NEWS

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SPEECH TO THE
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"WHAT SHOULD BE THE ROLE OF THE SEC IN THE PUBLIC SECURITIES MARKETS?"

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* THE SECURITIES AND EXCHANGE COMMISSION, AS A MATTER OF POLICY, DISCLAIMS RESPONSIBILITY FOR SPEECHES BY ANY OF ITS COMMISSIONERS. THE VIEWS EXPRESSED HEREIN ARE THOSE OF THE SPEAKER AND DO NOT NECESSARILY REFLECT THE VIEWS OF THE COMMISSION.

In the Calendar of Events which the PSA prepared for this meeting, you entitled my address "What Should Be the Role of the SEC in the Public Securities Markets?" I have reflected for some time on how to answer this question in a manner which will permit me to leave this assembled group unscathed but be welcome at the SEC upon my return.

I am sure you know that my predicament is not eased by the fact that the SEC has not yet commented upon the "Municipal Securities Full Disclosure Act" proposed by Senator Williams, and I already gave a speech on the industrial development bond exemption. Although I could confine my address to issues of concern in the market for U.S. government securities, I might then arouse the wrath of other government agencies which believe that regulation of the markets in such securities is their prerogative.

I considered cancelling this engagement but that seemed spineless. Besides, the guarantees which the federal government has now given for New York City bonds, and my own past New York connections gave this question a certain urgency. I decided there was only one safe response for me to give to your question. The role of the SEC in the public securities markets should be that of a net buyer. However, since we are a small agency with a small budget we are unlikely to have enough surplus funds for any long position we would acquire to make much of a difference in the marketplace.

I WILL GET MORE SERIOUS, IF NOT NECESSARILY LESS EVASIVE, BY REFERRING YOU TO A VERY THOUGHTFUL CRITIC OF THE COMMISSION'S CORPORATE DISCLOSURE POLICIES, PROFESSOR HOMER KRIPKE, WHO WAS A DISSENTING MEMBER OF THE SEC'S ADVISORY COMMITTEE ON CORPORATE DISCLOSURE. PROFESSOR KRIPKE DISSENTED FROM THE ADVISORY COMMITTEE'S REPORT BECAUSE OF ITS FAILURE TO BROADLY CONSIDER THE USEFULNESS OF A FEDERALLY MANDATED DISCLOSURE SYSTEM. HE SUGGESTED THAT SUCH AN ANALYSIS "WOULD HAVE INVOLVED A SENSITIVE CONSIDERATION OF (A) THE PRESENT SYSTEM OF COSTS OF DISCLOSURE TAXED BY THE COMMISSION ... AND ITS DELEGATE, THE FASB ... ON ISSUERS FOR THE BENEFIT OF SECURITY ANALYSTS AND THE PUBLIC ... AND (B) THE LIMITED APPARENT BENEFIT OF THE SYSTEM IN THE LIGHT OF THE FACT THAT IT IS PAST-ORIENTED AND NECESSARILY FIRM-ORIENTED ..." 1/ IT IS PROFESSOR KRIPKE'S VIEW THAT WITH RESPECT TO INDIVIDUAL ISSUERS, THE "VALUE OF SECURITIES LIES IN THE FUTURE, NOT IN THE PAST," BUT THAT THE IMPORTANCE OF MACRO-ECONOMIC EVENTS IS CRUCIAL AND THEREFORE THE "DISCLOSURE SYSTEM CANNOT REFLECT A LARGE PART OF THE EVENTS THAT INFLUENCE THE MARKET." 2/

1/ DISSENTING STATEMENT OF HOMER KRIPKE, REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION, COMMITTEE PRINT 95-29, 95TH CONG., 1ST SESS. (NOV. 3, 1977) AT D-55-56.

2/ KRIPKE, "WHERE ARE WE ON SECURITIES DISCLOSURE AFTER THE ADVISORY COMMITTEE REPORT?" 2 JOURNAL OF ACCOUNTING, AUDITING & FINANCE 4(1978).

WITHOUT EITHER AGREEING OR ARGUING WITH PROFESSOR KRIPKE, I BELIEVE THAT HIS QUESTIONS CONCERNING THE VALUE OF A MANDATED RATHER THAN A MARKET MOTIVATED DISCLOSURE SYSTEM ARE WORTH DISCUSSING IN THE CONTEXT OF ANY FEDERAL MUNICIPAL SECURITIES LEGISLATION.

AS PROFESSOR KRIPKE HAS POINTED OUT, "/T/HE NEW ECONOMICS ASSERTS THAT A SECURITY CAN BE ANALYZED IN TERMS OF ITS EXPECTED TOTAL RETURN AND ITS RISK." 3/ MUCH OF INVESTOR DECISION MAKING ABOUT GOVERNMENT SECURITIES, INCLUDING MUNICIPAL SECURITIES, IS DONE BY INSTITUTIONAL INVESTORS, AND INVOLVES JUDGMENTS ABOUT FUTURE POLITICAL DECISIONS CONCERNING INTEREST RATES, TAX POLICIES AND SPENDING. THIS NECESSARILY RAISES QUESTIONS ABOUT WHETHER AN INDEPENDENT FEDERAL REGULATORY AGENCY SHOULD DEVISE AND ENFORCE A MANDATED DISCLOSURE SYSTEM FOR THE MARKET IN MUNICIPAL SECURITIES, BASED ON A SYSTEM WHICH WAS DEVELOPED PRIMARILY FOR THE DISTRIBUTION OF CORPORATE EQUITY SECURITIES TO INDIVIDUAL INVESTORS.

