

1 THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

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UNOFFICIAL TRANSCRIPT OF THE

5

ROUNDTABLE DISCUSSION ON

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PROPOSALS FOR SHAREHOLDERS

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Friday, May 25, 2007

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P R O C E E D I N G S

(9:17 a.m.)

OPENING REMARKS

CHAIRMAN COX: Good morning. I'm going to call this to order just a little bit late this morning, and I appreciate very much everyone's being here. Welcome to what is going to be the SEC's third and last roundtable at least this month on proxy process.

Let me begin by recapping for those of you who may not have been following these roundtables closely what we've heard and learned thus far. At our first roundtable on May 7th we discussed the state law underpinnings of shareholder rights to nominate and vote for directors. We looked at the way that shareholders can make proposals that are binding on companies as well as the way that the federal proxy rules have embellished state law rights when it comes to nonbinding proposals.

At our second roundtable yesterday morning we focused on the way that the exercise of shareholders' state law rights are very much affected by the mechanics of the proxy voting system. As you can see it's been a busy and a productive month and the commission and our staff have benefitted from the enthusiasm and the willingness of our panelists in these two roundtables to share their knowledge and their expertise with us.

1 Today's roundtable will build on what we've learned
2 and address the most important question before us, how can we
3 improve our proxy system going forward. What approach by the
4 SEC will best serve the rights and the interests of
5 shareholders in the way that Congress intended?

6 Today's panelists include representatives of a
7 broad spectrum of shareholders who use the federal proxy
8 process to make proposals. The first panel this morning will
9 consider what types of binding proposals by shareholders
10 should be included in the company's proxy statement. They'll
11 address questions such as whether the federal government
12 should impose an eligibility requirement if there isn't one
13 under state law and what kind of disclosures shareholders
14 might need about the person making the proposal in order to
15 make an informed decision.

16 Our second panel will consider the ways in which
17 shareholders can communicate with their companies and vice
18 versa in addition to the annual meeting of shareholders.
19 Given the advances in telecommunications technology that we
20 all enjoy, in fact that we're going to enjoy today because
21 we'll have one panelist participating via telecommunications
22 from Stanford later on, there may be more effective ways for
23 shareholders to communicate with the company beyond what
24 everyone acknowledges is the rather cumbersome federal proxy
25 solicitation process.

1 Several of the speakers on this panel have often
2 used rule 14A-8 to make nonbinding shareholder proposals to
3 companies.

4 In light of their experience, they and the other
5 panelists will be asked for their views on how something
6 along the lines of an electronic shareholder forum might
7 permit shareholders to promote their ideas and vote on
8 nonbinding proposals more often than annually.

9 Finally, our third and last panel will help us knit
10 together all that we've heard in the previous panels and in
11 the preceding roundtables and address the question whether
12 any or all of these ideas for changes in the federal system
13 would better vindicate shareholder state law rights than the
14 current system.

15 Since four of the members of our third panel
16 appeared at our first roundtable, we'll have come back full
17 circle to the fundamental questions that we addressed that
18 day of the relationship between federal and state law. At
19 this time hopefully we'll be a little bit better informed and
20 a little wiser.

21 On behalf of the commissioners and the commission
22 staff, I'd like to welcome our distinguished panelists,
23 beginning with the first panel, to this day's roundtable.
24 And thank you very much for your participation. We're
25 looking forward to discussing and learning.

1 PANEL ONE - VINDICATING FUNDAMENTAL STATE LAW RIGHTS

2 MR. WHITE: Thank you, Chairman Cox, and good
3 morning. I am John White, director of the Division of
4 Corporation Finance, and I am very pleased to welcome you as
5 well to the commission's roundtable on proposals for
6 shareholders, our third and final roundtable for this month
7 at least, as Chairman Cox said.

8 Chairman Cox has laid out what we are hoping to
9 accomplish in each of the panels today, so I will not go
10 through that again, but I will point out that we are very
11 pleased at this final roundtable to have the -- I guess I
12 will call it the stakeholders, the companies and investors
13 with experience in the area of shareholder proposals. And of
14 course on our final roundtable, final panel, we will also
15 have some of the participants from our first roundtable
16 rejoining us from the academic world and the judiciary.

17 To my right is Marty Dunn, deputy director of the
18 Division of Corporation Finance. He's joining me again at
19 the moderator table for the morning.

20 A few rules of the road. Similar to the previous
21 roundtables, we've prepared a number of questions for the
22 panelists. They are in the agenda and up on the web site for
23 those who would like to see them. We also anticipate we'll
24 be having questions from the commissioners.

25 We have specifically asked each of the panelists

1 today not to provide formal opening statements. Instead we
2 want to go directly to our questions. However we have
3 encouraged them like we encourage each of you in the audience
4 and each of you listening by webcast to submit written
5 statements and other materials that you'd like to us. There
6 is a combined public comment file for all three of the
7 roundtables out there and we would certainly like to have any
8 submissions that you'd like to make.

9 We will, at the end of each of the panels as we
10 come to the close, ask each panelist to give us a minute or
11 two of their closing thoughts and suggestions for the
12 commission. That's in lieu of opening statements; we'll have
13 closing comments.

14 To ensure that everything runs smoothly we would
15 ask both the panelists and the commissioners, if you would
16 like to be recognized to please turn your tent card up on
17 end. And Marty and I promise to make every effort to
18 recognize everyone, not necessarily in the order you put your
19 tent cards up, but we will do the best we can.

20 So with that I'd like to move to our first panel.
21 Let me introduce everyone starting on the far left. Rich
22 Ferlauto, director of corporate governance and pension
23 investment at the American Federation of State, County and
24 Municipal Employees; Jonathan Gottsegen, director of
25 corporate and securities practice group at the Home Depot;

1 David Hirschmann, president of the U.S. Chamber of Commerce
2 Center for Capital Markets Competitiveness; Bess Joffe, who
3 works on corporate governance issues at Hermes Equity
4 Ownership Services; Bill Mostyn, deputy general counsel and
5 corporate secretary at Bank of America; and Damon Silvers,
6 associate general counsel at AFL-CIO.

7 So let's go to our first topic. As Chairman Cox
8 described, at our first roundtable there was a good bit of
9 discussion about the fact that some binding shareholder
10 proposals, including proposals to amend the bylaws to permit
11 shareholder nomination of directors are permitted under state
12 law but are not permitted today under our proxy rules.

13 So Damon, I guess we'd like to start with you and
14 go to our threshold question of whether the federal proxy
15 rules should be revised to be more consistent with the state
16 law rights of shareholders and permit any matter that can be
17 made binding under state law to be included in a company's
18 proxy statement.

19 MR. SILVERS: Thank you, John. It's a pleasure to
20 be here with the commission.

21 The question you pose I think points out this sort
22 of anomaly that there are proposals that are valid under
23 state law that have real effect that are not, that at times
24 the commission staff has not allowed to go through under
25 14A-8. And this seems sort of perplexing and strange in a

1 way.

2 And so the solution that's proposed, to allow all
3 such proposals and take the burden off of Marty and his
4 colleagues to sort them out which one is which under current
5 commission practice has a lot of merit on its face. It
6 embodies what I believe has been the prior discussion of the
7 fact that under state law shareholders have sort of three
8 fundamental rights. One is to simply participate in the
9 annual meeting in all of its forms. Two is to amend the
10 bylaws and three is to elect directors.

11 It's particularly troubling I think that this hole
12 that you identified and that this panel seeks to address is
13 in the area of director elections primarily because that
14 right is so fundamental under state law. There are three
15 issues that I think the commission and the staff need to look
16 at if they want to go in this direction. And I think that,
17 assuming that reasonable and effective answers to these
18 issues are found, that investors would be quite supportive of
19 moving in the direction that the question poses.

20 The first issue is understand what exactly the
21 zone, the range of proposals that would then be automatically
22 allowed would be. The question of what is a proper, binding
23 proposal under state law, even just in Delaware, is one that
24 has not been extensively litigated, and there are quite
25 differing theories out there about how broad that range is.

1 Shareholders at various times both in front of the
2 commission and in courts have urged that the latitude for
3 binding proposals is quite broad. The corporate community
4 has generally viewed provisions of Delaware law that vest the
5 management of the corporation and the board as narrowing that
6 dramatically.

7 It's unclear, I believe, and as part of trying to
8 understand that you'd have to understand what the commission
9 would do to resolve questions about what that range is. I
10 don't think that you would want that result to be the
11 commission appearing before the Delaware courts 20 or 30
12 times a proxy season. I don't think that's a practical
13 response.

14 Secondly, I think the commission would want to look
15 at the question of whether this approach would create its own
16 anomaly. And the anomaly would be that there would be
17 certain items which you could not bring as a precatory
18 proposal but you could only bring as a binding proposal.

19 I think investors generally feel that the
20 preferable way of making change in corporate governance is
21 through bringing precatory proposals which outline a
22 principle, which are then enacted in detail by the board who
23 are familiar with some of the ramifications thereto, and that
24 binding proposals are generally only brought when a board
25 simply refuses to listen to shareholders.

1 And so I don't think the commission would want to
2 close off that as the general way of doing things,
3 particularly in areas as important as say, directorial
4 elections. And so I think that if the commission wanted to
5 look at those two issues and figure out appropriate ways of
6 handling them, that this is a very attractive way to proceed.

7 I would conclude by saying one thing, which is that
8 I disagree with the premise and the materials that precatory
9 proposals are a creation of the federal law. The federal law
10 really doesn't have the ability to create state law rights,
11 and the right to bring a precatory proposal is part of the
12 broad rights of participating in an annual meeting.

13 It's certainly true that the federal rules have
14 heightened the importance of them and made them more common.

15 Thank you.

16 MR. WHITE: Jonathan, do you want to give your views
17 on this question?

18 MR. GOTTSEGEN: Well, to answer your initial
19 threshold question, John, straightforward, I don't think the
20 proxy rules are in need of revision to be more consistent
21 with state law. In my view, from where I sit, the commission
22 at the end of the day, in order to improve our system going
23 forward, which is the goal articulated by Chairman Cox,
24 should focus on only a few specific changes to the
25 shareholder proposal process.

1 From the in house perspective, with the exception
2 of a handful of pieces of 14A-8, there is strong familiarity
3 and history that both companies and shareholders can rely on.
4 And the rules work pretty well, as is evident by the number
5 of proposals that companies receive and include in their
6 proxies each year. And the rules work well, as is evident by
7 the number of contested elections that we see more and more
8 of.

9 So I think, to give a very simple answer to the
10 initial question, I would move cautiously in terms of
11 revising the rules in an effort to make them more consistent
12 with state law.

13 MR. WHITE: Bill, how do you feel about that?

14 MR. MOSTYN: I would agree with many of the things
15 that Jonathan said. My view is that, especially in terms of
16 director nominations, I think this is an issue that is a
17 solution looking for a problem, frankly.

18 Shareholders have a right today to bring up their
19 own slate of directors and contest the directors slate. And
20 the costs of that are really not that much. In fact, I think
21 the costs are going to be coming down substantially in terms
22 of use of the internet.

23 I suspect that Rich, you probably spent more money
24 on that AIG case in legal fees than it would have cost you to
25 run your own slate at AIG. It's not that big of a deal. I

1 think we're making a much bigger issue out of it than it
2 really has to be.

3 MR. DUNN: Rich, I won't ask you to answer that, but
4 I was going to turn to you next, Rich, because one of the
5 questions that Damon's point raises is -- do you think that
6 this would result in companies seeing more binding if you
7 went that route, and is that a good or a bad thing?

8 MR. FERLAUTO: We the AFSCME Fund probably has more
9 experience drafting binding proposals than probably any other
10 shareholder or shareholder group. We've drafted and filed I
11 think about 20 over the past five years, a number of them
12 relating to the access question, but also majority voting.
13 Leo Strine is in the audience here -- you know, capturing the
14 solicitation expenses.

15 There are certain barriers and requirements that
16 make -- that if narrowed shareholder access just to binding
17 proposals I think it wouldn't do the issuers any good and
18 certainly wouldn't do the proponents very good.

19 First of all you've got -- the question that you
20 first posed is that there's a wide range of state law that's
21 developing now in terms of what can be binding or not. You
22 know, certainly we've got the recent changes in North Dakota.
23 We've got changes that are moving through the legislature in
24 Ohio. We've had recent changes in California so that for
25 shareholders to decide or to have a competition among states

1 regarding what binding rights might exist might be difficult.

2 The other difficulty, which I think should be of
3 concern to the issuers on this as well as ourselves is that
4 under current rules we have 500 words. To craft a
5 sufficiently robust amendment to the bylaws in 500 words,
6 which would include the leading material that doesn't work in
7 adding material that would give the detail that would be
8 required, particularly when there are nuance questions to be
9 dealt with, is burdensome and frankly quite difficult to do,
10 although I think we're capable of doing it.

11 We spent a lot of time trying to figure out how
12 that works. I think from the issuer perspective they would
13 much rather hear our views and have some flexibility in
14 drafting language in consultation with a shareholder vote
15 that would urge them and give them impetus for that kind
16 of -- those sets of changes.

17 And frankly, other than the I-8 question around
18 access, the 14A-8 process works pretty well. It's an
19 imperfect system but it seems to work for everybody basically
20 because there's been at least 50 years of sort of robust
21 discussion in which shareholder rights or the rights for more
22 robust communication have developed. And in practice you've
23 got corporate secretaries, you have issuers, you've got the
24 proponents, who are all comfortable with the system and
25 understand how to make it work pretty well given the

1 moderation of and the very good work of the staff.

2 So in short I think binding proposals are a tool
3 that would be used only occasionally, and for the most part
4 precatory proposals would be the preferred method of
5 engagement. And the problem that we run into -- again, it's
6 the anomaly that Damon point out -- is that you've got a
7 fundamental right under Delaware and most state laws around
8 director elections.

9 That's really the principle upon which the
10 structure of the corporation in the U.S. has been created.
11 And that's one right that communications vehicle doesn't
12 allow the discussion around. And that's what we're focused
13 on. And rather than taking our broad battle axe to how 14A-8
14 might be recreated in some way, my suggestion is that you
15 really focus on binding proposals related to -- or any type
16 of proposals for that matter relating to the director
17 election question, which is allowable under state law.

18 MR. DUNN: Before we move off the threshold question
19 I want to give David and Bess a chance. I'll start with
20 David and then let Bess be next.

21 MR. HIRSCHMANN: Well, thank you. Thanks for
22 including me and thanks to the commission for holding this
23 series of roundtables. I had the chance to listen to the
24 previous roundtable and thought it was a very constructive
25 discussion.

1 The question here is really whether the commission
2 should move in this direction. I want to make it clear that
3 we believe that the second question, which is the can
4 question, is also important, which was discussed in previous
5 roundtables. And my views of that ultimately will be decided
6 in the courts.

7 But the should question hinges on whether the
8 commission believes that in doing this it will advance its
9 to-for mandates. And in some ways when thinking about this
10 it just seems to me that it's based on -- the should question
11 is based on somewhat of a false premise, the premise that
12 somehow if these state rights were reflected in the proxy
13 process they might be used for a different purpose or more
14 responsibly than the current rights that shareholders have
15 under the proxy.

16 And I'm not sure that that is really the case.
17 It's really about one of two things. It's either about
18 leverage over the board or it's about changing the governance
19 model and having a board that represents a diversity of
20 constituencies that reflects more the European system or
21 about both.

22 You know, I believe that Damon and Richard do their
23 jobs very well. If I tomorrow woke up and worked at the
24 AFL-CIO, I'd want to have as much leverage for my members as
25 possible. And I believe that they, frankly, use this

1 leverage more responsibly than most.

2 It doesn't mean we agree with everything. Mondays,
3 Wednesdays and Fridays -- agrees with organized labor, on
4 immigration and other issues. On Tuesday and Thursdays we're
5 fighting on card check and other issues. I'm just not sure
6 that giving this additional leverage would serve ultimately
7 long-term shareholder value or that others would use it as
8 responsibly as Damon or others might.

9 Companies tell us that at the end of the day when
10 they sit down with those proposing these proposals,
11 especially AFSCME or the union proposals, it's always about
12 the union agenda. And I think if you look at the track
13 record of AFSCME last year, in more than half the cases,
14 boards sat down and negotiated an outcome that they were
15 willing to live with, with the unions.

16 The question is, whether that's good or bad, do we
17 need to enhance that leverage. And the second
18 question -- issue is a question of what's the right
19 governance model. Do we really want boards that represent a
20 diversity of interests with fractious and conflicting
21 agendas, whether it's unions or environmental groups or
22 biotech companies, pro- or anti-stem research groups or a
23 defense company's views on the war or shareholders who might
24 want short-term gains versus long-term gains?

25 I don't think the commission wants to put the staff

1 in the position of deciding what board directors qualify or
2 don't qualify. And you know, it's a worthy debate to decide
3 what the board should look like, but I don't think simply
4 wrapping this in the name of democracy would produce a better
5 long-term value for shareholders.

6 MR. DUNN: Well, Bess, before I turn to you, since
7 it seems like everybody agrees on the panel -- a couple of
8 things David said I thought were quite interesting and turn
9 to you. One is he mentioned the European system and he also
10 mentioned the notion of leverage and rights that folks have
11 now.

12 A number of years ago I met with somebody else at
13 Hermes and they pointed out that the European system which
14 provides them the leverage means that they rarely have to use
15 it, which is kind of an interesting balance there. So I
16 think it's a good point to turn to you to close us up here,
17 and if you can add anything to the leverage point I
18 appreciate it.

19 MS. JOFFE: Well, thank you very much for the
20 opportunity to speak here.

21 I think that is true very much about the European
22 system, the U.K. system in particular and several other
23 common law jurisdictions around the world as well. And the
24 point that I was going to make is generally with -- in the
25 U.S. context I would agree with much of what Jonathan said,

1 that the system tends to work quite well as it is currently.
2 But I think if the general -- if you want to limit the number
3 of precatory proposals that shareholders submit on an annual
4 basis, I think in some way enfranchising them with more
5 rights, that would go a long way to see a diminished number
6 of proposals being submitted.

7 I think majority voting is key to that. An
8 advisory vote on compensation structures is also key. I
9 think just having a bit more say in what goes on in a company
10 and different ways of engaging with boards and management
11 would alleviate the pressure of the proposals in a lot of
12 instances.

