WEBMASTER NOTE: This is the unedited transcript of the Roundtable on the Federal Proxy Rules and State Corporation Law held on May 7, 2007, which we received directly from the court reporter. We are posting the transcript in this form to make it available as soon as possible.

ROUNDTABLE DISCUSSIONS REGARDING THE

FEDERAL PROXY RULES AND STATE CORPORATION LAW

MONDAY, MAY 7, 2007

BEFORE: CHAIRMAN AND COMMISSIONERS OF THE

SECURITIES AND EXCHANGE COMMISSION

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C O N T E N T S

C O N T E N T S (Continued)

C O N T E N T S (Continued)

C O N T E N T S (Continued)

Ann Yerger

Council of Institutional Investors

P R O C E E D I N G S

OPENING REMARKS

CHAIRMAN COX: Good morning. I want to welcome people as you are still coming into the auditorium to the Securities and Exchange Commission's Roundtable on Shareholder Rights and the Federal Proxy Rules.

This is the first of three roundtables that we are going to be having on this subject, and those three roundtables will all take place this month.

The purpose of having three of them is so that we can very thoroughly elicit comments and opinions that will help us on the Commission to inform our thinking as we develop a proposal to amend our proxy rules, which we expect to have in proposed form ready early this Summer.

This is an important rule-making that involves fundamental questions of what shareholders get to do and how they get to do it.

In these roundtables, we are starting with the legal framework underlying the proxy rules, both in state and Federal law. That is today's topic.

In the next roundtable, we will get into the mechanics of the voting process, including such questions as broker voting and over voting and empty voting.

In our third roundtable, we will listen to stakeholders and other knowledgeable parties about what works

now and what can be made to work better.

We have a truly broad scale in these three roundtables. Today is just the beginning, although as you will see from the distinguished panel that we have assembled, it is a very powerful beginning.

I want to begin by welcoming our distinguished panelists today, who include two vice chancellors of the Delaware Court of Chancery; eight law professors; practicing lawyers who are expert on corporate laws, including Delaware and Maryland, as well as the Model Business Corporation Act and the U.K. Companies Act, and representatives of the individual and institutional investor communities.

We are bringing these different perspectives to bear on all of these questions before us because our objective for this and for the other roundtables is to take a thorough top to bottom look at what is and what should be the SEC's role in regulating the proxy solicitation process.

In 1934, when Congress enacted the Securities and Exchange Act, it charged the Commission with regulating the proxy process. At that moment, 73 years ago, there began a Federal role in vindicating shareholders' state law rights.

The system that Congress authorized the SEC to devise was meant to replicate as nearly as possible the opportunity that shareholders would have to exercise their voting rights at a meeting of shareholders if they were

personally present.

As SEC Chairman Ganson Purcell put it in 1943, the rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under state law, to appear at the meeting, to make a proposal, to speak on that proposal at appropriate length, and to have his proposal voted on.

Just how that should be done, however, has been the subject of extensive debate and real life experience over the many ensuing decades.

Since 1934, the proxy rules have been amended many times, most recently in 1992. Today, they comprise a complex set of procedural and substantive requirements that shareholders have to follow.

Whether today's system is what Congress intended when it created a Federal role for the vindication of shareholders' state law rights is a key question that our roundtable panelists will be asked to address today.

Today's roundtable is comprised of four panels. The first panel will address the Federal role in upholding shareholders' state law rights. Among other things panelists will discuss will be the scope of shareholders' voting rights under applicable state law, the limitations that state law might impose on the shareholders' ability to govern the corporation, and the core authorities that state law gives

shareholders to choose the directors of the corporation, to propose by-law amendments and vote on them, and to vote on charter amendments.

The second panel will focus on the purpose of the Federal proxy rules and their effect on the exercise of shareholders' state law rights.

Panelists will discuss how the Federal proxy rules have affected the ability of shareholders to make proposals on subjects that fall within the rights of shareholders under state law, and on subjects that fall within the province of the Board of Directors and management.