NEVERTHELESS, THERE IS GREAT PUBLIC CLAMOR FOR INCREASED ACCOUNTABILITY BY GOVERNMENT BODIES, PARTICULARLY WITH REGARD TO FINANCIAL INFORMATION. INVESTORS, TAXPAYERS AND VOTERS WANT MORE AND BETTER DISCLOSURE AND ARE LOOKING FOR GUIDANCE ON HOW TO ACHIEVE IMPROVED FINANCIAL REPORTING BY GOVERNMENT. SINCE THE SEC IS AN AGENCY WHICH SPECIALIZES IN FINANCIAL DISCLOSURE, IT IS NOT SURPRISING THAT CONGRESS

3/ IBID.

IS CONSIDERING HOW THE COMMISSION'S EXPERTISE CAN BE UTILIZED TO SOLVE SOME OF THE VERY TROUBLESOME PROBLEMS WHICH EXIST IN THE GOVERNMENT SECURITIES MARKETS.

IN RECENT YEARS THE COMMISSION'S RESPONSIBILITIES AND ACTIVITIES WITH RESPECT TO GOVERNMENT SECURITIES, INCLUDING MUNICIPAL SECURITIES, HAVE INCREASED SIGNIFICANTLY. WHEN ADOPTED, BOTH THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934 EXEMPTED U.S. GOVERNMENT AND MUNICIPAL SECURITIES FROM ALL BUT THE ANTIFRAUD PROVISIONS OF THOSE STATUTES. THE COMMISSION HAD AUTHORITY TO ENFORCE THOSE ANTIFRAUD PROVISIONS, BUT IT DID NOT HAVE AUTHORITY TO ESTABLISH A REGULATORY FRAMEWORK EITHER FOR ISSUER DISCLOSURE OR FOR THE REGULATION OF SECURITIES PROFESSIONALS WHOSE BUSINESS WAS LIMITED TO MUNICIPAL AND GOVERNMENT SECURITIES.

HOWEVER, THE SECURITIES ACTS AMENDMENTS OF 1975 GAVE THE COMMISSION AUTHORITY TO REQUIRE REGISTRATION OF MUNICIPAL SECURITIES PROFESSIONALS AND TO ADOPT RULES CONCERNING THEM. THOSE AMENDMENTS ALSO ESTABLISHED THE MUNICIPAL SECURITIES RULEMAKING BOARD AS THE SELF-REGULATORY ORGANIZATION WITH PRIMARY RULEMAKING RESPONSIBILITY FOR THE MUNICIPAL SECURITIES INDUSTRY.

THE 1975 AMENDMENTS GREATLY INCREASED THE COMMISSION'S ROLE WITH RESPECT TO THE MUNICIPAL SECURITIES MARKETS AND MARKET PROFESSIONALS, BUT DID NOT MANDATE DISCLOSURE STANDARDS FOR MUNICIPAL ISSUERS. FURTHER, GOVERNMENT SECURITIES FIRMS CONTINUE TO BE AN UNREGULATED SEGMENT OF THE BROKER-DEALER COMMUNITY. BEFORE THE 1975 AMENDMENTS WERE FULLY IN EFFECT, INFORMATION SURFACED CONCERNING THE FISCAL CRISIS IN NEW YORK CITY, WHICH RAISED SERIOUS QUESTIONS CONCERNING MUNICIPAL ISSUER DISCLOSURE. WHEN PUBLIC ATTENTION FOCUSED ON THE RISKS ASSOCIATED WITH NEW YORK CITY'S SECURITIES, MANY WONDERED WHETHER APPROPRIATE DISCLOSURE HAD BEEN PROVIDED TO INVESTORS, AND WHO SHOULD BE LIABLE FOR THE OFFER AND SALE OF SUCH SECURITIES IF FULL AND FAIR DISCLOSURE HAD NOT BEEN PROVIDED.

THE COMMISSION BEGAN A FORMAL INVESTIGATION INTO THE EVENTS SURROUNDING NEW YORK CITY'S FISCAL CRISIS AND, IN AUGUST, 1977, TRANSMITTED TO THE CONGRESS A DETAILED STAFF REPORT ON TRANSACTIONS IN NEW YORK CITY'S SECURITIES. ANOTHER RESULT OF THE NEW YORK CITY FISCAL CRISIS WAS AN INCREASE IN CONGRESSIONAL EFFORTS TO EXTEND THE COMMISSION'S AUTHORITY CONCERNING DISCLOSURE BY MUNICIPAL ISSUERS.

QUESTIONS ABOUT THE ADEQUACY OF THE REGULATORY SCHEME FOR THE GOVERNMENT SECURITIES MARKETS WERE ALSO RAISED BY THE DISCLOSURE IN A NUMBER OF SEC ENFORCEMENT CASES OF FRAUDULENT PRACTICES IN THE SALE OF MUNICIPAL AND GOVERNMENT SECURITIES. ONE COMMISSION RESPONSE TO FRAUDULENT PRACTICES IN THE SALE OF CERTAIN INDUSTRIAL DEVELOPMENT BOND ISSUES WAS THE RECOMMENDATION THIS PAST SPRING THAT LEGISLATION BE INTRODUCED TO ELIMINATE EXEMPTIVE PROVISIONS OF THE SECURITIES ACTS FOR INDUSTRIAL DEVELOPMENT BONDS. THE COMMISSION HAS NOT, TO DATE, CONSIDERED OR RECOMMENDED ANY LEGISLATION ADDRESSED TO RECENT PROBLEMS UNCOVERED IN THE U.S. GOVERNMENT SECURITIES MARKETS, PARTICULARLY IN THE SALE OF GINNIE MAE SECURITIES.

