

STATEMENT OF A. GILCHRIST SPARKS, III
FOR THE DELAWARE STATE BAR ASSOCIATION
JANUARY 20, 1988

ON BEHALF OF THE DELAWARE STATE BAR ASSOCIATION, I AM APPEARING TO URGE THE PROMPT ADOPTION OF THE BAR ASSOCIATION'S PROPOSED SECTION 203. LET ME NOTE AT THE OUTSET IN THAT CONNECTION THAT THE BAR ASSOCIATION BILL DIFFERS IN ONE RESPECT FROM HOUSE SUBSTITUTE 1 TO HOUSE BILL 396 IN THAT THE BAR ASSOCIATION HAS MADE NO RECOMMENDATION WITH RESPECT TO THE APPROPRIATE GRANDFATHER CLAUSE DATE TO BE INSERTED IN PARAGRAPH C(5), BELIEVING IT TO BE MOST APPROPRIATE TO LEAVE THAT DECISION TO THE LEGISLATIVE PROCESS BASED UPON WHAT SEEMS FAIR AT THE TIME OF PASSAGE.

THIS PROPOSED LEGISLATION HAS BEEN DEVELOPED AFTER 7 MONTHS OF STUDY INVOLVING HUNDREDS OF VOLUNTEER HOURS BY MEMBERS OF THE BAR WHO, IN THEIR PRACTICES, VARIOUSLY REPRESENT ACQUIRORS, TARGETS AND STOCKHOLDERS.

IT IS THE PRODUCT OF A SERIES OF COMPROMISES

WHICH BOTH PRECEDED AND FOLLOWED THE NATIONWIDE CIRCULATION IN LATE NOVEMBER FOR COMMENT TO ATTORNEYS, ACADEMICS, CORPORATIONS, PENSION FUNDS, FEDERAL OFFICIALS AND OTHERS OF AN EARLIER DRAFT OF THE STATUTE.

EVERY ONE OF MORE THAN 150 WRITTEN COMMENTS WAS THOROUGHLY REVIEWED. MANY CHANGES TO THE CIRCULATED DRAFT WERE MADE AS A RESULT OF THOSE COMMENTS, INCLUDING CHANGES MADE IN RESPONSE TO INITIAL CONCERNS EXPRESSED BY SEC COMMISSIONER GRUNDFEST, WHO NONETHELESS REMAINS OPPOSED TO THE BILL, AND BY CERTAIN MEMBERS OF THE UNIVERSITY OF DELAWARE ECONOMICS DEPARTMENT, MOST OF WHOM I HAD THE PRIVILEGE OF BRIEFING YESTERDAY ON THE COMPROMISE LEGISLATION, AND NONE OF WHOM HAVE CHOSEN TO TESTIFY AGAINST THE BILL.

AS A RESULT OF THIS PROCESS, I BELIEVE WE HAVE SUCCEEDED IN BRINGING TO THE GENERAL ASSEMBLY FOR YOUR CONSIDERATION A BALANCED PROPOSAL WHICH, RATHER THAN INHIBITING LEGITIMATE TAKEOVER ACTIVITY AS SOME OTHER STATES HAVE DONE, IS NARROWLY TARGETED TO ADDRESS A LIMITED CATEGORY

OF TAKEOVER ABUSES WHICH HAVE BEEN REPEATEDLY RECOGNIZED BOTH BY THE U.S. SUPREME COURT AND BY OUR DELAWARE SUPREME COURT, IN WHICH OFFERORS SEEK TO TAKE ADVANTAGE OF THE POWER UNDER OUR LAW OF A BARE MAJORITY STOCKHOLDER TO CASH OUT THE MINORITY TO COERCE STOCKHOLDERS INTO SELLING THEIR STOCK AT A PRICE WHICH IS LESS THAN THAT WHICH STOCKHOLDERS WOULD RECEIVE IN A FREE AND UNCOERCED MARKET.

OVER THE PAST TWO WEEKS EITHER I OR OTHER REPRESENTATIVES OF THE BAR ASSOCIATION HAVE HAD THE OPPORTUNITY TO REVIEW WITH EVERY MEMBER OF THE GENERAL ASSEMBLY IN GREAT DETAIL THE TERMS OF THE STATUTE AND TO RESPOND TO YOUR QUESTIONS. I WILL NOT BURDEN YOU WITH A REPEAT OF THAT NOW. HOWEVER, BOTH AS A REPRESENTATIVE OF THE BAR ASSOCIATION AND AS AN INDIVIDUAL DELAWAREAN, I WISH TO EXPRESS MY GRATITUDE FOR THE COURTESIES SHOWN TO ME BY THE MEMBERS OF THE GENERAL ASSEMBLY AND FOR THE LONG HOURS WHICH THOSE MEMBERS HAVE SPENT IN ACHIEVING A MASTERY OF THE ISSUES RAISED BY THIS LEGISLATION. MY ONLY REGRET

IN THIS WHOLE PROCESS IS THAT, UNLIKE THE MEMBERS OF THE GENERAL ASSEMBLY, CERTAIN OF THOSE PERSONS WHO HAVE CHOSEN TO COMMENT ADVERSELY HAVE NOT TAKEN THE TIME TO UNDERSTAND THIS UNIQUE LEGISLATION, BUT INSTEAD HAVE REACTED TO ERRONEOUS CHARACTERIZATIONS OF THE LEGISLATION BY ITS HEAVILY FINANCED OPPONENTS OR HAVE TENDED TO LUMP IT TOGETHER GENERICALLY WITH BROADER AND MORE RESTRICTIVE LEGISLATION IN OTHER STATES.