13 And with respect to the issue of binding and
14 nonbinding proposals, when I see a proxy card on my desk we
15 evaluate them much on the same basis. And I actually think
16 that -- I mean we oppose many nonbinding proposals because
17 they come across as too prescriptive to the board or too
18 restrictive. And we would like to stay away from increasing
19 the number of binding proposals.

20 It's very difficult for shareholders to accurately
21 draft these types of proposals that can then be actually
22 useful to companies. And that would create a whole other set
23 of problems. I think Rich highlighted some of them.

24 The other sort of theoretical issue is that the
25 bylaws are really very important constating to a corporation

1 and we wouldn't want to see those changed constantly with
2 several of the issues that come up as nonbinding proposals.
3 So I think there has to be a balance between the two. But I
4 think you could decrease the number of proposals that you see
5 by enhancing other rights.

6 MR. DUNN: To jump into -- oh, I'm sorry, Rich. Go
7 ahead; I didn't see your card.

8 MR. FERLAUTO: Just to respond generally here, you
9 know, one person's leverage is another institution's
10 accountability mechanism. There is a mediating factor here
11 that hasn't been discussed in any of the panels, and that is
12 the fiduciary responsibility of the trustees of the
13 institutions.

14 Now whether they are multi-employer funds governed
15 by ERISA or state pension funds governed by whatever state
16 law is applicable, there's a strict fundamental duty that the
17 actions of those institutions be for the beneficial
18 ownership, which is the creation in the case of my members,
19 of long-term value related to their pension retirement
20 system.

21 So to say that or to make accusations out of thin
22 air that whatever the motivations are seem to ring fairly
23 hollow. What we're looking for are accountability mechanisms
24 that again are endorsed by a majority of the shareholders
25 through a vote. And I think that's the fundamental question

1 here.

2 In the exercise of fiduciary duty, which under ERISA law
3 is quite explicit, given the Avon letter and 94-1, that those
4 interpretive bulletins actually provide impetus for action on
5 our part, that we would be actually in breach of our
6 fiduciary duty if we weren't engaged in these fundamental
7 issues that would create long-term shareholder value. And
8 hopefully when we get to the materiality questions we can
9 talk about our view of long-term value and what that means.

10 MR. WHITE: Commissioner Atkins, did you have a
11 question?

12 MR. ATKINS: Well, yes. I guess I just wanted to
13 follow up on this point about precatory proposals because
14 we've been talking about the discussion and leverage that
15 they engender. And I guess the thing that troubles a lot of
16 people is that this discussion and leverage occurs in the
17 shadows with the few shareholders out of really the sight of
18 the many. And we're using the apparatus of the corporation
19 to put forward these precatory proposals, which obviously are
20 nonbinding. And if it's important enough to invoke that
21 apparatus shouldn't it be only for binding things rather than
22 just for this side show that happens without disclosure and
23 oftentimes people don't really know what the cause and effect
24 of it is?

25 MR. SILVERS: I mean to answer one level, if

1 investors were told that they could not withdraw proposals
2 and could not negotiate with companies about those proposals,
3 I suppose we can live in that environment. I'm not sure what
4 the corporate community would think about that, but I think
5 we'd be happy with that arrangement.

6 In terms of what precatory proposals are, I think
7 it's important that the commission be aware that most comp
8 proposals are precatory and probably have to be. Although
9 again there's some dispute about that.

10 Secondly, a series of issues which I think there is
11 very broad public support for in terms of the ability of
12 investors who are concerned about them to raise, pretty much
13 have to be in precatory form. And those include issues
14 related to equal employment opportunity, the famous Cracker
15 Barrel question, issues related to the environment, many of
16 which have very substantial business consequences, and issues
17 relating to human rights, which have a history going back to
18 South Africa but today are raised in the context of the Sudan
19 and Burma and other things of very high profile in terms of
20 the public's view and many shareholders' view of what
21 business in America ought to do.

22 I cannot see how those issues could practically,
23 regardless of what the Delaware courts might decide, I can't
24 see how those issues could practically be brought up in the
25 context of binding proposals, nor would anyone want to see

1 them brought up that way. And I don't think it's -- I think
2 the notion of taking precatory proposals of the table would
3 be fundamentally disenfranchising.

4 MR. ATKINS: Just to follow up on that, I guess one
5 thing is most of those fail dismally when they come up on the
6 ballot. They never get anywhere near the majority. So I
7 mean obviously there are a few -- going back to my question,
8 the few versus the many, a few people are very interested or
9 agitated about it, but not the many. I just was curious
10 about it.

11 MR. SILVERS: I would suggest that Nelson Mandela
12 didn't think they failed.

13 MR. DUNN: David, you had a view on this, and then
14 we'll go to Bill after that.

15 MR. HIRSCHMANN: Two points. I think it's important
16 to remember why this leverage is so strong already, which is
17 in part because you have -- and why AFSCME and others are
18 more successful than others who are presenting shareholder
19 proposals, and that simply ISS. And that came up
20 significantly in the first roundtable.

21 You know, when you have one participant who's able
22 to direct over a third of the votes cast, then that leverage
23 becomes very powerful and that forces boards to make a choice
24 between two bad alternatives, either accepting something that
25 may not be in the interest of shareholders long-term or

1 spending the time and cost and money and distraction of the
2 board and management in order to fight the proposal.

3 And boards have to make the right fiduciary choice
4 at the time, which is it may be a cost but the greater good
5 for shareholders is to accept something that has a
6 consequence and not distract the board or spend additional
7 resources fighting that proposal.

8 MR. DUNN: We are -- clearly the commissioner has
9 touched a nerve here because everybody wants to talk now.
10 We're going to go with Bill and then Bess, and hopefully then
11 we're going to move on to some more specific questions.
12 Sorry about that, Rich, but I need to keep us moving here.

13 MR. FERLAUTO: Some statistics that might have been
14 helpful to Commissioner Atkins, that's all.

15 MR. DUNN: All right. Well, we'll get there.

16 MR. MOSTYN: I'll just make this quick. The
17 companies -- and I think I speak for all companies, including
18 yours Jonathan. We spend a lot of time and effort, a lot of
19 resources, corporate resources dealing with precatory
20 proposals. And to answer your question specifically
21 commissioner, in some sense it's better for us to be able to
22 negotiate out real quick rather than have these issues on the
23 proxy statement. If it means just sending a delegation to
24 somebody's office to have a discussion, which -- a lot of
25 times that's what it means, they just want to have a

1 dialogue, then we can do that.

2 And I don't see any need to raise the issue and to
3 bring it to a vote for all shareholders. A lot of these
4 things are just not worth the time and effort to do that.

5 MS. JOFFE: I would agree with Bill and just say
6 that Hermes undertakes quite an extensive engagement program
7 on a number of issues, mainly with respect to performance,
8 financial performance on a global basis.

9 And the vast majority of discussions that we have
10 with companies are done privately. We find that that
11 actually works best and engenders a very good relationship,
12 fosters constructive and collaborative dialogue with
13 companies and it is often the case that we are really just
14 looking for further disclosure on issues to give us comfort
15 that certain risks are being managed in an appropriate way.

16 And as a result in most of the world we don't have
17 this phenomenon of shareholder proposals that get used hardly
18 ever. And the other point, just with respect to the
19 discussions going on in the shadows, I think that's a very
20 good point to make because when I do talk to companies about
21 certain shareholder proposals on ballots, when I'm looking at
22 how I'm going to vote, one of the first questions I ask is
23 have you engaged with this proponent and where does this
24 proposal come from and can you give me some context on the
25 discussions that you've had because that informs my decision

1 making process as well.

2 I'd like to know where the shareholder is coming
3 from and what kind of relationship and dialogue they've had
4 with the company. So I think that it can be illuminating.

5 MR. DUNN: Okay. I'd like to move on to a little
6 different discussion, which is -- assume for the sake of our
7 discussion today that we move to something more towards the
8 federal rules coinciding better with the state law and saying
9 if it's a binding proposal that you can bring under state law
10 that you can bring it and it would go into proxy.

11 Under our 14A-8 right now there's the threshold of
12 \$2,000 of ownership for a year. The U.K. system is very
13 different. As we learned it's five percent holder or a
14 hundred folks getting together who I think own 100 pounds
15 each or something similar to that. Is there a notion that
16 you'd have to balance a broader access for binding proposals
17 with a different eligibility standard, and would that be wise
18 or would that be too disenfranchising of folks, because
19 there's obviously a huge range between \$2,000 and five
20 percent, at least in most public companies?

21 If you don't mind, Jonathan, I'd like to start with
22 you on that and get your views on it.

23 MR. GOTTSEGEN: I think eligibility should be
24 reviewed and considered for all proposals. It doesn't matter
25 if the proposal is binding or not. It's critical that

1 shareholders are able to express concerns to the board and
2 management, however there are parts of 14A-8 that are in
3 desperate need of being dusted off.

4 To use an expression from earlier this month, I
5 think proponents should have more skin in the game. There
6 should also be an examination of employing more stringent
7 resubmission limitations. Regarding the latter, there are
8 many examples of proposals appearing on a company's proxy,
9 five, six, seven, eight years in a row, and that proposal
10 being defeated by a wide margin year after year after year.

11 But the proponent has the ability to come back
12 because of the thresholds in paragraph 12, is it, are too low
13 or have become too low. And the \$2,000 requirement is, I
14 think, even more stark. And I haven't verified this, but I
15 was told that the threshold was \$1,000 in 1942, which is 65
16 years ago during the administration of FDR.

17 So I think that both of those requirements, both of
18 those rules need a hard look.

19 MR. DUNN: Rich, since I cut you off on the last one
20 I'll go to you this time. And one thing, I'd like your
21 response to what Jonathan thought, but at the same time could
22 you deal with some of it by permitting more collective action
23 to get together smaller holders?

24 MR. FERLAUTO: Well, that's what I was going to say.
25 I think the fundamental problem here for institutional

1 holders, some adjustment, inflation adjustment or some other
2 adjustment, isn't a substantial issue. I think the question
3 is really the rights of the small holders in this case. And
4 there is a fairly robust community of small shareholders who
5 feel that their rights are being denied in some way in terms
6 of this engagement.

7 I was at a shareholder meeting yesterday as a
8 matter of fact in which there was quite a robust discussion
9 and engagement by the small shareholders. So that's where my
10 concern would be in that regard.

11 I'd also say that if there was some type of
12 materiality test what you might want to do is look at both
13 ends and that is an override position, particularly regarding
14 to issues related to I-7, to ordinary business, so that if a
15 filer came in with three percent or two percent or five
16 percent if you wanted to look at the ordinary business set of
17 issues, that might be an override on there because that's
18 material.

19 But again my concern is with the small
20 shareholders. And I'm not sure that you want to be in a
21 position at this point of restricting their rights.

22 MR. DUNN: If I could turn to Bill for one second,
23 I'll get to you Damon.

24 Bank of America gets a ton of proposals I know
25 because you send us a ton of letters. And we appreciate them

1 all. And -- they're beautifully written, yes. And the thing
2 I was wondering is, in the proposals you see, what's the
3 average size? I mean the nature of the proponents you see,
4 are they small, are they large, is it a mix?

5 MR. MOSTYN: They own generally between about the
6 minimum of \$2,000 worth of stock to maybe \$5,000 worth of
7 stock. They're usually the individual shareholders and they
8 usually have their own unique idea of how we should run the
9 company.

10 MR. DUNN: Are those smaller ones usually though
11 with precatory proposals or binding?

12 MR. MOSTYN: Generally precatory. We've had some
13 attempted binding proposals, yes, bylaw changes.

14 MR. DUNN: Damon, did you want to?

15 MR. SILVERS: I think in this area there's a long
16 history of these, both the minimum ownership thresholds and
17 the numbers for being able to resubmit proposals being
18 reexamined by the commission every decade or so. And it
19 tends to be very contentious because of what Rich said about
20 the fact that for individual investors this mechanism is
21 pretty much the only effective voice they've got, and those
22 individual investors who feel that they ought to be heard
23 will fight very strongly for these things.

24 For institutions they're less critical issues,
25 although the resubmission issue is important because while

1 some proposals may not move up, others do over time, and many
2 key corporate governance issues such as independent
3 directors, declassifying boards and majority votes for
4 director elections have all moved up dramatically over the
5 years.

6 I think this question really poses sort of the
7 subtext issues of these series of meetings, which is that
8 there is great concern on the part of investors about the
9 shareholder nominations process and on the other hand there's
10 no question that there's been deep opposition from at least
11 some segments of the public company community to those same
12 issues over the years. We all know that.

13 And currently the second circuit has found that
14 shareholder proposals on proxy access are proper under the
15 14A-8 rules as they stand today. The commission wants to
16 know what to do about that. One solution that the commission
17 could look at would be to follow the second circuit's general
18 view but to have higher standards for submitting a proposal
19 of that kind.

20 If you move that concept from that one issue to the
21 broad category, say, of binding proposals, you then implicate
22 these historic issues that have been intractable and not
23 intractable for bad reasons, intractable because they are
24 profound and legitimate interests involved in terms of the
25 small investor which is after all in many ways what our

1 securities law is designed to vindicate, very differently for
2 example than the securities law regime and corporate
3 governance regime in Europe, which really treats the
4 individual investor as though they don't exist. Many
5 Europeans are upset about that.

6 MR. DUNN: Dave wants to go next. I did want to
7 point one thing out. One second, Dave. On the resubmission
8 thresholds, you know, when they were set up ten years ago,
9 you saw a lot of the precatory social responsibility issues
10 max out at like eight, ten, twelve percent, and now you see
11 most of them max out at like 22, 25, 28 percent. So it is
12 possible that just the nature of the voting core has changed
13 and what really reflects interest may have changed over the
14 years, and it is something that may need to be looked at.

15 David, you wanted to chime in.

16 MR. HIRSCHMANN: I have two quick points. The first
17 is a serious point, which is that in today's technology world
18 shareholders, small groups of shareholders have many more
19 ways to communicate with companies, so the notion that it all
20 has to be done through the proxy I think is a false notion.

21 We have YouTube, blogs, the communications tools to
22 make your point. Very small groups of people can have a huge
23 impact, and we've seen that in the political sphere. I don't
24 think it's any different in this sphere either.

25 The perhaps slightly less serious point but

1 still -- it just helps make a serious point -- is I think the
2 threshold should be one percent more than the number of
3 shares, the percentage of shares that ISS can instruct at any
4 particular company.

5 MR. DUNN: That's a difficult rule to write. Bess
6 and Bill wanted to finish up this point, so we'll go in that
7 order. Go ahead, Bess.

8 MR. MOSTYN: I just want to comment about something
9 that Rich said. Rich mentioned shareholder rights. This is
10 an invention of the proxy rules I think in this context, but
11 one thing I would caution about is whether small shareholders
12 have a right to tie up the kind of resources at companies
13 that they do tie up for issues that really are not of general
14 interest to the majority of shareholders.

15 I think there really has to be a higher threshold,
16 maybe partly a materiality threshold, but we are, as
17 Professor Joffe said, we're subject to the tyranny of the 100
18 share stockholder. We are, and it's a monster that's
19 beginning to get even bigger.

20 MS. JOFFE: Until the end I was going to say I
21 largely echo what Bill was saying about tying up resources
22 and looking at the amount of money that companies are
23 spending dealing with so many of these proposals. And I
24 think that one of the ways to address it, and just to repeat
25 myself from earlier, is enhancing the accountability of

1 directors and management to all shareholders, whether they
2 are large or small, by extending other basic shareholder
3 rights. And I think then you address a lot of these issues.

4 MR. DUNN: Jon, you had wanted to go next, but if I
5 could ask you to tie in what you were going to say with one
6 other thing -- everybody has mentioned materiality -- and
7 then we'll get to Damon after that. The other way to look at
8 this of course is, is there sufficient shareholder interest
9 in it for it to keep going forward? Another way to look at
10 it is what's the materiality of this to the company? Is it
11 really any effect and should that be a test?

12 The test in the rule right now is largely
13 overridden by the significance language that goes along with
14 it, so the five percent test isn't particularly forceful. If
15 you could, address possibly ways you consider materiality of
16 the company as well as whatever it was you wanted to add in
17 there.

18 MR. GOTTSEGEN: I looked at the materiality question
19 in advance, obviously. And I struggled with how it would
20 work. I believe there should be some materiality threshold,
21 but it may be difficult to apply in practice given its
22 subjectivity.

23 What I wanted to come back to, Bill has the same
24 job that I have at a different company, and what I wanted to
25 echo is the resources dedicated to the shareholder proposal

1 process. It doesn't matter if it's binding or if it's not
2 binding. Even with one proposal, what -- companies use
3 in-house lawyers, outside lawyers, Delaware counsel,
4 securities counsel, investor relations staff, compensation
5 analysts; it goes on and on and on. Management and the
6 board, the board has a role in the process. They have to be
7 involved because at the end of the day they make a resolution
8 to recommend or not recommend that proposal to shareholders.
9 It is a very consuming, resource intensive process
10 that's -- frankly, it's not just the season anymore. You
11 know, it's become six months, nine months of the year.

12 We have meetings with Rich's group, with Damon's
13 group, with everyone throughout the year. It's fairly
14 consuming.

15 MR. DUNN: Damon, you had wanted to go. And if
16 could, address some of those points as well.

17 MR. SILVERS: Two points. One, again, I mean this
18 meeting has this kind of sideways quality to it because
19 there's a very specific issue involved here, which is the
20 question of how the proxy process ought to deal with director
21 elections questions, and then there are these very broad sort
22 of statements that kind of scoot around it.

23 And I'll make one point about this, that when a
24 statement is made that we need, that there would be less
25 shareholder proposals if there was more accountability, all

1 right, what that statement is really telling you, I think, is
2 that perhaps the commission ought to go back and look at the
3 14A-11 approach to these issues, the notion that you ought to
4 have a structured, required process, as you do more or less
5 in the United Kingdom, whereby shareholders can nominate
6 directors on the company proxy.

7 Now that issue has been done to death by the
8 commission at various times and now we are looking at
9 basically ways of dealing with shareholder involvement and
10 director nominations through a sort of private process,
11 through the 14A process of allowing shareholders to bring
12 that idea to companies one by one as an alternative.

