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Legislative Approaches to Corporate Governance

Howard M. Metzenbaum *

In the last session of Congress, I introduced the Protection of Shareholders' Rights Act of 1980.[1] This bill establishes federal minimum standards for the composition of corporate boards, duties of directors, and certain shareholder rights. It is designed to make corporations more accountable to their shareholders and to the public.

There is widespread agreement within and without the business community that reforms are necessary in the governance of the nation's major corporations. There is no agreement, however, on the need for federal legislation to bring about those essential reforms. This issue raises two basic questions: First, do major and pressing problems exist? Second, is action in the form of legislation necessary to solve those problems in a timely manner? The answer to both these questions is yes.

There is no doubt that we face serious problems in the governance of our major corporations. In recent years, a corporate management style has appeared that is unresponsive to both shareholders and the public interest. In a recent issue of *Chief Executive*, a magazine written by and for top corporate executives, Arnold Bernhard, research chairman of the Value Line Investment Survey, had this to say about today's corporations:

> Management's self-interest now propels them to give first consideration to independent survival of the corporation itself, to their own salaries and bonuses, and to their standing in the communities where they live. The individual investor who put up the capital and took the risk to start the business is now being relegated to second class.[2]

Mr. Bernhard's observation is borne out by a recent episode involving David Norr, a respected oil analyst with Lieber and Company. Mr. Norr has consistently criticized oil company diversification into non-energy areas like department stores, newspapers, and restaurants. He has argued that oil company stockholders would do far better if excess cash went into buying up the company's own stock.

Mr. Norr sells his good advice to his clients. But when Mr. Norr had the temerity at a security analysts' meeting last year to ask an ARCO executive to justify the company's purchase of Anaconda Copper, he received a response that has become far too typical. If ARCO's shareholders don't like management policy, the executive replied, "they can always sell their shares and invest elsewhere."[3]

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* United States Senator, State of Ohio. ©1981 Senator Howard M. Metzenbaum.

1 S. 2567, 96th Cong., 2d Sess. (1980).

2 Bernhard, *The Widening Gulf Between Management and Ownership*, CHIEF EXECUTIVE, Spring 1979, at 40.

3 Wall St. J., Dec. 4, 1979, § 1, at 6. This attitude is prevalent among many top executives. The Wall Street Journal recently reported that shareholders "especially like to ask about executives' pay. 'It really bothers me,' says James Bere, chairman and chief executive of Borg-Warner Corporation. 'I don't think it's anyone's business.' " Wall St. J., April 8, 1981, at 31.

"Students of the evolution of the modern corporation will note," Mr. Norr subsequently stated, "that shareholders once had the right to remove directors at will. Today, management tells the owners to remove themselves from the corporation."[4]

Mr. Bernhard's point is further underscored by the undisputed fact that for years leading companies have engaged routinely in questionable and even illegal activities. Important corporations have made illegal political contributions here at home; have made a practice of paying bribes to officials of foreign governments; and with the full knowledge and consent of management, have falsified their books to cover up such payments.

In a major 1976 report on illegal corporate payments, the Securities and Exchange Commission (SEC) declared:

> The almost universal characteristic of the cases reviewed to date by the Commission has been the apparent frustration of our system of corporate accountability which has been designed to assure that there is a proper accounting of the use of corporate funds and that documents filed with the Commission and circulated to shareholders do not omit or misrepresent material facts. Millions of dollars of funds have been inaccurately recorded in corporate books and records to facilitate the making of questionable payments. Such falsification of records has been known to corporate employees and often to top management, but often has been concealed from outside auditors and counsel and outside directors.[5]

Here are just a few examples:

—Between 1960 and 1972, Gulf Oil Corp. contributed $6.8 million to domestic political campaigns, $5.4 million of which was returned to the United States from foreign countries in off-book transactions. In addition, Gulf's political contributions in seven foreign countries during that period totaled approximately $6.9 million. Gulf used false accounting procedures and a subsidiary in the Bahamas to launder approximately $10 million for both foreign and domestic use.[6]

