NEWS

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REMARKS TO
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THE TENSION BETWEEN THE FIRST AMENDMENT AND THE FEDERAL SECURITIES LAWS

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MANY AMERICANS TODAY BELIEVE THAT THE GOVERNMENT HAS GROWN TOO BIG AND TOO POWERFUL. REGULATORY AGENCIES IN PARTICULAR HAVE BECOME TARGETS FOR ATTACK. BOTH INDIVIDUALS AND REGULATED BUSINESSES ARE SEARCHING FOR NEW WAYS TO LIMIT AND CONTROL GOVERNMENT'S INTRUSION INTO OUR DAILY LIVES. THE REGULATORY REFORM MOVEMENT HAS BROUGHT TOGETHER SOME UNLIKELY ALLIES WHO ARE FIGHTING GOVERNMENT REGULATION WITH SOME UNLIKELY WEAPONS. ONE OF THESE WEAPONS, WHICH HAS PROVED SURPRISINGLY SUCCESSFUL IN SOME SKIRMISHES BETWEEN BUSINESS AND GOVERNMENT, IS THE FIRST AMENDMENT PROTECTION OF FREE SPEECH.

I HAVE CHOSEN TO SPEAK TO THIS AUDIENCE TODAY ABOUT THE TENSION BETWEEN THE FIRST AMENDMENT AND THE FEDERAL SECURITIES LAWS FOR SEVERAL REASONS. FIRST OF ALL, I HAVE ATTEMPTED TO TALK ON THIS SUBJECT BEFORE BUT THE TOPIC WAS ALWAYS REJECTED BY THE PROGRAM CHAIRMAN IN FAVOR OF SOMETHING MORE TOPICAL OR MORE PERTINENT. HOWEVER, SINCE YOUR LUNCHEON CHAIRMAN IS SUCH AN OLD FRIEND AND HE HAD ALREADY PERSUADED ME TO SPEAK ON A MORE INTERESTING AND RELEVANT THEME TO ANOTHER LAWYER'S GROUP EARLIER THIS YEAR, I GAVE HIS SUGGESTIONS FOR A TOPIC FOR TODAY SHORT SHRIFT. SECONDLY, I WAS TOLD THAT THE ASSOCIATES OF THE

HEBREW UNIVERSITY WANTED TO ATTRACT A VARIED GROUP OF LAWYERS WITH FAR RANGING INTELLECTUAL INTERESTS TO THIS LUNCHEON, AND NOT JUST SOME NARROW SECTION OF THE SECURITIES BAR. AND IT SEEMED TO ME THAT ALTHOUGH IT MIGHT BE DIFFICULT TO RELATE RULE 10B-5 OR SEGMENT REPORTING TO THE JEWISH QUESTION, I COULD PERSUADE A BROAD GROUP OF NEW YORK LAWYERS TO CONSIDER THE FIRST AMENDMENT AS A POSSIBLE ANTIDOTE TO OVERREGULATION BY THE SEC.

FINALLY, AND MORE SERIOUSLY, I FEEL THAT MY POSITIONS AS A DISSENTING MAVERICK ON THE COMMISSION ARE SOMETIMES MISUNDERSTOOD. I DO NOT FAVOR REGULATORY REFORM AND LIMITATIONS ON THE POWER OF GOVERNMENT BECAUSE I AM PRO-BUSINESS, ALTHOUGH I WILL ADMIT THAT SOME OF MY BEST FRIENDS ARE BUSINESSMEN OR PRIVATE PRACTITIONERS. RATHER, I HAVE ALWAYS BEEN DEEPLY CONCERNED ABOUT PROTECTING THE INDIVIDUAL FROM THE STATE. IN THIS CONNECTION, I WOULD NOTE THAT MR. JUSTICE BRANDEIS, IN A FAMOUS DISSENT CONCERNING THE FOURTH AND FIFTH AMENDMENTS, WROTE:

> THE MAKERS OF OUR CONSTITUTION ... KNEW THAT ONLY A PART OF THE PAIN, PLEASURE AND SATISFACTIONS OF LIFE ARE TO BE FOUND IN MATERIAL THINGS. THEY SOUGHT TO PROTECT AMERICANS IN THEIR BELIEFS, THEIR THOUGHTS, THEIR EMOTIONS AND THEIR SENSATIONS. THEY CONFERRED, AS AGAINST THE GOVERNMENT, THE RIGHT TO BE LET ALONE--THE MOST COMPREHENSIVE OF RIGHTS AND THE RIGHT MOST VALUED BY CIVILIZED MEN. 1/

WHEN I WAS YOUNGER, I VIEWED THE BILL OF RIGHTS AS PROTECTIONS WHICH WERE NEEDED PRIMARILY BY THE POOR AND BY INTELLECTUALS. I DID NOT KNOW MANY BUSINESSMEN THEN AND THOSE I KNEW SEEMED QUITE ABLE TO PROTECT THEMSELVES. THE ONLY EMPLOYMENT SITUATIONS TO WHICH I APPLIED THE FREE SPEECH PROTECTIONS OF THE FIRST AMENDMENT WERE TEACHING AND PUBLISHING. I SAW NO CONNECTION BETWEEN ACADEMIC FREEDOM AND THE FREEDOM OF AN INVESTMENT BANKER TO TELL HIS CUSTOMERS ABOUT HIS PRODUCTS IN HIS OWN WORDS.

HOWEVER, AS GOVERNMENT HAS EXTENDED ITS POWER OVER AND INTO THE PRIVATE SECTOR, THE LINE BETWEEN COMMERCE AND POLITICS IS BECOMING INCREASINGLY INDISTINCT. FURTHER, THERE IS AN INCREASING RECOGNITION THAT ALTHOUGH CORPORATIONS MAY ONLY BE JURIDICAL PERSONS, EMPLOYEES (AND EVEN OFFICERS AND DIRECTORS) ARE PEOPLE

1/ OLMSTEAD V. UNITED STATES, 277 U.S. 438, 478 (1927) (MR. JUSTICE BRANDEIS, DISSENTING).

AND THEY ARE ENTITLED AS INDIVIDUALS TO CONSTITUTIONAL PROTECTIONS AGAINST GOVERNMENT ACTION WHICH ADVERSELY AFFECTS OR INHIBITS THEIR COMMERCIAL ACTIVITIES. WHEN THESE INSIGHTS ARE COUPLED WITH THE POLITICS OF REGULATORY REFORM THEY CAN GIVE REGULATORS LIKE ME SOME PAUSE IN APPLYING THE RESTRICTIONS ON SPEECH WHICH ARE AT THE VERY HEART OF THE FEDERAL SECURITIES LAWS.

I WAS NOT ALONE IN ASSUMING, UNTIL RECENTLY, THAT THE FIRST AMENDMENT DID NOT GENERALLY REACH THE KIND OF SPEECH IN WHICH BUSINESS ENTITIES ENGAGE. IN 1942 THE SUPREME COURT RULED 2/ THAT THE FIRST AMENDMENT IMPOSED NO RESTRAINT ON GOVERNMENT WITH RESPECT TO THE REGULATION OF PURELY COMMERCIAL ADVERTISING OR SPEECH. NEVERTHELESS, IN SOME CASES, THE COURTS PROTECTED COMMERCIAL SPEECH. FOR EXAMPLE, IN 1952 THE SUPREME COURT HELD THAT COMMERCIAL MOTION PICTURES ARE ENTITLED TO FIRST AMENDMENT PROTECTION EVEN THOUGH THEIR PRODUCTION, DISTRIBUTION AND EXHIBITION IS A LARGE SCALE BUSINESS. 3/ ONE FEDERAL DISTRICT COURT HELD 4/ THAT THE FACT THAT A LOBBYIST WAS PAID DID NOT DEPRIVE HIM OF FIRST AMENDMENT PROTECTIONS.