In the afternoon, the third panel will address non-binding shareholder proposals and explore the benefits and shortcomings of our current system of allowing some non-binding proposals but not others.

The final panel of the day will address binding shareholder proposals under the Federal proxy rules. Panelists will discuss the important question of whether the Federal proxy rules fully vindicate shareholders' rights in those areas which are most clearly the responsibility of shareholders under state law, proposing and voting on by-law and charter amendments, and nominating and voting on directors.

On behalf of the Commissioners and the Commission staff, I would again like to thank our distinguished

panelists for their participation in today's roundtable.

We look forward to listening to and learning from our discussions today, so let's have at it. John?

INTRODUCTION OF ISSUES

MR. JOHN WHITE: Thank you, Chairman Cox. Good morning. I'm John White, Director of the Division of Corporation Finance, and I am also very pleased to welcome you to the SEC Roundtable on the Federal proxy rules and state corporation law.

As Chairman Cox explained, we have three roundtables planned for this month with regard to the proxy process. Today, the first Roundtable, we hope to be able to basically step back from all of the discussion that has occurred to date regarding the proxy process and focus on the basic concept of shareholder rights.

We will do that by looking at the relationship between the Federal proxy rules and state corporation law.

We have a terrific set of panelists to help us do that. I would certainly like to echo Chairman Cox's remarks of welcoming all of you to today's proceedings, and to extend the thanks of the Commission and of the staff for taking your time to be here today. We are all looking forward to learning a great deal.

As Chairman Cox outlined, we have four different panels. I will not go through again what we are planning on

doing with each of those panels. We are going to have two in the morning, two in the afternoon, and we have an one hour break for lunch at 12:30. We hope to conclude by 5:30. We have a long day ahead of us.

MR. DUNN: 4:45. We are not going to be here until 5:30.

MR. JOHN WHITE: I am sorry. I got the time wrong already. We are going to be done by 4:45. That was Marty Dunn, the Deputy Director of Corporation Finance, who is going to be moderating the panels with me, including the last panel.

MR. DUNN: Including the one until 4:45.

MR. JOHN WHITE: We have prepared a number of questions for the panelists. We are hoping that we will get interaction from the Commissioners and the Chairman, and they are certainly welcome to ask questions when they would like.

We have asked the panelists all day long not to present any formal opening statements. We are hoping they, like any of you here today, any of you watching on the webcast, will submit written statements. We are certainly encouraging everyone to do that.

We actually have a single file, Commission file, set up for all three Roundtables to collect written statements.

Even though we are not going to have people give

opening statements, we are planning at the end of each panel to reserve 10 or 15 minutes so each of the panelists can give us their maybe two minutes of closing thoughts on things they would like the Commission to go away with from this whole endeavor.

Normally, at this point, I would explain that if you wish to be called on, that you should turn your tent card up on end, like this.

I feel like we are all close enough here and I think eye contact will probably be able to work. If people get out of hand, then we will go to the tent cards.

Marty and I will try to do it by eye contact in terms of calling on people and trying to call on everybody at the appropriate time.

With that in terms of introduction, let us go to panel one. I will introduce the panelists.

First, we have Stephen Bainbridge, Professor of Law at UCLA. Next to him, Frank Balotti, one of the Deans of the Delaware Bar with Richards, Layton & Finger. Jack Coffee, Professor of Law at Columbia University Law School. Roberta Romano, Professor of Law, Yale Law School, and Leo Strine, Vice Chancellor, Court of Chancery of the State of Delaware.

If you noticed from the five of our panelists, there is somewhat of a tilt, maybe I should say a heavy tilt towards academics and the judiciary on this first panel. I

understand Frank is also an adjunct professor at the University of Miami School of Law. I think that makes us five for five on academics and the judiciary.

That was not actually a coincidence as we were putting this panel together because we really want to return to basics as we get started.