—From 1967 to 1972, Ashland Oil, Inc. made domestic political contributions totaling $850,000, of which only $25,700 were legal. Those funds were improperly recorded in Ashland's books.[7]

—Minnesota Mining & Manufacturing Co. misappropriated and placed in a secret fund the sum of $633,997 to be used for domestic political contributions. The assets of that secret fund were falsely recorded on the books as foreign insurance premium expenses and as foreign legal expenses.[8]

But the problems that exist in today's corporate world go far beyond the issue of illegal payments. The author of a recent *Fortune* article reported with some surprise:

> A look at the record [of the top U.S. companies] since 1970 shows that a surprising number of them have been involved in blatant illegalities. . . . Of the 1,043 major corporations in the study, 117, or 11% have been involved in at least one major delinquency in the period covered. But companies have been multiple offenders. In all, 188 citations are listed covering 163 separate offenses—98 antitrust violations; 28

4 Wall St. J., Dec. 4, 1979, § 1, at 6.

5 SENATE COMM. ON HOUS., BANKING AND URBAN AFFAIRS, 94TH CONG., 2D SESS., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS (Comm. Print 1976).

6 *Id.* at App. B.

7 *Id.*

8 *Id.*

> cases of kickbacks, bribery, or illegal rebates; 21 instances of illegal political contributions; 11 cases of fraud; and five cases of tax evasion. This roll call of wrongdoing is limited to domestic cases; the list would have been longer had it included foreign bribes and kickbacks. . . . Eleven percent of major American corporations involved in corrupt practices is a pretty startling figure.[9]

In addition to these flagrant illegalities, top corporate executives have all too often enriched themselves at shareholders' expense. For example, in 1980, the *New York Times* reported that the Playboy Enterprises Audit Committee had asked Hugh Hefner and other top executives to repay $918,413 to the company for "certain benefits" that were not "approved or properly documented."[10] The SEC has documented scores of similar cases in which corporate executives have abused their positions for personal gain—racing yachts, cars, home improvements, etc.[11] The *Washington Post* recently reported, with extensive documentation, that Mobil Corporation President William Tavoulareas facilitated his son's involvement in a shipping venture that benefited handsomely from its relationship with Mobil.[12] The arrangement catapulted the twenty-four-year-old son from a $14,000 shipping clerk to a major owner of the Atlas Maritime Co., complete with a Rolls-Royce and luxurious homes in London and Long Island.[13]

In theory, a major responsibility of a corporation's board of directors is to carefully monitor corporate policy to prevent abuses of this kind. But in fact, many corporate boards do not exercise meaningful oversight and control over management. Perhaps the best illustration of the failure of many corporate boards to exercise such control is the Penn Central collapse. At the time of its collapse in June 1970, Penn Central was the largest railroad in the country and the sixth largest industrial corporation. Within a two year period, shareholders watched their shares plummet in value from 86-1/2 to 2-3/4. A director who joined Penn Central in December 1969 gave the following devastating description of board attitudes:

> They sat up there on the 18th floor in those big chairs with the [brass name] plates on them and they were a bunch of, well, I'd better not say it. The board was definitely responsible for the trouble. They took their fees and they didn't do anything. They didn't know the factual picture and they didn't try to find out.[14]

In testimony before the Senate Commerce Committee a few years ago, former SEC Chairman Roderick Hills summed up the situation as follows: "Too many boards are dominated by inside directors. Even where there are significant numbers of outsiders on a board, they are all too often old friends of the chief executive officer who would rather resign from the board than severely criticize

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9 Ross, *How Lawless Are Big Companies?*, FORTUNE, Dec. 1, 1980, at 56.

10 Kleinfield, *Playboy Payments Inquiry*, N.Y. Times, Feb. 14, 1980, § D, at 2.

11 *Hearings on the Role of the Shareholder in the Corporate World Before the Subcomm. on Citizens and Shareholders' Rights of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess.—(1977) (statement of Phillip Loomis) [hereinafter cited as *Hearings on the Role of the Shareholder*].