THE COMMISSION'S TRADITIONAL ROLE WITH RESPECT TO CORPORATE SECURITIES AND, MORE RECENTLY, GOVERNMENT SECURITIES IS PRIMARILY THAT OF AN ADVOCATE FOR INVESTOR PROTECTION. THE FEDERAL SECURITIES LAWS GENERALLY PROMOTE INVESTOR PROTECTION BY THE REGULATION OF SECURITIES MARKET PROFESSIONALS AND ISSUER DISCLOSURE REQUIREMENTS. IT SEEMS TO ME THAT THE ROLE OF THE SEC IN THE PUBLIC SECURITIES MARKETS WILL BE DETERMINED BY HOW EFFECTIVELY SUCH A REGULATORY SCHEME CAN BE UTILIZED FOR THOSE MARKETS AND WHETHER THE INVESTOR PROTECTION FOCUS OF THE SEC CAN BE RECONCILED WITH OTHER ECONOMIC AND POLITICAL CONSIDERATIONS RELEVANT TO THE PUBLIC SECURITIES MARKETS.

ONE OF THE BIGGEST OPEN QUESTIONS ABOUT THE ROLE OF THE SEC IN THE PUBLIC SECURITIES MARKETS IS THE EXTENT TO WHICH THE COMMISSION WILL EXERCISE RESPONSIBILITY FOR MUNICIPAL DISCLOSURE STANDARDS AND REQUIREMENTS. ACCORDINGLY, I AM GOING TO DISCUSS WITH YOU SOME OF THE ALTERNATIVES WHICH WOULD GIVE THE COMMISSION REGULATORY AUTHORITY OVER MUNICIPAL DISCLOSURE.

THERE APPEAR TO BE A NUMBER OF SIMILARITIES IN THE CONSIDERATIONS RELATING TO DISCLOSURE BY PRIVATE CORPORATIONS -- WITH WHICH THE COMMISSION HAS LONG EXPERIENCE -- AND BY MUNICIPALITIES. THESE SIMILARITIES INCLUDE (I) THE IMPORTANCE OF HOLDING AN ISSUER, WHETHER A CORPORATION OR A MUNICIPALITY, ACCOUNTABLE TO THOSE WHO INVEST IN ITS SECURITIES BY REQUIRING DISCLOSURE OF ALL MATERIAL INFORMATION CONCERNING ITS SECURITIES, (II) THE VIEW THAT SUCH DISCLOSURE WILL ENGENDER CONFIDENCE IN THE FAIRNESS OF THE MARKETPLACE, AND (III) THE NEED FOR UNIFORMITY OF DISCLOSURE IN ORDER TO MAKE A MEANINGFUL COMPARISON BETWEEN ALTERNATIVE INVESTMENTS. NEVERTHELESS, UNLIKE THE REQUIREMENTS CONCERNING CORPORATE SECURITIES, THERE HAS BEEN NO SYSTEM REQUIRING THAT UNIFORM INFORMATION BE MADE CONSISTENTLY AVAILABLE TO PURCHASERS OF MUNCIPAL SECURITIES. WHETHER SUCH UNIFORMITY IS NECESSARY AND APPROPRIATE, AND IF SO, WHETHER IT SHOULD BE MANDATED BY FEDERAL STATUTE, STATE REGULATORY INITIATIVES, OR THE MARKETPLACE IS A QUESTION WHICH DESERVES THOUGHTFUL ANALYSIS.

SOME MAJOR UNDERWRITERS RECENTLY HAVE INSISTED THAT MUNICIPAL ISSUERS FURNISH A RANGE OF INFORMATION WHICH HAS NOT IN THE PAST BEEN REQUIRED. THIS INFORMATION GENERALLY HAS FOLLOWED THE GUIDELINES FOR VOLUNTARY DISCLOSURE SUGGESTED BY THE MUNICIPAL FINANCE OFFICERS ASSOCIATION ("MFOA"). ISSUERS WHICH REFUSE TO PROVIDE SUCH INFORMATION HAVE RECEIVED FEWER BIDS FOR THEIR SECURITIES OR HAVE RESORTED TO A NEGOTIATED UNDERWRITING. HOWEVER, UNDERWRITERS HAVE NOT BEEN ABLE TO PROCURE ADEQUATE DISCLOSURE FROM ALL ISSUERS. TO THE EXTENT THAT CERTAIN UNDERWRITERS ARE WILLING TO BID ON SECURITIES OF SUCH ISSUERS, THERE MAY NOT BE THE ECONOMIC INCENTIVE FOR THE ISSUER VOLUNTARILY TO PROVIDE ADEQUATE DISCLOSURE, PARTICULARLY SINCE MORE AND BETTER DISCLOSURE DOES IMPOSE COSTS ON MUNICIPALITIES.

THE CURRENT UNEVENNESS IN VOLUNTARY OR UNDERWRITER-IMPOSED MUNICIPAL SECURITIES DISCLOSURE PRESUMABLY MAKES SUCH DISCLOSURE LESS VALUABLE TO INVESTORS THAN UNIFORM DISCLOSURE. THE LACK OF UNIFORMITY IN MUNICIPAL DISCLOSURE IS PARTICULARLY APPARENT WITH RESPECT TO FINANCIAL INFORMATION. WHILE ACCOUNTING PRINCIPLES GENERALLY ARE WELL ESTABLISHED WITH RESPECT TO CORPORATE ENTITIES, GOVERNMENTAL UNITS WHICH CHOOSE TO MAKE FINANCIAL DISCLOSURES HAVE A VARIETY OF PERMITTED ACCOUNTING CONVENTIONS FROM WHICH TO CHOOSE IN REPORTING THE SAME TRANSACTION.

WHILE THERE ARE IMPORTANT SIMILARITIES IN THE POLICY CONSIDERATIONS INVOLVED IN THE IMPOSITION OF MUNICIPAL AND CORPORATE DISCLOSURE, THERE ALSO ARE IMPORTANT DIFFERENCES.

