

# NEWS

## SECURITIES AND EXCHANGE COMMISSION

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REMARKS TO THE  
SEMINAR ON NEW CORPORATE CHALLENGES  
EMORY UNIVERSITY SCHOOL OF BUSINESS ADMINISTRATION

ATLANTA, GEORGIA  
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"QUESTIONS OF FEDERALISM IN THE ARENAS OF  
CORPORATE GOVERNANCE AND CORPORATE TAKE OVERS"

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SECURITIES AND EXCHANGE COMMISSION

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PUBLIC OFFICIALS, LIKE CORPORATE DIRECTORS, ARE CONSTANTLY BEING CALLED UPON TO ACCOUNT FOR THEIR CONDUCT, TO JUSTIFY THEIR PUBLIC TRUST. ONE OF THE RITUALS BY WHICH AMERICANS TEST THE ENDURANCE, IF NOT NECESSARILY THE INTELLIGENCE, OF THEIR PUBLIC OFFICIALS IS TO REQUEST THEM TO APPEAR AND SPEAK WITH GREAT FREQUENCY ON A VARIETY OF TOPICS USUALLY CHOSEN BY CONFERENCE PROGRAM DIRECTORS.

AS A COMMISSIONER OF THE SEC I AM EXPECTED TO EXPRESS MYSELF, ELOQUENTLY AND WITH COMMON SENSE, ON ANY SUBJECT WHICH THE COMMISSION IS NOW OR MAY IN THE FUTURE CONSIDER. GIVEN THE BROAD SCOPE OF THE SEC'S CONCERNS, I FRANKLY FIND FULFILLING SUCH AN EXPECTATION DIFFICULT. HOWEVER, IT WOULD BE INAPPROPRIATE FOR ME TO COMPLAIN ABOUT MY LACK OF INTEREST OR EXPERTISE WITH RESPECT TO SOME OF THESE SUBJECTS. AFTER ALL, INTERESTED AND AFFECTED PERSONS ARE EXPECTED TO COMMENT INTELLIGENTLY ON THE COMPLEX RULE PROPOSALS WHICH WE CONSTANTLY SEEM TO BE PROMULGATING, AND THE BUSINESSES WHICH WE REGULATE ARE EXPECTED TO BE SUFFICIENTLY FAMILIAR WITH MY AGENCY'S STATUTES AND RULES TO COMPLY WITH THEM, HOWEVER CHANGING OR MORE RIGOROUS OUR INTERPRETATIONS OF THOSE REGULATIONS MAY BECOME.

SO, WHEN I WAS PRESENTED WITH THE CHALLENGE OF ADDRESSING YOU ON THE SUBJECTS OF CORPORATE GOVERNANCE AND CORPORATE TAKE OVERS, I DID NOT GIVE IN TO MY SPONTANEOUS REACTION TO THIS ASSIGNMENT. I DID NOT REFUSE THIS

INVITATION ON THE GROUNDS THAT I HAVE NO SPECIAL EXPERTISE REGARDING CORPORATE GOVERNANCE OR CORPORATE TAKEOVERS; NEITHER DO I HAVE ANY LONG STANDING OR DEEP INTEREST IN EITHER SUBJECT.

AS A HOPEFULLY CONSCIENTIOUS AND ACCOUNTABLE SEC COMMISSIONER I REALIZED THAT THESE ARE TWO CONTROVERSIAL SUBJECTS OF CURRENT INTEREST. ACCORDINGLY, I HAVE SOME OBLIGATION TO FORM OPINIONS ABOUT THEM AND ARTICULATE THE CONCLUSIONS I REACH. SO I THOUGHT MORE FULLY ABOUT THESE SUBJECTS, AND WHAT THEY MIGHT HAVE IN COMMON IN ADDITION TO THEIR CURRENCY. AND I REALIZED THAT CORPORATE GOVERNANCE AND CORPORATE TAKEOVERS ARE BOTH ARENAS OF CONFLICT BETWEEN STATE AND FEDERAL LAW. THEY BOTH PRESENT SIGNIFICANT QUESTIONS OF FEDERALISM IN THE INTERPRETATION OF THE FEDERAL SECURITIES LAWS.

QUESTIONS OF CORPORATE GOVERNANCE ARE USUALLY DECIDED BY STATE LAW, EITHER STATUTORY OR COMMON LAW. THE U.S. SUPREME COURT RECENTLY UNDERLINED THE LIMITATIONS ON THE SCOPE OF FEDERAL SECURITIES LAWS WITH RESPECT TO INTERNAL CORPORATE MATTERS IN THE SANTA FE V. GREEN <sup>1/</sup> CASE, WHICH I WILL TALK ABOUT LATER. ACCORDINGLY, IN THE COURSE OF THE COMMISSION'S CORPORATE GOVERNANCE HEARINGS HELD LAST YEAR, AND OUR SUBSEQUENT RULEMAKING PROCEEDINGS DURING THE PAST FEW MONTHS, MANY CRITICS HAVE QUESTIONED THE COMMISSION'S AUTHORITY TO REGULATE CORPORATE BOARD OR COMMITTEE STRUCTURE, OR ENACT DISCLOSURE RULES WHICH HAVE SUCH REGULATION AS THEIR SOLE OR PRIMARY PURPOSE.