12 Washington Post, Nov. 30, 1979, at A1. Mr. Tavoulareas and his son have sued the Washington Post for libel challenging the truth of these allegations. Tavoulareas v. The Washington Post Co., No. 80-3032 (D.D.C., filed Nov. 25, 1980).

13 Washington Post, Dec. 1, 1979, at A3.

14 J. DAUGHEN & P. BINZEN, THE WRECK OF THE PENN CENTRAL 303 (1971).

or vote to oust their old friend."[15] And former American Telephone & Telegraph Company (AT&T) Chairman John D. DeButts wrote recently in *The Corporate Director*: "To strengthen the board of directors we must, first of all, get rid of the notion that the principal criterion for membership is compatibility."[16]

Obviously, Mr. DeButts was responding to a very real problem. These examples raise the most basic questions related to the governance of the American corporation.

In June 1977, the Senate Subcommittee on Citizens and Shareholders Rights and Remedies, which I then chaired, held hearings on "The Role of the Shareholder in the Corporate World."[17] Witness after witness spoke of the need to stop the erosion of standards of conduct for corporate management and to expand shareholders' role in the modern corporation.[18] Testimony before other congressional committees and before the SEC carried the same message. Just a few months ago, an SEC staff study documented the weakness of shareholder democracy in major corporations.[19]

In February 1978, I appointed an advisory committee on corporate governance. Its twelve members represented many of the most prestigious and active names in American business, labor, and consumer activities.[20] While the committee members expressed divergent views regarding federal legislation as a mechanism for effectuating change, they agreed that improvements in corporate governance and corporate accountability are vital to the future of our economic system. The committee endorsed several specific reforms, including requiring that a majority of board members of publicly-owned corporations be "outside" directors or "independent" of management, and that publicly-owned corporations have an audit committee composed solely of independent directors and a nominating committee composed of a majority of independent directors.

In addition, the American Law Institute,[21] the American Bar Association,[22] the SEC,[23] the Business Roundtable,[24] Congress Watch[25] and the Federal Trade

15 *Hearings on Corporate Rights and Responsibilities Before the Senate Comm. on Commerce*, 94th Cong., 2d Sess. 303 (1976).

16 DeButts, *The Challenge of the Eighties*, THE CORPORATE DIRECTOR, Jan.-Feb. 1980, at 19, 20.

17 *Hearings on the Role of the Shareholder*, *supra* note 11.

18 *Id.*

19 *See* note 23 *infra*.

20 Members included John D. DeButts, then chairman of the board of AT&T; Irving S. Shapiro, chairman of the board of DuPont; Douglas Fraser, president of the United Auto Workers; Mark Green, director of Congress Watch; A.A. Sommer, Jr., former member of the SEC; William Winpisinger, president of the International Association of Machinists and Aerospace Workers; William B. Batten, chairman of the New York Stock Exchange and former president of the J.C. Penney Co.; Professor William L. Cary, chairman of the SEC from 1961 to 1964; Lewis D. Gilbert, a major spokesman for shareholders' interests; John Bustamente, chairman of the First National Bank Association of Cleveland; Alice Tepper Marlin, founder and executive director of the Council of Economic Priorities; and George Aronoff, Cleveland attorney.

21 *See generally* CORPORATE STRUCTURE AND GOVERNANCE, ALI-ABA SYMPOSIUMS 1977-78 (Schwartz ed. 1979).

22 *Id.*

23 SENATE COMM. ON HOUS., BANKING AND URBAN AFFAIRS, 96TH CONG., 2D SESS., REPORT ON CORPORATE ACCOUNTABILITY, DIVISION OF CORPORATION FINANCE, SECURITIES AND EXCHANGE COMMISSION (1980).

24 Statement of the Business Roundtable, *The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation*, 33 BUS. LAW 2083 (1978) [hereinafter cited as Statement of the Business Roundtable].