AS A GENERAL MATTER, THESE DIFFERENCES INVOLVE THE NATURE OF THE INFORMATION AVAILABLE FOR DISCLOSURE, THE EXISTENCE OF VOTERS AND TAXPAYERS WHOSE INTERESTS SHOULD BE CONSIDERED, AND QUESTIONS RELATING TO THE PROPER RELATIONSHIP BETWEEN STATES AND THE FEDERAL GOVERNMENT WITH RESPECT TO MANDATORY DISCLOSURE REQUIREMENTS.

AN IMPORTANT CONSIDERATION IN ANY PROPOSAL FOR MUNICIPAL DISCLOSURE IS THE DIFFERENCE IN THE TYPE OF INFORMATION WHICH IS RELEVANT TO DECISIONS WITH RESPECT TO CORPORATE AND TO MUNICIPAL SECURITIES. A GOVERNMENTAL UNIT GENERALLY DOES NOT USE A BALANCE SHEET SIMILAR TO THAT OF A CORPORATION WHICH WOULD CONTAIN A SINGLE UNIFIED SET OF ACCOUNTS FOR RECORDING AND SUMMARIZING ALL FINANCIAL TRANSACTIONS BY THE UNIT. INSTEAD, THE UNIT'S ACCOUNTS NORMALLY ARE ORGANIZED ON THE BASIS OF FUNDS, WITH THE OPERATION OF EACH FUND REPORTED AS A SEPARATE SELF-BALANCING ACCOUNT. AN IMPORTANT ASPECT OF ANY AUDIT OF SUCH FUNDS IS A DETERMINATION AS TO WHETHER THE GOVERNMENTAL UNIT, IN OBTAINING AND SPENDING PUBLIC MONEY, HAS COMPLIED WITH THE FRAMEWORK OF CONTROLS ESTABLISHED BY LAW. ACCORDINGLY, THE AUDITOR MUST CONSIDER WHETHER THE BUDGETARY PROCESS HAS BEEN FOLLOWED AND WHETHER MONEY COLLECTED FOR A PARTICULAR PURPOSE HAS BEEN PLACED IN THE CORRECT FUND. AS A RESULT, WHILE AUDITED FINANCIAL DISCLOSURE BY GOVERNMENTAL UNITS COULD INCREASE AN INVESTOR'S ABILITY TO EVALUATE THE UNIT'S FISCAL HEALTH, SUCH DISCLOSURE MIGHT REFLECT ONLY INDIRECTLY THE UNIT'S ABILITY TO MAKE PAYMENTS WITH RESPECT TO PRINCIPAL OR INTEREST ON A PARTICULAR ISSUE OF SECURITIES.

IN ADDITION, REQUIRING GOVERNMENTAL UNITS TO PREPARE AUDITED FINANCIAL STATEMENTS, WITHOUT ALLOWING SUCH AUDITS TO BE PERFORMED BY INDEPENDENT PUBLIC OFFICIALS RATHER THAN PRIVATE ACCOUNTING FIRMS, COULD CREATE DIFFICULTIES BECAUSE, AS A PRACTICAL MATTER, A GOVERNMENTAL UNIT MIGHT BECOME SUBJECT TO THE CONTROL OF THE PRIVATE FIRM.

ANOTHER CRITICAL FACTOR WHICH MUST BE CONSIDERED WITH RESPECT TO MUNICIPAL DISCLOSURE IS THE BALANCING OF DIFFERING PUBLIC INTERESTS. THE SALE OF CORPORATE SECURITIES INVOLVES THE ISSUER AND INVESTORS, WITH THE ISSUING CORPORATION UNDERTAKING CERTAIN RESPONSIBILITIES TO THE INVESTING PUBLIC WHEN IT ENTERS THE MARKET. IN CONTRAST, GOVERNMENTAL UNITS ARE PUBLIC BY NATURE, REGARDLESS OF WHETHER THEY SEEK TO ISSUE MUNICIPAL SECURITIES. SUCH UNITS HAVE RESPONSIBILITIES NOT ONLY TO PURCHASERS AND POTENTIAL PURCHASERS OF THEIR SECURITIES, BUT ALSO TO THEIR TAXPAYERS AND VOTERS. THIS ADDED RESPONSIBILITY IS ESPECIALLY CRITICAL IN TWO AREAS: THE ALLOCATION OF ANY LOSS AS A RESULT OF FAULTY DISCLOSURE AND THE COST OF DISCLOSURE.

TAXPAYERS AND VOTERS HAVE AN OBVIOUS INTEREST IN THE ALLOCATION AND EXTENT OF LOSS IN THE EVENT OF ALLEGATIONS OF FAULTY DISCLOSURE, PARTICULARLY BECAUSE SUCH ALLEGATIONS ARE MOST LIKELY TO BE MADE WHEN THE RESOURCES OF THE GOVERNMENTAL UNIT ARE STRAINED BY THE PROSPECT OF A DEFAULT.

CERTAIN LOCAL OFFICIALS HAVE ARGUED THAT ANY ALLOCATION OF LOSS IN SUCH CIRCUMSTANCES SHOULD RECOGNIZE THAT THE MONEY RAISED IN FINANCING BY A GOVERNMENTAL UNIT IS FOR A PUBLIC PURPOSE, AND THAT ALLOWING RECOVERY BY PRIVATE INDIVIDUALS WOULD PRODUCE MORE HARM TO THE PUBLIC THAN IF INVESTORS WERE REQUIRED TO BEAR THE LOSS. SUCH AN ARGUMENT ESSENTIALLY REJECTS THE CONCEPT OF INVESTOR PROTECTION AND FAVORS TREATING INVESTOR INTERESTS AS SUBSERVIENT TO THOSE OF OTHER INTERESTED PARTIES. WHERE MUNICIPAL SECURITIES ARE SOLD ACROSS STATE LINES THERE IS SOME QUESTION AS TO WHETHER THE INTERESTS OF VOTERS AND TAXPAYERS IN ONE STATE SHOULD BE SO PREFERRED OVER THE INTERESTS OF INVESTORS IN ANOTHER STATE.