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<sup>1/</sup> 430 U.S. 462 (1977).

BY CONTRAST, THE HARMONIZATION OF STATE AND FEDERAL LAW IN THE TENDER OFFER ARENA SEEMS TO BE POINTING TO AT LEAST A LIMITED PRE-EMPTION OF THE SUBJECT BY THE FEDERAL SECURITIES LAWS. THIS ISSUE IS CURRENTLY BEING LITIGATED IN THE CASE OF GREAT WESTERN UNITED V. KIDWELL, 2/ WHICH I ALSO WILL TALK ABOUT LATER.

I BELIEVE THAT IT IS NO ACCIDENT THAT QUESTIONS OF FEDERALISM HAVE ARISEN IN THESE TWO ARENAS OF CURRENT INTEREST. THE PRESENT SUPREME COURT IS VERY CONCERNED ABOUT THE ABILITY OF THE FEDERAL COURT SYSTEM TO SOLVE THE ENDLESS VARIETY OF CONTROVERSIES WHICH BROAD FEDERAL CONSUMER PROTECTION LEGISLATION HAS SPAWNED. THEREFORE, THE COURT HAS BEEN LIMITING ACCESS TO THE FEDERAL COURTS IN CASES ARISING UNDER SUCH STATUTES AS THE FEDERAL SECURITIES LAWS. AT THE SAME TIME, THE FREQUENTLY DUPLICATIVE AND EVEN CONFLICTING REGULATIONS WHICH APPLY TO MANY BUSINESS ENTITIES HAVE LED TO CRIES FOR RELIEF FROM BOTH FEDERAL AND STATE REGULATORY SCHEMES. IN SOME CASES, SUCH AS THE TENDER OFFER ARENA, THIS CRY FOR RELIEF IS A REQUEST FOR FEDERAL PRE-EMPTION.

THE FEDERAL SECURITIES LAWS ARE 45 YEARS OLD. IN THIS ERA OF DIMINISHING EXPECTATIONS ABOUT THE ABILITY OF GOVERNMENT TO SOLVE MANY SOCIAL AND ECONOMIC PROBLEMS AT A TOLERABLE COST, THERE IS VALUE IN RE-EXAMINING THE PREMISES UPON WHICH REGULATION BY THE SEC IS BASED. SUCH A

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2/ CCH FED. SEC. L. REP. PARA. 96,529 (5TH CIR. AUG. 10, 1978),

RE-EXAMINATION MUST NECESSARILY ADDRESS QUESTIONS OF FEDERALISM WHICH HAVE NOT BEEN SERIOUSLY EXAMINED FOR FOUR DECADES.

ONE OF THE REASONS THAT QUESTIONS OF FEDERALISM HAVE ARISEN REGARDING CORPORATE GOVERNANCE IS THAT THE STATES HAVE NOT EXERCISED THEIR RESPONSIBILITIES AS THE PRIMARY REGULATORS OF INTERNAL CORPORATE CONDUCT IN A SUFFICIENTLY EFFECTIVE AND SATISFACTORY MANNER. THE U.S. SUPREME COURT HAS WRITTEN:

"CORPORATIONS ARE CREATURES OF STATE LAW, AND INVESTORS COMMIT THEIR FUNDS TO CORPORATE DIRECTORS ON THE UNDERSTANDING THAT, EXCEPT WHERE FEDERAL LAW EXPRESSLY REQUIRES CERTAIN RESPONSIBILITIES OF DIRECTORS WITH RESPECT TO STOCKHOLDERS, STATE LAW WILL GOVERN THE INTERNAL AFFAIRS OF THE CORPORATION." <sup>3/</sup>

BUT, IN THE MINDS OF MANY, STATE LAW GOVERNANCE OF THE MODERN CORPORATION HAS PROVEN INADEQUATE. THE MODERN CORPORATION APPEARS TO HAVE GROWN TOO POWERFUL FOR STATE LAW TO HOLD IT ACCOUNTABLE TO SHAREHOLDERS, EMPLOYEES, CONSUMERS AND THE PUBLIC IN GENERAL.

THE GIANT MODERN CORPORATION, WHICH IS OFTEN NATIONAL OR EVEN INTERNATIONAL IN SCOPE, IS AN ENTITY WITHOUT GEOGRAPHICAL LOYALTIES. ITS MANAGEMENT WILL SELECT AS THE CORPORATION'S LEGAL DOMICILE THAT JURISDICTION WHOSE LAW MOST ADEQUATELY CONFORMS TO ITS OWN REGULATORY PREFERENCES.

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<sup>3/</sup> CORT V. ASH, 422 U.S. 66, 84 (1975),

MOREOVER, BECAUSE THIS SELECTION INVOLVES THE PAYMENT OF SIGNIFICANT SUMS OF CORPORATE FRANCHISE FEES TO FINANCIALLY SQUEEZED STATE GOVERNMENTS, THERE IS COMPETITION AMONG THE STATES TO MAKE THEIR CORPORATE LAW THE MOST ATTRACTIVE TO MANAGEMENT. THE RESULT IS A BODY OF LAW WHICH ALLOWS CORPORATIONS GREAT LATITUDE IN THEIR STRUCTURE AND GOVERNANCE AND ALLOWS DIRECTORS GREAT FREEDOM IN THEIR MANAGEMENT OF A CORPORATION'S BUSINESS AND AFFAIRS.