13 I think most investors, and I'm sure you've heard
14 this already and will hear it again, most investors would be
15 happy with the commission going in either direction as long
16 as it was real, as long as there was a real ability to have
17 accountability to long-term investors around the board
18 election process.

19 Either way works. Today we're really focused on
20 the voluntary way, all right, which has a nice ring to it.

21 Now I would say this about -- every time this
22 commission probably back until the 1940s has convened on this
23 subject I am sure that someone from the corporate community
24 has pointed out the fact that there are costs involved in
25 shareholder proposals. Now if we were hearing this from very

1 small companies I suspect -- I have a little bit of sympathy.
2 Bank of America and Home Depot can afford the price of a
3 meeting in order for there to be accountability. Home Depot
4 could afford to pay Bob Nardelli what they paid him; they can
5 afford to meet with shareholders, and they can afford the
6 cost of dealing with shareholder proposals.

7 Now it is true that just as it could cost the
8 shareholder a lot of money to litigate it can also cost a
9 company a lot of money to fight tooth and nail to the bitter
10 end to keep a proposal off the proxy process. If that's what
11 they choose to do, we certainly can't stop them. But to them
12 come here and complain that it costs a lot of money to fight
13 to silence your investors, it just doesn't have the ring of
14 credibility.

15 MR. DUNN: Rich, I wanted to go to you next, but I
16 also want you, as you finish this up, to move to our next
17 topic, which is something Commissioner Atkins had discussed
18 earlier. And that's the notion of, if you're expanding this,
19 is there some notion that there needs to be more in the proxy
20 than simply, "I'm Marty Dunn, I live at x address, and I put
21 forth this proposal." Should there be some more disclosure
22 regarding the nature of the proponent? Is that of interest
23 to the people deciding how to vote? Is that important in
24 figuring out the process? Is it important for accountability
25 on both sides, to use Damon's phrase?

1 MR. FERLAUTO: Sure. Let me follow up first and
2 then I'll end up there.

3 One is you've got to talk about the price of
4 communication of the issuer to the broader community and that
5 in attempting to -- and if you narrow that or you expand that
6 rather in a way that is so broad that what you're going to
7 end up with is chaos -- and attempting to deal with chaos is
8 going to be much more expensive for the Home Depot or the
9 Bank of America than a mediated, structured process through
10 14A-8 and shareholder meetings that if they need to worry
11 about every single posting on the web every day and were in a
12 virtual shareholder meeting that occurs 24/7, 365 days a
13 year, what you've got to do is you've got to establish a
14 system that monitors MySpace or something like that.

15 And I'm not sure that that's productive for
16 anybody, but if that's the terrain that gets established for
17 communicating with shareholders, that's what you're going to
18 get. So I think our preference and the preference of the
19 issuers are really very common, are absolutely common. And
20 that is give us a structured process that's rational, that's
21 got rules of the game, that sets benchmarks for
22 participation, and we will attempt to work within those
23 rules.

24 If you give us chaos, it's going to be
25 extraordinarily expensive and the communications that you see

1 now are -- the communication costs are just going to become
2 exponential for everybody.

3 So trying to deal with the very specific issue that
4 Damon was honing in on about -- the I-8 issue about proxy
5 nominations I think is key, and if we get lost it will be a
6 problem for everybody.

7 In returns -- to disclosure issues, we're about
8 nothing if we're not about disclosures. We believe in
9 absolute transparency and the more transparency the better.
10 At the same time, there are certain collective action
11 problems, which I'll talk about a little bit later hopefully
12 in closing.

13 So that filing a 13-G form or something like that,
14 I think, for an institutional shareholder is not a big deal.
15 We are long-term passive investors and many of our funds,
16 many of the big public funds need to file the G form anyway
17 because they're large enough or could take positions that are
18 larger.

19 If you get into 13-D, I think there are other
20 issues that are involved, collective action issues that
21 become much more complicated. Again, you run into the
22 problem of how do you mediate that in an electronic world
23 where you're not exactly sure who's participating in any
24 particular point in time, so it becomes problematic for the
25 smaller shareholders.

1 So in essence, fundamental transparency is a good
2 idea. How do you apply it in an electronic system? I really
3 couldn't -- I don't have a clue.

4 CHAIRMAN COX: I wondered if I might ask the
5 moderators if I can jump in at this point. Bess, earlier you
6 said, on this point about disclosure, you said earlier that
7 it's material to you whether or not the proponent has engaged
8 the company, and that you inquire about that. Why is that
9 so?

10 MS. JOFFE: Well, really it's because for us, I mean
11 our view is that shareholder proposals should be a last
12 resort in terms of engagement or it should take place only in
13 very egregious situations. But I think we always want to
14 make sure -- I certainly do, I think my colleagues do as
15 well, but as I deal with the Americas it falls on me mainly.

16 I always want to make sure that the proponent has
17 submitted the proposal for what I would consider to be a
18 valid reason that emanates from a position of responsible
19 ownership, caring about the long-term performance of the
20 company. And oftentimes I do get information that leads me
21 to believe that that's not exactly the case, that there are
22 other angles or motives behind the submission of the
23 proposal. And that really causes me a lot of discomfort.

24 So that's why it's material. And I would say that
25 I think we would also support more disclosure as to the

1 identity of the proponents, what their interests are. I just
2 question how that could be regulated because when I
3 talked -- last year, there were several proxy contests, for
4 example, and I would speak to hedge funds who had submitted
5 their own slate of directors and always the answer comes
6 back, "of course we're in it for the long-term, and we've got
7 a huge skin in the game because we have six or eight percent
8 of the company." But how do you know as a fellow shareholder
9 if that's actually true, and how would that be regulated?

10 MR. WHITE: I think we're pretty close here to
11 coming to our conclusion. But Bill, could you just comment
12 on the disclosure point before we go to the concluding
13 statements?

14 MR. MOSTYN: Well, I think if you raised the
15 threshold level to five percent you'd probably solve your
16 problem anyway. The fact is that a lot of these precatory
17 proposals you know what the objective is, you know who's
18 behind it. I don't think at a lower threshold level you're
19 really going to add a lot to the equation, honestly.

20 MR. WHITE: Why don't we move to -- I guess we'll
21 call it the closing remarks. And Rich, we'll start with you
22 and then move down the table.

23 MR. FERLAUTO: Sure, thank you. I think this was a
24 very interesting panel and I thank you all for the
25 opportunity to be here.

1 I just want to put this in context a little bit,
2 and that's why -- I think that we're not as far apart from
3 the business community as they may argue that we are. You
4 know, we're long-term shareholders, and that we're concerned
5 about the power of long-term shareholders who will be holding
6 the company primarily through index funds or just because of
7 the diversification that we need to be appropriate
8 fiduciaries for a very long time, and that we'd want to be
9 able -- but there are a lot of us out there, too, so we've
10 got a collective action problem at the same time.

11 We don't want to be disadvantaged by the short-term
12 manipulators that may be -- you know, a hedge fund or an
13 arbitrage or somebody who wants to short the stock or
14 somebody who's engaged in empty voting in some way. And I
15 think those are the real issues or problems that are out
16 there, so that we're looking for -- and they've got the
17 resources, obviously, to put together an eight or nine
18 percent position in a very short term and flip that around
19 and try to create specific value that goes to them and not
20 broadly to the rest of the shareholders.

21 We're looking for power, frankly, for long-term
22 shareholders, so that the materiality question may actually
23 be "are you committed to the company and are you committed to
24 long-term shareholder value?" And I think the best way to
25 reflect that is rather than trying to get into my brain,

1 Bill, and figure out what our motives are here, is is that
2 reflective in holding of the stock for some period of time.

3 So I would make that a test and I would suggest to
4 you that that should be the right materiality test. Are you
5 in the company for a year or two years or three years or
6 whatever might be appropriate? And if we're concerned about
7 the long-term shareholder value aspect I think then the
8 concerns about leverage and all that other stuff sort of
9 disappears because we're looking for value, and the other
10 issue again is the collective action problem in terms of
11 putting together groups of shareholders.

12 You know, there's a very significant cost to that,
13 so that any threshold for proxy access or anything else, even
14 if it's one, two or three percent, is fairly significant.
15 And then even through proxy access -- I mean there's a proxy
16 access proposal coming up next week at United Health -- is
17 the cost for engagement there are still fairly substantial so
18 that there is skin in the game even around promoting those
19 types of processes.

20 So again, I don't think we're looking for broad
21 reform in any of these rules. What we're looking for is much
22 more specifically dealing with the rights of shareholders
23 regarding the access question and the nomination question.
24 And the way to deal with that is through clarifying I-8. I
25 believe the second circuit has already done that, and by

1 codifying the second circuit decision in some way, that I-8
2 relating to the election of directors for the purpose of
3 creating a process would be totally appropriate.

4 And that will deal with your problem rather than
5 trying to reinvent a proxy process that can open up a
6 Pandora's box that nobody wants to go towards.

7 Thank you very much.

8 MR. GOTTSEGEN: Thank you again for the opportunity
9 today.

10 In my view, as I've tried to emphasize, many
11 underestimate the work of the board and management and the
12 considerable resources used to manage this one corner of
13 compliance. Using my own company as an example, currently a
14 shareholder needs a pen and some paper and about 50 shares
15 and he can grab the attention of management, grab the
16 attention of the board, he can compel negotiations, he can
17 appear on the proxy, at the meeting, and force a vote on
18 serious issues or, at best, simply require the corporation to
19 use limited resources in the case of a frivolous proposal.

20 I think currently there's an imbalance as boards
21 attempt to budget time and resources between compliance and
22 regulatory matters and most importantly their primary job,
23 which is to manage the business of the corporation. The
24 balance, I think, could be restored to some degree by
25 amending and strengthening certain sections of 14A-8 without

1 diminishing the rights of shareholders.

2 Thanks again.

3 MR. HIRSCHMANN: I want to join in thanking the
4 commission and the staff for allowing me to be here and
5 frankly for the way in which you conduct these roundtables.
6 We were joking before the session that if Congress helped
7 prepare people as well as the commission staff does that
8 people would look forward to testifying before Congress.

9 And I'd like to begin really my final comments
10 where you left of, Jonathan, which is that cost is really
11 about more than dollars. Even cost, I would hope we could
12 all agree that companies should only spend money where it
13 provides a return, where there's some value to it.

14 But you know, the time, no matter how well paid a
15 CEO and the board directors still have the same amount of
16 hours in a week as in a smaller company. And the management
17 time point I think is a very fundamental point.

18 So the question I would in conclusion ask the
19 commission to think as they look through these issues is how
20 is the leverage used today? Is it being used responsibly by
21 everybody? How do you prevent its irresponsible use? What
22 is ISS's role in this process, and if you're going to make
23 additional changes, what is needed in terms of reforming
24 ISS's role?

25 How would additional powers be used? Would they

1 lead to factious boards that might not function the way
2 Sarbanes-Oxley intends boards to function or would they
3 really be used as leveragings, which case, even though the
4 underlying proposal may be valid and supportable, how do all
5 shareholders know that when they get into the private room
6 what's really being asked is something that is not in the
7 interest of all shareholders? And if you give groups of
8 shareholders more power, how do you ensure that you're not
9 disadvantaging shareholders in that process?

10 MS. JOFFE: I also would like to thank you for
11 inviting me to participate in the panel. I think it's been
12 very useful to hear what everybody's views are. Our view at
13 Hermes is that as long-term shareholders we're on the same
14 side as management and boards of directors. We all are
15 looking for the same results of improving value.

16 With respect to the U.S. situation, we'd really
17 like to advance the idea of extended accountability rather
18 than the creation of more rules. And I think it was in the
19 first panel discussion where Mr. Underhill took part, talking
20 about the rights that exist in the U.K. and also for that
21 matter in many other jurisdictions. It's very difficult to
22 just import those rights into a different context, and I
23 certainly recognize that.

24 That being said, I do think that, again, if you
25 do -- and as you said at the beginning, Marty, that if you do

1 give shareholders more rights there's less likelihood of
2 actually needing to use them. And so I think going forward
3 that would be a way to address a lot of these concerns. You
4 would cut down on the resources that companies have to
5 expend, which we would certainly be in favor of, in dealing
6 with shareholder proposals. You would address many of the
7 accountability issues that smaller investors have and open up
8 the process more to them and diminish the costs that they
9 undertake to participate with a louder voice.

10 MR. MOSTYN: Thank you, Mr. Chairman, commissioners,
11 John and Marty. Just a couple of brief comments.

12 I think that the system generally works pretty
13 well, and to address an issue that Rich has raised, which I
14 think is really the subject for another panel, at least in
15 the current system we spent about four months, we dedicate
16 resources in my group to about four months of the year. If
17 we were to expand that, I'm not sure what the costs would be,
18 but it would probably be a lot more.

19 The advantage that the system has to us is that
20 it's predictable. We can estimate the kind of resources that
21 we need to dedicate each year to this process. And we budget
22 for it and we go on with it.

23 If we were to make substantial changes, especially
24 where you can allow access across the board, 12 months a
25 year, I think that that would have a significant impact on

1 use of resources.

2 Most of the precatory proposals that we get are
3 really not intended to add value to the company. They're not
4 interested necessarily in allowing us to achieve our
5 objective, which is to earn money for our shareholders.
6 There are many social issues and many other things.

7 I'm not saying that that's a bad thing. I'm just
8 saying that that's what we get. That's what most of the
9 issues deal with, and that's what we dedicate our process to.
10 I'm not sure necessarily that that's the correct model. I
11 don't think that was the original intention of the corporate
12 model, but that's what we have today.

13 In terms of access to the proxy statement for
14 director elections, I think the system is not broke. I think
15 that if a sufficient number or larger shareholder, somebody
16 who has more skin in the game than some real small
17 shareholders are interested in nominating their slate of
18 directors or a short slate, I think that that's not an
19 expense that's going to be prohibitive.

20 In fact, I think the original, if I recall the
21 original proposal in '03 has a three percent threshold
22 representing shareholders of about three percent. Well, if
23 that applied to the Bank of America, you'd be talking about
24 approximately over 140 million shares of Bank of America
25 stock. I submit that anybody who has the money to buy that

1 amount of shares of Bank of America stock has the money to
2 run their own directors slate.

3 And finally, in terms of materiality, I think that
4 would be difficult to do. I just can't understand how we
5 could verbally deal with this issue. I think that you'll
6 have a lot more problems at CorpFin trying to define this
7 issue and dealing with this issue than you already have. I
8 think maybe the best way to do it is to have a proper
9 threshold level.

10 Thank you.

11 MR. SILVERS: Again, like everyone else I express my
12 gratitude and thanks to the commission and the staff for
13 being here, for inviting me. This discussion is happening
14 because there is this long-term question that's been around
15 as long as the commission has been around as to how
16 shareholders, how investors should be able to participate in
17 director elections.

18 And this issue took on enormous importance when
19 there was a broad understanding in our society after Enron
20 and WorldCom that it really, really mattered whether you had
21 independent, tough-minded people on boards or you didn't.
22 And while it's true that some investors, particularly
23 short-term investors with large holdings in companies have a
24 history of running short slates, it's also true that the very
25 long-term investors, the very people that everyone here

1 agrees ought to be in the driver's seat so to speak in terms
2 of governance and accountability, do not have such a record.

3 The reasons for that are complicated and there's no
4 time to go into them, but really what we are talking about
5 here is creating -- hopefully creating mechanisms so that
6 long-term investors can ensure that there are individuals on
7 the boards of large corporations that all of our wealth and
8 prosperity depend on who are going to really look out for the
9 broader interests of those long-term investors.

10 Now there are two ways of doing that that I can
11 think of. Maybe there's others, but there are two ways
12 basically. One is the approach the commission took in 2003,
13 which is a mandatory rule for all public companies that tries
14 to put that power into the hands of long-term holders, three
15 percent, two-year holding period, that kind of thing. The
16 other way is to let the corporate governance process through
17 the shareholder proposal process work to bring those
18 proposals forward and to have them debated and to have
19 whatever works come out of that process.

20 That's the 14A-8 proposal. In effect the idea of
21 allowing all binding proposals to come forward under 14A-8
22 facilitates that idea. As I've said earlier investors I
23 think are open to either way. It's not -- and there are
24 advantages to either way. And different investors depending
25 on who they are would tend to lean one way or the other.

1 It's extremely important that the commission and
2 the staff allow one or the other to go forward. And today
3 one, the voluntary one is going forward under the AIG
4 decision.

5 Allowing that to continue or having a different but
6 equally viable and real way of doing it is a critical,
7 critical task for the commission at this time. But in doing
8 so, and this is the last thing I'm going to say, in doing so
9 I think the commission has heard from this panel in different
10 ways.

11 There is no broad support, and there is bitter and
12 there would be bitter and serious opposition to undermining
13 something somebody said a moment or two ago, which is that in
14 our society, under our securities rules a small investor can,
15 with a pen and paper, bring a serious and important issue
16 before their fellow investors.

17 In this respect we are fundamentally different than
18 other major capital markets that don't have that, and I would
19 submit that if there were a lot of people listening, if we
20 filled this room with Americans and if we filled this room
21 with Latin people who vote and the people they elect to
22 office, they would say that that is a fundamentally positive
23 aspect of our system, reflects our core values.

24 And I would say that most investors believe that
25 although they don't do so exactly with a great deal of -- it

1 doesn't thrill them, particularly late at night in March,
2 that the staff of the commission has done an outstanding job
3 over the years in sorting out which of those issues that
4 small investors bring forward are really important, serious
5 issues that the companies ought to have -- that other
6 investors ought to hear about and express an opinion on, and
7 those which aren't.

8 And the judgment of companies as to what is
9 important and what isn't, the judgment of management as to
10 what is important and what isn't, the judgment of management
11 as to, say, for example, was Bophol important, slave labor
12 important, is global warming important? It should not be the
13 last word.

14 MR. DUNN: Okay. Thank you all very, very much. I
15 will say one last thing, which is obviously in the
16 shareholder proposal process people have very strongly held
17 views across the board and I very much appreciate you all
18 willing to come up here and listen to each other and express
19 each other's views, and I also want to appreciate everybody
20 involved in the process for how well you all treat us during
21 the year.

22 On the staff side of it, truly we say no to one of
23 you every time and you all are very respectful of that and
24 you are very good to us and I appreciate that. With that,
25 I'll turn it over to the chairman to wrap up.