25 M. GREEN, M. KAMBER & J. BERNSTEIN, THE CASE FOR A CORPORATE DEMOCRACY ACT OF 1980 (1980).

Commission have examined this subject extensively. All agree that some improvement in the mechanisms of corporate governance is necessary. The major differences concern how these improvements should be achieved.

Most corporations resist any federal legislation, preferring to wait for the corporate community to make voluntary adjustments or, at most, for legislative decisions by the states. With all due respect to the advocates of laissez-faire and corporate voluntarism, I must confess that some of us have a more skeptical view of human nature. As Professor Abram Chayes has said: "Like societies before us, we will be ill-advised to rely exclusively on the conscience or benevolence of the wielders of power to secure that it be exercised for ends we value."[26]

This is not to say that there have not been changes and improvements, for there have been. Many major companies have brought outside directors onto the board. But history teaches that such voluntary reforms are likely to be short-lived responses to passing pressures. In 1979, for example, Harvard Business School Professor Myles Mace, who did a landmark study of corporate directors ten years ago, updated his research and concluded:

> Nearly ten years have passed since the publication of *Directors: Myth and Reality*, and board practices have changed little during that decade. Recommendations for reforms of board practices have not been forthcoming from business leaders. The SEC and Congress, however, have directly affected the duties and responsibilities of boards. This concern on the part of the Federal government as to what goes on in the boardroom may only be expected to increase.
>
> The reluctance of business leaders to develop affirmative and constructive ideas for improving corporate governance is somewhat understandable. It is not reasonable to expect CEO's [chief executive officers] to give up or restrict voluntarily their de facto powers of control in their respective corporations. As was the case ten years ago, CEO's still control board membership; determine what the board does and does not do; stack their boards with employees and with purveyors of professional services to the management such as investment bankers, commercial bankers, and outside legal counsel; control the agenda and management information systems; and manage the compensation packages for key executives, including perquisites. Many CEO's like it the way it is. Recommendations for any change that seems to whittle away at de facto powers of control are resisted, being dismissed as counterproductive or, as categorized in the words of one executive, unAmerican and destructive to the free enterprise system.
>
> Directors should represent the stockholders and not management. Board members, except for two or three insiders, should all be "independent" of the CEO. Investment bankers, commercial bankers, and outside legal counsel should not serve on the boards of their clients. Finally, board duties and functions should be clearly defined in writing.
>
> None of these aspirations will be realized through voluntary reform of governance by CEO's. The SEC, therefore, should and probably will prescribe over the next decade these basic changes in board practices. Further congressional action may be necessary and would contribute to strengthening the abilities of boards of directors to serve the interests of their primary constituency—the stockholders.[27]

In 1980, Heidrick and Struggles surveyed 13,000 of the nation's largest industrial and nonindustrial concerns. Of the 487 who responded, 87.6% had boards on which outsiders were a majority. That sounds very good, until one

26 Chayes, *The Modern Corporation and the Rule of Law*, in THE CORPORATION IN MODERN SOCIETY 25, 45 (Mason ed. 1959).

27 Mace, *Directors: Myth and Reality—Ten Years Later*, 32 RUTGERS L. REV. 293, 307-08 (1979).

looks a little closer. Many of these companies considered anyone not a present employee to be an outsider. Only 55% said they had a board with an "independent" outsider majority.[28] Though we don't even know how "independent" was defined—whether it included major suppliers or the firm's bankers, for example—that is still only 55% of the 487 who responded. The other 219 may have been even worse.