MANY ARGUE THAT THIS LACK OF REGULATION HAS BEEN A CONTRIBUTING FACTOR TO THE GROWTH AND STRENGTH OF AMERICAN BUSINESS. BUT OTHERS ARGUE THAT AMERICAN BUSINESS IS NOT ACCOUNTABLE FOR ITS CONDUCT, AND ONE REASON FOR THE INSUFFICIENCY OF SOCIETAL CONTROLS IS THAT STATE LAW IS AN UNSATISFACTORY REGULATOR OF PROBLEMS WHICH ARE NATIONAL OR EVEN INTERNATIONAL IN THEIR EFFECT.

THE MOST APPARENTLY APPLICABLE FEDERAL STATUTES THROUGH WHICH FEDERAL INTERVENTION IN CORPORATE GOVERNANCE MIGHT BE EFFECTED ARE THE FEDERAL SECURITIES LAWS. BUT, THE COURTS - PARTICULARLY THE U.S. SUPREME COURT - HAVE BEEN HESITANT TO EXTEND THESE STATUTES TO INTERNAL CORPORATE MATTERS. A RECENT IMPORTANT CASE EXEMPLIFYING THIS HESITANCY IS SANTA FE V. GREEN.<sup>4/</sup> THAT U.S. SUPREME COURT DECISION INVOLVED A SHORT FORM MERGER UNDER DELAWARE LAW, BY WHICH OWNERS OF AT LEAST 90% OF A SUBSIDIARY'S STOCK MAY MERGE WITH

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<sup>4/</sup> SEE NOTE 1 SUPRA.

THAT SUBSIDIARY WITHOUT REQUESTING THE CONSENT OF MINORITY SHAREHOLDERS - WHO, IN TURN, MUST RECEIVE FAIR VALUE FOR THEIR SHARES. IN THEIR COMPLAINT, THE MINORITY SHAREHOLDERS IN SANTA FE DID NOT ALLEGE ANY MATERIAL MISREPRESENTATION OR OMISSION. RATHER, THEY ARGUED THAT RULE 10B-5, AN ANTIFRAUD PROVISION UNDER THE FEDERAL SECURITIES LAWS, WAS APPLICABLE TO A BREACH OF CORPORATE FIDUCIARY DUTY, IN THAT THE MAJORITY SHAREHOLDERS WERE NOT PURSUING A LEGITIMATE CORPORATE PURPOSE. THE U.S. SUPREME COURT, HOWEVER, REFUSED TO APPLY RULE 10B-5 TO ALLEGATIONS OF INTERNAL CORPORATE MISMANAGEMENT. IT STATED:

ABSENT A CLEAR INDICATION OF CONGRESSIONAL INTENT, WE ARE RELUCTANT TO FEDERALIZE THE SUBSTANTIAL PORTION OF THE LAW OF CORPORATIONS THAT DEALS WITH TRANSACTIONS IN SECURITIES, PARTICULARLY WHERE ESTABLISHED STATE POLICIES OF CORPORATE REGULATION WOULD BE OVERRIDEN. 5/

ALMOST FIFTEEN YEARS AGO, THE SEC AVOIDED AN OPPORTUNITY TO DEFINE THE DUTIES OF CORPORATE DIRECTORS. IN AN ADMINISTRATIVE DECISION IT WROTE:

THE [SECURITIES] ACT [OF 1933] DOES NOT PURPORT . . . TO DEFINE FEDERAL STANDARDS OF DIRECTORS' RESPONSIBILITY IN THE ORDINARY OPERATIONS OF BUSINESS ENTERPRISES AND NOWHERE EMPOWERS US TO FORMULATE ADMINISTRATIVELY SUCH REGULATORY STANDARDS. 6/

HOWEVER, IN CONDUCTING POST MORTEMES ON MANY OF THE GREAT FRAUDS OF THE 1960's, AND IN FORMULATING AND PROSECUTING THE QUESTIONABLE PAYMENTS PROGRAM, THE SEC BECAME INCREASINGLY INVOLVED IN DEFINING THE DUTIES AND RESPONSIBILITIES OF CORPORATE DIRECTORS, AND INQUIRING INTO THE ADEQUACY OF CURRENT CORPORATE GOVERNANCE PRACTICES.

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5/ 430 U.S. AT 479.