2/ VALENTINE V. CHRESTENSEN, 316 U S. 52 (1942).

3/ BURSTYN V. WILSON, 343 U.S. 494 (1952).

4/ MOFFETT V. KILLIAN, 360 F. SUPP. 228 (D. CONN. 1973).

AND IN THE FAMOUS CASE OF NEW YORK TIMES V. SULLIVAN 5/ THE SUPREME COURT HELD THAT A PAID-FOR NEWSPAPER ADVERTISEMENT IS PROTECTED BY THE FIRST AMENDMENT IF THE NATURE OF THAT ADVERTISEMENT IS POLITICAL OR EDITORIAL.

UNTIL 1975, HOWEVER, PURELY COMMERCIAL SPEECH APPEARED TO BE OUTSIDE ANY FIRST AMENDMENT PROTECTION. SEVERAL SUPREME COURT DECISIONS THEN DRASTICALLY ALTERED THE LAW. IN BIGELOW V. VIRGINIA 6/ THE SUPREME COURT HELD UNCONSTITUTIONAL A STATE LAW WHICH PROHIBITED THE ADVERTISING OF ABORTION SERVICES. RECOGNIZING THE INTERRELATIONSHIP BETWEEN COMMERCIAL AND POLITICAL SPEECH, THE COURT NOTED THAT BECAUSE SPEECH RELATES TO THE MARKET PLACE OF PRODUCTS OR OF SERVICES DID NOT MAKE IT VALUELESS IN THE MARKET PLACE OF IDEAS. ALTHOUGH THE COURT FOUND IT UNNECESSARY TO DECIDE THE PRECISE LEVEL OF CONSTITUTIONAL PROTECTION, IT DID HOLD THAT COMMERCIAL SPEECH INCLUDING ADVERTISING, IS WITHIN THE FIRST AMENDMENT'S PROTECTION.

AFTER BIGELOW IT WAS RELATIVELY CLEAR THAT SPEECH WHICH ENTAILED A COMMERCIAL ASPECT COULD BE PROTECTED - AT LEAST IF THERE WAS A POLITICAL OVERTONE TO THE SPEECH.

5/ 376 U.S. 254 (1964).

6/ 421 U.S. 809 (1975).

LEFT OPEN, HOWEVER, WAS THE QUESTION OF WHETHER PURELY COMMERCIAL SPEECH, LACKING POLITICAL OR EDITORIAL ELEMENTS COULD BE PROTECTED. THAT QUESTION WAS ANSWERED IN THE AFFIRMATIVE BY VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL. 7/ IN THAT CASE, THE COURT HELD THAT A STATE MAY NOT PROHIBIT A LICENSED PHARMACIST FROM ADVERTISING THE PRICES OF PRESCRIPTION DRUGS. THIS WAS THE FIRST TIME THAT THE COURT HELD THAT "PURE" COMMERCIAL SPEECH IS NOT WHOLLY OUTSIDE THE FIRST AMENDMENT'S PROTECTION. UTILIZING THE REASONING OF ALEXANDER MEIKLEJOHN, 8/ A NOTED FIRST AMENDMENT SCHOLAR, THE COURT INDICATED THAT COMMERCIAL SPEECH SERVES AN INDISPENSABLE ROLE IN THE ALLOCATION OF RESOURCES IN THE FREE ENTERPRISE SYSTEM. IN A DEMOCRACY, THE PUBLIC INTEREST IS SERVED BY INFORMING THE PUBLIC. THE STATE CANNOT JUSTIFY A BAN ON COMMERCIAL SPEECH BY CLAIMING A NEED FOR PUBLIC IGNORANCE.