There seems to be a regression here as well. For a while there seemed to be a trend toward keeping the company's lawyer off its board for the most obvious of reasons: How can someone hired by a chief executive officer (CEO) act critically and independently of the CEO? In a 1978 Korn/Ferry survey of 552 major corporations, the proportion of boards whose members included the company's lawyer had dropped to 32.8 percent, still a very high figure.[29] Last year, the figure turned upward to 35.1 percent—the first increase since 1973. One reason, according to Lester Korn, could be less SEC pressure.[30]

Nor can the problems be left solely to the states. State corporation laws are designed primarily to enable management to operate with minimum interference. States have competed with each other in what has been called a race to the bottom, to develop a permissive, management-oriented body of law that will attract corporations to domicile within their borders and provide corporate business. The states concede this. A 1968 report of New Jersey's corporation law revision committee states:

> It is clear that the major protections to investors, creditors, employees, customers, and the general public have come, and must continue to come, from Federal legislation and not from state corporation acts. . . . Any attempt to provide such regulations in the public interest through state incorporation acts and similar legislation would only drive corporations out of the state to more hospitable jurisdictions.[31]

More recently, Lowell Sachnoff, a well-known corporate lawyer, said:

> The simple fact is that the states have not done their job of protecting shareholders' interests. Whether or not there is a "race to the bottom," no one can seriously contest the fact that state laws do not adequately protect shareholders from overreaching and subtle forms of greed and rapaciousness. State court opinions have been patch-work and quixotic. A good example is how Delaware undercut *Singer v. Magnavox* by the decision in *Tanzer v. International General Industries, Inc.*[32]

If voluntarism is uncertain and state reform is either unlikely or too time-consuming, why not rely upon the SEC instead of legislation? The simple answer is that the SEC does not now have the legislative authority to institute needed reform. The SEC's jurisdiction, a product of the Securities Act of 1933[33] and the Securities Exchange Act of 1934,[34] relates primarily to the corporate securities distribution and trading process rather than to corporate governance. The principal purpose of these statutes is disclosure to permit investors to make informed

28 Wall St. J., Nov. 3, 1980, § 2, at 33.
29 Wall St. J., Nov. 4, 1980, § 1, at 1.
30 *Id.*
31 Corporation Law Reform Commission of New Jersey, Report, N.J. STAT. ANN. tit. 14A, xi (West 1969).
32 Sachnoff, *The Present System Does Not Prevent Long-Scale Fraud*, in CORPORATE STRUCTURE AND GOVERNANCE, ALI-ABA SYMPOSIUMS 1977-78, at 232 (Schwartz ed. 1979) (citations omitted).
33 15 U.S.C. §§ 77a to 77bbbb (1976). See § 20(b) of the Securities Act, 15 U.S.C. § 77t(b) (1976).
34 15 U.S.C. §§ 78a to 78hh-1 (1976). See § 27 of the Exchange Act, 15 U.S.C. § 78aa (1976).

investment decisions, and to permit shareholders to exercise their rights intelligently. That purpose is simply too limited to also empower the SEC to ensure a more effective and responsive corporate governing structure.

The corporate shareholder thus finds that state laws often will not protect him, that the federal securities laws apparently are not strong enough to do so, and that other laws are not broad enough. I therefore introduced S. 2567,[35] which prescribes minimum federal standards to protect shareholders and to restore the sense of accountability that has been absent from too many of our major corporations, without reducing managerial efficiency. I believe these goals can best be accomplished by strengthening the role of the board of directors. Other bills would go much further. For example, the Corporate Democracy Act[36] recently introduced in the House of Representatives deals with such matters as the public disclosure of corporate operations and activities, the rights of employees, the impact of plant closings on affected communities, interlocking directorates, and the accountability of corporate officers for violations of federal laws. With all due respect to a very honorable effort, I prefer instead to rely on building a limited set of internal mechanisms that will enable the good sense and honesty of American businessmen to operate in a manner that is creative, effective, and meaningful.

The only real way to accomplish this is to require that a majority of the boards of major corporations be composed of individuals without certain significant economic or personal relationships with the corporations they serve. These directors can play a crucial role in helping and monitoring management. They can provide different perspectives and ask hard questions, the kind that might have prevented the Penn Central disaster, the slush funds, the illegal contributions, the foreign bribes, and the excessive corporate perks and compensation for insiders.