1 try to keep moving here because it is, as the chairman said,
2 the day before Memorial Day and we'd like to get everybody
3 out before rush hour.

4 The next panel we're going to talk about is means
5 to promote communication between shareholders and the
6 company. Before I get into the substance, I'd like to thank
7 our panelists, and I'll introduce them. At the far end is
8 Evelyn Y. Davis with Highlights and Lowlights. Next to Ms.
9 Davis is Russell Read from CalPERS; Amy Goodman at Gibson
10 Dunn who was with us earlier this month and was kind enough
11 to come back, I appreciate that; Nell Minow from the
12 Corporate Library and possibly moviemom.com if I just heard,
13 thank you, Nell; Bill Mostyn, who has been kind enough to
14 pull double duty today and will have totally different views
15 than he had on the last panel; and to my right, Gary Brouse
16 with the Interfaith Center on Corporate Responsibility.

17 Thank you all very much for being here. The last
18 panel was very useful, and this is I'm sure going to be as
19 useful on a slightly different topic.

20 And what we want to talk about, when we were at the
21 last roundtable there was a good bit of discussion about
22 nonbinding proposals and the benefits that they can bring to
23 effect change and to get shareholder views. And the current
24 proxy rules as everyone knows under 14A-8 has the subject
25 matter exclusions. And so some of these nonbinding proposals

1 are required to be included in the proxy and some are not.

2 And what we want to discuss today is means by which
3 you could use technology to provide shareholders with
4 alternative means to communicate their views on these other
5 matters or on those matters if they wanted to use the other
6 means that way.

7 And the term that's been used at the last
8 roundtable and we use today is the notion of an electronic
9 shareholder forum. Is there a way for companies to
10 establish, using the internet, a means by which shareholders
11 can raise views and interact amongst each other, God forbid,
12 without the proxy process getting in the way, and actually
13 raise consciousness about a number of views, both those that
14 would go in the proxy and those that wouldn't.

15 And so we're going to address the potential for
16 that on this panel, and we're going to address what the
17 commission would need to do to make that useful, to motivate
18 its use and go from there. I'd like to start by asking Nell
19 first and then after Nell is finished I'd like to turn to Ms.
20 Davis to get the final view on that, but is the notion of an
21 electronic shareholder forum something that would bring
22 attention to management. Is it something that shareholders
23 would use? Could it be effective as an alternative?

24 MS. MINOW: No question. I would not use the world
25 alternative. I'd use the word supplement. But I think no

1 question that it could be effective. I think the most
2 important way that it could be effective is not as much in
3 the shareholder proposal forum because even I do not want to
4 have perpetual shareholder proposal day for the entire year.
5 But perhaps with regard to contested elections where we could
6 say that just the notice to the company would be deemed
7 notice to the entire shareholder group for the purposes of
8 the broker votes, and then the company would simply in its
9 proxy materials refer to the web site of the people with the
10 contest or the people with the proposal because of the word
11 limit, and I would love to see that involved.

12 Some years ago I got a call from an unhappy
13 shareholder who said that he and the other shareholders had
14 been complaining on the Yahoo! message board about what a
15 lousy company it was. And the employees were there giving
16 even more information about what a bad company it was. And
17 he said, so I asked everybody how much stock do you have, and
18 they had 40 percent of the stock on the Yahoo! message board.
19 So he said, now what do I do, I've got 40 percent of the
20 stock.

21 And I said, okay, hang up, call a lawyer, have the
22 lawyer explain to you what a 13D filing is, and then call me
23 back. And I think that's really going to be the challenge
24 for the commission.

25 I think that there are electronic shareholder

1 forums out there. They're called Motley Fool and Yahoo! and
2 chat rooms and all of that. The challenge for the commission
3 is how you're going to adjust to this new reality and allow
4 for this free discussion and encourage participation
5 particularly by directors as well as management without
6 getting into the kind of mess that triggers these filing
7 requirements.

8 MR. DUNN: Ms. Davis, if you'd like to follow up on
9 that, how do you think people would use it?

10 MS. DAVIS: I think it's preposterous. I'm Evelyn
11 Y. Davis. I'm editor of Highlights and Lowlights. I have
12 been giving shareholder proposals for 40 years, and the
13 reason that I am still around while others fall by the
14 wayside is I know when to stop. I don't go too far like
15 people who want to nominate a director.

16 I mean this is preposterous. What you do, you
17 don't nominate a director, you work on incumbent directors
18 and get them to your viewpoint. That's the way to do it.

19 I'm also the one -- the shareholders had more
20 proposals in a friendly way. Management has agreed to do it,
21 either with bringing a proposal or after discussions with
22 management and they say they're going to adopt it.

23 Like an example, I gave a proposal on paper stock
24 certificates to the New York Stock Exchange, and they took it
25 up with the SEC, saying this was ordinary business. And to

1 everybody's great surprise, including mine, the SEC agreed
2 with them. However I gave the same proposal to Federated
3 Department Stores. A week later, the chairman, Terry London
4 called me and he said, "Evelyn, I think it's a great idea; we
5 are going to adopt this."

6 So naturally, I said, "fine, Terry, send me a
7 letter," and that was what he did. And if you look on page
8 77 of the Federated Department Stores proxy statement, you
9 see what happened. Very friendly, very nice. This is a
10 sensible proposal and a commission, the SEC -- institutional
11 investors and unions, let them elect directors and get
12 controversial proposals advisory things on the executive
13 compensation, which I never would attempt.

14 This is dumb. I mean you know that they're going
15 to fight back. They have to use a little psychology. Try to
16 do it in a nicer way to say you're getting paid too much and
17 lower it. And even -- that's right, you can't put a gun to
18 their head with those type of resolutions.

19 These proposals were -- system and a
20 non-controversial thing like a piece of paper, a paper stock
21 certificate to which shareholders are entitled to have as
22 proof of ownership. You should never be forced to use book
23 entry.

24 Now most companies have a rule that you can have a
25 choice. If you want a book entry, fine, but if you want your

1 paper certificate you can have it too, and how would you like
2 to have your home, your car or your -- or your marriage
3 certificate or your divorce papers in book entry? Yet this
4 commission here, they wrote this that a paper stock
5 certificate is ordinary business while electing a director
6 which is extremely controversial that's done by unions and
7 large shareholders.

8 I mean what's the matter here with the SEC? While
9 here, everybody was here last December, last December the
10 same commissioners unanimously adopted a parallel issue. I'm
11 not a lawyer, but I know what a parallel issue is,
12 unanimously adopted that people had the choice of a paper
13 proxy.

14 Now why doesn't the same SEC then say that a paper
15 stock certificate is ordinary business and some members of
16 Congress both in the Senate and the House are very upset
17 about it? And Chris, you know who I'm talking about.

18 MR. DUNN: Ms. Davis.

19 MS. DAVIS: You know, I live in Washington. I know
20 too when to keep my mouth shut. Okay, I drop my comments
21 here. It's before the commission now. I hope that the
22 commission will overrule a noncontroversial thing like a
23 piece of paper.

24 All right. Now we go back to the internet. When
25 you let them use electronics you know what's going to happen?

1 You don't know what you're in there. You have established a
2 legal way for companies to snoop on everything shareholders
3 do and say on the internet. The current system is fine
4 provided we have the names and addresses of the proponents.

5 Now to get the companies something too, what I
6 believe in, they should go from 2,000 minimum ownership to
7 4,000. And above all, nobody really touched on that, the
8 holding period should be four years for any proposal.

9 Now the current proxy system is not perfect. I
10 know this better than anybody. I have been at this for 40
11 years, but I have had more proposals adopted of mine -- in
12 the last three years I had 20 proposals adopted of mine.
13 Some I had given several years. Some like the one with
14 Federated gave, and then immediately they said, "this is a
15 great idea."

16 You do things in a nice way. You get more with
17 honey than with vinegar, but you don't put a gun to the head.
18 And then you what's going to happen?

19 MR. DUNN: Ms. Davis.

20 MS. DAVIS: One more thing, and then I'll stop.

21 MR. DUNN: There's five other people up here. There
22 are five other people.

23 MS. DAVIS: Okay. You know what's going to happen?
24 If you're going to allow these binding proposals and director
25 elections and this votes on executive compensation, the

1 companies are going to go private. And now that would kill
2 the goose that's laying your golden eggs. The companies go
3 private, they don't have to pay attention to anybody. All
4 right.

5 MR. DUNN: Thank you, Ms. Davis. I was going to
6 turn to Russell next, but I kind of forgot what my question
7 was, so I'm going to repeat it.

8 Russell, if we did this as a supplement, would
9 CalPERS use it?

10 MR. READ: I think, as a supplement, this is a very
11 good idea. You know, what we've heard this morning both in
12 the first panel and I think in this one really reflects
13 something that's fairly important, that this is not a zero
14 sum gain. We are looking -- everyone has an interest in
15 increasing share -- the value of the companies involved.

16 The tension that arises are really two things. Too
17 often you can have long-term share owners who feel
18 under-represented in certain issues and certain
19 circumstances, much better today than certainly historically.

20 And you have companies sometimes that feel
21 overburdened by costs. And we look at this as a way to -- if
22 we can improve both of those, if we can improve the
23 representative nature and also have board members feeling
24 more responsible and representative of their share owners,
25 that's a good thing. And if we can reduce the burdens and

1 costs associated with some of the director and company
2 communications that would be a good thing.

3 So we think as a supplement this is really in the
4 right direction on those two dimensions. So again, as a
5 replacement for precatory proposals we would not be in favor
6 of that at all. We think that could be problematic. But as
7 a supplement this actually might accomplish a lot of good
8 things.

9 MR. DUNN: Gary, I'd like to turn to you next
10 because the ICCR is very well known for raising a lot of
11 consciousness on social responsibility issues. Do you think
12 this would be a good means for that?

13 MR. BROUSE: You know, the -- first of all, I'm
14 sorry, thank you very much for having me here. I really
15 appreciate -- this is really a privilege to be here and have
16 a voice. I know it's difficult to sit out there in the
17 audience because a lot of people feel very anxious about
18 having their input in this and to be up here and have that
19 opportunity is a privilege and thank you.

20 The answer to your question is I don't know. This
21 question, in preparing to come here, was asked in several
22 different ways. One was as this as an option. The other was
23 an alternative. I think as a possible supplement to what is
24 currently in practice, yes, that sounds more likely because
25 we really don't know what the impact is on the annual

1 shareholder meeting, the communications between shareholders
2 and the board, between shareholders and shareholders, and
3 then shareholders with management.

4 Those are all dynamics to take on different
5 avenues. And so to have that opportunity you have to
6 understand what is the impact on these other processes that
7 are going on.

8 There is nothing greater -- I remember my first
9 annual shareholder meeting, and to be able to get up and
10 speak in front of the whole board of directors and the
11 management like that, it's such a privilege. You know, the
12 process of voting on a particular shareholder resolution is
13 one way of voicing your concerns, and then the shareholders
14 each have a vote too that they can express their concerns.

15 These are all expressions, and this just seems
16 another opportunity to do that. The question is how will it
17 impact the other processes.

18 MR. DUNN: Amy and Bill, I want to ask in whichever
19 way you want to go how would companies view this and what
20 would be needed to motivate them to move toward it?

21 MS. GOODMAN: I'll leave it to Bill to answer the
22 individual company response, but I think it's important to
23 lay some groundwork here in terms of background when we talk
24 about communication between companies and their shareholders,
25 boards, management, shareholders, that there really has been

1 a sea change over the past five or ten years in the level of
2 communication that currently goes on.

3 Shareholders and boards and management are talking
4 quite frequently today. In fact, I've heard from some
5 institutional investors that say I wish these companies would
6 stop calling me so much. Because I think companies do
7 recognize and directors recognize the interest of
8 shareholders on a lot of these issues.

9 Just over the past couple of years, the Council of
10 Institutional Investors and the National Association of
11 Corporate Directors as well as the Business Roundtable have
12 put out publications on guidelines for enhancing
13 communications between directors and boards. The New York
14 Stock Exchange listing standards require companies to provide
15 a means for interested parties, not just shareholders, but
16 clearly shareholders and other interested parties to
17 communicate with the independent directors as a group
18 or -- and many companies provide a link on their web site for
19 direct communications board members and a site from corporate
20 secretaries weeding out solicitations and resumes. That
21 information goes on to the board.

22 Frankly, there's nothing that gets my clients more
23 annoyed than receiving a shareholder proposal where the
24 proponent has not contacted them before to say what their
25 concern is, on the theory that companies want to hear what

1 the concerns are. CalPERS, for example, several years ago
2 was concerned about nonaudit services, more recently
3 concerned about compensation consultants doing work for the
4 company beyond that of the compensation committee.

5 These are concerns that companies want to hear
6 about, and many of them get taken care of even before the
7 proposal. And then once the proposal is submitted, many are
8 withdrawn, as you know, and I think the numbers are
9 increasing each year because companies and shareholders have
10 that kind of dialogue.

11 So, I think there are mechanisms in place for that
12 dialogue to take place, and I'm not quite sure what this
13 forum would add to that.

14 MR. MOSTYN: First of all, for the record, I agree
15 with everything that Ms. Davis said. I hope I don't get
16 another shareholder proposal next year as a result of that.

17 MS. MINNOW: You may get one from me.

18 MS. DAVIS: You mentioned my name. I'm a very good
19 friend of your CEO, Ken Lewis.

20 MR. MOSTYN: Yes, ma'am, I know that.

21 MS. DAVIS: Very good friend of mine. So, watch
22 what you're saying.

23 (Laughter.)

24 MR. MOSTYN: You know, some of things that Amy said
25 are absolutely correct. There is a growing amount of

1 communications between companies and their shareholders. I
2 think a lot of companies now on an annual basis if not more
3 frequently make sure that they at least have meetings with
4 their larger shareholders and spend time talking about
5 governance issues.

6 I think the issue here probably is more of the
7 smaller shareholder, the individual shareholder and giving
8 them an access to some way of communicating. But they can do
9 that anyway. They can write letters to us. And I know when
10 we get letters, we pay attention to them. I personally
11 respond to every shareholder that writes to me, writes to our
12 company. And if it's an issue that I think I need to run by
13 the board, I'll do that. So, I think it's already there.

14 My concern, and I'm getting more concerned now as I
15 hear other members of the panel talk about this issue is that
16 it's going to be viewed as a supplement, and basically I look
17 at this as a parallel operation, which is going to tie up
18 more of my resources maybe all year long dealing with this
19 issue.

20 So I just -- and I think that -- I suspect that the
21 individual shareholders will probably not accept this as an
22 alternative unless there's some clout to it, there's some
23 meaning to it. You know, it has to get heard, there's going
24 to be a vote on it or something. And in that case, it does
25 become a parallel system, and I'm very concerned about that.

1 MR. DUNN: Let me ask one specific thing then. If
2 there was some notion in this that this was truly set up by
3 the company but not something that the company monitored or
4 was responsible for, that may impact the extent to which
5 shareholders wanted to use it, but would that put your mind
6 more at ease about the resources point?

7 MR. MOSTYN: Well, in that case, would the purpose
8 be to communicate with the company?

9 MR. DUNN: Well, it would be to communicate amongst
10 shareholders, and to the extent that it rises to the
11 company's level of interest, then yeah.

12 MR. MOSTYN: Okay. Well, if there's communication
13 among shareholders and a significant number of shareholders
14 have an interest in an issue then bring that to the company,
15 I think that's a good system. I have no problem with that.
16 If I was CORPFIN, I'd be concerned about this, though,
17 because you're going to end up with a lot of stuff out there
18 that's potentially misleading. And, you know, you're going
19 to have a lot of issues to deal with I think if that occurs.

20 MR. DUNN: That was actually my next question that
21 I wanted to ask everyone. Would there need to be something
22 in this that made very clear -- and give you some
23 alternatives and everybody can jump in -- would it have to
24 say you can't talk about stuff that's on the proxy because
25 then it might be a solicitation? Would it have to be that

1 anything on there is not a solicitation ever regardless of
2 what you're talking about? Everybody realizes what it is and
3 what it's for and it sits there. How should we deal with
4 exactly the issue that Bill just brought up?

5 And since Nell went first and hasn't spoken in a
6 while, we'll go to her to start and everybody can jump in.

7 MS. MINNOW: Well, first of all, I think it's
8 absolutely essential that everybody have to have their
9 identity disclosed. I understand that there are some
10 advantages in some circumstances to anonymity, but I don't
11 think that that would work here.

12 But I also want to say that, as I touched on in my
13 initial remarks, I think this is one thing the market is
14 handling very, very well. And I particularly like the way
15 that the Motley Fool approaches it, where participants rate
16 each other. And so you know when somebody is a crackpot or
17 you know when somebody is a pump-and-dump guy because nobody
18 ever listens to him, and so you have immediate credibility
19 for the people who are posting.

20 Now as for your proposal that we just say, by the
21 way, no matter what I say here, it's not a solicitation. You
22 know, Abraham Lincoln used to say how many legs does a cow
23 have if you call a tail a leg? And the answer is four,
24 because calling a tail a leg doesn't make it one. And you
25 can say it's not a solicitation, but if you're saying I know

1 it's not a solicitation, but by the way, I really want you to
2 support my proposal, it doesn't really do any good.

3 So I think the main thing here is you want to look
4 to what is already happening out there in the marketplace. I
5 think that, as I said, the system of creating credibility for
6 particular posters has been very, very -- the SEC should do
7 something near and dear to the heart, and that is making all
8 the public disclosures Internet friendly in such a way that
9 they can be imported easily and looked at and discussed and
10 benchmarked so that that will provide a good basis for the
11 conversation.

12 CHAIRMAN COX: I just wondered, on your anonymity
13 point, if you could explain your thinking.

14 MS. MINNOW: Sure. I think there is a lot of
15 appeal to the idea of anonymity in order to encourage
16 frankness and freedom from reprisals. On the other hand,
17 there are a lot of nasty people out there who are not clear
18 about their motives and who I would not want a hedge fund
19 manager to hide behind anonymity when -- as he was, you know,
20 shorting the stock.

21 And I think it is important for -- and one thing
22 that bothers me right now about the current SEC rules is that
23 companies need not disclose the name of the proponent in the
24 proxy. They have to tell you if you call, but they don't
25 have to put it in the proxy. And it infuriates me. I once

1 had a proposal and they left my name out. I wanted my name
2 on the proposal because I know people in the shareholder
3 community and I think my name adds a lot of credibility to my
4 proposals.