ANOTHER RECENT SUPREME COURT CASE, LINNMARK ASSOCIATES, INC. v. WILLINGBORO, 9/ PROVIDED ADDITIONAL GUIDANCE CONCERNING THE NATURE AND EXTENT OF THIS NEW COMMERCIAL SPEECH DOCTRINE. IN THAT CASE THE

7/ 425 U.S. 748 (1976).

8/ SEE GENERALLY A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

9/ 431 U.S. 85 (1977).

COURT STRUCK DOWN AN ORDINANCE WHICH PROHIBITED "FOR SALE" SIGNS. THE ORDINANCE HAD BEEN ENACTED FOR THE PURPOSE OF STEMMING THE FLIGHT OF WHITE HOMEOWNERS FROM A RACIALLY INTEGRATED NEIGHBORHOOD. WRITING FOR THE COURT, JUSTICE MARSHALL STATED THAT THE ORDINANCE COULD NOT BE SUSTAINED ON THE UNSUBSTANTIATED GROUNDS THAT IT FURTHERED AN IMPORTANT GOVERNMENTAL OBJECTIVE. NOR WAS IT SUSTAINABLE ON THE GROUNDS THAT IT WAS THE LEAST RESTRICTIVE METHOD AVAILABLE TO ACCOMPLISH WHATEVER GOVERNMENTAL OBJECTIVE WAS SOUGHT. THIS CASE, LIKE THE EARLIER DECISIONS IN BIGELOW AND VIRGINIA BOARD OF PHARMACY, INDICATES THAT, WHILE COMMERCIAL SPEECH IS NOT ENTITLED TO AS MUCH PROTECTION AS POLITICAL SPEECH, IT WILL BE MEANINGFULLY PROTECTED. INDEED, IN THE SEVEN SUPREME COURT CASES WHICH HAVE DEALT WITH COMMERCIAL SPEECH PROBLEMS, FIRST AMENDMENT INTERESTS HAVE PREVAILED IN FIVE OF THEM.

AS WITH ANY DEVELOPING AREA, THE PRECISE DIRECTION IN WHICH THE SUPREME COURT IS MOVING IS UNCLEAR. NEVERTHELESS, I BELIEVE THE COURT IS APPLYING AT LEAST THREE BASIC PRINCIPLES.

FIRST, COMMERCIAL SPEECH, EVEN "PURE" COMMERCIAL SPEECH SUCH AS PRICE LISTS OR ACCOUNTING DATA, ARE NO LONGER WHOLLY OUTSIDE THE FIRST AMENDMENT'S PROSCRIPTIONS ON GOVERNMENTAL INTERFERENCE.

SECOND, COMMERCIAL SPEECH, EVEN IF PROTECTED BY THE FIRST AMENDMENT, MAY BE, TO SOME EXTENT, REGULATED BY THE GOVERNMENT. RESTRICTIONS ON THE TIME, PLACE AND MANNER OF COMMERCIAL SPEECH WILL BE UPHELD IF THEY ARE REASONABLY RELATED TO VALID GOVERNMENTAL OBJECTIVES.

THIRD, CERTAIN TYPES OF COMMERCIAL SPEECH ARE NOT PROTECTED. FOR EXAMPLE, SPEECH WHICH PROPOSES AN ILLEGAL TRANSACTION CAN BE SUPPRESSED. MORE IMPORTANT FOR PRESENT PURPOSES, THE FIRST AMENDMENT DOES NOT PROTECT COMMERCIAL SPEECH WHICH IS FALSE, MISLEADING OR DECEPTIVE.

