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Plain English-Changing the Corporate Culture

Isaac C. Hunt Jr.

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ISAAC C. HUNT, JR.*

Good afternoon ladies and gentlemen. It is nice to be here with you. You picked a nice locale for your first conference or the school did. The weather is nice, and I very much wish I could stay here with you rather than rushing back to the hustle and bustle of Washington. It is always nice to get out of that hustle and bustle to reflect on the great legal issues of the day.

The hotel concierge informed my office that Andre Agassi and Brook Shields stayed here a couple of days ago. I wonder if they stayed for your conference.

In case you did not notice, the dean mentioned that I was sworn in February 29th which is leap day. So instead of having a four-year term as most commissioners have, I will have a 20-year term.

Looking over your schedule, and again, I am delighted to be here, I see that you will be focusing on some of the more hyper-technical issues that you face as practitioners in this field. Tomorrow our own, Cathy Dixon, chief of our staff's Mergers and Acquisitions Office will give you an update on the commission's current thinking on some of these issues. I think I will step back for a minute to talk about a culture change that we, at the SEC, are trying to foster.

Over the past several years, many of us have lost sight of the fact that the disclosure documents that are filed with the SEC every year are

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* Isaac Hunt was nominated to the Securities and Exchange Commission by President Bill Clinton in August of 1995 and was confirmed by the Senate on Jan. 26, 1996. He was sworn in as a commissioner on Feb. 29, 1996. This paper was prepared for delivery as the lunch keynote speech at the first annual University of Miami Institute on Mergers and Acquisitions.

Prior to being nominated to the commission, Commissioner Hunt was Dean and Professor of Law at the University of Akron School of Law, a position he held from 1987 to 1995. For seven of his eight years as Dean at the University of Akron, he also taught securities law. Previously, he was the Dean of the Antioch School of Law in Washington D.C. where he also taught securities law.

During the Carter and Reagan administrations, Commissioner Hunt served as Deputy General Counsel and as Acting General Counsel in the Office of General Counsel at the Department of the Army.

Previously, he practiced corporate and securities law at the law firm of Jones, Day, Reavis and Pogue, and he commenced his legal career at the SEC as a staff attorney from 1962 to 1967.

Commissioner Hunt was born in 1937 in Danville, Virginia. He earned his B.A. from Fisk University in Nashville, Tennessee and his J.D. from the University of Virginia School of Law in 1962.

not only liability documents, but are intended to be one of the primary ways that the corporate community communicates with investors. The marketplace has become very much more complex. Corporate transactions and financial instruments are also becoming more complex, and I am well aware that SEC regulations are not always a shining example of simplicity. I am also aware that, as M&A practitioners, you must be mindful not only of SEC requirements but also those of the Justice Department, the Federal Trade Commission, the federal and state judicial pronouncements, and of course, the Internal Revenue Service.

Given these competing forces, it is not surprising that you add new items to your legal checklist with every deal. It is even understandable that during the long days and late nights when you're preparing a proxy statement you don't ask yourself probably, who is our intended reader? What percentage of the company's shareholders are retail investors versus sophisticated institutional investors? What will investors need to know to make an informed investment decision?

Each of us I think must accept some blame for the current situation, but where do we go from here? As you are well aware, we at the SEC, under the leadership of Chairman Arthur Levitt, are engaged in a campaign to change some of the corporate culture in America. We want documents that are meant for investors to read, to be prepared so that investors can use them.

This is the reason we are promoting the use of the so-called plain English. As Chairman Levitt has said many times, "Disclosure is not disclosure if it does not communicate."[1] This is the reason why the commission recently proposed a plain English rule. This proposal is part of our continuing effort to bring the protection that our federal securities laws promise to many more investors.

The proposed plain English rule would apply to all prospectuses. It would require you to prepare the cover page, summary and risk factors sessions using plain English principles. The required disclosures would have to avoid legal jargon and highly technical business terms and use everyday words and short sentences. The design of the sections may include pictures, charts, graphs, and other design elements so long as the required information is presented clearly.

Our proposal would also add a note to the present requirement that the information in a prospectus should be presented in a clear, concise and understandable form. Overly complex presentations will be out. Vague boilerplate explanations that are imprecise will be out, and com-

1. Mark H. Anderson, *SEC Rules That Require Prospectuses To Be in "Plain English" Are Proposed*, WALL ST. J., Jan. 14, 1997, at C22.

plex information copied directly from other legal documents will be gone.

Let me state the obvious, however: Good writing is hard work. It takes time and effort to clearly summarize complex material, but it can be done. Let me give you an example. Just the other day, the commission adopted rules that would require better disclosure of derivative investments.[2] The adopted release covered many complex areas, including complicated financial products, accounting, and the market sensitivity analysis. Nevertheless, the release is an excellent example of good writing.

If I was still teaching, I would have given the accountants who wrote the release an A, something I never thought I would give accountants. The intended audience of the release was other accountants and corporate lawyers, and the staff wrote the document with these persons and readers in mind. You may not agree with all the substantive provisions of the new derivative disclosure rules, but at least you will know what the provisions mean.

After working through the substance of the new requirements and putting them down on paper, the staff started the process of presenting the information in as clear a fashion as possible. They had plain English consultants, who knew nothing about the subject, read the drafts, and made suggestions on how it could be improved. They wrote and rewrote. I am sure you will appreciate the extra effort they put into that project.

Along with proposing the plain English rule, the commission also issued a draft of its plain English handbook. It was released in draft form to encourage you and your colleagues to review it and send us your suggestions on how it can be improved.