5 So I think that in the -- because of the
6 sensitivity of the material and because of the motivation of
7 bad actors out there, I think that outweighs the appeal of
8 the protection of anonymity.

9 CHAIRMAN COX: And so you're not motivated by a
10 concern for restricting the conversation to shareholders,
11 even if it were restricted to shareholders, you would still
12 want there to be a --

13 MS. MINNOW: Yes. I thought about that a lot,
14 because I knew that was one of the issues that was going to
15 come up today, and it is not -- it's not an easy and obvious
16 answer. But I've decided that in my opinion, it does
17 outweigh the benefits of anonymity.

18 MS. DAVIS: Okay. On this proposal here, if you're
19 going to use the Internet it's like taking a shower in
20 public. Anybody can know what you're going to do. All the
21 companies are going to -- don't think anybody cannot get into
22 your computer. Hackers and even terrorists, anybody, they
23 can get even in the most sophisticated government computers.
24 They know everything you're doing. Everything you're doing.

25 Now I have given report, but the thing is, they

1 have the names of the shareholders and the addresses in the
2 proxy statement. I get about 40 stockholder proposals each
3 year, and many years ago, many left my name out, you know.
4 Now it's only one place, Pfizer, where they don't have my
5 name but they said they'll get the name of the proponent, you
6 know, and the address upon request. Okay. That can be done,
7 all right.

8 But even where the name is not used, then the name
9 they can get -- of course, it's much better if they use it
10 like they do, you know, it's why not? What's the secrecy?
11 And then by telephone, all right. I got many phone calls
12 about my proposal. So you know what I do? I say, well, you
13 don't know who is calling you. A lot of employee
14 shareholders call, and they want to know just what are you,
15 you know, particular about my political contributions,
16 resolutions and some other, I say, well, I thank you very
17 much, I said, you can send me a letter with your particular
18 questions with your name and address, I said, but I cannot
19 say anything else about my proposal except what's in the
20 proposal, so that nobody ever can say that I'm trying to
21 solicit proxies. I've never asked anybody to vote for my
22 proposal.

23 Sometimes when I lecture at universities or other
24 places or recently before my neighbors, I always say read
25 your proxy statement, read the proposals, vote yes or no, but

1 don't abstain or in some cases it would be voted against.
2 But I don't even ask anybody ever to vote for my proposal,
3 even my own neighbors. I said just read it, do what you want
4 to, but read it, and don't abstain. Vote for or against.
5 The education thing, I said. But no way ever -- I've been at
6 this for 40 years, so I know what I'm doing. If anybody
7 thought I was soliciting, I'm sure they would have heard
8 about at the SEC. Nobody considered.

9 But like I say, this is just a means for the
10 companies to see everything you are doing when you have
11 anonymity. I don't use e-mail either. I tell you why,
12 because remember Spitzer, you know --

13 MR. WHITE: Ms. Davis, can let Gary make a comment
14 here?

15 MS. DAVIS: Yeah, yeah, yeah. Yeah, yeah. Just
16 let me finish here. And the same thing, I don't use a word
17 processor. I'm not a perfect typist. If I have to have
18 something done, I have somebody do it for me if it has to
19 look real neat. But my typewriter, nobody can get into.

20 MR. WHITE: Ms. Davis --

21 MS. DAVIS: But your word processor, anybody will
22 know what you are doing. So this is outrageous. And let me
23 tell you another thing, okay.

24 MR. WHITE: Ms. Davis --

25 MS. DAVIS: One more thing. One more thing.

1 MR. DUNN: We need to move.

2 MR. WHITE: We need to move. Gary would like to
3 make some comments on this.

4 MS. DAVIS: Yeah, yeah. But I want to -- may I
5 have one more? One comment on this, please, John?

6 MR. WHITE: We'll come back to you before we're
7 done today.

8 MS. DAVIS: All right. All right.

9 MR. WHITE: Gary?

10 MR. BROUSE: Thank you. I just wanted to add
11 something about the Electric Shareholder Forum issue, and I
12 still don't know what the impact and the implications are
13 going to be on this. But the other thing I was just thinking
14 was is that before we go to a company to ask a question or
15 address an issue, we spend a lot of time researching it,
16 going over the questions, the concerns. And we're not about,
17 you know, wasting the company's time, the management time in
18 addressing particular issues, this might, you know, with just
19 a lot of gab going on.

20 I think there needs a component in there where it
21 makes whatever questions or whatever you want to address,
22 that there's some responsibility behind it, that it is well
23 documented and the interest that you have in the company and
24 the stockholder's value in it is there, too, in that
25 component. And that process we go through to go to a company

1 and contact them, we take a lot of that under consideration.

2 You know, you have to wonder in this process, how
3 is that going to ensure that the questions and the
4 conversation are going to be quality and they're not going to
5 be a lot of wasted time? Thank you.

6 MR. DUNN: Russell is next, and we'll get to Bill
7 after that.

8 MR. READ: Thank you. I think there is a bright
9 line standard here that actually could and should emerge.
10 There's a principle involved regarding a share owner forum,
11 and that is, you know, you're looking for the directors for
12 the company to be responsive to the interests of the share
13 owners. I think -- I'm definitely in the camp that for a
14 share owner forum, that it should not be anonymous. That
15 would not be -- it does not facilitate the board or the
16 company being more responsive if they see something that is
17 anonymous.

18 If it's a different forum, for instance, if it's a
19 public relations forum, an electronic public relations forum,
20 a PR forum, which could also be useful, but wouldn't
21 necessarily involve share owners, I think that probably could
22 and should be anonymous. There are different folks,
23 different issues raising issues that could be important from
24 a public perspective, that could be another useful type of
25 forum for the company. But with regard to -- restricting it

1 just to the share owner forums, I think that should not be
2 anonymous.

3 CHAIRMAN COX: Before you pass off of that idea,
4 since I want to make sure I apprehend it fully, is there
5 anything that would need to be done to the proxy rules to
6 have the kind of PR forum that you're talking about, or is
7 that something that under existing law and rules you could do
8 anyway if you wanted to?

9 MR. READ: The interesting question is, you know, a
10 lot of this happens already on the Internet with some various
11 forums. So those Internet forums themselves are pretty
12 useful. What's missing in part can be participation from the
13 company and from the directors. And there are probably other
14 people who can answer better than I as to what -- as to how
15 the companies themselves and the directors would feel
16 restricted in those forums. But the forums themselves that
17 are out there, such as Motley Fool and others, are actually
18 pretty useful.

19 MR. MOSTYN: Just a couple of points. Actually,
20 your last point, we -- and I think most companies generally
21 try to stay away from the chat rooms and the blogs, because
22 if we started getting involved in that discussion, we'd be
23 tied up in disclosure issues and liabilities and that sort of
24 thing. So we try to stay away from that.

25 Just getting back --

1 MS. MINNOW: Could I just ask you something? I'm
2 sorry. Can I just ask you, when you say stay away from it,
3 you mean you don't read them or you don't respond?

4 MR. MOSTYN: We actually probably don't even read
5 them, for the most part. There are some people that do, but
6 I think that we generally don't read them. Just
7 getting -- there was an example actually that is relevant
8 here in terms of what might occur.

9 When Sarbanes-Oxley was passed, and then the New
10 York Stock Exchange listing standards were adopted, the new
11 ones, they required a communication vehicle to get to
12 companies. And some of the companies that want to get out in
13 front of this issue set up web sites for that purpose, and
14 some of the experiences that those companies -- and they were
15 pretty big companies -- were horrendous. I know one company
16 in particular that had to hire a staff of people to sort of
17 address these issues.

18 And that kind of volume concerns me a lot. And
19 even if it was restricted to shareholders, I think that you
20 might get -- I'm really anticipating more volume, because
21 it's just easier to deal with the stuff when -- on a key on
22 your computer than when you write a letter or make a phone
23 call to a company.

24 MR. DUNN: Amy, if I could --

25 MS. DAVIS: Yeah. No. Okay. This is absolutely a

1 lot of nonsense, because you have no control as a proponent
2 that way, and you don't know -- like I say, you're going to
3 get company employees acting like individual shareholders.
4 You get special interests and anonymity while otherwise and
5 you have the names and addresses of proponents. You get
6 letters, fine, so you know who is writing and all that. And
7 you can pick up the phone, talk to them or not talk to them,
8 and a lot of mail I get from people, too, they just say,
9 well, thank you, Mrs. Davis, you're doing a great job. We
10 support you in that.

11 If they ask specific things why I have a reason to
12 get this at a particular company, I don't go. I just say
13 this is what is in the proxy statement. This is it. And
14 they should be -- nothing is perfect, but the current system
15 is working. Just like I say, and you work -- incumbent
16 directors, they are not like -- I had in a friendly way, I
17 had two years ago a problem with the bank --

18 MR. DUNN: We --

19 MS. DAVIS: Now, look. You didn't interrupt Nell
20 either. You're showing favoritism to Nell.

21 MR. DUNN: No. You're repeating yourself. That's
22 why I interrupted you.

23 MS. DAVIS: Well, that's -- I'm not a lawyer. I'm
24 sorry.

25 MR. DUNN: No, no. It was only -- I only cut in

1 when you started repeating yourself.

2 MS. DAVIS: Well, I'm sorry if I do that. But,
3 like I said, the present system, it's not perfect, okay. But
4 it is working. But I want to have also that we don't have
5 in-and-out traders a four-year holding period for anybody to
6 give a proposal and at least a minimum of \$4,000 worth of
7 shares.

8 Now this guy here who works for the Bank of America
9 said the average shareholder has 5,000 shares. I have 80,000
10 worth of Bank of America, which is also, you know, a lot for
11 me, but I'm not a 10-share stockholder either. And we don't
12 have, you know, we don't have those kind of people. Four
13 thousand minimum.

14 And I think that should resolve a lot of the
15 problems, but no electronic stuff. And you cannot trust the
16 Internet of senior citizens and small shareholders either.
17 You have to be a computer wizard and anybody will know who
18 contacts you, anybody will know what you are doing.

19 MR. DUNN: Okay. We're moving on to the next
20 topic. Amy? For the sake of discussion, Bill has said that
21 companies don't even look at the sites, or his company
22 doesn't, or it might be wise not to. I don't want to put
23 words in your mouth, Bill.

24 What would we need to do to change the rules to
25 give them comfort? What is it in the securities laws that

1 lead a company legally -- and I know there's a money issue,
2 but legally, to feel that it's better off just to ignore?

3 MS. GOODMAN: Well, I think there are questions
4 relating to uncertainty under the law with respect to duty of
5 update and duty to correct and to the extent that the company
6 becomes aware, let's say there's unusual trading in their
7 stock, I think there are a variety of reasons why companies
8 don't want to respond to -- it's the equivalent of responding
9 to market rumors, I think. And for all those reasons.

10 And as I had mentioned earlier and as Bill
11 indicated, there are alternative ways for shareholders to
12 make their views known to a company.

13 MR. DUNN: Bill, what would you think? What would
14 put your mind at ease?

15 MR. MOSTYN: I don't think there is any way to do
16 it. I mean, actually, honestly have read some blogs, chat
17 room conversations, and I'm amazed at some of the allegations
18 that they're making about the company. I caution people with
19 the company not to get engaged in a communication with them
20 about this, because it's -- you're going to go off in some
21 issue that we're going to have to issue an 8-K for probably
22 or things like that. And so there are lots of things that
23 come out there, and it's just not -- it's not the right
24 vehicle. It's not reviewed, it's not governed by any rules.
25 I'm not sure that, you know, to try to impose a 10b-5 type of

1 regime on a blog is really going to work.

2 MR. DUNN: That was part of my question there. Is
3 it wise to say -- to make clear that there isn't a 10b-5
4 regime or there isn't a duty to correct or there isn't a duty
5 to update or this doesn't result in any company obligation?

6 MS. GOODMAN: Well, if the company is speaking, I
7 mean, if we're assuming that the company is not speaking,
8 then there's no problem. But if you want this to be a
9 two-way street and the company is going to use this to speak,
10 then I think it would be very hard for the SEC to give a
11 total pass to what the company had to say.

12 MR. DUNN: Okay. So let's divide the question in
13 half, then. If the company -- if it's merely from the
14 company view, passive, and the company doesn't have an
15 obligation to speak -- obviously, if a company ever chooses
16 to speak, it has to speak truthfully and completely. If the
17 company doesn't have an obligation to speak, and therefore we
18 could find some way to come up with saying the company has no
19 responsibility for whatever gets said on there. That's one
20 issue. How would -- would that be reasonable?

21 And then the other is, if the company was speaking,
22 what would it need?

23 MS. GOODMAN: Are you assuming that the company
24 would be maintaining this forum? I mean, I think that's the
25 problem. I think to the extent that the company doesn't

1 maintain the forum, then it doesn't have or feel any
2 obligation to monitor it. On the other hand, if the company
3 is maintaining this forum pursuant to an SEC rule, for
4 example, it becomes hard I think both from the company
5 standpoint and from the SEC standpoint not for the company to
6 have some monitoring obligation and want to correct false and
7 misleading information.

8 CHAIRMAN COX: I think the question that Marty's
9 asking is ought there be a rule that makes clear there is no
10 such obligation? I mean, in the early days of the Internet
11 back when we had CompuServe and Prodigy, the New York Supreme
12 Court, the trial court in New York, ruled in a libel case
13 that someone who had said something about an investment bank,
14 and we couldn't trade down who that person was, triggered
15 liability at Prodigy.

16 And so now-Senator Wyden, Representative Wyden and
17 I wrote a law that overturned that decision, and that's been
18 the rule on the Internet ever since. We would do the same
19 thing in this space so that the maintenance of the site would
20 not in any way subject the maintainer, if it were the company
21 or anyone else, to that kind of monitoring obligation.

22 MS. GOODMAN: I guess I'm concerned that you would
23 still, as Professor Newhauser talked about on the May 7th
24 roundtable, create a Wild West atmosphere where if
25 there's -- that you would end up then in a situation where

1 nobody would really use the forum because it would become an
2 open Wild West where there -- I mean, I question what the
3 value of it would be at that point.

4 MR. DUNN: Rusty, do you want to -- go ahead.

5 MR. READ: Love to. I actually think that
6 protections that you could provide from the SEC in an
7 electronic forum would be very important. Our view is that
8 things that materially facilitate communication between the
9 share owners and the company and the directors is generally
10 cost effective and good, something that is -- should be
11 promoted. And without those protections, it's going to be
12 difficult to have an effective dialogue.

13 So I would say that if you want to have the
14 electronic forum be -- have effect at all and have it not
15 simply be a conversation among the investors, then I think
16 you probably need to provide that -- some measure of
17 protection to the company and to the directors.

18 MR. DUNN: Thanks. We are -- we're coming down to
19 the closing remarks point, so I was going to turn it over to
20 Ms. Davis to go first. Everybody has a minute or two, and
21 we'll go. Ms Davis.

22 MS. DAVIS: All right. I'm just -- I'm trying to
23 say that this whole -- I am not a lawyer, but I know darn
24 well if you're going to use the Internet, some company or
25 somebody could make a subpoena and find out who the ones were

1 who had these different things on the web. While if you
2 write to a director personally or you write to a stockholder
3 or a proponent or whoever, nobody but the proponent knows.
4 You have the mail. You don't know -- I don't give out who
5 writes to me, who calls me. But I'm trying to say this is
6 open to litigation. I'm not a lawyer. But they can use
7 that. And also at some point, the companies might -- now
8 like I say, I've been at this for 40 years, I have seen them,
9 the companies try to say you had to have 1 percent of the
10 stock before you could give any proposal and that stuff. But
11 this is not good. They could even try to eliminate the
12 annual meeting and use these forums and then take the things
13 they want to. And if that gets to that, I tell you one
14 thing. I am not a young woman anymore, but I am rich. I
15 would take it up to court, even to the Supreme Court. I have
16 nothing to lose. If they were to try to stop annual
17 meetings, okay, they tried to force this Internet stuff, you
18 can't force senior citizens and small shareholders who are
19 not computer experts.

20 Sure, the institutional investors have big stocks
21 and all that, but people, if they're dumb enough to use it
22 and get themselves -- they can find out who you are even if
23 you think it's anonymous. Are you kidding? They can find
24 out anything about everything you do on the Internet. Don't
25 kid yourself. That's why I say, I don't use a word

1 processor. I don't use e-mail. I use my typewriter. I do
2 what I want to. I pick up the phone. Sure, people can tap
3 your phone, but not as much as, you know, and in other ways,
4 and you are in control as the proponent, and that way you
5 will not be -- and the directors are listed in the proxy
6 statement. If people want to talk to the individual
7 directors --

8 MR. DUNN: Ms. Davis --

9 MS. DAVIS: -- they can find out.

10 MR. DUNN: Ms. Davis --

11 MS. DAVIS: They can find out the names and
12 addresses --

13 MR. DUNN: I'm clearly not in control. I'm clearly
14 not in control as the moderator.

15 MS. DAVIS: Yeah, but you favor -- you favor Nell.

16 MR. DUNN: Oh, stop that. Stop that.

17 MS. DAVIS: I am prettier than she is.

18 MR. DUNN: Nobody -- oh, jeez.

19 (Laughter.)

20 MR. DUNN: Thank you so much. Russell?

21 MR. READ: I think this is an important opportunity
22 which is going to take years to figure how to do effectively.
23 From our standpoint at CalPERS, all of our -- well, our
24 approach to voting proxies is all based on principles,
25 principles which we believe will benefit -- in fact, the way

1 we look at principles, we only establish them if we think
2 they will benefit companies. If they think they will add
3 value. We think that's a proper and good way to formulate
4 principles.

5 We do believe that there is -- the most important
6 principle of all is the alignment of interests between the
7 share owners and the companies that they are investing in.
8 So that alignment of interest, anything that facilitates
9 that, better communication is, you know, is generally a good
10 thing. We view this as something that's supplemental, not as
11 a replacement, I think for many of the reasons that were just
12 previously mentioned, but as an addition, as a supplement, we
13 think that there are some promising aspects here to improve
14 the alignment of interests, to potentially I think actually
15 reduce the costs to companies.