THE APPLICATION OF THE DEVELOPING LAW ON COMMERCIAL FREE SPEECH TO THE FEDERAL SECURITIES LAWS REMAINS TO BE SEEN. SINCE THE FEDERAL SECURITIES LAWS ARE A SCHEME OF REGULATION OF COMMERCIAL SPEECH, THERE IS AN OBVIOUS TENSION BETWEEN SUCH REGULATION AND THE FIRST AMENDMENT. THE SEC's MANDATED DISCLOSURE REQUIREMENTS, COUPLED WITH THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS EFFECT A CHILL ON FREE SPEECH BY PUBLIC COMPANIES. IN ADDITION, THE MANNER IN WHICH THE REGISTRATION PROCESS FOR PUBLIC OFFERINGS OPERATES OFTEN ACTS AS A PRIOR RESTRAINT ON SUCH SPEECH. NEVERTHELESS, SEC REGULATION GENERALLY RELATES TO THE TIME, PLACE, OR MANNER OF SPEECH OR PROHIBITS DECEPTIVE OR MISLEADING SPEECH. SUCH TYPES OF RESTRICTIONS ON COMMERCIAL SPEECH HAVE WITHSTOOD ATTACK UNDER THE FIRST AMENDMENT IN THE CASES WHICH I MENTIONED EARLIER.

EARLIER THIS YEAR OF THE COMMISSION'S STATEMENT OF POLICY ON MUTUAL FUND ADVERTISING. THE STATEMENT OF POLICY WAS DEVELOPED IN RESPONSE TO A 1950 REVIEW OF SALES LITERATURE BY THE COMMISSION WHICH REVEALED MANY QUESTIONABLE PRACTICES IN THE SALE OF MUTUAL FUNDS. THE STATEMENT OF POLICY DID NOT CONTAIN PROHIBITIONS AGAINST REPRESENTATIONS IN SALES LITERATURE, BUT IT DID PROVIDE THAT IF CERTAIN TYPES OF STATEMENTS WERE MADE THEY HAD TO BE JUXTAPOSED WITH CERTAIN ADDITIONAL INFORMATION OR DISCLAIMERS IN ORDER THAT THE STATEMENTS WOULD NOT BE MISLEADING OR DECEPTIVE. ALTHOUGH IT WAS POSSIBLE TO ARGUE THAT THE STATEMENT OF POLICY DID NOT VIOLATE CONSTITUTIONAL PROSCRIPTIONS, THE COMMERCIAL FREE SPEECH CASES AT LEAST RAISED A QUESTION ABOUT THE PROPRIETY OF THIS TYPE OF REGULATORY APPROACH TO ADVERTISING. WHEN THE COMMISSION VOTED TO RESCIND THE ENTIRE STATEMENT OF POLICY AND TO REPLACE IT WITH THE GENERAL ANTIFRAUD RULES, MY OWN VOTE ON THIS ISSUE WAS INFLUENCED BY FIRST AMENDMENT CONCERNS.

IF THE SUPREME COURT BECOMES INTERESTED IN EXPANDING FIRST AMENDMENT PROTECTION OF COMMERCIAL SPEECH, ASPECTS OF THE COMMISSION'S ENFORCEMENT AND REGULATORY PROGRAMS COULD PROVE OPEN TO CONSTITUTIONAL ATTACK. THE SCOPE OF THE ANTIFRAUD PROVISIONS OF THE SECURITIES ACTS,

PARTICULARLY RULE 10B-5 UNDER THE SECURITIES EXCHANGE ACT OF 1934 HAS COME UNDER CRITICAL SCRUTINY BY THE JUDICIARY IN RECENT YEARS. I BELIEVE THAT THE CHANCES ARE REMOTE THAT THE SUPREME COURT WOULD HOLD AS SUBJECT TO THE PROTECTION OF THE FIRST AMENDMENT THE DELIBERATE FALSIFICATION OF INVESTMENT ADVICE, SALES LITERATURE, OR ANY OTHER DELIBERATE MISREPRESENTATIONS MADE TO SELL SECURITIES. INDEED, IN THE 1976 CASE OF SEC V. WORLD RADIO MISSION, 12/ THE FIRST CIRCUIT HELD THAT SUCH PROHIBITIONS DID NOT INTRUDE ON FIRST AMENDMENT FREEDOM OF RELIGION RIGHTS.

