

MEMORANDUM

August 6, 2010

To: File No. S7-10-09 (Facilitating Shareholder Director Nominations)

From: Zachary S. May
Office of Commissioner Luis A. Aguilar

Re: Meeting with Representative of PepsiCo, Inc.

On Wednesday, July 28, 2010, Commissioner Luis A. Aguilar, and Smeeta S. Ramrathnam and Zachary S. May, Counsels to the Commissioner, met with Mr. Larry D. Thompson (General Counsel, Secretary and Senior Vice President of Government Affairs for PepsiCo). The participants discussed, among other things, the proposed rulemaking on facilitating shareholder director nominations. Mr. Thompson provided a copy of the attached article at the meeting. Also attached are materials sent by Mr. Thompson on August 3, 2010.

Copyright material redacted. See:

"Short-Termism and U.S. Capital Markets: A Compelling Cast in Charge" (June 2007) & "Long-Term Value Creation: Guiding Principles for Corporations and Investors" (2010) at The Aspen Institute at www.AspenBSP.org.

Larry D. Thompson, "The Responsible Corporation: A Historical and Legal Perspective"(2010).



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LARRY D. THOMPSON
SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS
GENERAL COUNSEL AND SECRETARY

August 3, 2010

The Honorable Luis A. Aguilar
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Commissioner Aguilar:

I very much appreciate you taking time out of your very busy schedule last week to speak to me. I also enjoyed meeting Smeeta Ramarathnam and Zach May.

As we discussed, enclosed is a draft of my essay, *The Responsible Corporation*. Based, in part, on my experience as a General Counsel of a public company, the essay explains why it is desirable for a corporation to focus on long-term shareholder value creation and that to do so is entirely consistent with sound legal principles and an understanding of the corporate form from a historical perspective.

Also enclosed is the Aspen Institute publication, *Long-Term Value Creation: Guiding Principles for Corporations and Investors*. I am pleased to note that PepsiCo is a signatory to this document. Based on the principles articulated in this document, I believe the Commission should adopt, pursuant to appropriate regulations, a minimum holding period, preferably 3 years, for proxy access by shareholders.

Finally, enclosed is a copy of a speech I gave at the University of Michigan Business School when I was Deputy Attorney General. I believe this speech has earned me the perpetual enmity of the Wall Street Journal editorial page. I hope you enjoy it.

Take care my friend.

Enc. 

AUG 04 2010

FINAL
SPEECH* OF DEPUTY ATTORNEY GENERAL
LARRY D. THOMPSON
UNIVERSITY OF MICHIGAN
ANN ARBOR MICHIGAN
JANUARY 31, 2003

GOOD AFTERNOON.

IT IS GOOD, AS ALWAYS, TO BE BACK AT THE UNIVERSITY OF MICHIGAN. I SPENT THREE GREAT YEARS STUDYING LAW, SO I THINK IT IS GOOD TO BE BACK HERE IN ANN ARBOR TO TALK TO THIS DISTINGUISHED GATHERING ABOUT ONE OF THE RATHER MOMENTOUS ISSUES THAT NOW FACE US AT THE DEPARTMENT OF JUSTICE.

ALTHOUGH ON A DAY-TO-DAY BASIS I DEVOTE MUCH OF MY TIME TO THE WAR AGAINST TERRORISM THAT WE ARE FIGHTING BOTH HERE AND ABROAD, I DO NOT PLAN TO ADDRESS THOSE MATTERS TODAY, AT

LEAST NOT DIRECTLY. INSTEAD, I WILL SAY A FEW WORDS ABOUT A SUBJECT NEAR TO MY HEART AS BOTH A PROSECUTOR AND A FORMER WHITE-COLLAR DEFENSE LAWYER OF MANY YEARS; AND THAT IS THE ROLE THAT SWIFT AND STRONG PROSECUTION DECISIONS SHOULD PLAY IN MAINTAINING A VIBRANT BUSINESS ENVIRONMENT.

