified when the Rule was amended in 1954. At the same time, the Commission restricted somewhat the use of the rule by adopting limitations, based on a percentage of the vote received, against the resubmission of proposals which had been included during the previous five years. The rule had already been amended to permit the omission of proposals designed to enforce personal claims or redress personal grievances against the company or its management and those submitted for the purpose of promoting general economic, political, racial, religious, social or similar causes. The rule has been revised

only once between 1954 and the present date. The latest revision in 1967, which I might add was largely initiated and strongly supported by the Corporate Secretaries, allows the company to furnish, upon request, the name and address of the proponent who has submitted an included proposal in lieu of identifying him in the proxy statement.

The administration of the rule, as might be expected, has proven to be a difficult task at times. As you know, when a decision is made by management not to include a proposal the rule requires that both the Commission and the proponent be informed of this fact and given a statement of management's reasons for the refusal. The staff, in yet another of its varied review functions, gives careful consideration to management's statement, and any statement which the proponent may furnish in support of the proposal, and then takes an informal position on whether or not it will raise an objection to management's decision to omit the proposal, informing both management and the proponent of such position. It has generally been the policy of the Commission to make an informal review of the staff's position on a particular proposal when it is requested to do so by either the management, the proponent or the staff. This review, which is discretionary on the part of the Commission, has raised the question of whether the expression of the Commission's views on a particular shareholder proposal is reviewable by the courts. This question is currently being litigated in an original action brought by a proponent who seeks court review of the Commission's agreement with the staff not to raise any objection if the proponent's proposals should be omitted. The Commission is taking the position in this case that the court has no jurisdiction to review the decision with respect to the proposal since the Commission has neither issued an order nor taken any other form of agency action which is subject to judicial review. I believe this position to be consistent with the Exchange Act since Section 14(a) provides no authority for the Commission to conduct adjudicatory proceedings to direct compliance with the proxy rules. The Act does give the Commission discretionary

authority to investigate the facts when it has reason to suspect a violation of the proxy rules and it may, again in its discretion, bring an action to enjoin threatened violations of the proxy rules. The decision to investigate the facts and to institute injunctive action are internal matters which the Commission believes are clearly not subject to judicial review. If a proponent disagrees with the Commission's views on his proposal, his remedy is to bring an injunctive action against the management of the company and not against the Commission.

The Commission's action on the shareholder proposals submitted to General Motors Corporation this spring by the Project on Corporate Responsibility, Inc., has received wide discussion and publicity, some of which has been favorable. The nine proposals originally submitted by the Project ranged from a proposal to increase the number of GM directors from 24 to 27 to a proposal which would increase the number of GM franchises, managerial positions and skilled positions held by those in minority groups. The Commission took the position that two of the nine proposals were not excludable under the rule. The first of these was the proposal to increase the board of directors. The second and more controversial proposal involved a resolution for the creation of a Committee for Corporate Responsibility which was to prepare a report to stockholders and directed the Committee to inquire into certain specified areas, among which was the manner in which GM has used its economic power to contribute to the social welfare of the nation.

Let me point out once again the Commission's function with respect to the nine proposals submitted to GM and, for that matter, all shareholder proposals which it considers. The Commission was not acting in an adjudicatory capacity when it determined that the two proposals were not excludable by GM under the rule. It was in effect telling GM that if it should exclude the two proposals, we might go into court to require their inclusion. I do not wish to underplay, however, the importance of the Commission's role in this procedure, especially as it affects a company involved since it is a serious matter for a company to litigate with either the

Commission or a proponent. The Commission and the staff are aware of the importance of their responsibilities in these matters and have always given thoughtful and deliberate consideration before taking a position on a proposal.

As you know by now, the two proposals submitted by the Project were defeated at the annual meeting of GM held on May 22, each receiving less than three percent of the total votes cast. It is much too soon to speculate upon the future effects to the public, the business community or the Commission from the publicity generated by these two proposals. It is probably safe to assume, however, that Rule 14a-8 will be increasingly focused upon as a means of raising questions which companies have assumed to be outside the perimeter of proper shareholder interest.

Changing conditions and attitudes require that all of us periodically reassess and reevaluate our responsibilities. The shareholder proposal rule has seemed to justify itself as a comparatively inexpensive and practical method of providing a form of corporate democracy. It is my hope that its usefulness will not be destroyed by abuse from either the public or the business community.

LINE OF BUSINESS REPORTING
AND BUSINESS COMBINATIONS

In conclusion, I would like to comment briefly upon two other important areas of disclosure which are included in Brace Young's suggested topics for the panel discussion this morning - product-line reporting and pooling of interests. These particular topics are closely related since the reporting problems in the conglomerate area seem to be concentrated in the accounting for the acquisition and the reporting of the results. There are two almost inseparable and highly controversial matters involved in accounting for an acquisition. The first is whether the pooling-of-interests concept, whereby the combined entities are merely added together without restatement of accounts on either side, is valid. Second, and somewhat more complicated, is the determination of the proper accounting in a purchase transaction and in this connection, whether goodwill is an asset that will last forever or whether its demise should be recognized in advance by amortization through charges to income. The Commission for some time has been involved in the consideration of these questions. The most recent discussions on the general subject were before the House Antitrust Subcommittee about a month ago. On this occasion, I discussed on behalf of the Commission the problem of reporting earnings per share and our participation in developing the APB's opinion on this subject. Progress in this area is being made and I am advised the APB's exposure draft involving the questions of pooling and purchase is on the APB's agenda at the end of this month. We shall be very interested in the results of this meeting since we have followed this matter closely and, as early as February 1969, stated we believed the matter required the highest priority.

I might also mention that since the Financial Executives Institute has requested its members to send us copies of their letters of comment to the Board, we are well aware of the nature of the controversy and that there is no unanimity of opinion on the subject. We are aware that the principal

objections have been discussed in releases of the FEI and that the size test in the opinion is one of the main points of controversy. I believe the FEI at first supported a 9 to 1 size test instead of the 3 to 1 test in the APB proposal but now takes the position that no size test should be imposed. The FEI also opposes mandatory amortization of intangibles which we support. Of course the views of all interested parties will be considered and some revisions may be made. All concerned agree that this is one of the most important accounting problems today and that a prompt solution is desirable. The decisions are not easy but are necessary if the public is to continue to subscribe to the view that the bases upon which they are invited to invest their savings are fairly and accurately disclosed.