16 You know, although theoretically I think there were
17 some costs that you could see increasing, I think in general,
18 you know, that better communication would forestall a number
19 of precatory proposals, frankly. I think we see that in
20 general when we come out with our focus list of companies
21 that we believe are troubled and not reflecting share owner
22 interests. We engage companies very heavily. In fact, most
23 of the companies that could be potential focus list companies
24 end up not making the final list because we engage them and
25 the companies respond.

1 So, I think the engagement process is important.
2 This is another type of engagement process. So anything that
3 you could do to help make this meaningful and effective I
4 think would be a good thing.

5 MR. DUNN: Amy?

6 MS. GOODMAN: Thank you. I think what Russ just
7 said is so important that the level of communication that is
8 going on today between companies and their shareholders is at
9 an incredibly high level on proxy proposal issues, an area
10 where I don't think there's been as much communication as I
11 think there could be, and this gets at the issue that was
12 discussed at the previous panel relating to the director
13 election process is communication with, for example, board
14 criteria.

15 Boards under the New York Stock Exchange listing
16 standards and under the SEC rules are now required to put in
17 their proxy statements and their corporate governance
18 guidelines up on their web site, lots of information about
19 the criteria that they apply in picking out director
20 candidates. In addition, there's a required disclosure about
21 procedures for shareholders to recommend candidates to the
22 governance and nominating committee. And under the new
23 listing standards in the SEC rules, the independence of the
24 governance committee and their whole role in the nominating
25 process is much greater than it ever was.

1 But if you talk to, and I'd welcome Bill's
2 thoughts, but if you talk to a lot of companies, they get
3 very little input from shareholders or even large
4 shareholders about the criteria that they have in their proxy
5 statements about board candidates and about the people that
6 they nominate for the board, and that's an area where I'd
7 like to see greater communication.

8 MS. MINNOW: I think the great conundrum, Marty, is
9 the one that you raised a moment ago, which is that we want
10 companies to be fully accurate and fully responsive in all of
11 their communications, and yet we also want to encourage them
12 to participate in what really is the Wild, Wild West out
13 there on the Internet. And I just don't think that we're
14 going to be resolving that one today. That's a very tough
15 one.

16 I am usually extremely happy to take up the time of
17 corporate executives with what I think are very important
18 shareholder concerns, and even I take pity on the idea that
19 they would have to be surfing the net all day long to read
20 what a blogger has to say and respond to every single thing.
21 Because if they didn't respond to this one and they did
22 respond to that one, it would be like conceding. I think
23 that that's a nightmare.

24 I think the best thing that the SEC could do right
25 now is focus on using the technology that's out there, as I

1 said before, to strengthen and make more robust the process
2 for director nomination and contested elections and to look
3 and monitor closely what the market is providing out there in
4 terms of online forums for shareholder interchange and make
5 sure that the required disclosures are very compatible with
6 that, so that they can make that a richer experience.

7 MS. DAVIS: Okay. I have actually two more --

8 MR. DUNN: Ms. Davis, we're finishing. We're going
9 to end. We've got to end. We're on to the lovely and
10 talented Bill Mostyn now. Bill?

11 MR. MOSTYN: Thank you. I think the objective of
12 this idea very laudable if it was to siphon off what would
13 have been precatory proposals and put them into a different
14 forum and basically simply the normal proxy statement process
15 each year for a company.

16 But my sense is, and especially listening to the
17 panelists today, that we're talking about a supplemental
18 system, that we're just going to have to devote more
19 resources to. And in that context, I don't think it's a good
20 idea. I think it would have to be the alternative to it.
21 Otherwise, we'd be spending a lot of time on it.

22 MR. WHITE: Gary, you get --

23 MR. DUNN: Gary gets the last word here.

24 MS. DAVIS: What about me?

25 MR. DUNN: You went first.

1 MS. DAVIS: Well, wait a minute.

2 MR. DUNN: Gary, do you want to give us your
3 comments?

4 MR. WHITE: Gary's getting the last word, Ms.
5 Davis. We've got to end. We're past time.

6 MS. DAVIS: No. Well, wait a minute.

7 MR. DUNN: Gary, do you want to give us your
8 comments?:

9 MS. DAVIS: I mean, my last words, brief last
10 words.

11 MR. DUNN: I get the last word. Go ahead, Gary.

12 MR. BROUSE: What I wanted to do is again thank you
13 for allowing us to be here and to be able to express
14 ourselves on this issue. I wanted to say that I also
15 represent the American Indigenous Coalition on Institutional
16 Accountability, and we're sort of newcomers into the
17 investment market.

18 And the one thing great about ICCR is, we have a
19 great reputation with corporations. We don't always agree on
20 things. We start out with letters or communications or we
21 dialogue with the company. We go to annual meetings. And
22 it's interesting. Sometimes we don't always agree in those
23 dialogues, or maybe we don't have a dialogue, maybe it's a
24 resolution that gets those dialogues started.

25 But the great thing is, is that I think we've

1 actually helped companies in heading off potential problems
2 in the future. We've been helpful that way. Sometimes
3 corporations even call us for assistance in particular areas
4 and information. And that's why I think it's so important,
5 no matter what process is in place, that the quality of the
6 communications that takes place is really important, because
7 we don't want to waste our time. When we do bring up an
8 issue, we want to be taken seriously.

9 And it's one of the things that the American Indian
10 community, as we get into this investment market, are looking
11 at that model and knowing that we don't get that many
12 opportunities to participate in a place like this or go to an
13 annual meeting. So our opportunities are pretty limited.
14 And we know that when we do get those opportunities, we have
15 to make the most of them.

16 And I think in this particular area, people of
17 color, you know, their opportunities are not as great as
18 other people to be able to voice our concerns, our opinions,
19 and to share our comments with the business leaders of this
20 country. And we've been very fortunate in the relationships
21 that we've been able to build with corporations as investors,
22 as a group of people. And we appreciate that opportunity,
23 and we would not like to see that quality of communications
24 deteriorate in any way.

25 And so, you know, again, I would say that, you

1 know, we still have a lot of questions about this process,
2 and we hope we're able to continue to participate and to
3 contribute in how to make this a good process for everyone.

4 Thank you.

5 MR. DUNN: Thank you very much. With that, we're
6 going to, to use the chairman's phrase, move immediately to
7 the next panel, which I guess means ten or fifteen minutes.

8 We're going to start at 11:45. I'll -- I just want
9 to thank everyone, Evelyn, Russ, Amy, Nell, Bill, for pulling
10 double duty, Gary. I'm emotionally and physically spent, so
11 I'm done.

12 CHAIRMAN COX: Thank you very much to the entire
13 panel. And on Marty's last point, I really did intend that
14 we'd move seamlessly into the second panel, which did not
15 happen, so let's try and do that with the third panel so that
16 we can get people on their way.

17 Thank you very much.

18 (A brief recess was taken.)

19 PANEL THREE - REVISTING THE RELATIONSHIP BETWEEN
20 STATE LAW RIGHTS AND THE FEDERAL PROXY RULES

21 MR. WHITE: Okay. We'd like to get started on our
22 tenth and final panel for this -- for our roundtable series.
23 First I should just check. Joe, can you hear us? Joe
24 Grundfest.

25 MR. GRUNDFEST: I can hear you loud and clear.

1 MR. WHITE: Okay. Just checking. We can see you.

2 MR. GRUNDFEST: I can hear you loud and clear.

3 MR. WHITE: But we just wanted to make sure you
4 could hear us.

5 CHAIRMAN COX: Could we turn Joe's volume up,
6 though?

7 MR. WHITE: Okay. Whoever handles the volume,
8 we're going to need to turn Joe's volume up. So as I say,
9 welcome back to our final panel. Our goal here is to build
10 off of our first roundtable on May 7 and come back to some of
11 the fundamental issues and look at those again in light of
12 what we've heard in the interim.

13 We're very fortunate to have back four of the
14 panelists from our first day, plus Stan Gold. But let me
15 introduce everyone just down the line here. Jill Fisch,
16 Professor of Business Law at Fordham University School of Law
17 and currently visiting at Pennsylvania Law School.

18 Stan Gold, President and CEO of Shamrock Holdings.

19 Joe Grundfest, who is connected by video, Professor
20 of Law and Business at Stanford Law School. Joe, do you want
21 to speak to us now so we can see how you sound?

22 MR. GRUNDFEST: Well, good morning, everyone.

23 MR. WHITE: That is perfect. Thank you. Don
24 Langevoort, Professor of Law at Georgetown University Law
25 Center; and Leo Strine, Vice Chancellor of the Delaware Court

1 of Chancery.

2 I'd like to just, you know, dive right in here in
3 terms of where we're at. We obviously, you can tell from
4 some of the things that were being discussed this morning,
5 and the questions we've provided to the panelists, mulling
6 over the idea that binding proposals that are permitted under
7 state law should be included in proxy statements, perhaps
8 with certain requirements. And we've obviously heard a lot
9 of back-and-forth on that.

10 So, Jill, I guess we'd like to start with you and
11 hear what your reaction to that is in light of all the things
12 that we've heard.

13 MS. FISCH: Thank you. In light of the questions
14 that you circulated, there were a couple of points that I was
15 concerned about. One, I think you're absolutely right in
16 focusing on the relationship to state law. But I wonder if
17 that relationship isn't a little bit more complicated than
18 our previous discussion really highlighted.

19 I mean, first of all, shareholders -- we've been
20 focusing on Delaware, and in Delaware, shareholder voting
21 rights are pretty well defined. A number of cases say that
22 shareholders have the right to nominate directors, and
23 shareholders clearly have the non-divestible right to amend
24 the bylaws. But that's not true in every state. In fact,
25 there are at least a couple of states where shareholders

1 don't have the right to amend the bylaws at all. That power
2 resides exclusively in the board.

3 And I wonder what shareholder proposals or
4 shareholder resolutions look like under such a system. And I
5 also wonder what the sort of implied or residual shareholder
6 resolution right is in a state in which shareholders don't
7 have the power to amend the bylaws, and where that residual
8 right comes from.

9 I went back and I looked at the TransAmerica case
10 where we really kind of, where the 3rd Circuit kind of came
11 up with this idea that shareholders of course have the right
12 to introduce and vote on resolutions. But when you look at
13 the state statute, it's not entirely clear to me where that
14 right comes from, and whether states, or to what extent
15 states have the right to eliminate that. So if that's true,
16 then I'm a little bit confused about the relationship of this
17 federal right with the underlying state law.

18 Related to that, there's this issue of what's a
19 proper subject. And I'm not sure you get away from that
20 with -- by restricting shareholders to binding or to bylaw
21 amendments. There's still the residual question of the
22 interplay in Delaware, the interplay between Section 109 and
23 Section 141. Just because something is in the form of a
24 bylaw amendment doesn't automatically make it a proper
25 subject for a shareholder vote. And state law has not

1 addressed that question. I assume that it will. It may not
2 resolve that question in the same way in every state. And
3 then you've got an additional complication with respect to
4 the effect of these rules.

5 Third question. Interplay between the federal
6 right and issuer-specific rules, issuer-specific limits on
7 shareholders' right to amend the bylaws. Would a federal
8 rule prevent an issuer from having a bylaw that said you need
9 5 percent of the outstanding shares to amend the bylaws, or
10 introducing a different time period or a different holding
11 requirement? I think there's a lot of value in
12 issuer-specific experimentation.

13 But I assume that if there were a general federal
14 proxy right to introduce binding bylaw resolution, that that
15 would conflict, or at least some courts would perceive that
16 as conflicting, with issuer-specific freedom.

17 I don't want to take too long, so I'll stop there.

18 MR. WHITE: I don't even think that was playing by
19 the rules. I mean, you're the professor and you're just
20 asking questions. We were looking for answers, but thank
21 you.

22 Don, maybe you can give us some answers, as well as
23 your observations.

24 MR. LANGEVOORT. A couple of more questions,
25 actually.

1 MR. WHITE: Oh, great.

2 MR. LANGEVOORT. No. I agree with everything Jill
3 said. In addition, and one thing that is clear I think in
4 every state that I know of is the bylaws cannot be
5 inconsistent with the charter or articles of incorporation.
6 And I have to believe the Commission would set in motion a
7 great degree of experimentation in charters, especially
8 adopted pursuant to IPOs, that people buy into that will add
9 to the difficulty of the questions of what's -- where are
10 the shareholders going too far, given the charter that was
11 adopted, things like that.

12 So, I think the Commission and its staff would
13 inevitably be drawn into the creation of law on the subject.
14 And we would see what we saw with precatory amendments for
15 the last 40 years, which is the Commission supplanting state
16 sources of authority, because it's far more actively and
17 constantly involved in answering these questions, and it
18 won't get answered. I mean, Jill and I can't answer your
19 questions. We've looked at the body of law. I don't think
20 the body of state law is going to ripen quickly, so that it's
21 easy for you guys.

22 MR. DUNN: If I could weigh in on one thing. And
23 for anyone. At the last roundtable when you all were here,
24 Leo, you had mentioned that nonbinding proposals aren't
25 provided for in state law, I think was the phrase you used.

1 And -- I didn't go back and read it. I made that up. But I
2 think that's what you said. And the notion, though, that,
3 you know, so it's permissive, it doesn't disallow it. You
4 know, I've never seen any company ever write in with a
5 nonbinding proposal and argue it's invalid under state law.

6 So while I think it's a fair question, and of
7 course state law could be changed to make it not permissive
8 -- not permitted, it's fair to say that, although it's an
9 open question, it's kind of an open secret that it's fine.
10 Would that be fair?

11 MR. STRINE: I think what I said the last time is
12 this. Delaware is not -- I mean, I am not John C. Calhoun.
13 I hope that's obvious to everybody, interposition and
14 nullification, not my thing, not my state's thing, and it's a
15 federally mandated process.

16 What the statute says is that you can come before
17 an annual meeting and you can bring up anything that's
18 proper. Right. Yeah. You can go to the annual meeting,
19 hopefully it's not on the Internet, it won't be traceable.
20 I'm a little concerned that my remarks are traceable now
21 because of the Internet connection I saw. But I'm proceeding
22 nonetheless in the assurance that it won't be.

23 But the idea of the mandated vote on a matter
24 that's not binding, no one -- where is there a court case
25 that says I stood up at the annual meeting and I demanded a

1 vote. The chairman said I could make my remarks, but I'm not
2 having a vote on it because it's not a bylaw. And then went
3 to a state court, and the state court says as a matter of
4 corporate law, yes, you have to put it to a shareholder vote.

5 The shareholder vote on these nonbinding things is
6 a result of federal action. We're not John C. Calhoun. We
7 don't care. You're regulating the proxies. As a matter of
8 the proxy rules, you have created something. And that was
9 one of my points about your proposal. You're not vindicating
10 a state law right.

11 The difficult thing for the Commission that you're
12 grappling with is a history of -- and it may be a
13 Machiavellian kind of conservative idea here, which is to
14 diffuse energy around social issues into a forum dominated by
15 capital, right? Which is, we're going to diffuse energy that
16 might be directed to Congress into a forum where capitalists
17 have the vote. And I say that kind of whimsically, but
18 there's a certain amount of truth to that, right, which is
19 that nobody under business statutes ever invented this
20 process. It's an outlet.

21 It's not clear to me as a normative matter, for
22 example, why with respect to a lot of the issues that Damon
23 talked about, which are issues that are close to my heart,
24 you know, that I can't really express in my current job, why
25 workers wouldn't be able to make such proposals about the

1 employment, you know, practices of an American public
2 corporation. The idea that you have to buy shares in order
3 to open the gateway to federally mandated communication is an
4 odd thing, or community, for example, people who live in a
5 community affected by the environmental practices of a
6 corporation.

7 Why is that they would not get -- if this is what
8 this is about, it's a conversation about larger issues of
9 social responsibility, the question -- the nexus to security
10 ownership seems to me to be an exceedingly trivial basis as a
11 gateway. And so what I'm saying, Marty, is, I think under
12 state law, you can go to a meeting. The annual meeting has
13 an outlet purpose, and you can stand up and say something.
14 And you have to -- it's like what we have to do as judges
15 with most pro se litigation, right? Some of it's useful.
16 Some of it's just the medicine you take as part of the job.
17 But this idea that you get a vote on it is a federal
18 creation. There is not a body of state law.

19 Now I'll finish with this about the real issue,
20 which is the bylaws. What I heard this morning a little bit,
21 and I think what we need to talk about, a very difficult
22 political issue for the Commission to shut down something 50
23 years old. I heard institutional investors saying they
24 wanted more of the real stuff, but no reduction in the stuff
25 that's less business-oriented and less meaningful. I heard

1 the business community say, we'd like to get rid of the
2 imaginary stuff but no more of the real stuff.

3 And I think the real conversation we need to have
4 is what is the balance? Who is going to strike the real
5 balance for the ordinary investor? Which is, what is the
6 right mix here? And that involves some give-and-take on both
7 sides. And I think that the business community's desire to
8 gag bylaws about the election process to me doesn't have the
9 ring of credibility, but nor does this idea that we want on
10 the investor side to have more influence over who is a
11 director and over bylaws, but we're not willing to give up
12 anything on the other side of the equation and allow the
13 people that we've now elected to face some of these choices
14 without a flurry of precatory proposals.

15 MR. WHITE: So, Joe, you're here on the big screen.
16 Everybody can see you throughout the auditorium. Would you
17 like to give us some comments?

18 MR. GRUNDFEST: Thank you very much. I promise no
19 special effects from Silicon Valley. Let me agree violently
20 with the comments of all of the panelists to this point and
21 suggest that, at least in my view, they point in a consistent
22 direction.

23 First, let's call a spade a spade here. What we
24 have is a set of federally mandated communications. And in
25 addition, these federally mandated communications are subject

1 to federal content regulation. We have employees of the
2 federal government looking at the content and deciding what
3 goes in on a content base and what does not go in on a
4 content base.

5 Putting aside for the moment whatever
6 constitutional issues might be implicated by that fact, it is
7 from my perspective not the best place for the federal
8 government to be, to simultaneously be compelling speech,
9 compelling the use of corporate resources with regard to the
10 making of any speech. And here I speak without any view with
11 regard to the substance whatsoever -- and then having the
12 government in the middle of the situation acting as though
13 they're the editor of an op ed page, saying we'll accept this
14 piece, we won't accept this piece. And very often, it has
15 nothing to do with, you know, the number of shares you hold,
16 how long you've held them. It's we don't like the way it's
17 written or we don't think that what it says is appropriate.
18 A highly questionable role I think for the federal government
19 to be in.