The provisions in the bill I introduced for an independent director majority do not go as far as some would like—SEC Chairman Harold Williams, for example, would require almost all board members to be outsiders.[37] The bill reflects instead a widespread consensus. For example, both the Business Roundtable[38] and the American Bar Association's Section on Corporation, Banking and Business Law[39] support such a board composition.

Admittedly, the word "independent" is not easily defined. However, the categories set forth in the bill focus on those persons whose board service raises legitimate questions of independence. Investment bankers, commercial bankers, major suppliers and lawyers who do a certain amount of business with the corporation, among others, are not classified as independent directors in the bill.[40] Nothing in this bill, of course, precludes such persons from serving on a corporate board—it requires only that they not be in the majority.

35 *See* text accompanying note 1, *supra*.

36 H.R. 7010, 96th Cong., 2d Sess. (1980).

37 Williams, *Corporate Accountability*, in CORPORATE STRUCTURE AND GOVERNANCE, ALI-ABA SYMPOSIUMS 1977-78, at 520 (Schwartz ed. 1979). Chairman Williams has been particularly concerned about and hostile to board membership of the corporation's lawyer. Washington Post, Oct. 20, 1980, Washington Business section, at 10.

38 Statement of the Business Roundtable, *supra* note 24, at 2083.

39 ABA Committee on Corporate Laws, *Corporate Directors' Guidebook*, 33 BUS. LAW. 1599 (1978).

40 S. 2567, § 5(a), (b), 96th Cong., 2d Sess. (1980).

The bill also requires all subject corporations to establish audit committees composed solely of independent directors.[41] In addition to other duties, the audit committee would have the sole authority to hire and dismiss the independent auditor and to determine his compensation, subject to the approval of a majority of the outstanding shares of the corporation.

The value of independent audit committees is undisputed. The SEC first recommended audit committees as a means for improving financial disclosure in 1940.[42] In 1939, the New York Stock Exchange endorsed the concept. Today, the Business Roundtable supports it.[43] The New York Stock Exchange requires all listed companies to establish audit committees composed solely of independent directors,[44] and the American Stock Exchange recommends the same thing for its listed companies. But simply having an audit committee is not enough. Such a committee must responsibly perform difficult functions, and some do not. The bill therefore sets out some of the responsibilities of audit committees.[45]

Nominating committees should also be independent. Corporate elections are usually won by the persons nominated by management. The chief executive officer, who traditionally selects the candidates for board membership, can intimidate would-be dissenters who wish to remain on the board and who know he or she can deny them reappointment. The bill, therefore, requires that all subject corporations have a nominating committee composed solely of independent directors, with the responsibility for recommending nominees to fill board vacancies.[46] Shareholders should be advised of the nominating committee's role and encouraged to submit recommendations to the committee. Properly implemented, this concept would significantly increase shareholder participation in the corporate electoral process.

The bill also grants shareholders the right to nominate candidates for the board of directors, provided such candidates are supported by a specified number of shares outstanding at the time the candidate's name is sought to be placed in nomination.[47] This provision will make proxy solicitations more open, and help place outside groups on a more equal footing with the inside management.[48]

But simply giving shareholders the right to nominate directors is not enough. Shareholders must also have some electoral power. Cumulative voting is a mechanism that assures some stockholders, if they are sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the size of their holdings. This is achieved by permitting each shareholder, acting alone or in concert with others, to cast the total number of his or her votes for a single candidate for election to the board, or to distribute such total among any number of such candidates.

Like all other provisions of the bill, the cumulative voting provision does not

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41 *Id.*

42 SEC Accounting Series Release No. 19 (Dec. 5, 1940).

43 N.Y. Stock Exchange Rules, 91104 (Feb. 1977).

44 Statement of the Business Roundtable, *supra* note 24, at 2122.

45 S. 2567, § 6, 96th Cong., 2d Sess. (1980). Those duties include reviewing the scope of the audit and rendering reports in connection with the audit, significant detected unrecorded transactions, and material changes in the corporation's accounting principles.