FEDERALLY MANDATED MUNICIPAL DISCLOSURE REQUIREMENTS ALSO RAISES QUESTIONS ABOUT OUR FEDERAL SYSTEM. THESE QUESTIONS ARE POLITICAL AS WELL AS CONSTITUTIONAL. SOME FEDERALISM QUESTIONS ARE MERELY A REITERATION OF THE POINT THAT TAXPAYERS AND VOTERS ARE ENTITLED TO CONSIDERATION, BUT OTHERS REQUIRE GENERAL POLICY DECISIONS CONCERNING THE COEXISTENCE OF STATE AND FEDERAL GOVERNMENTS IN THE FEDERAL SYSTEM, POLITICAL AUTONOMY, AND THE ROLE OF LOCAL ACCOUNTABILITY IN SELF-GOVERNMENT.

THE MOST OBVIOUS BASIS FOR THE FEDERAL GOVERNMENT'S INTEREST IN THE MUNICIPAL SECURITIES MARKETS IS THE COMMERCE CLAUSE OF THE CONSTITUTION (ART. I, SEC. 8, CL. 3), WHICH PROVIDES THAT THE CONGRESS HAS THE POWER "TO REGULATE COMMERCE WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES ... ." BECAUSE MUNICIPAL SECURITIES ARE TRADED AMONG THE SEVERAL STATES, THE COMMERCE CLAUSE APPEARS TO PROVIDE A BASIS FOR IMPOSING CONDITIONS ON THAT ACTIVITY. NEVERTHELESS, IN NATIONAL LEAGUE OF CITIES V. USERY, 426 U.S. 833 (1975), THE SUPREME COURT HELD THAT SERIOUS CONSTITUTIONAL ISSUES ARE RAISED WHEN THE CONGRESS SEEKS TO LEGISLATE, SOLELY UNDER THE COMMERCE CLAUSE, WHERE THE EFFECT OF THE LEGISLATION IS DIRECTLY TO DISPLACE THE STATES' FREEDOM TO STRUCTURE INTEGRAL OPERATIONS IN AREAS OF TRADITIONAL GOVERNMENTAL FUNCTIONS. WHETHER THE USERY CASE WOULD INVALIDATE FEDERALLY MANDATED DISCLOSURE IN THE SALE OF MUNICIPAL SECURITIES DEPENDS TO SOME EXTENT ON WHETHER THE SALE OF SUCH SECURITIES IS REGARDED AS A TRADITIONAL GOVERNMENTAL FUNCTION IMMUNE FROM FEDERAL REGULATION. IN ADDITION, USERY LEAVES OPEN THE QUESTION OF WHETHER A FEDERAL STATUTE PURSUANT TO CONSTITUTIONAL POWERS OTHER THAN THE COMMERCE CLAUSE NECESSARILY WOULD BE SUBJECT TO THE SAME ANALYSIS.

OTHER PROVISIONS OF THE CONSTITUTION MAY ALSO PROVIDE AUTHORITY FOR FEDERALLY IMPOSED DISCLOSURE. THE SPENDING POWER (ART. I, SEC. 8, CL. 1), FOR EXAMPLE, MAY BE PARTICULARLY APPROPRIATE BECAUSE OF INCREASED FEDERAL INVOLVEMENT IN LOCAL FINANCING THROUGH REVENUE SHARING. THERE IS ALSO THE INCREASED POSSIBILITY THAT PROBLEMS IN LOCAL FINANCING MAY REQUIRE EMERGENCY AID, SUCH AS WAS SUPPLIED TO NEW YORK CITY IN THE FORM OF THE NEW YORK FINANCIAL ASSISTANCE ACT OF 1978.

ALTERNATIVE APPROACHES TO MUNICIPAL SECURITIES DISCLOSURE ARE LIKELY TO BE ANALYZED BY THE SEC IN LIGHT OF THE COMMISSION'S ROLE AS AN ADVOCATE OF INVESTOR PROTECTION, AND ITS EXPERIENCE WITH A DISCLOSURE SYSTEM DEVELOPED FOR THE ISSUANCE AND TRADING OF CORPORATE SECURITIES. THE COMMISSION RECOGNIZES, HOWEVER, THAT THE APPLICATION OF SUCH EXPERIENCE TO A MUNICIPAL SECURITIES DISCLOSURE SYSTEM REQUIRES BALANCING THE SIMILARITIES AND DIFFERENCES BETWEEN THE MARKETS FOR CORPORATE AND MUNICIPAL SECURITIES. FOR EXAMPLE, THE COMMISSION VIEWS INDUSTRIAL DEVELOPMENT BONDS THAT ARE FUNDED BY PAYMENTS MADE BY AN INDUSTRIAL OR COMMERCIAL ENTERPRISE AS CONCEPTUALLY INDISTINGUISHABLE FROM OTHER CORPORATE DEBT SECURITIES. ACCORDINGLY, THE COMMISSION REQUESTED SENATOR WILLIAMS TO INTRODUCE LEGISLATION PREPARED BY THE COMMISSION STAFF WHICH WOULD SUBJECT INDUSTRIAL DEVELOPMENT BONDS TO THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT OF 1933.

On the other hand, with respect to legislation that would subject all municipal securities to the registration requirements of the Securities Act of 1933, the Commission commented in Hearings in 1976 that "it is unlikely that the threatened harm to investors justifies so drastic a proposal."