What I wanted to do, I am not sure we can stay on topic, but I am hoping to break this first panel up into two separate topics. The first topic we will examine is the scope of shareholder voting rights under state law today, particularly with respect to the election of directors and proposing and amending by-laws.

In a moment, I will ask Mr. Balotti to lead off that discussion and then turn to Vice Chancellor Strine.

I will initially be looking for each of them for us to outline what is the scope of state law rights, at least in Delaware, today.

At this initial stage, if we can, I would like to stay away from the Federal side of it, and just focus on state law rights.

Our second topic, which we can move to in half an hour or so, will be the relationship between Federal law and state law in this area.

If we can just start laying the ground rules, the basics, on state law.

Mr. Balotti, if you could lay out the law in Delaware for us, particularly as I say, focusing on shareholder rights to adopt and amend by-laws and to nominate and vote on the election of directors.

PANEL ONE

THE FEDERAL ROLE IN UPHOLDING SHAREHOLDERS' STATE LAW RIGHTS

MR. BALOTTI: Thank you very much, John.

MR. JOHN WHITE: I think you need to turn on your mike. Hit the button on your mike.

MR. BALOTTI: Thank you very much. It is a real pleasure to be here. I very much appreciate having been invited to participate in this seminar. I am going to be very general as one must be in describing shareholder rights in Delaware, because there are a lot of specifics that we just do not have time to reach.

To my mind, the most basic shareholder right in Delaware is shareholders have the right to elect directors. In that process, shareholders can nominate whomever they please at a meeting of the stockholders to vote on the election of directors.

The division of power between stockholders and directors is also a very basic concept. The shareholders elect the directors and the directors run the business and affairs of the corporation.

I submit to you that you cannot have any other

system in a public corporation. The shareholders simply cannot run the business and affairs of the corporation.

Now, under the statutory scheme in Delaware, and this is again very general, there are nine votes contemplated by the statute where shareholders must have the opportunity to vote. Then there are four other votes contemplated by the statute where shareholders have permissive rights to vote.

I put by-law amendments in the permissive area because while shareholders always have the right to amend the by-laws of the corporation, that is not the only way as a practical matter because that power can also be given to directors and in just every public corporation I know of, that power has been given to directors, but it is still reserved to the shareholders.

Shareholders can propose and pass any by-laws which relate -- that's a magic word in Section 109(a) of the corporation law -- which relate to the business of the corporation and to the powers of the shareholders and the directors, so long as these by-laws do not conflict with the Certificate of Incorporation or applicable law, and applicable law is both statutory and case law.

Provisions which define or limit -- again, magic words -- the powers of shareholders and directors must be included in the Certificate of Incorporation. There is nothing in Delaware law, no case law yet, that tells us what

the difference between "defining and relating to" on the one hand -- I'm sorry -- "defining and limiting" on one hand and "relating to" on the other hand means, and where the distinction between the two is.

Where does this leave us? It leaves us that shareholders vote on all basic questions facing the corporation, mergers, amendments to the Certificate of Incorporation, et cetera.

The directors, on the other hand, run the business and affairs.

We get into questions as to how far the shareholders can go in adopting by-laws that get into the basic business and affairs of the corporation.

This is the basic conflict -- it's not a conflict -- the basic question between Section 109, which I said, allows shareholders to pass by-laws which relate to the powers of directors, and the statutory power of directors to run the business and affairs of the corporation given to the directions in Section 141(a).

The real question in this area is how far into the business and affairs of the corporation the shareholders can venture by way of by-law amendment.

I guess the underlying question there is how important it is and to whom is it important. It is certainly important to hedge funds that they have the right to impinge

upon the power of the directors to run the business and affairs of the company, but I submit to you it is for all the wrong reasons, the reasons being short term benefit of the hedge funds and not the long term interest of the corporation or the shareholders.

Just by way of closing this up, let me point out that we now have a perfect opportunity, I think, to find out how important all of the shareholder rights are to shareholders.

As you all know, North Dakota now has a very shareholder friendly law. We now have the state laboratory at work. If this is very important, all the IPOs will be for North Dakota corporations. If that happens, perhaps Delaware and Maryland will have to change their ways.