20 And then with regard to all of the excellent
21 technical questions that have been raised by my colleagues,
22 it's clear that the Commission is not in the best place to
23 resolve those issues, and it's also clear that if the
24 Commission were to attempt to resolve those issues, it would
25 become ensnared in a wide range of difficult questions where

1 it has no comparative institutional advantage, and would be
2 certain to come up with a set of principles that are
3 simultaneously over-inclusive and under-inclusive and
4 unlikely to really achieve the best objectives of a large
5 number of corporations.

6 So, you know, for that reason, I think the
7 suggestion by Professor Fisch, which is very simpatico with
8 my own, which is, let's figure out some strategy for
9 devolution of this authority to individual corporations so
10 that the corporations and the shareholders that have to live
11 with the rules that are adopted are actually the ones that
12 adopt the rules governing access to their proxies and
13 defining the material that will actually be on the proxy.

14 In other words, I think the Commission needs to
15 come up with a strategy that gets the Commission out of the
16 14a-8 business and puts the individual corporations and their
17 shareholders in the business of defining what will and won't
18 go on the proxy, and to the extent that there are questions
19 of state law rights of access, aren't the state
20 laws -- aren't the state courts the appropriate venue for the
21 resolution of those issues?

22 I don't know that I want people in the Division of
23 Corporation Finance wearing Justice Strine's robes and
24 opining on matters of Delaware law. That's it.

25 MR. DUNN: Well, I wouldn't fit in Leo's robes,

1 but --

2 (Laughter.)

3 MR. DUNN: It's a very tough spot, I agree with you
4 on a lot of those things. Stan, you were going to speak for
5 a second. How do you view this whole thing?

6 MR. GOLD: First of all, let me thank you for, one,
7 inviting me to be a part of the panel. I've read the earlier
8 transcript, and it's an illustrious panel, and I'm happy to
9 be here. Thanks to the chairman and the Commission for
10 inviting me.

11 Let me -- I think I do agree with most of the
12 remarks this morning, but let me approach it at a different
13 way and share with you some of my experiences, because I
14 don't know, as all the professors do, all of the rules and
15 regulations of various states and even the SEC rules.

16 In the end, it seems to me that the Commission
17 wants to have the best companies, the most efficient and
18 effective companies. We have a series of state laws, and
19 there may be some exceptions, that say we give great latitude
20 to directors who can take some risks, can do lots of things.
21 Don't have personal liability. Can't bring a business
22 judgment rule, unless you're in real bad faith, you don't do
23 it. Because we think that encourages corporations to do well
24 in America, which in the end of the day is all of our job.

25 The one thing that has been missing here is when

1 you do make a mistake. We're not talking about bad faith.
2 We're talking about mistake, bad business dealing, not paying
3 attention to the compensation of the CEO, not having the
4 right mix of businesses, keeping too much corporate booty.
5 I've never met a CEO who doesn't want a huge war chest.

6 So, when those decisions go wrong, there needs to
7 be some accountability. The way to do it, in my mind, is
8 somewhat guided by the AIG case, to allow each company to go
9 and change its bylaws. I wouldn't try to decide one size
10 fits all. You've got to hold the shares for three years.
11 You've got to have 1 percent, 5 percent, ten years. Let the
12 companies -- we have companies out there, good companies,
13 that are \$100 million companies, and we have companies that
14 are \$100 billion companies. If you're going to try to make a
15 rule that fits, it won't work.

16 And so let the shareholders decide what that
17 amendment to their bylaw ought to include or not include.
18 Shareholders are pretty smart. And you've got to give some
19 access to the shareholders for accountability of the
20 directors.

21 Let me just give you some of my experiences.
22 Disney. No surprise. We ran a rather well known, extensive
23 Vote No campaign against Michael Eisner and George Mitchell.
24 Let me tell you, that campaign cost us 10 to 12 million
25 dollars. Most shareholders in America couldn't do that if

1 you didn't belong to a wealthy family. I don't know, but a
2 pretty educated guess, I believe the company spent between 30
3 to 40 million dollars to retain those two individuals
4 basically as directors.

5 We need to have some ability -- a mailing, a
6 mailing at Disney. And Disney has got the most shareholders
7 of any company in America -- it was more than \$2 million.
8 I'm not talking lawyers. I'm not talking printing. I'm
9 talking postage, U.S. postage, was in excess of \$2 million
10 and going up. So, if you don't help the shareholders get
11 some ability to have accountability of the directors and be
12 able to replace them when they don't do a good job, you're I
13 think missing the boat. So I'd encourage you to do that.

14 One other observation and then I'll stop. And that
15 is, we run about a billion dollar activist fund. On any
16 given day, we have 12, 15 positions of companies, relatively
17 small companies, \$1.5 billion. Two-thirds of those companies
18 engage with us by nothing more than a phone call. You call,
19 say we own 2, 3, 4, 5 percent. We'd like to come see you.
20 We've got a couple of ideas. Two-thirds of those people
21 listen, and for the most part engage constructively and adopt
22 some or all of our proposals. About a third. Put it in
23 writing. We'll get back to you. And they never do. Put it
24 in writing. Don't call. We know. We know this company
25 better.

1 So there is about -- my experience is, about a
2 third of the companies give you the stiff arm. Don't want to
3 hear from you. They know better. Hard to engage with them.
4 And there you need some mechanism, not an immediate one. I
5 like the idea of the amendment because it's really a two-year
6 cycle. You've got to amend the bylaw first, and then a year
7 later come back to decide on a director, and then it's a
8 short slate because it's not going to be a majority of
9 directors probably, is a good process.

10 So if you're going there, I want to encourage you
11 to keep going. Thank you for the opportunity.

12 MR. DUNN: The next thing -- I would like to weigh
13 in and I was going to ask Leo a question and I think he wants
14 to respond anyhow. And Joe brought this up and a lot of
15 folks have brought it up is, you have to have the question of
16 state law. You're going to have issues come up. You know,
17 we have 450 issues a year that we've got to resolve in a very
18 short period of time. And so the real question is, if you're
19 going by state law, does it become a two-year process?
20 Because it's not ripe until it doesn't happen. Or is there
21 some way to go about doing it? So I'd like, if you don't
22 mind, Leo, I'd like you to start with that, everybody weigh
23 in, and I won't ask you to weigh in on your view in short
24 slates, because I've already heard how you feel about that.

25 MR. STRINE: I love short slates. Being short

1 myself, I feel like it's a tribute to my class. The very
2 interesting and I think creative thing that was done between
3 the Securities and Exchange Commission and the state of
4 Delaware recently which allows the Commission to ask -- to
5 actually promulgate a certified question of law to the
6 Delaware Supreme Court.

7 I actually think there's a juris potential
8 implication to that that is useful in this dynamic, which is
9 as a matter of judicial conservatism, Vice Chancellor Lamb,
10 who is an excellent judge, you know, declined actually to
11 rule on the validity of a bylaw until there was a vote. That
12 was judicial conservatism, which is to say, is it real or
13 not? And then I'm going to decline to do it.

14 I actually think when the Delaware constitution has
15 now been amended to contemplate that sort of advisory ruling
16 by the Delaware Supreme Court, I don't want to prejudge it,
17 but it becomes more difficult I think for a judge on the
18 Delaware Court of Chancery asked by an issuer or a proponent
19 to render a declaratory judgment to say it's not ripe,
20 because somebody might chuckle and say, well, see your
21 constitution. And so this constitutional amendment may have
22 another sort of implication.

23 I think what we may be talking about his the
24 maturity of -- and I mean this more in the sense of contrast
25 -- adolescents like me with mature people. We often say

1 mature people should act in a reasonable way, which is don't
2 decide on the eve of proxy season to do something novel and
3 expect that we're going to turn over the universe and make a
4 decision that will last for ten years in an instant.

5 I think if a stockholder has something serious,
6 they can propose it early enough in the season that maybe at
7 the, you know, in the summer, late summer, and say this is
8 the thing, talk to the company, and then get a declaratory
9 judgment now in a way where you know. I think in general,
10 though, the Commission, one way for the Commission is to just
11 simply say this. If it's clearly decided under state law
12 that this is not a viable bylaw, we're not going to make you
13 put it on. But if it's not clearly decided and it's in the
14 form of a bylaw, we're going to allow states to deal with
15 this.

16 Now, will that put some pressure on state decision-
17 makers? Sure it will. But that's -- with responsibility
18 ought to come accountability. And I think if you actually
19 look at the things that animate people, like proposals around
20 takeover defenses, proposals around compensation, proposals
21 around the election process, there will tend to be a common
22 set of issues in which some -- you know, the decision of some
23 cases will provide guidance that will help resolve a lot more
24 cases.

25 And so I'm not convinced that you will have, you'll

1 need 500 cases, for example, to deal with what's okay in the
2 takeover area in terms of a bylaw; what's okay in the
3 election area. You know, five to ten decisions out of state
4 courts could provide an awful lot of guidance. And so I
5 think this new interaction with the Commission is a useful
6 thing.

7 I will reiterate that there is an area I think
8 specially creates a federal problem, and it's one that we all
9 ought to be very sensitive to, is this what do you do to
10 facilitate meetings in a fair and equitable way when there's
11 a corporate meltdown and you can't file seasonable financial
12 statements? I don't want to lose that.

13 Because I think when you look at what brought about
14 Sarbanes-Oxley, you know, Enron, WorldCom, HealthSouth, it is
15 an unintended consequence of a well-intended federal
16 regulation that stockholders' ability to exercise voice is
17 compromised at precisely the time in the life of a
18 corporation when it's probably most needed.

19 And so I hope we don't lose that flavor in anything
20 that you do this year. Because that really is an important
21 intersection of federal and state law. I think we all kind
22 of agree on that.

23 MR. WHITE: Before we call on any more of the
24 panelists, I just wanted to make sure that -- is there
25 anywhere any of the Commissioners would like to take this

1 conversation?

2 CHAIRMAN COX: I think I like where it's going.
3 I'm learning a lot, so, I don't want to --

4 MR. DUNN: I'll jump in. Judge, do you want to
5 follow up on the state law point, or do you have anything
6 that you want to add?

7 MR. GRUNDFEST: No. I think, you know, lots of
8 Leo's points were, you know, right spot on. And, you know,
9 the only observation that I would share is the judge observed
10 there are certain situations where the Commission might have
11 to decide whether matters have been clearly decided or not.
12 As we all know, we can have a good faith debate about whether
13 a matter is clearly decided or not. And as practiced
14 lawyers, we all know how to take established decisional law
15 and write a proposal in the shadow of the decisions that's
16 designed to emphasize the ambiguities or the fissures in the
17 established doctrine.

18 So, to assume that the Commission can easily
19 determine which matters are clearly established under state
20 law and which are not I think is to assume that the future
21 will not look like the past.

22 MS. FISCH: Just to follow up on the concern about
23 it being a two-year process, I think that there is some value
24 to proceeding slowly and allowing some room for
25 experimentation. I think the Commission has been struggling

1 with the issue particularly with respect to bylaws that
2 relate to the director nomination process for some time. And
3 I don't see a real disadvantage if we have to go through the
4 bylaw stage first in order to get there.

5 A small point related to that, if we're going to
6 use bylaws to address things like the director nomination
7 process, you might want to think a little bit more carefully
8 about the word limits. I was just looking at Apria
9 Healthcare's director nomination policy, which allows
10 shareholders to nominate directors, deals with a lot of the
11 issues that the Commission has been considering for a number
12 of years, such as the percent of shareholders, re-proposal,
13 director qualifications, disclosure, all of that. It's two
14 pages on the web.

15 You know, it's a very careful, thoughtful policy.
16 I can imagine a lot of experimentation on a lot of the
17 different fronts. But if you want that kind of responsible
18 proposal and debate process, I think there needs to be a
19 little bit more room to do that as well.

20 MR. WHITE: Commissioner Campos?

21 MR. GRUNDFEST: If I -- just one other small point
22 about this two-year cycle, which I really do think is an
23 important detail. As a practical matter, it's likely to come
24 up early in the process with regard to any new change.

25 So the first time that you have a new change and a

1 new policy, you might run into a two-year cycle, but as Judge
2 Strine points out in Delaware, it might be a shorter cycle
3 now. But once you've resolved it by going through the
4 process the first time, you should have it resolved with
5 regard to most similar issues.

6 Of course, the system is going to respond and then
7 try to come up with other issues around the edge. So we
8 should understand that the two-year process is the equivalent
9 of a one-time startup cost that we're going to encounter as
10 each new innovation works its way through the system, but
11 once you've got it through the system, it should be
12 relatively cookie cutter in terms of applying it.

13 COMMISSIONER CAMPOS: I'm hearing, you know, with a
14 lot of interest, all of the cautions about the items that are
15 unresolved under state law, the potential problems if we
16 send, if that were to be the route we go, send binding
17 proposals for the states to deal with. It's not the same
18 thing in every state. You know, what is the fundamental
19 situation with, you know, given rights to shareholder votes
20 and so forth?

21 What would you say about keeping the current system
22 we have? In other words, not doing anything in terms of
23 letting essentially the world that exists after the AFSCME
24 AIG's situation continue? Which is essentially a, you know,
25 a shareholder one-on-one situation, corporation and

1 issuer-by-issuer? You know, is that the better part of
2 valor, you know, in this particular time?

3 MR. STRINE: I'll take a shot at that. I mean, I
4 think it's not intolerable at all, and I think it's more
5 credible than it used to be. I think the question I guess I
6 have about it is this, which is whether it's sort of only
7 addressing part of the issue. I mean, I think if you're
8 going to continue to have federally mandated proxy voting on
9 precatory proposals, it's really -- it is unavoidably a duty
10 I think of the Commission to consider thresholds that might
11 be -- strike a little bit better cost benefit
12 analysis -- benefit balance for investors.

13 COMMISSIONER CAMPOS: On precatory?

14 MR. STRINE: Yes. Because that will be an aspect
15 -- because what you're going to have is if the AIG decision,
16 which, you know, frankly -- I mean, the AFSCME decision, I'm
17 sorry -- it makes sense to me. I mean, the idea that
18 you -- it's a little bit perverse. We've all talked about
19 it. The idea that a bylaw dealing with the election process
20 that might well have been viable under state law was kept off
21 the ballot when you could have something that was precatory
22 mandated to be on the ballot.

23 You're amplifying stockholder influence, and we've
24 talked about at earlier stages who you might be amplifying
25 the voice of. There's that concern about who it is. But

1 it's the election process. That makes sense. There's going
2 to be more voice then. That means they're going to have more
3 influence on whoever sits on the board, and it's going to be
4 -- it be some more costs attendant to that.

5 If you're still going to have a federally mandated
6 process dealing with precatory nonbinding proposals, then I
7 think the Commission has to then take on the burden of
8 thinking what are the thresholds that have to be met for
9 someone to actually generate costs for other investors by
10 using that? And they probably have to be, you know,
11 tailored.

12 I also think there's an interesting question, which
13 is, if the precatory proposal process in that world is really
14 mostly this historical idea that there ought to be sort of a
15 voice about corporate social responsibility once a year, even
16 if it's nonbinding, should we have a kind of admixture, which
17 is where investors get to propose things that deal with real
18 governance measures in the form of binding bylaws and put
19 them on the proxy, but they choose tactically to phrase them
20 in precatory terms, if you see what I mean. Which is, I
21 could have done this as a real binding proposal about the
22 election process, but I think I'll get more votes if I
23 actually call it nonbinding.

24 And so that you have the corporate social
25 responsibility bucket. You have the stuff that could have

1 been a bylaw, and then you have the stuff that is a bylaw,
2 and we haven't changed any of the thresholds, and, frankly,
3 from the corporate governance industry's perspective, that's
4 great, because it creates the most motion. It's not clear
5 from the individual investor standpoint that that is the best
6 balance.

7 So I think if you're going to do the two,
8 Commissioner Campos, if you're going to go forward with the
9 election stuff, I do think you've got to look at the cost
10 side of the other. That would be my only comment.

11 MR. DUNN: Stan if I could follow up with a
12 question for you. You said that you've done some proposals,
13 and what I wasn't clear on was whether you've just gone to
14 meet with them about the proposals or whether you've gone the
15 formal 14a-8 process. Have you done both, or how does that
16 work? And if I could -- one follow-up is, what about the
17 14a-8 system if you've used it would you fix?

18 MR. GOLD: Yeah. My comment was going to, talking
19 to them about their business and their proposals. These were
20 not discussions about putting things on the ballot either
21 binding or precatory. These were really trying to get them
22 to focus on how to make the company better without having to
23 remove directors or change bylaws or anything.

24 And in two-thirds of the cases, we get a receptive
25 audience. What we have done in the ones that we haven't is

1 begin to suggest that they leave us with no other alternative
2 but to run a proxy slate, run our own proxy slate and go to
3 it.

4 There is a lot of -- and I heard it today in the
5 other panels, there's a lot of sort of hum about these
6 precatory, nonbinding. And I don't want to demean any of the
7 social causes, because in most cases, on a personal level, I
8 agree with them. But the real heart of this is director
9 responsibility.

10 One of the things that I didn't say in the
11 beginning, and it hasn't been said here, I actually think
12 that the -- sort of the white elephant in the room that no
13 one talks about is executive compensation. And if we had
14 some kind of a rule that was like the AIG case, whether we
15 just let things stay as the 2nd Circuit suggested, or some
16 more formal rule, what you're going to get is directors being
17 much more cautious about big pay packages.

18 Because what happens is, if they don't work out,
19 the company doesn't make money, big embarrassment. Not only
20 are those directors susceptible to being removed on this
21 particular board, but they probably -- that argument is going
22 to follow them when they go on other boards. And there is an
23 industry of directorships around here. I actually like this
24 idea better than what's being proposed in the House about
25 trying to limit in some fashion.

1 Let the shareholders be able to get and remove
2 directors in some kind of a direct form will give you a
3 better lid and caution on compensation, especially given the
4 transparency the Commission has also already asked. So now
5 you've got the transparency, and now you have a mechanism for
6 redress.