Because of the inadequacies of the voluntary approach to municipal securities disclosure and the apparent absence of any initiatives by states towards uniform disclosure requirements, there is some impetus for the establishment of uniform disclosure requirements for municipal securities by federal legislation. S. 2339, the "Municipal Securities Full Disclosure Act of 1977," was introduced jointly on December 1, 1977, by Senators Proxmire, Williams, and Javits to meet the need for such federal uniform municipal securities disclosure, and would provide a system of disclosure and periodic reporting for municipal securities issuers.

The Bill would require issuers of municipal securities which have an aggregate principal amount of municipal securities exceeding $50,000,000 outstanding during any portion of a fiscal year to prepare an annual report and reports of events of default. All issuers,

REGARDLESS OF SIZE, WOULD BE REQUIRED TO PREPARE A DISTRIBUTION DOCUMENT PRIOR TO THE OFFER OR SALE OF AN ISSUE OF MUNICIPAL SECURITIES. THE DISCLOSURE SCHEDULES FOR REPORTS AND DISTRIBUTION DOCUMENTS, WOULD, IN GENERAL, INCORPORATE DISCLOSURE ITEMS SUGGESTED IN THE MFOA DISCLOSURE GUIDELINES AS WELL AS CERTAIN CATEGORIES OF DISCLOSURES FROM SCHEDULES A AND B OF THE SECURITIES ACT OF 1933. IN ADDITION, THE REPORTS AND DISTRIBUTION DOCUMENTS WOULD BE REQUIRED TO CONFORM TO ANY FURTHER REQUIREMENTS PROMULGATED BY THE COMMISSION.

UNLIKE EXISTING REGULATIONS WITH RESPECT TO FILING CORPORATE SECURITIES DOCUMENTS, MUNICIPAL ISSUERS WOULD NOT BE REQUIRED, AT ANY TIME, TO FILE REPORTS OR DISTRIBUTION DOCUMENTS WITH THE COMMISSION. STAFF REVIEW OF DISTRIBUTION DOCUMENTS TO BE USED IN CONNECTON WITH A PROPOSED OFFERING WOULD BE NEITHER REQUIRED NOR AVAILABLE.

ISSUERS WOULD BE EXEMPT FROM THE DISCLOSURE REQUIREMENTS OF THE BILL IF THE STATE IN WHICH THE ISSUER IS ORGANIZED ADOPTED DISCLOSURE REQUIREMENTS "SUBSTANTIALLY SIMILAR" TO THOSE OF THE BILL. ISSUERS ALSO WOULD BE ABLE TO USE THE SECURITIES AND TRANSACTIONAL EXEMPTIONS OF THE SECURITIES ACT, SUCH AS THE PRIVATE AND INTRASTATE OFFERING EXEMPTIONS.

THE BILL WOULD IMPOSE EXPRESS LIABILITIES ON MUNICIPAL SECURITIES ISSUERS, UNDERWRITERS, EXPERTS, AND OTHERS FOR MISLEADING STATEMENTS IN THE DISTRIBUTION DOCUMENTS AND REPORTS REQUIRED BY THE BILL. THE LIABILITY PROVISIONS ARE MODELED, IN PART, ON SECTIONS 11 AND 12 OF THE SECURITIES ACT, AS WELL AS SECTION 18 OF THE SECURITIES EXCHANGE ACT. ANY IMPLIED PRIVATE RIGHTS OF ACTION AVAILABLE UNDER SECTION 17(A) OF THE SECURITIES ACT AND SECTION 10(B) OF THE SECURITIES EXCHANGE ACT ALSO WOULD BE AVAILABLE TO INVESTORS IN MUNICIPAL SECURITIES, EXCEPT WITH RESPECT TO ACTIONS AGAINST ISSUERS, UNDERWRITERS, AND EXPERTS FOR A MATERIALLY MISLEADING DISTRIBUTION DOCUMENT. THE BILL WOULD PROVIDE EXCLUSIVE REMEDIES AGAINST SUCH PERSONS.

THE COMMISSION HAS NOT YET COMMENTED TO SENATOR WILLIAMS AND HIS STAFF CONCERNING THE "MUNICIPAL SECURITIES FULL DISCLOSURE ACT" AND, THEREFORE, IT WOULD BE PREMATURE FOR ME TO DISCUSS THAT BILL IN ANY DETAIL OR FOR ME TO STATE ANY PERSONAL VIEWS I MAY HAVE RESPECTING THE BILL. IT MAY BE NOTED, HOWEVER, THAT DISTINCTIONS BETWEEN THE MARKETS FOR CORPORATE AND MUNICIPAL

SECURITIES NECESSARILY PREVENT S.2339 FROM BEING PATTERNED DIRECTLY AFTER THE CURRENT CORPORATE DISCLOSURE FRAMEWORK. FOR EXAMPLE, COMMISSION STAFF REVIEW OF MUNICIPAL SECURITIES DISTRIBUTION DOCUMENTS WOULD BE OUTSIDE OF THE COMMISSION STAFF'S CURRENT AREAS OF EXPERTISE AND WOULD REQUIRE A CONSIDERABLE INCREASE IN THE COMMISSION'S BUDGET. IN ADDITION, SUCH REVIEW WOULD RAISE CONSTITUTIONAL CONCERNS IF A DELAY IN THE STAFF'S REVIEW OF SUCH A DOCUMENT DELAYED A PUBLIC SALE OF SECURITIES, THE PROCEEDS OF WHICH WERE TO BE AN ESSENTIAL PART OF A MUNICIPALITY'S BUDGET. ANOTHER EXAMPLE OF AN ACCOMMODATION OF THE CORPORATE SECURITIES STRUCTURE TO MUNICIPAL OFFERINGS IS THE EXEMPTION OF ISSUERS FROM THE DISCLOSURE REQUIREMENTS OF THE BILL IF THE STATE IN WHICH THE ISSUER IS ORGANIZED ADOPTS DISCLOSURE REQUIREMENTS WHICH ARE "SUBSTANTIALLY SIMILIAR" TO THOSE OF THE BILL.