I COULD TALK ABOUT A NUMBER OF ASPECTS OF WHAT WE ARE DOING AT THE DEPARTMENT OF JUSTICE TO ADDRESS THE SPATE OF CORPORATE SCANDALS THAT ROCKED THE NATION AND OUR ECONOMY SEVERAL MONTHS AGO. PRESIDENT BUSH ESTABLISHED THE CORPORATE FRAUD TASK FORCE WHICH HE ASKED ME TO HEAD. WE HAVE HAD, IN MY OPINION, REMARKABLE SUCCESS. SINCE THE TASK FORCE WAS ESTABLISHED, WE HAVE OPENED OVER 130 INVESTIGATIONS, CHARGED OVER 160 INDIVIDUALS, AND OBTAINED CONVICTIONS OF OVER 50 INDIVIDUALS. WE HAVE FROZEN OR FORFEITED OVER 30 MILLION DOLLARS. I COULD ALSO TALK ABOUT MY DIRECTION TO OUR

PROSECUTORS TO NOT HESITATE TO CHARGE A BUSINESS ENTITY ITSELF UNDER APPROPRIATE CIRCUMSTANCES CONSISTENT WITH DOJ GUIDELINES AND ALSO TO LOOK AT THE ROLE PROFESSIONALS PLAY IN THESE MATTERS CAREFULLY. INSTEAD, IN THIS SETTING, I WOULD LIKE TO OFFER SOME OBSERVATIONS ABOUT WHAT WE ARE DOING AS PROSECUTORS.

FEW AMONG US, EVEN THE MOST EXTREME ADVOCATES OF LAISSEZ-FAIRE ECONOMIC POLICY, WILL ARGUE THAT GOVERNMENT SHOULD TAKE NO ROLE IN POLICING THE MARKET – THAT THE LAW OF THE JUNGLE SHOULD REPLACE THE LAW OF CONTRACTS. RATHER, IT SEEMS TO ME THAT THE DEBATE TENDS TO FOCUS ON THE NATURE AND DEGREE OF GOVERNMENT INTERVENTION.

WHERE YOU COME OUT IN THIS DEBATE DEPENDS ON YOUR FAITH IN THE ULTIMATE RESILIENCE OF OUR CAPITALIST SYSTEM. IF YOU JOIN WITH ME IN THE BELIEF THAT ADAM SMITH'S "INVISIBLE HAND" BEST

ALLOCATES RESOURCES TO THE IMPROVEMENT OF OUR SOCIETY AS A WHOLE, THEN YOU WILL WANT TO LIMIT THE EXTENT OF POLICING – SINCE EVERY GOVERNMENT INTERVENTION TENDS TO CARRY AN ECONOMIC PRICE TAG.

OVER TIME, MANY CRITICS HAVE ATTACKED THIS PROPOSITION: FROM THE MERCANTILISTS TO THE MARXISTS TO TODAY'S ANTI-GLOBALIZATION PROTESTERS. WHAT THESE CRITICS HAVE IN COMMON IS THE CONVICTION THAT SOME GROUP OF EXPERTS DIVORCED FROM THE ROUGH AND TUMBLE OF TRADE CAN DO A BETTER JOB – THAT THEY CAN ACHIEVE WHAT THE ECONOMIST THOMAS SOWELL DERISIVELY REFERS TO AS A “COSMIC JUSTICE.”

CAPITALISM'S CRITICS POUNCED ON THE RECENT SPATE OF CORPORATE SCANDALS TO PRONOUNCE OUR SYSTEM DEEPLY FLAWED AND IN NEED OF A THOROUGH AND INTENSIVE REGULATORY OVERHAUL. BUT IT IS IMPORTANT TO REMIND OURSELVES THAT – AS

TRAUMATIC AS THESE MASSIVE FRAUDS HAVE BEEN FOR INVESTORS AND FOR THE CONFIDENCE OF THE MARKETS – SUCH EVENTS ARE NOT NEW.