Now, as I say, we have an opportunity to find out how important shareholder rights are and whether they trump the benefits of the Delaware and Maryland system.

That is a general outline of shareholder rights. I am sure we will get into many more specifics as we go forward.

MR. JOHN WHITE: Thank you. Vice Chancellor Strine, would you like to elaborate on that?

VICE CHANCELLOR STRINE: Yes. I would actually like to talk about the relationship between global warming and North Dakota's initiative. I think they are not

coincidental.

MR. JOHN WHITE: We had something about staying on topic.

VICE CHANCELLOR STRINE: I am actually going to sort of concentrate on the question that was asked, which is what are the rights under state law. I think a couple of the pertinent things is what do stockholders vote on.

In Delaware, they vote on real things, which is you get the opportunity to vote annually for directors, major transactions, including sales of substantially all the assets, you get to vote on.

We do not have imaginary voting. We do not have therapy for whoever. I promised Marty I would get this in. We do not have what I call "pizza on the wall." That is precatory proposals.

In fact, I could have a proposal, I wish we would cure male pattern baldness in a real way that will protect me. We do not authorize votes on that. Motive things, we do not do.

What do we do? By-laws. There are very real things you can do with by-laws, and stockholders are starting to realize them.

Delaware passed a law this year, a very critical law in the last year, indicating in an area of particular sensitivity to stockholders, which is the voting process,

stockholders could actually pass a particular form of by-law that could not be amended by the directors.

I do not believe there is any implication in this that this by-law could not have been passed in the first instance under the existing law, but the idea here was to make clear that in this area when stockholders spoke -- frankly, there is a misnomer.

What this does is it requires you to get a majority of votes for yourself to get elected. It is sometimes called "majority voting," which is a really imprecise and silly way of talking about an issue. Usually, in an election, we use plurality voting because if there are three candidates, the candidate that gets the most votes usually wins.

Most of our presidents would not have been elected, you know, if you have majority voting in close elections, because literally, somebody could get 47.8 percent of the popular votes, someone else could get 45 percent, and some other candidate gets 2 percent, and no one gets elected.

We passed a law in Delaware that says now that stockholders can adopt a by-law requiring that for a director to get re-elected, you essentially have to get a majority of the votes cast.

This essentially turns a withhold or proxy vote, which is essentially no vote at all, just we are not giving someone a proxy, into a no vote. That kind of a by-law

cannot be amended now by the directors.

There are also other tools. For example, I do not think that Frank mentioned that with respect to setting the required number of votes for the Board to take certain actions, that has historically been also something that by-laws can do.

I think my friend, Professor Bebchuk, who is extremely creative, has picked up on this in some of his proposals, to say that a Board of Directors to do X or Y have to have a certain number or percentage of the Board to vote. That is also something that is within the by-laws' power.

Our law, as you know, in terms of the case law, there is nothing that is probably protected more vigorously than the stockholders' ability to exercise free choice.

There is a very symbiotic relationship, I think, between the Securities and Exchange Commission and the Federal law and our law in the area of disclosure.

We try, particularly in the Court of Chancery, to not expand invariable disclosure requirements. That is really the job of the Commission. It is expert in determining what should be in quarterly reports.

Where fiduciary duty law comes into play is protecting stockholders' ability to make informed decisions, in particular, in situations when they are asked to exercise voting rights.

We will often make materiality decisions about that because it is the law under Delaware that when your stockholders vote, you have to give them the material information in order to make an informed judgment.

We are very vigorous about protecting that. There is also the so-called "Blasius" line of cases, which actually goes back to something more fundamental, a case called Schnel vs. Chris-Craft, which is the idea that simply because something is legal, it does not mean it's equitable.

We give a lot of discretion to people, but Schnel was really an electoral manipulation case about moving an annual meeting to up state New York at a cold time of year and not giving people a fair opportunity to run a proxy fight.