AN ISSUE WHICH CONCERNS ME, HOWEVER, INVOLVES THE IMPACT OF THE COMMERCIAL SPEECH DECISIONS ON THE DEVELOPING STANDARDS FOR CULPABILITY UNDER THE ANTI-FRAUD PROVISIONS OF THE SECURITIES LAW. AS MOST OF YOU PROBABLY KNOW, THE SUPREME COURT HAS ALREADY HELD, IN ERNST & ERNST V. HOCHFELDER, 13/ THAT IN A PRIVATE DAMAGE ACTION MORE THAN SIMPLE NEGLIGENCE IS REQUIRED FOR THE ASSESSMENT OF LIABILITY UNDER RULE 10B-5. BUT SEVERAL IMPORTANT ISSUES REMAIN. MUST THE COMMISSION IN AN EQUITABLE ACTION UNDER RULE 10B-5 PROVE MORE THAN SIMPLE NEGLIGENCE BEFORE AN INJUNCTION WILL ISSUE? IS MORE THAN NEGLIGENCE NECESSARY TO SUCCESSFULLY PROSECUTE EITHER A DAMAGE OR AN INJUNCTIVE ACTION UNDER SECTION 17 OF THE SECURITIES ACT OF 1933?

12/ 544 F.2D 535 (1ST CIR. 1976).

13/ 425 U.S. 185 (1976).

THE COMMERCIAL SPEECH DECISIONS MAY NOT ONLY INFLUENCE THE JUDICIAL RESOLUTION OF THESE ISSUES, BUT ALSO RELATED ISSUES CONCERNING THE APPROPRIATE REMEDY FOR PROVEN SECURITIES LAWS VIOLATIONS. MAY A COURT, FOR EXAMPLE, ENJOIN FUTURE COMMERCIAL SPEECH ON THE BASIS OF PAST STATEMENTS WHICH, WHILE MISLEADING, WERE MERELY NEGLIGENT? RECENT CIRCUIT OPINIONS INVOLVING FTC PROCEEDINGS SEEKING "CORRECTIVE ADVERTISING" 14/ -- SUCH AS THE ATTEMPT TO GET WARNER-LAMBERT TO RETRACT ITS LISTERINE ADVERTISEMENTS -- HAVE INDICATED THAT THE REMEDIAL ORDER MUST BE THE LEAST INTRUSIVE RESTRICTION ON THE PROTECTED SPEECH. AT LEAST ONE COMMENTATOR 15/ HAS SUGGESTED THAT THERE NEED BE A REQUIREMENT OF "BAD FAITH, RECKLESS INDIFFERENCE OR COMPELLING REASON" BEFORE THE CORRECTIVE ADVERTISING REMEDY OF THE FTC CAN BE USED.

THE SAME ARGUMENT MIGHT BE MADE WITH RESPECT TO THE SEC'S POWER TO OBTAIN INJUNCTIVE RELIEF WHEN THE GRAVAMEN OF THE COMPLAINT IS SIMPLY THAT THE DEFENDANT WAS NEGLIGENT AT SOME TIME IN THE PAST. THIS COULD RESULT IN A REQUIREMENT FOR SOME INTERFACE BETWEEN SPEECH AND CONDUCT BEFORE THE ISSUANCE OF AN INJUNCTION REGULATING COMMERCIAL SPEECH. OF COURSE, IN MOST ANTIFRAUD CASES UNDER THE SECURITIES LAWS SUCH AN INTERFACE IS PRESENT.

14/ WARNER-LAMBERT CO. V. FTC, 562 F.2D 749 (D C. CIR. 1977); NATIONAL COMMISSION ON EGG NUTRITION V. FTC, 570 F.2D 157 (7TH CIR. 1977).

15/ ROBERTS, TOWARD A GENERAL THEORY OF COMMERCIAL SPEECH AND THE FIRST AMENDMENT, 40 OHIO ST. L. J. 115, 151 (1979).