THE DUSTBIN OF HISTORY IS LITTERED WITH THE SENSATIONAL EXPOSURE OF MASSIVE FRAUDS. JUST WITHIN RECENT MEMORY WE HAD THE DEVASTATING SAVINGS AND LOAN BANKRUPTCIES OF A DECADE AGO. LESS THAN TWO DECADES AGO, WE HAD THE HIGH-PROFILE INSIDER TRADING SCANDALS AND THE SPECTACULAR COLLAPSE OF THE JUNK BOND SCHEMES. THREE DECADES AGO WE DISCOVERED THAT SOME OF OUR PROMINENT CORPORATIONS WERE ENGAGING IN CORRUPT FOREIGN PRACTICES THAT WOULD HAVE BEEN INTOLERABLE IN THE UNITED STATES. THE LIST GOES ON WITH DEPRESSING REGULARITY THROUGH THE STOCK MANIPULATIONS OF THE 1920s AND THE ANTITRUST CONSPIRACIES AND THE ROBBER BARONS OF THE EARLY TWENTIETH CENTURY TO THE REAL ESTATE SCAMS THAT MARKED THE DAWN OF THE REPUBLIC.

THE LESSON HERE IS NOT THAT GREED AND CRIMINALITY HAVE ALWAYS BEEN WITH US – ALTHOUGH, CLEARLY, THEY HAVE. RATHER THE LESSON IS THAT AMERICANS HAVE OVERCOME EACH OF THESE JOLTS, AND OUR ECONOMY HAS REMAINED THE ENVY OF THE WORLD. EACH FRESH BUSINESS SCANDAL HAS BROUGHT CALLS FOR MORE REGULATION, TIGHTER RULES, BETTER WEAPONS TO FIGHT THE LAST WAR, TO MAKE CERTAIN THAT THE CHICANERY USED SO SUCCESSFULLY IN THE SCHEME JUST PAST CAN NEVER BE USED AGAIN.

SOME REGULATIONS HAVE BEEN EXEMPLARY. THOSE THAT PROMOTE TRANSPARENCY CAN GIVE THE MARKET MORE UNIFORM AND ACCURATE INFORMATION. BUT OVERZEALOUS AND SOMETIMES MINDLESS REGULATION CAN ALSO PROVE TO BE A VERY BAD THING. TOO MANY REGULATIONS, RULES THAT BECOME BYZANTINE IN THEIR COMPLEXITY OR RULES THAT SEEK TO ADVANCE SOCIAL POLICY PREFERENCES UNRELATED

TO THE GENERAL ECONOMIC WELFARE: THESE RULES CAN SERIOUSLY STIFLE INNOVATION.

AS COMMENTATORS FROM MILTON FRIEDMAN TO PHILIP HOWARD, AUTHOR OF "DEATH OF COMMONSENSE," HAVE POINTED OUT, WE ARE ALREADY SUFFERING SOME OF THE ILL EFFECTS OF OVER-REGULATION. COMPANIES MUST HIRE LEGIONS OF EXPERTS AND CONSULTANTS MERELY TO COMPLY WITH THEIR DICTATES. THESE REGULATIONS' FREQUENT SHIFTS AND VIRTUAL IMMUNITY TO LEGISLATIVE RECOURSE MAKE THE FUTURE BUSINESS CLIMATE MORE DIFFICULT TO PREDICT AND FURTHER INCREASE THE COST OF CAPITAL. START-UP BUSINESSES ARE DETERRED FROM EVEN ENTERING HEAVILY REGULATED INDUSTRIES. COMPANIES CHOOSE THE SAFEST COURSE, NOT THE ONE THAT MIGHT PAY DRAMATIC RETURNS.

WHILE IT BEGINS WITH THE WELL-INTENTIONED IMPULSE TO CLOSE THE BARN DOOR AFTER THE HORSE

IS GONE, THE PROBLEM IS THAT THE OVER-AGGRESSIVE REGULATORY SYSTEM BECOMES PROGRESSIVELY MORE COMPREHENSIVE WITH EACH ENSUING SCANDAL. REGULATIONS GRADUALLY EXPAND TO ENCOMPASS EVERY POSSIBLE ABUSE – EXCEPT THE NEXT ONE. THIS IS WHAT I CALL THE HYPER-REGULATORY “NANNY STATE” THAT GROWS EVER CLOSER TO CENTRAL PLANNING AND TO THE SUBSTITUTION OF A GOVERNMENT-DRIVEN POLICY FOR INDIVIDUAL INITIATIVE.