6/ FRANCHARD CORPORATION, 42 S.E.C. 164, 176 (1964),

THESE ISSUES WERE EXAMINED AT LENGTH LAST YEAR IN THE COMMISSION'S CORPORATE GOVERNANCE HEARINGS. ONE PRODUCT OF THOSE HEARINGS WAS A SET OF PROPOSED RULES ISSUED IN JULY TO MANDATE INCREASED DISCLOSURE ABOUT THE AFFILIATIONS OF CORPORATE DIRECTORS AND BOARD AND COMMITTEE STRUCTURE. Z/

THE LEGALITY OR WISDOM OF USING SEC DISCLOSURE POLICY TO CHANGE CORPORATE BEHAVIOR HAS LONG BEEN A SUBJECT OF DISCUSSION, AND THE COMMISSION'S JULY RELEASE TOUCHED OFF A HEATED DEBATE ON THIS QUESTION. IN PART, THIS WAS BECAUSE THE COMMISSION'S JULY RELEASE ENDORSED THE "EVOLUTION OF STRONGER, MORE INDEPENDENT BOARDS OF DIRECTORS." THE POPULAR CONSTRUCTION OF THIS ENDORSEMENT WAS THAT THE SEC INTENDED TO REQUIRE MORE INDEPENDENT DIRECTORS TO SIT ON CORPORATE BOARDS. MOREOVER, THE COMMISSION SPECIFICALLY STATED IN THE RELEASE THAT IT IS "DESIRABLE" THAT BOARD AUDIT, NOMINATING AND COMPENSATION COMMITTEES "NORMALLY BE COMPOSED ENTIRELY OF PERSONS INDEPENDENT OF MANAGEMENT."

BECAUSE I WAS CONCERNED ABOUT THE COMMISSION TAKING STEPS TOWARD MANDATING BOARD OR COMMITTEE STRUCTURE OR COMPOSITION I REGISTERED MY DISAGREEMENT FROM SUCH A PREDICATE FOR NEW DISCLOSURE REQUIREMENTS. MY DISAGREEMENT WAS BASED ON MY BELIEF THAT UNLESS AND UNTIL FEDERAL CHARTERING LEGISLATION IS ENACTED AND GIVEN TO THE SEC TO ADMINISTER, THE COMMISSION HAS NO AUTHORITY TO MANDATE THE STRUCTURE OR COMPOSITION

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Z/ SECURITIES ACT REL. 14970 (JULY 18, 1978).



OF CORPORATE BOARDS. FURTHER, SUCH A RESULT SHOULD NOT BE ACCOMPLISHED INDIRECTLY UNDER THE GUISE OF DISCLOSURE RULES. IT SEEMS TO ME THAT THE BALANCE BETWEEN FEDERAL AND STATE REGULATION OF CORPORATIONS AND DIRECTORS SHOULD ONLY BE CHANGED BY DELIBERATE ACTION ON THE PART OF ELECTED REPRESENTATIVES, AND NOT BY AN INDEPENDENT REGULATORY AGENCY.

AS A RESULT OF ITS JULY RULE PROPOSALS ON CORPORATE GOVERNANCE MATTERS, THE COMMISSION RECEIVED A RECORD NUMBER - ABOUT 600 - PUBLIC COMMENTS. ALMOST ALL WERE CRITICAL. HOWEVER, THE LETTERS WERE MOST CRITICAL OF THE PROPOSAL TO REQUIRE EACH DIRECTOR'S RELATIONSHIP TO THE CORPORATION TO BE CHARACTERIZED BY A LABEL - SUCH AS "MANAGEMENT," "AFFILIATED NON-MANAGEMENT," AND "INDEPENDENT." PRESUMABLY, THIS UPROAR RESULTED, AT LEAST IN PART, FROM A CONCERN THAT THESE LABELS WOULD BE THE BASIS FOR SUBSEQUENT REQUIREMENTS SPECIFYING BOARD COMPOSITION.

AFTER EXAMINING THESE PUBLIC COMMENTS, THE COMMISSION DETERMINED NOT TO REQUIRE ANY SUCH LABELS CHARACTERIZING INDIVIDUAL DIRECTORS. RATHER, THE COMMISSION DECIDED TO REQUIRE AFFIRMATIVE DISCLOSURE CONCERNING THE AFFILIATIONS OF CORPORATE DIRECTORS.

IN HIS STATEMENT AT THE OPENING OF THE COMMISSION'S DELIBERATIONS, CHAIRMAN HAROLD WILLIAMS SPECIFICALLY NOTED THAT THE COMMISSION DOES NOT DESIRE TO SUPPLANT STATE LAW OR PRIVATE SECTOR INITIATIVES TOWARDS DEVELOPING EFFECTIVE

MECHANISMS OF CORPORATE ACCOUNTABILITY. I AGREE WITH CHAIRMAN WILLIAMS' ANALYSIS. I BELIEVE THAT THE COMMISSION'S DECISION WITH RESPECT TO THE LABELING OF DIRECTORS WAS INFLUENCED BY CONSIDERATIONS OF FEDERALISM AND THE APPROPRIATE ROLE OF FEDERAL LAW AND STATE LAW IN DECIDING CORPORATE GOVERNANCE ISSUES.

AS A QUICK ASIDE, IN A RELATED MATTER, THE COMMISSION HAS RECENTLY RE-EVALUATED ITS REQUIREMENTS REGARDING THE DISCLOSURE OF REMUNERATION PAID BY PUBLIC CORPORATIONS TO THEIR EXECUTIVE OFFICERS. IT SHOULD BE EMPHASIZED THAT THESE ARE DISCLOSURE REQUIREMENTS - WHICH ARE APPROPRIATE UNDER THE FEDERAL SECURITIES LAWS - RATHER THAN ANY ATTEMPT TO REGULATE THE AMOUNT OR MANNER OF REMUNERATION - WHICH ARE MATTERS TO BE DETERMINED UNDER STATE CORPORATION LAW.