It is, however, on the Commission's disclosure regulations that the commercial speech decisions may have the greatest impact. Substantive disclosure requirements as well as the manner in which the Commission sets and enforces an increasingly qualitative standard of materiality, may have to be reexamined in light of First Amendment protections.

Let me give you a specific example of how First Amendment concerns can liberalize disclosure policy. Those of you who have practiced securities law for some time are probably aware that for many years the Commission took the position that only objectively verifiable, backward-looking information could be included in documents filed with the Commission. Projections, appraisals, and other forward-looking valuation data were considered per se misleading and were forbidden in prospectuses or merger proxy statements. About 1972 this "hard information" theory of disclosure began to erode. The Commission's prescience was remarkable. It is very doubtful that, under the commercial speech cases, the Commission could continue to justify its old approach to forward-looking information.

Recently, after many attempts to deal with the problems of disclosing projections, the Commission adopted a safe harbor rule. 16/ This rule provides that an issuer will

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16/ Securities Act Release No. 6084 (June 25, 1979).

NOT BE HELD LIABLE FOR PUBLISHING A PREDICTION ABOUT ITS BUSINESS WHICH TURNS OUT TO BE INACCURATE SO LONG AS THE FORWARD-LOOKING INFORMATION HAD BEEN PUBLISHED IN GOOD FAITH AND HAD A REASONABLE BASIS AT THE TIME OF ITS PUBLICATION.

NEVERTHELESS, SOME FREE SPEECH QUESTIONS LINGER. AS WE ALL KNOW, AS A PRACTICAL MATTER, SAFE HARBOR RULES, ALTHOUGH ENUNCIATED AS "NON-EXCLUSIVE," TEND TO FORCE DISCLOSURE INTO A RIGID FORMAT SO AS TO MEET THE STANDARDS OF THE SAFE HARBOR RULE. IS THIS KIND OF PRACTICAL RESTRICTION ON THE MANNER IN WHICH DISCLOSURE IS TO BE MADE BY ISSUERS CONSTITUTIONALLY PERMISSIBLE EVEN UNDER THOSE CASES WHICH HOLD THAT SOME TIME, PLACE AND MANNER RESTRICTIONS ARE PERMISSIBLE? ALTHOUGH I WOULD ANSWER THIS QUESTION IN THE AFFIRMATIVE, I FEEL IT IS A QUESTION WORTH THINKING ABOUT.

THE CAPITAL RAISING PROBLEMS OF SMALL BUSINESS IS ANOTHER AREA FOR POSSIBLE CONSIDERATION IN TRYING TO CONNECT DEREGULATION AND THE FIRST AMENDMENT. IT IS CURRENTLY FASHIONABLE TO ARGUE THAT SEC DISCLOSURE POLICIES HAVE EFFECTIVELY PRECLUDED SMALL OR NEW BUSINESSES FROM RAISING CAPITAL BECAUSE OF DETAILED AND RIGID REQUIREMENTS THAT DISCLOSURES BE ACCOMPLISHED IN CERTAIN WAYS. ONE EXAMPLE IS THE REQUIREMENT THAT AUDITED FINANCIAL STATEMENTS BE INCLUDED IN A 1933 ACT REGISTRATION STATEMENT. THE "COMMERCIAL SPEECH" CASES COULD LEAD TO A QUESTIONING OF REQUIRED DISCLOSURES IN SUCH A PRECISE FORMAT. SUCH

REGULATION COULD BE VIEWED AS GOING BEYOND THE REGULATION OF DECEPTION AND INDEED BEYOND THE TIME, PLACE AND MANNER RESTRICTIONS WHICH HAVE BEEN LEGITIMIZED BY THE SUPREME COURT.