7 MR. DUNN: If I could ask one last question and
8 then ask you guys to tie it into your closing statements. We
9 have 10 or 15 minutes. That way I don't want to rush you,
10 and give you a chance to answer it. We all know the 14a-8
11 system we have now and how it interacts, and we know the
12 system pretty well now that we've been talking about it for
13 the last 15, 17 days, whatever it was since May 7th.

14 How would you -- what would -- how would you
15 compare the two? Advantages, disadvantages for shareholders
16 and companies. Which do you think is better for which? And,
17 you know, is it a different mousetrap or a better mousetrap,
18 and for whom? And then please tie that into whatever you
19 wanted to close with. And we'll go in alphabetical order and
20 start with Jill.

21 MS. FISCH: Sorry. What are we comparing?

22 MR. DUNN: I'd like to just -- I want to get a feel
23 for what a system that was -- that all binding went in with
24 whatever thresholds, and --

25 MS. FISCH: Oh, the thing in --

1 MR. DUNN: And the various things there. How would
2 that compare with what we have now? Do you find it better or
3 worse or just different?

4 MS. FISCH: Okay. Well, I think that having a
5 system in which serious binding proposals went in and the
6 Commission didn't try and play some sort of mediating role, I
7 think that would be very valuable.

8 I think -- my earlier remarks may have been
9 misinterpreted. I don't think it would be a bad idea to have
10 state courts and state law more active in resolving some of
11 the questions that are currently unresolved. I think the
12 reason they've been inactive is because a lot of times the
13 issues aren't ripe because of the SEC staff making that
14 preliminary determination.

15 So to the extent that we think shareholder voting
16 rights are important, it's useful to have state law confront
17 these questions and define actually what the scope of those
18 voting rights are.

19 Similarly, I think the issuer-specific innovation
20 and experimentation is valuable, and I think right now,
21 director nominations are the hot topic, and we've got the
22 AFSCME case, but we don't know what the next hot topic is
23 going to be. And I think shareholders and issuers should
24 have the freedom to respond, you know, before it gets to the
25 level of, okay, everybody recognizes that this is kind of the

1 next wave.

2 With respect to precatory proposals, I think that
3 the current rules give them too much weight and too much
4 support. I think in large part, they're not supported by
5 state law voting rights. They take a lot of time and money
6 and, you know, yes, they're important social issues, but the
7 question is whether shareholder voting is the right tool for
8 dealing with those social issues, and I'm not sure it is.

9 There are a lot of problems or potential problems
10 with the electronic bulletin board system, some of the
11 discussion on the last panel about the extent to which the
12 anti-fraud rules would apply, the extent to which those
13 communications would be proxy solicitations, the extent to
14 which, well, if it's anonymous postings, are they reliable?
15 Is this even valuable? If it's not anonymous, are you going
16 to have retaliation? I'm thinking of like Grady and
17 Analytics. And are you going to wind up with those sort of
18 problems? Internet fraud and the extent of manipulation
19 that's possible.

20 So there's a lot of cautionary notes, and if the
21 idea is just to provide the shareholders with some sort of
22 voice or some sort of forum to replicate their presence at
23 the annual meeting in the way that Leo described, why not
24 just require that the company distribute or post some sort of
25 shareholder remarks of the kind of the nature that a

1 shareholder would be entitled to make at the annual meeting?
2 You can have word limits. You can raise these issues, right,
3 both to the other shareholders and to the company management
4 directors. But you don't need to tie that communication or
5 that voice with the requirement of a formal vote and the cost
6 of a proxy solicitation.

7 So those are my reactions to the proposal.

8 MR. DUNN: Thank you. Stan?

9 MR. GOLD: I want to continue to encourage the
10 Commission to lower the barriers for shareholders to be able
11 to hold boards accountable. I think that the current system
12 of federal regulation made it more difficult. So I do like
13 going to the state law. I think the state law system is one
14 which can divide what are shareholder responsibilities or
15 rights and what are directors and management rights. And so
16 I would encourage the barriers to come down. I think that's
17 part of your question.

18 I find myself in keen agreement with the professor.
19 It's always hard to say that, but I think that you've heard a
20 lot of good ideas. The precatory is a way I think if you
21 allow direct action and responsibility in the
22 bylaws -- binding is what I'm saying -- you will find that
23 there are probably going to be less precatory. I think the
24 precatory became a mechanism to let off steam because they
25 had no -- the shareholders had no ability to have direct

1 effect on a binding thing.

2 And I think you will see the balance go down as
3 you, it's my hope that you will allow more direct and
4 binding.

5 MR. DUNN: I'm not going to let 3,000 miles make us
6 go out of alphabetical order. We'll go to Joe and
7 then -- your turn, Professor Grundfest.

8 MR. GRUNDFEST: Thank you so much. Thanks so much.
9 Look, at root this debate is really about various
10 conceptualizations of shareholder democracy, and I think it's
11 interesting to frame the question that way and to say
12 straightforwardly, look, if you believe in democracy, believe
13 in democracy.

14 If you think that it's important to hear the views
15 of shareholders on all of these questions, whether they are
16 mandated under state law or whether they're precatory under
17 the federal process, and if you think that the shareholders
18 have something intelligent to say and smart to say, that if
19 you think they're smart enough to vote on these matters,
20 aren't they also smart enough to set the rules by which they
21 will or won't vote on many of these matters?

22 I think it's very difficult to say that
23 shareholders have a selective form of intelligence that makes
24 them capable only of voting on the matters that the SEC says
25 they should vote on. That I think is intellectually a

1 difficult line to try to defend.

2 And with regard to, you know, the question of
3 precatory proposals and the like, I think that at some
4 corporations and with some shareholder bases, it makes
5 perfect sense to open the floodgates and allow virtually
6 anything in. In other situations, I think a reasoned
7 approach would be to dramatically constrain the number of
8 precatory proposals. But again, the organizations and the
9 groups that are best situated to do that are the corporations
10 and the shareholders whose proxies are, after all, implicated
11 here.

12 And the other thing that I think is really obvious
13 after all of these sessions is, look, let's face it. Every
14 constituency has come before you, and they have pounded their
15 own drum. What they're doing in a variety of ways, sometimes
16 very obvious, other times a little bit more subtle, is
17 they're asking the Commission to write rules in such a way
18 that if you were to put the question to the shareholders and
19 to the corporation, you might get a different results.

20 So, you know, advocates of corporate access, you
21 know, the shareholder governance constituency, social rights
22 communities, however it is you want to articulate them, will
23 of course come to the agency and say we needed the broadest
24 14a-8 rights. The agency should never keep anything out.
25 And, of course, anything that's mandated under state law

1 should go in.

2 That may well get them a level of access that they
3 would never get if they actually went to the shareholders and
4 said, you know, what do you think the rules in this situation
5 should be? That would be an example of the agency in effect
6 overriding the majority.

7 By the same token, when the corporate community
8 comes to you and says, look, what we need to do is shut down
9 everything that is precatory under 14a-8 and at the same time
10 make sure that nothing mandatory comes in under 14a-8, too,
11 they're simply doing exactly the same thing that the activist
12 groups are doing. They're asking the Commission to write a
13 rule that at the end of the day may give them an interest and
14 an outcome that would be very different from the one that the
15 shareholders and the corporation acting as a group would
16 actually resolve.

17 I don't want to be in the middle of that match. I
18 don't know that the Commission should want to be in the
19 middle of that match. I think what the Commission should be
20 thinking about now is an exit strategy. I think you're in
21 the middle of a political battle that you never should have
22 gotten into the middle of to begin with. I think this was a
23 situation where 50 years ago, for a variety of reasons, it
24 seemed like a good idea at the time. But look at how it's
25 evolved. Look at where it's taken people to.

1 Now it may well be that Commissioner Campos'
2 observation is at the end of the day a pragmatically sound
3 one; that the costs of change here are so high that we don't
4 want to incur those costs. In other words, better the devil
5 we know than the devil we might get by actually going to
6 something that looks like democracy and actually having each
7 corporation decide on its own rules, or by making any major
8 changes at the Commission level, which inevitably will be
9 viewed as either being pro-investor or pro-management or
10 anti-investor or anti-management.

11 So at the end of the day, I think as a pragmatic
12 matter, to me it seems like the real choices for the agency
13 are you stay where you are, you muddle along, you tinker
14 around at the edges, or you say, look, let's reconceptualize
15 this entire problem from the ground up, and let's come up
16 with an intelligent exit strategy that really devolves
17 authority to the locals, and the locals here are the
18 corporations and the shareholders.

19 MR. DUNN: You get the last word, last professor.

20 MR. LANGEVOORT: Last professor. Actually Leo is a
21 professor.

22 Well, I disagree with Joe actually, finally. Yes,
23 it strikes me that Congress put the commission square in the
24 middle of shareholder voting and corporate suffrage. And on
25 balance what the commission has done in occasionally weighing

1 in and providing mechanisms for shareholder voice and
2 enhanced democracy has been good for our system.

3 And I'd hate for the commission to take an exit
4 strategy. I don't think the default group will
5 necessarily -- states and corporations will necessarily get
6 it right. The economics of collective action and information
7 deficiencies still work against real corporate governance and
8 real democracy. And so I think the commission, continuing
9 its role is a good one.

10 What does it do? I find myself somewhat
11 sympathetic with what Commissioner Campos suggested. I do
12 believe that a relatively narrow definition of election for
13 purposes of what is excluded with respect to bylaws is
14 healthy. I think it's important to give shareholders the
15 right voice and the right support.

16 I do worry very much about moving to a new system.
17 And frankly this may be inherent in the existing system as
18 well, if it requires a two step, going to state courts to
19 litigate the bylaw question, which is expensive and time
20 consuming and can result in endless rounds of bouts, that
21 that will by itself discourage some otherwise healthy
22 experimentalism in this area.

23 It does strike me that for the commission to wisely
24 define election for purposes of what's to be excluded may be
25 the most sensible strategy in the end rather than trying to

1 invent something new.

2 Okay. Last point and then I'm finished. I share
3 the skepticism which grew on me over the last couple of hours
4 about the electronic forum as either a substitute or some
5 mechanism for letting steam off. At best, I would encourage
6 the commission to think about using Reg SK or proxy
7 statements to have corporations elaborate on what processes
8 they choose to adopt to enhance communication.

9 But for many reasons to create this chat room that
10 we then lock the door and say non-shareholders, you don't get
11 to enter, which I don't think is a good idea, that has us
12 getting into questions of what is the corporation's
13 responsibility for this federally mandated system. It will
14 produce a nightmare of questions and troubles.

15 Frankly my belief is we have to look to see where
16 the market has failed before we ask for regulatory
17 interventions. And as we heard this morning from Nell and
18 others, chat rooms and other mechanisms for communication are
19 flourishing without the need for regulatory subsidy.

20 I'd worry about having the hand of the SEC in on
21 this one. And I'll stop there.

22 MR. DUNN: Thank you. And Leo, I apologize for
23 denigrating your professorship there, I apologize, but you
24 get the last word.

25 MR. STRINE: A senior fellow or something, an

1 adjunct something or other at all kinds of places. But let
2 me be real pragmatic here, which -- I'm a pragmatist, and I
3 think you have to separate out the issues of what is sort of
4 really affecting the business governance of American
5 corporations from the traditionally precatory proposal
6 process dealing with corporate social responsibility to talk
7 about and to deal with the real kind of business stuff first.

8 I think the idea of the SEC -- and I appreciate
9 Joe's point about clearly decided. And because the way it
10 has been approved in the past, some law firms essentially
11 took decisions and said the decision of the Delaware supreme
12 court, striking down dead hand poison pills meant
13 stockholders couldn't propose a bylaw to restrict the use of
14 takeover defenses.

15 And at one point the commission accepted that and
16 said it was clearly decided under state law that the bylaw
17 was invalid. That ain't what I'm talking about. I'm talking
18 about if there's been a decision about a bylaw by the highest
19 court of a state and the bylaw is basically on all fours, you
20 keep it off. That's where I think you'd have to go to
21 because there has to be -- if the Delaware supreme courts
22 decided that an identical or basically identical bylaw is
23 invalid you keep it off. It can't be the old system, so I
24 agree with Joe on that.

25 But if you can get it to where if it's genuinely a

1 jump ball it can be on the ballot, I think you facilitate
2 company-specific solutions to business situations, which is a
3 good thing. And I think the AIG compensation thing is a good
4 example where frankly the stockholders came up with something
5 which is different than what is proposed in Congress but
6 works for them and they seem to be happy.

7 If you had Warren Buffett as your CEO and head of
8 your -- I mean as an outside director and head of your comp
9 committee, you might want Warren to be able to go find a CEO
10 without an annual stockholder vote, you know. If you had a
11 different comp committee chair, you might want something
12 different.

13 But this allows -- and I think in terms of Don's
14 point, the only thing I disagree with -- I think a few court
15 cases that actually had real guiding effect, yes, they might
16 be costly. It might cost \$2 million to litigate that case.
17 How much does it cost to have decades of tumult and
18 indecision at all of these different companies about these
19 questions? You've got to look at that.

20 And I think we work pretty fast in Delaware and we
21 can answer these things. I've tried entire cases in a month
22 with a week trial and a decision.

23 You know, deciding on the validity of a bylaw after
24 a couple weeks of briefing, we can do that kind of thing if
25 we have to. So I think it's -- and I think it's also an

1 elegant way out for the commission of this shareholder access
2 thing because you're providing access in the right way,
3 because the shareholders get to have a dialogue under state
4 law about what they want the system to be and you're not
5 having to engineer and entire system, you're facilitating
6 their rights.

7 And in terms of this -- somebody raised the
8 inconsistency of you having thresholds and stuff. There is
9 no inconsistency. If you mandate a certain level of access
10 under the federal proxy rules and you said that they have to
11 have so many shares to have that access, that's the federal
12 gateway. You could deny access if under state law, if under
13 North Dakota to propose a bylaw you had to be x and this
14 person wasn't x. There wouldn't be any inconsistency between
15 the federal thresholds and the state things, so there's ways
16 to deal with that.

17 You can't avoid dealing with some of the issues
18 under section 13, thinking about who stockholders are, are
19 they really long the company.

20 Joe mentioned stockholder democracy. I'm a
21 Republican. I believe in the republic. And if you want to
22 have direct democracy, that's a different thing than a
23 republic. And one of the things we have in this country,
24 we're having a debate about immigration. What are the rules
25 of citizenship? And I think this will pervade both things.

1 Under state law there are rules of citizenship, and
2 I think the commission out to respect them. When
3 you're -- and this will be my final point about covert social
4 responsibility, the other dividing line. It's never been a
5 big issue. There is a cost factor, and if you're amplifying
6 the real stuff, what are the citizenship rules in the domain
7 of the polity that the federal government has established?
8 And if you're going to have democracy, should transients be
9 able to exercise those rights and cost other people money?
10 Should there be longer holding periods? Should there be
11 materiality? You know, how big is your position with
12 respect -- can be proportionate to the market cap of the
13 company in order to cost other people money?

14 You can't have a democracy or republic without a
15 concept of citizenship. And I am actually with Don on this.
16 I think it's going to be very difficult for you all to get
17 out of this game. I see the bulletin board as a way to do
18 it. And here -- I'll finish with this. I think the way this
19 is phrased would be the worst possible cost benefit that you
20 could have because as I understand it, on a
21 company-by-company basis stockholder activists could choose
22 to use the proxy materials that they wish or do the bulletin
23 board.

24 Now think if you're an issuer and your general
25 counsel is having to deal with it. You now have to staff up

1 to handle the bulletin board, when the stockholder advocates
2 decide to go that way, or the proxy mechanism when they
3 decide to go that way. You can't -- and I appreciate the
4 dilemma you are all in.

5 I actually think the political constituencies
6 around the precatory proposal process are not ones that would
7 have scared Lincoln, not ones that would have scared FDR or
8 frankly Millard Fillmore. In our society it really
9 isn't -- there's a bunch of people in this town who are
10 executive directors, and there's a few industries.

11 If you actually gulped and swallowed and took it on
12 you would survive and the republic would survive. But I
13 realize that's difficult because in terms of the voice of the
14 constituency you face it's very loud. Ordinary American
15 investors saving for retirement and college are not sitting
16 around worried about small investors being able to make
17 social responsibility proposals. If they're serious about
18 social responsibility then they're voting for members of
19 Congress who express their beliefs, they're writing their
20 congressmen.

21 And so I do think it's doable. I'm not saying it's
22 easy. It will take guff, but it's manageable guff.

23 MR. DUNN: Thank you. I'll wrap up and turn it over
24 to John. I just wanted to thank the five of you and also on
25 a broader scale I wanted to thank all 17 of the panelists and

1 all the commissioners for letting me be here today and learn
2 from everybody. I appreciate that.

3 MR. WHITE: I'm always cautious when I speak for the
4 commission, but I think I'm going to choose Professor
5 Grundfest over Professor Langevoort this time, and I think
6 that we should have an exit strategy today from this topic.
7 We've had our three panels and so thank you all for being
8 here.

9 I did want to extend special thanks to three
10 lawyers in corporation finance that are all sitting over
11 behind Chairman Cox that have really put together all three
12 of these roundtables. They've done it. They obviously set a
13 commission record that I hope stands for some time of
14 organizing three roundtables in one month. But Lily Brown,
15 Tamara Brightwell and Ted Yu, thank you very much for putting
16 this all together for us.

17 And I'll turn it back to you, Chairman Cox.

18 CHAIRMAN COX: Here, here, for that exceptional
19 effort. We very much appreciated it. And speaking for the
20 commission, which I feel very comfortable doing in this
21 context, thanks very much to Jill, Stan, Joe, Don and Leo for
22 in all but Stan's case doing double duty and in Stan's case
23 for flying across the continent to be here with us right
24 before the holiday weekend.

25 We have learned a great deal from each of your

1 contributions. We've also learned a lot from the other
2 panels. Your help in synthesizing what we learned from all
3 those other panels has been especially valuable.

4 So as we go forward ultimately what will come of
5 this is a proposal and that proposal will then be exposed to
6 further comment and discussion and so on. So in that sense
7 we're just beginning, but thank you very, very much for
8 getting us this far.

9 And to our moderators once again, John and Marty,
10 thank you very much for an excellent job of leading us
11 through three roundtables.

12 (Whereupon, at 12:42 p.m., the roundtable
13 was concluded.)

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