In the handbook's introduction, Chairman Levitt appropriately points out:

> "Whether you work at a company, law firm or the SEC, the shift to plain English requires a new style of thinking and writing. We must question whether the documents we are used to writing highlight the important information investors need to make informed decisions. The legalese and jargon of the past must give way to everyday words that communicate complex information clearly."

The investing public is greeting the SEC's efforts with open arms.

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2. Derivative Financial Instrument Disclosures, Exchange Act Release No. 34-38223, 63 S.E.C. Docket 1851 (Jan. 31, 1997); Securities Act Release No. 33-7386, 63 S.E.C. Docket 1851 (Jan. 31, 1997); Financial Reporting Release No. FR-48, 63 S.E.C. Docket 1851 (Jan. 31, 1997); Investment Company Act Release No. IC-22487, 63 S.E.C. Docket 1851 (Jan. 31, 1997); International Series Release No. IS-1047, 63 S.E.C. Docket 1851 (Jan. 31, 1997).

I hear this firsthand each time I speak at one of our investor or small business town meetings around the country. There are some persons, however, who must be pulled into the 21st century kicking and screaming.

For instance, imagine my chagrin when I read a recent editorial in *Barron's*.[3] The editorial starts off with what I think was meant as a complement by stating that the SEC is "far from the most destructive federal agency."[4]

It goes on to state that the SEC is an agency that periodically takes leave of its senses; we have too many people doing too many mundane tasks, and we need to be watched.[5] Some of us, the editorial chides, get ambitious for higher office and the others become nostalgic for a "Wild West" enforcement style.

The *Barron's* editorial suggests that this is what lies behind our plain English rule. It was that paper's view that a plain English rule would take a lot of the fun out of reading disclosure documents.[6] The editorial noted that, "there's nothing like a team of lawyers spreading glutinous prose over an executive's previous incarceration or a selling owner's self-enrichment to provide evidence of a company's intent to deceive."[7]

My response with all the plain English that is fit for public consumption is: Give us a break. What we want, as Nancy Smith of our office of educational assistance has stated, is a new generation of disclosure documents that investors can understand. When we were working with plain English, the staff that was working on it gave me a proxy statement, and the first sentence of the proxy statement simply said, the shareholders' meeting will be held at such and such a place, Wilmington, Delaware, at such and such a date and time. The next 445 words described the one transaction to be voted at that meeting. That is not, ladies and gentlemen, an example of plain English writing.

We applaud those who walk with us. We applaud the corporate personnel and securities lawyers who prepared the proxy statement for the Bell Atlantic/NYNEX merger. The document opened with a question and answer section about the merger. That section is followed by a five-page summary of the deal that can actually be read and understood.

Along with Chairman Levitt, I would like to acknowledge the lead-

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3. *See* Thomas G. Donlan, *The SEC stirs itself to rule Where it isn't needed*, BARRON'S, Jan. 20, 1997, *available in* WESTLAW, 1997 WL-BARRONS 7489735.

4. *Id.*

5. *See id.*

6. *See id.*

7. *Id.*

ership and the vision of Kathleen Gibson, Bell Atlantic's securities counsel, and her colleague at NYNEX, Paul McConville. In addition, the attorneys at Morgan Lewis and at Weil Gotshal should be acknowledged for supplying their goodwill and excellent writing skill to the task.

The final Bell Atlantic/NYNEX proxy statement clearly answered the primary question every shareholder had: What will happen to my company if the merger takes place?

This disclosure was a victory for the investing public, and I am told that the process of preparing the merger documents was a lot of fun for everyone involved. The SEC staff even participated in some of the drafting sessions.

One of the attorneys at Weil Gotshal commented that it was a little more work because, in addition to the SEC's legal review, we got an SEC editorial review, comments in the margin like, "We have your summary and we don't see one word clearly explaining why shareholders should vote for this merger." In good spirits, the attorney admitted the SEC staff was correct, and they made some changes.

As I relay this experience to you, I, by no means, want to imply that we have no room for improvement at the SEC. I have publicly stated that we must work harder to clean up many of our rules and forms. We also should ensure that our releases are clearly presented. Maybe this will cut down on the number of no-action requests that staff considers every year.

When we released our plain English rule, I said to the staff assembled, physicians heal thyself, and I hope they will do that.

I also know that when you file documents for staff review, the staff's comments should be consistent with producing a better disclosure document, while at the same time, meeting the requirements of SEC disclosure regulations. If you should ever have concerns in this regard with your M&A documents, I encourage you to call Cathy Dixon on the staff or me directly. Our goal is to work with you, not against you, in this plain English process.

Now, I would like to squarely address a related issue that seems to always pop up, and that's the issue of legal liability.

Some practitioners have expressed concern that the use of plain English will expose companies to greater liability. We strongly believe that this concern is misplaced.

I would like to emphasize that no one seeks to reduce the substantive information that must be given to investors. Moreover, I know of no case that has held anyone liable for clearly and accurately disclosing material information to investors. In all likelihood, liabilities are

decreased with the use of plain English because it results in a less confusing disclosure.

So let us all move forward and make a cultural change. In preparing our documents, let us bear in mind our intended audience. Sometimes that audience is other lawyers, sometimes it is institutional investors and at other times it is retail investors. Maybe if documents are clearly drafted with their intended audience in mind, the Delaware courts will review fewer of them.

When your audience is retail investors, I would follow Warren Buffet's advice. He says that when he is writing Berkshire Hathaway's annual report, he pretends he is talking to his sisters. He has no trouble picturing them. Though highly intelligent, they are not experts in accounting or finance. They will understand plain English but not legal jargon.

If you do not have any sisters to write to, Mr. Buffet says you can borrow his. If you would like to write to someone else, maybe try Andre Agassi or Brook Shields. Thank you very much.