IN MY DISCUSSION OF CORPORATE GOVERNANCE I SUGGESTED THAT THE INCREASING FEDERAL INTEREST IN THAT SUBJECT MAY BE A CONSEQUENCE OF ABDICATION BY THE STATES OF THEIR RESPONSIBILITIES. WITH A TOUCH OF IRONY, I WILL BEGIN MY DISCUSSION OF CORPORATE TAKEOVERS WITH AN OBVERSE THESIS. THAT IS, THE INCREASED NUMBER OF STATE ANTI-TAKEOVERS STATUTES - ALSO CALLED SHARK REPELLENT LAWS - MAY BE, AT LEAST IN PART, A CONSEQUENCE OF THE FEDERAL GOVERNMENT'S ABDICATION OF ITS RESPONSIBILITIES.

AS I AM CERTAIN ALL OF YOU ARE AWARE, THIS DECADE HAS SEEN AN EXTRAORDINARY CONGLOMERATION OF CORPORATE POWER THROUGH CORPORATE TAKEOVERS. ALMOST EVERY DAY, THE BUSINESS PAGES OF OUR NATION'S NEWSPAPERS INCLUDE STORIES OF RUMORED TAKEOVERS, TAKEOVERS IN PROGRESS, AND THE CONSEQUENCES OF COMPLETED TAKEOVERS. MANY RECENT STOCK MARKET MOVEMENTS HAVE NOT BEEN BASED ON THE ECONOMIC FUNDAMENTALS OF CORPORATE ISSUERS, BUT RATHER ON THE PERCEIVED LIKELIHOOD OF A CORPORATION BEING A TAKEOVER RAIDER OR TARGET.

THE WILLIAMS ACT, ENACTED IN THE LATE 1960'S, PROVIDED FOR IMPROVED DISCLOSURE OF INFORMATION PERTAINING TO PERSONS SEEKING TO TAKE OVER CORPORATIONS. BUT, THE WILLIAMS ACT MAINTAINS A DECIDEDLY NEUTRAL POSITION ON THE FUNDAMENTAL ECONOMIC AND SOCIAL ISSUES INVOLVED IN TAKEOVERS. FURTHER, THERE IS SERIOUS QUESTION WHETHER THE FEDERAL ANTI-TRUST LAWS ARE AN EFFECTIVE BARRIER TO LARGE ECONOMIC CONGLOMERATES TAKING OVER SMALLER CORPORATIONS, ESPECIALLY NONRELATED INDUSTRIES.

THERE HAS BEEN AN OBVIOUS PUBLIC CONCERN ABOUT THESE DEVELOPMENTS. AND, BECAUSE OF THE PERCEIVED FAILURE OF THE FEDERAL GOVERNMENT TO PROTECT SMALLER, LOCAL BUSINESSES AGAINST THE PERCEIVED ECONOMIC IMPERIALISM OF THE CONGLOMERATES, THE STATES BEGAN TO FILL THE VOID. A LARGE NUMBER OF STATE LEGISLATURES HAVE ENACTED TAKEOVER STATUTES -

OR MORE APPROPRIATELY ANTI-TAKEOVER STATUTES. TRUE, THE NOMINAL PURPOSE OF THESE LAWS IS TO PROVIDE INCREASED INFORMATION ABOUT THE TAKEOVERS TO THE TARGET COMPANY'S SHAREHOLDERS, BUT THEIR MOST SIGNIFICANT EFFECT IS TO INCREASE - MOSTLY THROUGH DELAYING TACTICS - THE TARGET COMPANY'S ABILITY TO DEFEAT AN ATTEMPTED TAKEOVER. THE EXISTENCE OF THESE STATE LAWS, AND THEIR RELATION TO THE WILLIAMS ACT, HAS RAISED SOME MAJOR QUESTIONS OF FEDERALISM.

THE LEADING CASE IN THIS AREA IS THE FIFTH CIRCUIT'S RECENT DECISION IN GREAT WESTERN UNITED CORPORATION V. KIDWELL 8/ WHICH INVALIDATED THE IDAHO TAKEOVER STATUTE. THE STATE OF IDAHO HAS SOUGHT U.S. SUPREME COURT REVIEW OF THIS DECISION, SO MY REMARKS TODAY MAY BECOME DATED BECAUSE OF SUBSEQUENT ANALYSIS OF THE ISSUES.

THE FIFTH CIRCUIT REJECTED A NARROW PRE-EMPTION PRINCIPLE, URGED BY IDAHO, THAT THE STATE STATUTE WAS PRE-EMPTED ONLY IF IT COULD BE FOUND THAT IT WAS IMPOSSIBLE TO COMPLY WITH BOTH THE WILLIAMS ACT AND THE IDAHO STATUTE. INSTEAD, THE COURT FOUND THAT THE IDAHO STATUTE CONFLICTED WITH THE WILLIAMS ACT BECAUSE "IT STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS." IN DOING SO, THE COURT ACKNOWLEDGED THAT THE COMMISSION, IN ITS ROLE AS AN AMICUS CURIAE IN THE CASE, REJECTED THE NARROWER READING AND THAT DEFERENCE SHOULD BE GIVEN TO THE COMMISSION'S VIEWS.