RATHER THAN THE “NANNY STATE” MODEL, CRIMINAL FRAUD PROSECUTION REPRESENTS THE “MOMMY AND DADDY STATE.” IT IS THE “TOUGH LOVE” ANTITHESIS OF OVER-REGULATION. THE CRIMINAL LAW HAS THE UNIQUE ABILITY TO CONCENTRATE THE MIND OF THE CORRUPT BUSINESSPEOPLE AND TO DETER THOSE TEETERING ON THE BRINK OF LETTING GREED SUPPLANT RESPONSIBILITY. THE ENFORCEMENT OF THE CRIMINAL STATUTES THAT PUNISH FRAUD SEND THE MESSAGE

THAT DEVIANT BEHAVIOR WILL BE DEALT WITH IN A WAY THAT THE OFFENDERS FIND PARTICULARLY UNPLEASANT – GOING TO JAIL, AND GOING TO JAIL FOR A LONG TIME.

OUR JOB AT THE DEPARTMENT OF JUSTICE IS TO MAKE CLEAR THAT THE CONSEQUENCES OF CRIMINAL CONDUCT ARE SEVERE AND VIRTUALLY CERTAIN. OUR STRUGGLE HAS BEEN TO QUICKLY AND DECISIVELY PROSECUTE CORPORATE CRIMINALS SO AS TO DEMONSTRATE BOTH TO THE WRONGDOERS AND TO OTHER POTENTIAL WRONGDOERS – AS WELL AS TO THE INVESTING PUBLIC – THE DIRECT CONNECTION BETWEEN THE CRIME AND ITS CONSEQUENCES.

THE MASSIVE FRAUDS THAT WE ARE NOW INVESTIGATING AND PROSECUTING HAVE COMPROMISED THE INTEGRITY OF A WIDE RANGE OF COMPANIES – FROM MULTI-BILLION DOLLAR COMMUNICATIONS GIANTS TO TINY INTERNET START-UPS. AND BECAUSE THE VITALITY OF OUR INCREASINGLY COMPLEX ECONOMY

RESTS ON THE FREE AND FAIR EXCHANGE OF INFORMATION, THESE CRIMES ARE PARTICULARLY PERNICIOUS AND APPROPRIATELY THE SUBJECT OF INTENSE – AND THAT IS WHAT THEY ARE GETTING – LAW ENFORCEMENT FOCUS AND ACTION. THEY AFFECT NOT ONLY INSTITUTIONS, BUT SHAREHOLDERS AND EMPLOYEES AND PENSIONERS. THEY HARM AVERAGE FOLKS AS WELL AS MAJOR INVESTORS, MAIN STREET AS WELL AS WALL STREET.

IN DISCUSSING THESE CRIMES, IT IS IMPORTANT NOT TO UNDERESTIMATE THE STIGMA THAT APPROPRIATELY ATTACHES TO CRIMINAL CONDUCT AND THUS NOT TO TAR WITH TOO BROAD A BRUSH THE OVERWHELMING MAJORITY OF CORPORATIONS THAT OPERATE MORALLY AND PRODUCTIVELY IN THE BEST AND HIGHEST INTEREST OF THEIR SHAREHOLDERS AND THE COUNTRY. YET, I BELIEVE YOU WILL AGREE THE BREADTH AND EXTENT OF THESE RECENT SCANDALS DO DEMONSTRATE INTOLERABLE LEGAL AND ETHICAL

MISDEEDS THAT REQUIRE OUR COMPREHENSIVE RESPONSE.

THE ALTERNATIVE TO THE BROAD CAMPAIGN OF CRIMINAL PROSECUTION IS AN EVEN BROADER AND MORE MINUTELY INTRUSIVE REGULATORY FRAMEWORK THAT MORE CLOSELY DIRECTS INDIVIDUALS' CONDUCTS. YET, REGULATION ALONE CAN NEVER BE A SUFFICIENT DETERRENT BECAUSE THE TRULY CORRUPT WILL ALWAYS VIEW THE VIOLATION OF THESE RULES AS MERELY THE COST OF DOING BUSINESS. MY COLLEAGUES AT THE SECURITIES AND EXCHANGE COMMISSION, FOR INSTANCE, WOULD BE THE FIRST TO RECOGNIZE THAT THEIR JOBS GET EASIER AND REGULATORY COMPLIANCE GETS MUCH BETTER IF INDIVIDUALS REALIZE THAT WILLFUL VIOLATIONS MEAN PRISON AND STIGMA – NOT MERELY FINES AND LAWSUITS.