AS AN ALTERNATIVE TO THE METHOD IN S.2339 FOR THE ESTABLISHMENT OF FEDERAL MINIMUM DISCLOSURE STANDARDS, FEDERAL LEGISLATION COULD ESTABLISH A VEHICLE FOR SELF-REGULATION OF THE MARKETS FOR THE DISTRIBUTION OF MUNICIPAL SECURITIES. ONE SUCH APPROACH, SUGGESTED BY RICHARD B. SMITH, A FORMER MEMBER OF THE COMMISSION, WOULD BE TO ESTABLISH "A NATIONAL COUNCIL APPOINTED BY THE PRESIDENT COMPOSED SOLELY OF STATE AND LOCAL GOVERNMENT OFFICIALS ...

TO IMPLEMENT THE GENERAL MUNICIPAL DISCLOSURE AND ACCOUNTING STANDARDS [WHICH WOULD BE] CALLED FOR IN [A FEDERAL] STATUTE." MR. SMITH SUGGESTED SUCH A PROPOSAL BECAUSE OF HIS BELIEF THAT A MAJOR IMPEDIMENT TO FEDERAL LEGISLATION HAS BEEN THAT SUCH LEGISLATIVE PROPOSALS HAVE BEEN VIEWED AS REQUIRING INTERVENTION BY A FEDERAL AGENCY IN THE DETERMINATION OF APPROPRIATE DISCLOSURES FOR STATE AND LOCAL ENTITIES:

> REASONABLE ARGUMENTS CAN BE MADE IN FAVOR OF UNIFORM NATIONWIDE ACCOUNTING AND DISCLOSURE STANDARDS FOR MUNICIPAL ISSUERS, FOR GIVING STATUTORY STATUS TO THE DISCLOSURE STANDARDS SO THAT AN ISSUER WHO COMPLIES WOULD BE SUBSTANTIALLY PROTECTED, AND FOR THE DESIRABILITY OF EXPLICIT LIABILITY PROVISIONS SO THAT SUCH ISSUERS AND UNDERWRITERS KNOW WHERE THEY STAND. THE HANGUP IN THE FEDERAL LEGISLATION THAT HAS BEEN PROPOSED TO DATE IS HAVING THE STANDARDS DECIDED UPON BY A FEDERAL AGENCY COMPOSED OF FEDERAL EMPLOYEES. WHATEVER ANY OF US MIGHT THINK, THERE IS THIS DEEPSEATED CONCERN THAT AN APPROPRIATE FEDERAL-STATE RELATIONSHIP CANNOT BE RECONCILED WITH THE SEC. IT IS NOT UNREASONABLE TO BELIEVE THAT FEDERAL AGENCY INTERVENTION EVEN IN ONLY A DISCLOSURE WAY CAN HAVE POLITICAL IMPLICATIONS AND CONSEQUENCES. 4/

MR. SMITH'S PROPOSAL WOULD CREATE A FRAMEWORK WHICH WOULD PLACE THE COMMISSION IN A MERELY ADVISORY ROLE IN CONNECTION WITH THE ESTABLISHMENT OF MUNICIPAL SECURITIES DISCLOSURE STANDARDS.

4/ RICHARD B. SMITH, REMARKS AT DISCLOSURE SEMINAR SPONSORED BY THE MUNICIPAL FINANCE OFFICERS ASSOCIATION IN SAN FRANCISCO (OCTOBER 26, 1977).

SUCH AN APPROACH MAY BE MORE ACCEPTABLE POLITICALLY THAN GRANTING THE COMMISSION EITHER DIRECT RULEMAKING AUTHORITY CONCERNING DISCLOSURE REQUIREMENTS OR AUTHORITY, SIMILAR TO THAT WHICH THE COMMISSION HAS CURRENTLY UNDER THE SECURITIES EXCHANGE ACT WITH RESPECT TO SELF-REGULATORY ORGANIZATIONS, TO APPROVE, DISAPPROVE, OR AMEND THE RULES OF A SEPARATE RULEMAKING AUTHORITY.

IF FEDERALLY MANDATED DISCLOSURE REQUIREMENTS ARE NECESSARY TO ACHIEVE UNIFORM, ADEQUATE DISCLOSURE, THERE ARE CERTAIN CONTROVERSIAL ISSUES WHICH APPEAR TO BE PRESENT IN ALL OF THE VARIOUS APPROACHES. FOR EXAMPLE, WHATEVER CONSTITUTIONAL PROBLEMS MAY ARISE FROM THE APPLICATION OF NATIONAL, UNIFORM DISCLOSURE REQUIREMENTS TO STATES AND OTHER MUNICIPAL SECURITIES ISSUERS WOULD EXIST REGARDLESS OF HOW THOSE REQUIREMENTS WERE FORMULATED, AND WHAT FEDERALLY MANDATED BODY ENFORCES THEM.

IN ADDITION, ANY APPROACH TO FEDERALLY MANDATED DISCLOSURE WHICH MAY BE ADOPTED WOULD APPEAR TO INVOLVE SOME INCREASED ISSUER COST. THAT COST ALMOST CERTAINLY WOULD INCLUDE THE COST OF PREPARING THE DISCLOSURE MATERIALS AND OF HAVING AN INDEPENDENT AUDIT PERFORMED IN ACCORDANCE WITH SOME STANDARD GUIDELINES. WHETHER THE ADDITIONAL COST OF AN UNDERWRITER'S DUE DILIGENCE INVESTIGATION IS NECESSARY HAS BEEN THE SUBJECT OF SOME CONTROVERSY.