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8/ SEE NOTE 2 SUPRA.

THE COURT THUS FOUND A "CONFLICT" BETWEEN THE WILLIAMS ACT AND THE IDAHO STATUTE IN THE DIFFERING POLICIES AND PURPOSES OF THE TWO STATUTES. IN THIS REGARD, SETTING FORTH THE LEGISLATIVE HISTORY OF THE WILLIAMS ACT, THE COURT NOTED THAT A "CORNERSTONE" OF THE WILLIAMS ACT WAS THE LAW'S DELIBERATE NEUTRALITY AMONG THE CONTESTANTS IN A TENDER OFFER. IN CONTRAST TO THE EVENHANDEDNESS OF THE WILLIAMS ACT, THE COURT DETERMINED THAT:

THERE IS NO REAL DISPUTE THAT THE IDAHO STATUTE - LIKE MOST OF THE STATE TAKEOVER LAWS - INCREASES A TARGET COMPANY'S ABILITY TO DEFEAT A TENDER OFFER. THE IDAHO LAW HELPS TARGET COMPANIES PRIMARILY THROUGH PROVISIONS NOT FOUND IN THE WILLIAMS ACT THAT GIVE THEM ADVANCE NOTICE OF A TENDER OFFER AND THE ABILITY TO DELAY THE COMMENCEMENT OF AN OFFER, BY MEANS SUCH AS INSISTING ON A HEARING. 9/

AND WITH RESPECT TO THE VALIDITY OF THE IDAHO STATUTE UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION, THE COURT CONCLUDED THAT IDAHO, WHILE IT HAS A LEGITIMATE INTEREST IN PROTECTING IDAHO INVESTORS, HAS NO LEGITIMATE INTEREST IN EXTENDING THIS PROTECTION EXTRATERRITORIALLY TO INVESTORS IN OTHER STATES.

IT SHOULD BE NOTED THAT, BECAUSE THE FIFTH CIRCUIT'S OPINION IS WRITTEN IN VERY BROAD LANGUAGE, WITH EXPLICIT APPLICATION TO STATE TAKEOVER LAWS GENERICALLY, ANY STATE WHICH HAS ENACTED SUCH A LAW IS LIKELY TO BE CONCERNED ABOUT THE COURT'S HOLDING.

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9/ Id. AT 1278.

WHETHER THE COMMISSION'S AMICUS POSITION IN GREAT WESTERN IS CORRECT, AND THE IDAHO TAKEOVER STATUTE IS PRE-EMPTED BY THE FEDERAL SECURITIES LAWS, REMAINS TO BE DECIDED BY THE U.S. SUPREME COURT. BUT EVEN A SUPREME COURT AFFIRMANCE OF THE FIFTH CIRCUIT WOULD NOT, TO MY MIND, END THE INQUIRY. IF THE WILLIAMS ACT IS UTILIZED TO PRE-EMPT STATE ANTI-TAKEOVER STATUTES, THE FEDERAL GOVERNMENT MAY WELL HAVE TO ADDRESS THE CONCERNS THAT LED TO THESE STATUTES. AND THOSE CONCERNS GO BEYOND INVESTOR PROTECTION AND THE NEUTRALITY POLICIES OF THE WILLIAMS ACT.

IN A RECENT SPEECH, THE DEPUTY DIRECTOR OF THE BUREAU OF COMPETITION OF THE FEDERAL TRADE COMMISSION SUGGESTED THE NECESSITY FOR CONGLOMERATE MERGER LEGISLATION WHICH WOULD "CONFRONT SQUARELY THE ISSUES OF DIRECTIONLESS, RANDOM CORPORATE GROWTH AND THE EFFECTS OF AGGREGATE CONCENTRATION." 9/ I HAVE FREQUENTLY EXPRESSED MY OPPOSITION TO INCREASINGLY BURDENSOME GOVERNMENT REGULATION. NONETHELESS, I BELIEVE THAT CORPORATE TAKEOVERS MAY BECOME AN APPROPRIATE SUBJECT FOR GREATER FEDERAL INTERVENTION IN THE ECONOMY.

WE ARE EXPERIENCING INCREASING ANXIETY CONCERNING WHETHER THIS NATION CAN RAISE THE CAPITAL NECESSARY TO REMAIN COMPETITIVE IN THE INTERNATIONAL MARKETPLACE. AVAILABLE CAPITAL RESOURCES SHOULD BE USED TO REPLACE OUTMODED PLANTS, DEVELOP NEW PRODUCTS, CREATE NEW JOBS AND FUND NEW INDUSTRIES. WHETHER CAPITAL SHOULD BE SPENT AT PRESENT LEVELS BY EXISTING CORPORATIONS TAKING OVER OTHER EXISTING CORPORATIONS AT PREMIUM PRICES IS AT LEAST AN OPEN QUESTION.

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9/ LEGAL TIMES OF WASHINGTON P. 27 (DEC. 4, 1978).

