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# Introduction

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# SYMPOSIUM ON CORPORATE GOVERNANCE

## INTRODUCTION

*Harold M. Williams**

I am pleased to introduce this issue of the *Hofstra Law Review*, dedicated to a Symposium on Corporate Governance. Corporate governance, in its most essential terms, refers to the accountability of the corporate sector's power to credible decisionmakers acting according to publicly acceptable standards of conduct compatible with the values of the larger society. It is the normative constraint necessary to permit the private sector to exercise such power.

The American experience reflects the societal benefits of private enterprise. Most pronounced has been its influence on our economic well-being. In a few generations, our economic system changed the face of the United States from a generally subsistence economy to a society of mass production and mass consumption. Moreover, the free enterprise system has had an equally significant, if less tangible, effect on America's democratic character. Perhaps a legacy of our pioneer experience, free enterprise historically has been typified by decentralization of power and diversity in addressing national needs, thus facilitating a socioeconomic environment conducive to maintaining a free society. In this vein, Justice William O. Douglas observed that "the First Amendment and free enterprise . . . go hand-in-hand in a practical way."[1]

During most of this nation's history, the American people perceived a unity of interest between business' workings and national aspirations. The almost universal acceptance of the interrelationship between business activity and social progress was reflected in Ralph Waldo Emerson's conclusion that "[t]he greatest meliorator

* Chairman, Securities and Exchange Commission.

1. W.O. DOUGLAS, GO EAST, YOUNG MAN 308 (1974).

of the world is selfish, huckstering Trade."[2] Yet, this traditional consensus appears to be dissolving. Rather than being seen as acting consistently with publicly acceptable norms, business now is viewed by many as not trying to strike a fair balance between its profits and the public's interests.[3] But, if the consensus on business legitimacy does dissolve, the liberal society which the nation has built upon its free-enterprise foundation will also be shaken.

When business is perceived to be acting in a manner detrimental to, or inconsistent with, an important public interest, a governmental regulation is inevitably invoked to provide such accountability. Indeed, there has been, over the last decades, a series of governmental responses directed to regulating discrete areas that have been the subject of such public concern—ranging from unhealthy environmental practices[4] and inadequate automobile safety[5] to occupational health and safety[6] and truth-in-lending.[7] These instances can be viewed as illustrations of political determinations to remove control over such areas from the private sector to public authority which, presumably, would be more sensitive to the public interest embodied in the legislation creating the new regulatory system. To the extent that the business sector was not sufficiently responsive to the public concern that led to the governmental intervention, it made a costly mistake. After governmental regulation is in place, the corporation, nonetheless, is required to satisfy the public concern while experiencing the additional burdens inherent in being subject to an outside governmental decisionmaker that has the power to determine and enforce arbitrary standards. Such governmentally imposed standards tend to become entrenched and unyielding, even in the face of the changes in conditions that invariably occur over time. This regulatory inflexibility is typically even more pronounced when the subject matter is the concern of a single-interest political group, which may have no stake in balancing its objectives with other le-

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2. R.W. EMERSON, *Works and Days*, in SOCIETY AND SOLITUDE 155, 166 (1929).

3. Yankelovich, Skelly & White, Report to Leadership Participants on 1978 Findings of Corporate Priorities 5 (1979).

4. *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976).

5. *See* National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1976 & Supp. I 1977).

6. *See* Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976), *as amended by* Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183.

7. *See* Truth in Lending Act, 15 U.S.C. §§ 1601-1667e (1976).

gitimate public or corporate goals and interests. Thus, the newly regulated business may suffer a major loss in economic self-determination, which may impact negatively on other corporate goals and interests and, thereby, extend to areas not directly intended to be affected under the enacted regulatory scheme.

Increasingly, however, there is a tendency among some social critics not only to focus on discrete business decisions; but also on the manner by which such decisions are made, that is, the corporate governance process, itself. Over the last few years, a number of these critics have advocated specific legislative standards prescribing the composition of the board of directors, including, in some instances, the particular constituencies whose interests individual directors should advocate. But, effective corporate accountability is not merely a question of the identity of individual directors, the structure of particular boards, or even the acts of specific corporations. Rather, it is an objective that can only be approached with due regard for the environment—the interrelationship of people and institutions—in which it grows. Managers, directors, auditors, lawyers, government, communities, and the public-at-large all affect, and are affected by, that environment. It is important that, in focusing on each component, sight not be lost of its relationship to the whole.

This kind of systems approach is not often taken in examining a complex problem. Ours is a legally oriented society, and the systems approach does not lend itself to traditional legal analysis nor to resolution by governmental intervention. Therefore, it is not surprising that most legislative models on corporate governance center not on the dynamics of the corporate system; but, on individual questions, which fit more comfortably into a legal framework, such as the independence of directors. To the legal mind, independence is, after all, a relatively comprehensible concept susceptible to at least a superficial statutory articulation. Even if this were true, there is only a limited efficacy to isolating a single factor in such a complex of relationships. And, as we have learned over recent years in dealing with other complex systems—such as the environment or the economy—the negative consequences of disturbing such a system without understanding all the ramifications of our actions can be both severe and irreversible.

Therefore, it is my strong preference that the resolutions to questions regarding corporate accountability be found in the voluntary initiatives of the private sector rather than in the prescriptions of governmental mandates. While, at times, governmental action

has proved beneficial, there are major risks that arise whenever governmental intervention is invoked. Particularly in its legislative function, the government is not a subtle intervenor. As the most powerful force in society, and the only one that can impose its will, it almost always can have its way by sheer coercive force. Therefore, it institutionally never needed to—and never did—develop a sensitivity to the subtleties of interpersonal and interinstitutional dynamics in other than a political context. And, that means it generally acts without awareness of the effect of its actions on such sociological relationships. Moreover, by necessity, government typically deals in generalities in its own decisionmaking process. Those who fall within the parameters of a law's jurisdiction must conform to a unified standard, regardless of the economic consequences or any argument that conformity is unnecessary.

I, for one, am skeptical that this kind of "regulation" is appropriate to the extraordinarily complex and diverse decisions that are encompassed by the corporate decisionmaking and accountability process in hundreds and, indeed, thousands of companies around the country. To impose legislatively required generalities to particular corporate determinations, in my judgment, threatens to hamper significantly the innovation and diversity in problemsolving that well may be the most essential character of the free-enterprise system. Rather, we must recognize the limits of what government can do well. And, we must appreciate the societal risks in subjecting effectively functioning institutions to laws that are outside these bounds.

It is fitting that a legal periodical should provide a forum for this debate. In my judgment, the legal profession has unique responsibilities and interests in its outcome. At the most practical level, lawyers serve as key advisers in shaping the corporate practices that could either increase or undermine the public's confidence in business. At a more societal level, lawyers—as judges, legislators, and administrators—play a crucial role in determining the behavioral standards to be applied to corporate actions. And, at its most abstract but most significant level, personal freedom, which seems to flourish best where a viable private sector exists, is the fundamental logic upon which our legal system and our society are based.

Accordingly, I welcome the *Hofstra Law Review*'s presentation to the legal community of the issues raised in these pages. The very fact that such distinguished participants have devoted their efforts to this symposium underscores that corporate governance is a crucial issue of our times.