The Delaware Supreme Court said that was inequitable and set that aside.

There is no tighter scrutiny in our law than when there is a situation where there is a manipulation of the voting process. That is a very historically important part of our law.

I think one of the things I welcome and I appreciate the Chairman and all the Commissioners inviting us to talk about is there is a careful balancing between these various rights, and we do have a system in Delaware where it is essentially a republic plus.

What do I mean by that? In a republic, the people who are elected are the people who are responsible. They have to be given the freedom to make choices. They are the fiduciaries.

What is the "plus" aspect? Well, in a normal republic, you do not get to vote on so many important things. When Congress does something really important, they do not always give a vote to the public.

We have a lot of situations where if there's a transformational decision by the Board, you actually do get to vote, but the people who are the fiduciaries propose it in the first instance.

One of the issues for today is to talk about how selective intrusions into a system can disrupt the balance of power in a way that isn't necessarily good for everyone. I would ask everybody to keep in mind, when you talk about in the language of polities, of republic's, what is your concept of citizenship?

We do not have a lot of high thresholds. We let stockholders buy in and begin to exercise important rights almost right away, ask for books and records, run a proxy fight.

That is on the assumption that the old model is the separation of ownership and control, that the stockholders are diverse, that they do not get involved every day. That

is now changing. If we are going to talk about stockholder democracy, we talked about rights.

What usually comes with rights? Some responsibilities. If essentially what you are building is a republic of transients, and I said to Marty beforehand, hedge funds, there was an SEC program five years ago, and the estimate was hedge funds turned their portfolio's three times a year, median turnover in mutual funds, including index funds, is 60 percent. That is annually.

If you are going to increase the voice of these kind of folks, and you realize they are conflicted intermediaries, too, they are not the end user investor, there is a balance to be struck.

The state law has struck this balance in terms of access and other things. I would just ask people to keep that in mind. These are the rights under the old law.

I will finish with this. There is a lot untested here. One of the things I hope we talk about is to some extent the ability of stockholders to present by-laws is determined by the Federal Government, and some of the unanswered questions under state law is because of the inability of stockholders to actually get real proposals on the table, and it is kind of amusing to us in Delaware to see fights about precatory stuff and a bottleneck about presenting by-laws that might actually have a binding effect

under our law.

I think today is a good forum to discuss that kind of interaction.

MR. JOHN WHITE: Why don't we still stay on the basics of state law rights? We will turn to the academics on the panel. Ms. Romano, you want to start with your reactions?

PROFESSOR ROMANO: Thank you, John. Thanks very much. I thank you for inviting me to speak.

I would like to take the questions a bit more narrowly and more broadly in thinking about this. Just to put the academic gloss on thinking about the voting rights of shareholders, I tend to think of it as fundamental changes in your investment is what you are voting on, whether it is mergers, sale of the assets, the charter itself, changing it, which under state law requires you to specify all your stock rights, whether it is economic, dividend, liquidation rights, voting rights, so changes to that are things that you get to vote on, and the election of directors, which is important.

You are not voting on the managers, but the directors are picking them, and you can affect them in that way.

I thought it would be helpful to think about sort of the question that was phrased in terms of shareholders governing, what rights do they have to govern the corporation

and should they be expanded or eased.

In thinking of this, my responses have differed. If I was talking to the state legislature, I would be saying something other than the SEC, so I want to sort of answer this question by talking a little bit about my view of what state law is in terms of its approach, the substantive approach, and then focus this a little more narrowly on the issue of shareholder election or nomination or shareholder access to by-laws, which I think is underlying some of the reason for this Roundtable with the AIG decision.

Even though it is narrower, I think it will help to illuminate more broadly the general issue concerning the SEC regulation on shareholder proposals, whether precatory/mandatory.

I want to take a look at that compared to the way this works with state law, in terms of proxy fights and why there is this difference in state law.

State law recognizes the proxy process, but it does not specifically put in that proxy process shareholder nominations for directors as opposed to thinking of them doing it more actively in a challenge. I want to talk a little bit about that.