CORPORATE TAKEOVERS ARE HAVING A SIGNIFICANT, OLIGOPOLISTIC EFFECT UPON THE ECONOMY. MANY SUCCESSFUL SMALL AND MEDIUM-SIZED, AND A SUPRISING NUMBER OF LARGE CORPORATIONS, HAVE DISAPPEARED AS INDEPENDENT ENTITIES EITHER BY FALLING TO THE ATTACK OF THE TAKEOVER RAIDER OR BY EMBRACING THE FRIENDLIER, BUT EQUALLY FATAL, WHITE KNIGHT. INDEED, MANY POTENTIAL TARGET CORPORATIONS ARE BEING MANAGED WITH AS MUCH AN EYE TO PREVENTING A TAKEOVER AS TO ECONOMIC EFFICIENCY.

TAKEOVERS MAY CONTRIBUTE TO THE LIQUIDITY OF SECURITIES WHICH ARE SELLING BELOW THEIR TRUE VALUE, AND A TAKEOVER MAY BE A CHEAP AND EFFICIENT WAY FOR A CORPORATION TO EXPAND INTO A NEW AREA. THUS, IT CAN BE ARGUED THAT TAKEOVERS BENEFIT SHAREHOLDERS. NEVERTHELESS, THE DOMINATION OF THE ECONOMY BY CONGLOMERATES CAN, OVER TIME, ELIMINATE COMPETITION FROM THE ECONOMY, AND LEAD TO A CONTRACTION OF EMPLOYMENT OPPORTUNITIES. MOREOVER, MANY AMERICANS HAVE A HEALTHY SUSPICION OF LARGE AGGREGATIONS OF POWER.

I SHOULD BE QUICK TO STRESS THAT I DO NOT BELIEVE THAT MY CONCERNS CAN BE ADDRESSED BY THE COMMISSION UNDER ITS PRESENT STATUTORY MANDATE. CONGRESS DETERMINED IN THE WILLIAMS ACT THAT THE SEC SHOULD MAINTAIN A NEUTRAL POSTURE IN ATTEMPTED TAKEOVERS. FURTHER, EVEN IF CONGRESS SHOULD DETERMINE THAT FEDERAL INTERVENTION TO REGULATE TAKEOVERS IS WARRANTED THE SEC IS NOT NECESSARILY THE MOST APPROPRIATE AGENCY TO ADMINISTER ANY NEW LEGISLATION WHICH MIGHT BE ENACTED.

THE COMMISSION'S TRADITIONAL CONCERN FOR INVESTOR PROTECTION IS NOT SUFFICIENTLY BROAD TO ENCOMPASS THE GENERAL ECONOMIC ISSUES INVOLVED IN THE NATIONAL POLICIES AFFECTED BY TAKEOVERS. NEVERTHELESS, THERE HAVE BEEN PERIODS WHEN CONGRESS HAS RECOGNIZED THE INTER-RELATION OF THE NATIONAL POLICIES UNDERLYING THE SECURITIES AND ANTI-TRUST LAWS. DURING THE GREAT DEPRESSION, THROUGH SECURITIES TRANSACTIONS, SOME 15 HOLDING-COMPANY SYSTEMS CONTROLLED 80% OF ALL ELECTRIC ENERGY GENERATION, 98.5% OF ALL INTERSTATE ELECTRICAL TRANSMISSION AND 80% OF ALL NATURAL GAS PIPELINE MILEAGE IN THE UNITED STATES. UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, THE SEC WAS GRANTED CERTAIN REGULATORY AUTHORITY OVER THESE HOLDING COMPANIES AND PARTICULARLY THEIR FINANCING OF SECURITIES TRANSACTIONS. INDEED, DURING THE EARLY YEARS OF ITS EXISTENCE, ADMINISTERING THAT ACT WAS THE COMMISSION'S MOST SIGNIFICANT REGULATORY FUNCTION. AS A RESULT OF THE SEC'S EFFORTS THERE ARE TODAY 17 ACTIVE REGISTERED HOLDING COMPANY SYSTEMS, BUT THEY ACCOUNT FOR ONLY ABOUT ONE-FIFTH OF THE AGGREGATE ASSETS OF PRIVATELY-OWNED ELECTRIC AND GAS UTILITY AND GAS PIPELINE INDUSTRIES OF THE NATION. AND, MOST OF THE ELECTRIC AND GAS UTILITY COMPANIES WHICH WERE FORMERLY PART OF SUCH SYSTEMS ARE NOW INDEPENDENT COMPANIES.



ALTHOUGH ITS VERY SUCCESS CAUSED THE PUBLIC UTILITY HOLDING COMPANY ACT TO BECOME TODAY ONE OF THE COMMISSION'S LESS PUBLICLY NOTED STATUTES, PROFESSOR CARY OF COLUMBIA, A FORMER SEC CHAIRMAN, IN A THOUGHT-PROVOKING NEW YORK TIMES ARTICLE, REFERRED TO THAT ACT AS A POTENTIAL MODEL FOR RESOLVING THE CONTEMPORARY PROBLEMS RESULTING FROM CONGLOMERATE GROWTH. 10/