THE COMMISSION MAY ALSO BE CONFRONTED BY PROBLEMS IN AN EVEN MORE SENSITIVE AREA - THAT OF CORPORATE POLITICAL SPEECH. THIS PROBLEM IS ILLUSTRATED BY THE SUPREME COURT DECISION IN FIRST NATIONAL BANK OF BOSTON V. BELLOTTI. 17/ THAT DECISION HELD UNCONSTITUTIONAL A MASSACHUSETTS STATUTE WHICH PROHIBITED ANY CORPORATION FROM MAKING CONTRIBUTIONS OR EXPENDITURES OF ITS FUNDS WITH RESPECT TO A STATE REFERENDUM. THE COURT DID NOT HOLD THAT CORPORATIONS AS SUCH WERE PERSONS WHO ENJOYED FULL FIRST AMENDMENT PROTECTION. RATHER, THE COURT FOCUSED ON THE KIND OF SPEECH INVOLVED.

THE ESSENCE OF THE BELLOTTI OPINION SEEMS TO BE THAT THE FIRST AMENDMENT PROTECTS POLITICAL SPEECH AND THAT THE SOURCE OF SUCH SPEECH IS IRRELEVANT. ALTHOUGH THE COURT INDICATED THAT IN SOME CIRCUMSTANCES THE STATE MIGHT BE ABLE TO DEMONSTRATE A COMPELLING INTEREST WHICH WOULD VALIDATE THIS KIND OF RESTRICTION, THE RECORD IN BELLOTTI DID NOT DEMONSTRATE ANY SUCH INTEREST. THE COMMISSION WILL NO DOUBT HAVE TO DEAL IN THE FUTURE WITH THIS PROBLEM OF POLITICAL SPEECH IN THE CORPORATE ARENA.

17/ 435 U S. 765 (1978).

As I have indicated throughout this speech, I do not believe that the SEC is about to be put out of business by a Supreme Court decision to the effect that the disclosure scheme of the federal securities laws violates the First Amendment. At the same time, the commercial free speech cases are being reviewed by regulators who are already sensitized to the public's demands for less intrusive government regulation of business. The Commission is therefore receptive as a matter of policy to suggestions that the private sector should shoulder more responsibility for the disclosure of information to investors and shareholders. At the very least, the government should not be exercising unnecessary prior restraint on what corporations disclose. Rather, the Commission should be exercising an oversight or audit function. Moreover, the Commission should not mandate the specific type and format of disclosure so as to inhibit or foreclose meaningful commercial speech.

A variety of political and economic pressures are forcing the independent federal regulatory agencies to review their mandates and to alter their regulatory policies. The SEC is no exception to this ongoing critical reexamination. Since disclosure by public corporations is the cornerstone of the federal securities laws, any

SERIOUS REGULATORY REFORM AT THE COMMISSION WILL NECESSARILY AFFECT THE FORMULATION, IMPLEMENTATION AND ENFORCEMENT OF DISCLOSURE REQUIREMENTS. I BELIEVE AND HOPE THAT AN EFFORT TO FOSTER AND PROTECT COMMERCIAL FREE SPEECH WILL INFLUENCE THE COMMISSION'S CURRENT AND FUTURE REGULATORY INITIATIVES.

PUBLIC CORPORATIONS HAVE A NEED AND A DESIRE TO COMMUNICATE EFFECTIVELY WITH THEIR SHAREHOLDERS AND OTHER INVESTORS. GOVERNMENT MANDATED DISCLOSURE, HOWEVER, CHILLS BOTH CREATIVITY AND COMPETITION IN COMMERCIAL SPEECH. ONE OF THE CHALLENGES FOR THE COMMISSION IS TO RESOLVE THE TENSION BETWEEN THE FIRST AMENDMENT AND THE SECURITIES LAWS IN A WAY WHICH WILL CREATE INCENTIVES FOR FREER AND MORE MEANINGFUL DISCLOSURE BY PUBLIC CORPORATIONS, WITHOUT JEOPARDIZING LEGITIMATE DEMANDS FOR INVESTOR PROTECTION.