46 *Id.* § 7.

47 *Id.* § 8(a).

48 *Id.* § 9.

require something unprecedented, but merely adopts the best current practice. In thirteen states, cumulative voting is guaranteed in the state constitution;[49] in fifteen states it is an absolute shareholder right by statute.[50] A congressional requirement of fair and equitable suffrage in the administration of the Public Utility Holding Company Act[51] has been interpreted to support the right of cumulative voting.[52] Congress also insisted on cumulative voting when the Communications Satellite Corporation was created.[53]

The standard of care in S. 2567 is taken from the Model Business Corporation Act,[54] which was written and approved by the American Bar Association's Section on Corporation, Banking, and Business Law. It has been adopted in substance in more than twenty-five states, and major portions have been followed in many others.[55] Its enactment and uniform interpretation on a federal level would be an important step toward protecting the basic rights of public investors, and would add a necessary uniformity to the way directors of national companies are required to act.

The bill's duty of loyalty provision[56] was taken from the Corporate Director's Guidebook. It is based on the basic principle that a director should not use his corporate position to make a personal profit or gain other personal advantage.

Finally, the bill allows any shareholder of a subject corporation to enforce those provisions of the act not preempted by state law in federal district court.[57] The court would have original but not exclusive jurisdiction of such actions, and the prevailing party would be allowed to recover reasonable litigation costs, including attorney's fees.[58]

The proposed legislation reflects two important concerns. First, inflexible federal regulation should not stifle the need for innovative, creative, and experimental reforms that often come only from the private sector itself or from the states. The standards in this bill are sufficiently modest so that efforts at such reform are encouraged rather than stifled. They are encouraged because states and companies are urged to go beyond these minimum standards on a voluntary basis.

The second concern is that small businesses not be unnecessarily burdened by this or any other legislation. In crafting this bill we have therefore been quantitative as well as qualitative, sharply limiting the number of covered public corporations to approximately the 1,000 largest corporations, not including any mutual insurance companies.[59]

49 ARIZ. CONST. art. XIV, § 10; IDAHO CONST. art. XI, § 4; ILL. CONST. ART. XI, § 3; KY. CONST. art. 207; MISS. CONST. art. 7, § 194; MO. CONST. art. XI, § 6; MONT. CONST. art XV, § 4; NEB. CONST. art. XII, § 5; N.D. CONST. art. VII, § 135; PA. CONST. art. XVI, § 4; S.C. CONST. art. IX, § 11; S.D. CONST. art. XVII, § 5; W. VA. CONST. art. XI, § 4.

50 The states are Alaska, Arkansas, California, Hawaii, Idaho, Illinois, Kansas, Michigan, Missouri, North Carolina, North Dakota, Ohio, Washington, West Virginia, and Wyoming.

51 15 U.S.C. § 79k(a) (1976).

52 *See, e.g.*, *In re* United Gas Corp., 58 F. Supp. 501 (D. Del. 1944), *aff'd*, 162 F.2d 409 (2d Cir. 1947).

53 47 U.S.C. § 733(a) (1976).

54 ALI-ABA MODEL BUS. CORP. ACT § 35 (1979).

55 *See* MODEL BUS. CORP. ACT ANN. § 1, ¶ 3 (1977) for a list of states in which the Act has been enacted.

56 S. 2567, § 4(b), 96th Cong., 2d Sess. (1980).

57 *Id.* § 10(a).

58 *Id.*

59 S. 2566, § 3, 96th Cong., 2d Sess. (1980).

This bill will not be promptly enacted, especially after the results of the recent election. But it should be seriously considered. If we have another Penn Central or another wave of revelations about corporate misconduct, there may be such a reaction that much harsher, less considered legislation may be hastily adopted.

Such a development would be unfortunate. We now have time to reflect on what is the best approach. We should take that time and thoughtfully consider this and other proposals.