IN THAT ARTICLE, PROFESSOR CARY ASSERTS THAT THE REASON FOR THE PROLIFERATION OF TAKEOVERS BETWEEN UNRELATED INDUSTRIES IS NOT ECONOMIC EFFICIENCY, BUT THE EGO SATISFACTION INVOLVED IN GROWTH FOR ITS OWN SAKE. THE CURRENT SITUATION, HE BELIEVES, "IS POIGNANTLY REMINISCENT OF THE FRANTIC MANEUVERS BY PUBLIC UTILITY HOLDING COMPANIES" IN THE YEARS BEFORE THE PASSAGE OF THE PUBLIC UTILITY HOLDING COMPANY ACT. INASMUCH AS THERE IS A COMPARISON BETWEEN THE EARLIER ERA OF PYRAMIDING CONTROL OF PUBLIC UTILITIES AND WHAT HE CONSIDERS TO BE TODAY'S "GREAT DANGER IN CONCENTRATION HAVING NO RATIONAL THEME," PROFESSOR CARY'S CONCLUSIONS ARE INTRIGUING. HE WROTE:

PERHAPS LEGISLATORS SHOULD BE THINKING OF LIMITS UPON CONGLOMERATION WITHOUT RHYME OR REASON ... WE MIGHT HARK BACK TO THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, WHICH WALL STREET INVEIGHED AGAINST, ALTHOUGH IN THE LONG RUN VALUES WERE ENHANCED RATHER THAN DESTROYED. 11/

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10/ CARY, "WHEN FIRMS MERGE," NEW YORK TIMES (JUNE 23, 1978) PAGE A25.

11/ Id.

ALTHOUGH I AM NOT PRESENTLY ENDORSING PROFESSOR CARY'S PROPOSALS, I BELIEVE THEY DESERVE SERIOUS CONSIDERATION. NEVERTHELESS, I RECOGNIZE THAT THIS NATION HAS ENTERED A PERIOD OF DIMINISHED EXPECTATIONS REGARDING GOVERNMENT'S ABILITY TO SOLVE MANY PROBLEMS. THERE IS AN INCREASING HESITANCY TO CREATE ACRONYMIC STATUTES OR AGENCIES TO CORRECT ECONOMIC OR SOCIAL WRONGS. DISTRUST OF BIG BUSINESS IS BEING TEMPERED BY A DISTRUST OF GOVERNMENT AND DISGUST WITH BUREAUCRACY.

BUT, THE CORPORATE WORLD SHOULD TAKE ONLY LIMITED COMFORT IN THE RECENT ABSENCE OF LEGISLATION DIRECTED EITHER TO CORPORATE ACCOUNTABILITY OR CORPORATE TAKEOVER MATTERS. THE FACT THAT SUCH LEGISLATION HAS YET TO BE SERIOUSLY CONSIDERED IS NO ASSURANCE THAT IT WILL NOT BE FORTHCOMING.

LEGISLATION IS A REACTIVE PROCESS. LEGISLATORS GENERALLY PASS LAWS IN RESPONSE TO PERCEIVED CONTEMPORANEOUS EVILS. FOR EXAMPLE, ON THE FEDERAL LEVEL, THE MOST RECENT DOCUMENTATION OF WIDESPREAD CORPORATE ABUSES WAS SEEN IN THE DISCLOSURE OF QUESTIONABLE PAYMENTS TO FOREIGN PUBLIC OFFICIALS. THERE, THE SOCIAL PROBLEMS INVOLVED WERE CONSIDERED TO BE OF SUFFICIENT SERIOUSNESS THAT THEY OUTWEIGHED COUNTERVAILING ECONOMIC PROBLEMS AND OVERCAME CONGRESSIONAL HESITANCY TO INTERVENE IN THE INTERNATIONAL MARKETPLACE. THE RESULT IS THE FOREIGN CORRUPT PRACTICES ACT OF 1977, A MOST COMPREHENSIVE ANTI-CORRUPTION STATUTE.

I WOULD SUBMIT THAT THE LIKELIHOOD OF SIMILAR LEGISLATIVE INTERVENTION INTO THE CORPORATE GOVERNANCE OR TAKEOVER ISSUES IS DIRECTLY PROPORTIONAL TO THE EVIL PRESENTED IN THE NEXT SERIES OF CORPORATE SCANDALS BROUGHT TO THE PUBLIC'S ATTENTION. AND, IF SUCH LEGISLATION RESULTS, THE PRIVATE SECTOR WILL LOSE THAT MUCH MORE INDEPENDENCE AND SELF-INITIATIVE.

THUS, I APPEAL TO CORPORATE AMERICA TO BE RESPONSIBLE, HOPING THAT THE BUSINESS COMMUNITY WILL RECOGNIZE THE ALTERNATIVES. CORPORATIONS HAVE THE OPPORTUNITY TO ENJOY THE FRUITS OF THE NEWLY EMERGING PUBLIC SKEPTICISM TOWARDS REGULATION. THIS WOULD MEAN MORE PRIVATE SECTOR INITIATIVE THAT WOULD BENEFIT OUR ENTIRE ECONOMY AND SOCIETY IN GENERAL. ON THE OTHER HAND, A NEW WAVE OF DISCLOSURES OF PERCEIVED CORPORATE ABUSES MAY WELL RESULT IN MORE REGULATION - BY EITHER THE FEDERAL OR STATE GOVERNMENTS OR BOTH - AND LESSEN THE DECISION-MAKING INDEPENDENCE OF MANAGEMENT TO THE DISADVANTAGE OF US ALL.