IN CONSIDERING THAT POINT, IT IS CRITICAL TO RECOGNIZE THAT THE COSTS OF DUE DILIGENCE INVESTIGATIONS MUST BE BALANCED AGAINST THE LOSSES TO INVESTORS THAT WOULD POTENTIALLY BE AVOIDED. IN EVALUATING THOSE LOSSES, IT SHOULD BE NOTED THAT INVESTORS SUFFER NOT MERELY WHEN THERE IS A DEFAULT IN PAYMENTS OF INTEREST OR PREMIUM, BUT ALSO WHEN THEY MUST SELL THEIR SECURITIES IN THE SECONDARY MARKET AT A PRICE BELOW THAT AT WHICH THEY PURCHASED THE SECURITIES.

IN SPEAKING ABOUT THE ROLE OF THE SEC IN THE PUBLIC SECURITIES MARKETS, SOME MENTION SHOULD BE MADE OF PROBLEMS IN THE SALE AND TRADING OF U.S. GOVERNMENT SECURITIES, PARTICULARLY GINNIE MAES WHICH HAVE PROLIFERATED AT AN ALMOST GEOMETRIC RATE.

U. S. GOVERNMENT SECURITIES, PARTICULARLY GINNIE MAES, ARE TYPICALLY SOLD TO THRIFT INSTITUTIONS (INCLUDING SAVINGS AND LOAN INSTITUTIONS AND CREDIT UNIONS) PENSION FUNDS, AND LARGE INSTITUTIONAL INVESTORS. SOME OF THE FRAUDULENT PRACTICES UNCOVERED IN THE COMMISSION'S INVESTIGATIONS INCLUDE HIGH PRESSURE TACTICS EMPLOYED AGAINST UNIFORMED MONEY MANAGERS, EXCESSIVE FEES, ADJUSTED TRADING, AND OVER-COMMITMENTS RESULTING FROM LEVERAGING AND PURCHASES OF FORWARD CONTRACTS. IN THE PAST FEW YEARS, THE COMMISSION HAS INSTITUTED A NUMBER OF CASES AGAINST BROKER-DEALERS AND OTHERS ENGAGED IN FRAUDULENT PRACTICES IN THE SALE OF GINNIE MAES.

What the role of the SEC will be in the markets for U.S. Government securities remains to be seen. Some regulation of market professionals, either by the Commission or a self-regulatory organization may well become perceived as necessary.

Some of you may be disappointed by my failure to more clearly predict the role of the SEC in the public securities markets. However, I believe that political and economic events will determine the Commission's role to a large extent. This means that what role the SEC will play is partly up to you.

Federally mandated disclosure standards are less likely to be imposed by legislation if reasonably uniform municipal disclosure of satisfactory quality is developed for the sale of municipal bonds. The efforts of the MFOA in this direction are certainly to be applauded. In this regard, perhaps we should consider Professor Kripke's theory that issuers should not be burdened with the costs of interesting but non-essential disclosure to investors. Where issuers are government bodies, this caution is even more pointed. Similarly, if a self-regulatory organization for Ginnie Mae dealers is created voluntarily, registration and regulation of such dealers by the SEC is less likely.

THE GOVERNMENT SECURITIES MARKETS ARE AN INCREASINGLY IMPORTANT PART OF THE FINANCIAL MARKETS. TO THE EXTENT THAT THERE ARE WEAKNESSES IN THE PRESENT REGULATORY STRUCTURE FOR SUCH MARKETS WHICH CAN BE CORRECTED BY SOME FURTHER REGULATION OF EXEMPT MARKET PROFESSIONALS, SUCH AS GINNIE MAE DEALERS, OR THE ELIMINATION OF THE STATUTORY EXEMPTIONS FOR INDUSTRIAL REVENUE BONDS, SUCH FURTHER REGULATION PRESENTS NO SIGNIFICANT LEGAL OR CONCEPTIONAL PROBLEMS.

ON THE OTHER HAND, I PERSONALLY BELIEVE THAT THERE ARE BOTH LEGAL AND POLICY PROBLEMS INVOLVED IN A FEDERALLY MANDATED DISCLOSURE SYSTEM FOR MUNICIPAL ISSUERS. NEVERTHELESS, I ALSO BELIEVE THAT THE PRESENT REGULATORY SCHEME, WHEREBY FRAUDULENT SALES OF SUCH SECURITIES ARE PREVENTED MERELY BY OCCASIONAL CASES UNDER THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS IS UNSATISFACTORY. MORE AND BETTER DISCLOSURE BY MUNICIPAL ISSUERS IS ESSENTIAL TO SOUND FINANCING BY SUCH ISSUERS, AS WELL AS THE PROTECTION OF INVESTORS, VOTERS AND TAXPAYERS. THE FEDERAL GOVERNMENT HAS A SIGNIFICANT AND LEGITIMATE INTEREST IN ENCOURAGING SUCH IMPROVED DISCLOSURE, NOT ONLY TO PROTECT INVESTORS, BUT ALSO TO ASSIST CAPITAL FORMATION AND THE EFFICIENT ALLOCATION OF ECONOMIC RESOURCES. I HOPE THAT THE SEC WILL BE ABLE TO PLAY A USEFUL AND CONSTRUCTIVE ROLE IN THESE DEVELOPMENT OF BETTER MUNICIPAL ISSUER DISCLOSURE AND FAIRER AND MORE EFFICIENT PUBLIC SECURITIES MARKETS.