M E M O R A N D U M

TO: The Members of the Corporation Law Section

FROM: Charles F. Richards, Jr.

RE: Proposed Delaware Business Combination Statute

DATE: December 31, 1987

I am enclosing herewith a selection of materials which suggest that the proposed Delaware legislation is not the balanced bill its supporters would have you believe it to be. I believe that there is still time to achieve a balanced approach at the Bar Association level by amending the bill at the section level or remanding it to the Council with instructions to liberalize the "outs" along the lines suggested herein.

I enclose the editorial in today's Wall Street Journal against the current version of the bill. Some of you may have also seen Bob Samuelson's article in the current issue of Newsweek, apparently written after extensive discussions with Gil Sparks. The Wilmington Trust Company's earlier letter is included. Barney Taylor authorized me to advise the Council that the bank remains opposed to the modified bill, as I believe do the other correspondents whose letters are included. Of course, there has not been time for interested parties to express their views in writing since December 22.

Of particular importance, however, is the correspondence of Commissioner Grundfest, found at the back of the

packet, in his letters of December 10, 18 and 22. You will see that like the others, he does not support the compromise. I agree with his suggestion, as contained in his December 22 letter, that the stock of all directors, not just insiders, should be excluded from the formula. In addition, I would drop the percent required to 80%. Considering that 5% of shareholders are unresponsive, this would mean that an acquiror would have to get 80% out of 95% possible or 84.2% of the disinterested shares. This is still an overwhelming showing to require an acquiror to obtain. In addition to being a substantial impediment to takeovers, such an 80% hurdle assures that the offer must be a fair and full one to command such a super majority. The only real reason for opposing such a high threshold would be a desire to take away from shareholders their right to decide ultimately what they want to do with respect to their investment of their own money.

Without such a change, a very large percentage of companies are either takeover proof, or by placing small blocks could be made so easily. Another large group of companies could be taken over only if an acquiror could get essentially 100% of the disinterested shares. Such a statute is not balanced.

In addition, the §203(a)(3) vote should be lessened to a majority of the disinterested shares. In order to take advantage of subsection (3), an acquiror must first get control of the board. This would take 51%, an additional

requirement of a majority of the disinterested would take him to 75% -- that's enough.

With these changes, I could support the bill. While I may be in a minority on the Council, I believe that among shareholders and their representatives, academics, regulatory officials and people in the securities industry, the opposition to this bill is very widespread. A modification as outlined herein would do much to blunt this opposition and correspondingly reduce the risks of preemption, unconstitutionality, and the threat to Delaware's dominance in the corporate field though favoring the interests of management at the expense of shareholders and the public interest, not to mention the prospect of defeat in the State legislature.

I hope you will study these materials prior to the Section meeting, particularly Commissioner Grundfest's letters. I regret that all of these proceedings are so rushed and hurried, and that you do not have more time for reflection. Many of you have told me that you simply haven't had the time over the holidays to give these matters the attention they deserve. There is no good reason for this unseemly haste.

CFRjr/mrr
Enclosures