I WOULD ALSO LIKE TO SPEAK BRIEFLY TO SENATE BILL 311, WHICH DIFFERS FROM THE BAR ASSOCIATION PROPOSAL IN THAT IT WOULD REQUIRE STOCKHOLDERS TO "OPT IN" TO SECTION 203, RATHER THAN PERMITTING THEM TO OPT OUT. THIS ISSUE WAS CONSIDERED EARLY ON BY THE BAR ASSOCIATION AND THE OPT-IN MODEL WAS REJECTED FOR THE FOLLOWING REASONS:

FIRST, THE PREDOMINANT PATTERN IN OUR CORPORATION LAW IS OPT OUT; NOT OPT IN. IT IS UNFAIR TO DEVIATE FROM THAT PATTERN TO REQUIRE DELAWARE COMPANIES -- AND STOCKHOLDERS IN THOSE COMPANIES -- TO VOTE "IN" THE PROTECTION THEY

ARE ENTITLED TO, ESPECIALLY WHEN THE COERCION APPLIED TO STOCKHOLDERS BY RAIDERS IS THE PRODUCT OF A FEATURE OF OUR OWN CORPORATION LAW WHICH PERMITS A 51% STOCKHOLDER TO EXPROPRIATE THE STOCK OF THE 49% MINORITY.

SECOND, IT IS ALSO UNFAIR TO ASK A COMPANY TO CALL ATTENTION TO ITSELF AS A TARGET AND PUT ITSELF "IN PLAY" AT A TIME WHEN IT DOES NOT HAVE THE PROTECTION OF THE STATUTE BY ASKING ITS STOCKHOLDERS TO VOTE TO "OPT IN" TO THIS STATUTE. THE FACT THAT SUCH A VOTE IS SOUGHT WILL IMMEDIATELY BE REPORTED IN THE FINANCIAL PRESS AND WILL CONSTITUTE AN INVITATION TO EVERY RAIDER TO CHECK OUT THE PROPONENT'S VULNERABILITY TO A TAKEOVER. WE JUST CAN'T DO THAT TO OUR CORPORATIONS.

THIRD, AN "OPT-IN" STATUTE WOULD NOT BE COMPETITIVE, SINCE THE OTHER 27 STATES WITH TAKEOVER STATUTES ALL HAVE "OPT-OUT" STATUTES, OR NO "OUT" AT ALL. BY ADOPTING A MEANINGLESS STATUTE WHICH, FOR THE REASONS NOTED ABOVE, NO CORPORATION COULD RISK PUTTING TO A VOTE, DELAWARE WOULD

FORFEIT WHAT MAY BE ITS LAST OPPORTUNITY TO TAKE THE LEAD IN FASHIONING A BALANCED APPROACH TO THIS PROBLEM TO BE FOLLOWED BY OTHER STATES.

FINALLY, IF PROPOSED SECTION 203 WERE "OPT IN" AND A DELAWARE CORPORATION WANTED ITS STOCKHOLDERS TO HAVE THE PROTECTION OF TAKEOVER LEGISLATION, SUCH CORPORATION WOULD BE MUCH MORE LIKELY TO PURSUE A REINCORPORATION MERGER OUT OF DELAWARE TO A STATE WITH "OPT-OUT" LEGISLATION ALREADY IN PLACE THAN TO ADOPT SECTION 203, SINCE THE ANTI-TAKEOVER EFFECTS OF A REINCORPORATION MERGER ARE POPULARLY VIEWED AS SUBORDINATE TO A CORPORATION'S STATED PURPOSE OF REINCORPORATING TO RETURN ITS LEGAL DOMICILE TO THE STATE OF ITS PRINCIPAL PLACE OF BUSINESS. AS A RESULT, REINCORPORATION PROPOSALS ARE ROUTINELY APPROVED BY STOCKHOLDERS, AS IN THE CASE OF PEPSI, WHICH REINCORPORATED IN NORTH CAROLINA IN LATE 1986.

WHILE WE APPRECIATE THE FACT THAT THE SENATE BILL WAS FILED SO THAT THIS ISSUE COULD BE FRAMED AND

DEBATED, FOR THE REASONS I HAVE JUST NOTED IT IS IMPERATIVE THAT THE BILL AS ENACTED BE "OPT OUT" IN NATURE.

IN CONCLUDING, I URGE YOU TO MAINTAIN DELAWARE'S LEADERSHIP IN THE CORPORATE LAW FIELD BY ENACTING THE BAR ASSOCIATION'S PROPOSAL, WHICH CAN THEN SERVE AS A BALANCED AND MODERATE MODEL TO BE FOLLOWED BY OUR SISTER STATES.

WITH THE COMMITTEES' PERMISSION, I WOULD LIKE TO CLOSE BY FORMALLY PLACING INTO THE RECORD A NUMBER OF DOCUMENTS WHICH EITHER I OR OTHER REPRESENTATIVES OF THE BAR ASSOCIATION HAVE PREVIOUSLY PROVIDED TO MEMBERS OF THE GENERAL ASSEMBLY.