THE SAME HOLDS TRUE FOR ENTITY OR CORPORATE CRIMINAL LIABILITY. REGULATORY SANCTIONS SIMPLY

DO NOT HAVE THE POWER OF CRIMINAL PENALTIES TO CHANGE CORRUPT CORPORATE CULTURES. LARGE BUSINESS ORGANIZATIONS, PARTICULARLY PUBLIC COMPANIES THAT ARE ALREADY REGULATED IN MYRIAD WAYS, SOMETIMES HAVE THE DISAPPOINTING TENDENCY TO VIEW CIVIL SANCTIONS AS MERELY THE “COST OF DOING BUSINESS” – A COST THAT CAN BE PASSED ON TO CUSTOMERS AND SHAREHOLDERS.

VIGOROUS CRIMINAL ENFORCEMENT IS THUS MORE HARMONIOUS WITH THE HEALTHY ECONOMIC DEVELOPMENT TO WHICH WE ASPIRE. THE CRIMINAL LAWS SET A STANDARD WHOSE TRANSGRESSION IS – AND OUGHT TO BE – SWIFT AND YES – TERRIBLE. BUT THEY DO NOT, BY AND LARGE, CREEP TOWARD INSERTING THE GOVERNMENT AS THE DECISION MAKER AND UNDERMINE THE ENTREPRENEURIAL SPIRIT. A STRONG REGIME OF CRIMINAL ENFORCEMENT LEAVES THE HONEST BUSINESSPEOPLE FREE TO COMPETE WHILE WEEDING OUT THOSE FEW – AND I EMPHASIZE FEW – WHO BREAK THE LAW.

OF COURSE, BY MY COMMENTS HERE TODAY, I DO NOT MEAN TO UNDERMINE THE REGULATORY STRUCTURE NOW IN PLACE – CERTAINLY THE RULES THAT REQUIRE THE OPEN DISCLOSURE OF FINANCIAL INFORMATION ARE INVALUABLE TOOLS IN HELPING INVESTORS TO VALUE COMPANIES AND IN REVEALING CRIMINAL WRONGDOING. NEITHER DO I WISH TO DISPARAGE THE VALIANT EFFORTS OF THE REGULATORS THEMSELVES. WHAT IS CLEAR, IT SEEMS TO ME, IS THAT THE VIGOROUS ENFORCEMENT OF THE CRIMINAL LAWS – IN SUPPORT OF THE RULE OF LAW – IS APPROPRIATE FOR PUNISHING FRAUD WHILE PRESERVING ECONOMIC FREEDOM.

ALMOST 60 YEARS AGO, THE PHILOSOPHER FRIEDRICH HAYEK RECOGNIZED THAT, “WHILE EVERY LAW RESTRICTS INDIVIDUAL FREEDOM TO SOME EXTENT BY ALTERING THE MEANS WHICH PEOPLE MAY USE IN THE PURSUIT OF THEIR AIMS, UNDER THE RULE OF LAW THE GOVERNMENT IS PREVENTED FROM STULTIFYING INDIVIDUAL EFFORTS BY AD HOC ACTION. WITHIN THE

**KNOWN RULES OF THE GAME THE INDIVIDUAL IS FREE TO PURSUE HIS PERSONAL ENDS AND DESIRES”¹
WE AT DOJ WILL CONTINUE TO UPHOLD THOSE RULES TO KEEP THE GAME OPEN AND COMPETITIVE. WE WILL CONTINUE TO STRIKE DECISIVELY WITH OUR POWERS OF CRIMINAL ENFORCEMENT TO ENSURE THAT THE LIBERTIES WE CHERISH DO NOT GIVE WAY TO CORRUPTION.**

THANK YOU.

*NOTE: Mr. Thompson frequently speaks from notes and may depart from the speech as prepared. However, he stands behind the speech as presented in written format.

¹ F.A. Hayek, The Road to Serfdom.