My view of the changed facts, which is a little different from Frank and Leo's view about activist investors as hedge funds, but how I think that changes some of the

things, when this was thought about a few years ago, under access.

Let me just say this very briefly. State law is an enabling approach. It is a set of default rules. Sometimes firms opt out of them and sometimes they opt in, and I think that reflects the essential variation in firms about what they think is the best governance structure, the best Board of Directors for each firm, so we tailor it.

When we think of SEC regulation or wanting national laws, it is because we think there is a need for uniformity, and we really don't want variation across the states or the firms within our jurisdiction.

You have to be thinking about that in these terms. I think sort of the reason is there is vast empirical literature that has now been looking at various forms of corporate governance, who is on the Board and performance.

It is hard to find direct connections between what we think of as good corporate governance and performance in this literature. This is the literature that sort of combines all these things into one measure or take individual things like boards of directors and performance being measured by stock or account, and we do not find direct connections.

Part of that is because what we think are good practices independently, when they are all combined, it may

not be the same. We think it is good to have independent directors and good to have take over defenses, but we find in the constellation of firms, we often find the more independent the board is, the higher the number of defensive tactics.

There is a paper by several finance professors that looks at that.

Part of this is related to the nature of the firm's assets, whether they are intangible, business and the like. I just want to sort of emphasize in this variation how these things -- the constellation of these types of provisions -- that is a reason why we sort of like the approach of state law to be enabling.

In the SEC, when we are thinking about this, in some sense, the exemptive power allows there to be variation, but it has not really been taken in that approach.

That is one of the reasons why when we are thinking about should we expand or ease what the states have done, it is more complicated when we do it at the national level because at the state level, if a state expands it or subtracts it, another state can respond or it is easier to change that, and it permits firms to adapt to what looks the best for them.

When we are thinking of the SEC's role, I want to emphasize the need to have disclosure so the shareholders can

make informed decisions about fundamental impacts on their investment, and also the distribution and accessibility of that information to shareholders. That is something that is within what the SEC can do compared to what the states have been doing.

More concretely, let me sort of talk a little bit about the relationship between state law and the shareholder access or nomination proposals and proxy fights.

The access/nomination type of by-law or proposal really inflates Rule 14a-8 proposal and proxy fights. I think it is valuable to keep those things different or it is a mistake to want to keep them the same.

I think it is not fortuitous that the states have not combined these two. That is because of the incentive effect that the reimbursement systems differ.

So, 14a-8 or shareholder nominations of directors in the proxy process takes the proxy fight and makes the cost basically zero.

I think the objective should not be to make proxy fights cost a trivial amount. I think it is important to have proxy fights be expensive. That is because if we think about the incentives of people to behave, people who have financial risk, sort of the old proverb of put your money where your mouth is or having skin in the game, those people have more of an incentive to want to have a victory that will

improve stock value. Otherwise, it is not working, making the expenditures.

In the 14a-8 approach, there is no financial risk. You bear no costs in putting up your nominee. It is free but it is subsidized by all the other shareholders in the firm.

If we think about wanting to give people incentives, and people who have the resources that they can devote to, sort of thinking about how can we approve a business plan. You want a system where you are not subsidizing that completely, where they pay their fees.

In state law, what happens if you succeed in a contest, your fees are reimbursed. It is not like you win and you have paid costs out of pocket and you can't get it back, so state law, there is case law that makes it very clear you can be reimbursed for that expenditure. If you lose, you are not. That may sort of have some impact on how many proxy fights are undertaken. I am going to come back to that point in a minute.

If we look at the empirical literature that says what value is added by proxy fights, and we compare that to 14a-8 proposals, all of the literature finds in proxy fights is improved performance thereafter. We find stock price returns are positive about these announcements.

We do not find any effects of that in the 14a-8 process. I think that is partly because of the investment of

the people who are making these proposals, whether the proxy fight is to elect the board or change policy, because they have had to invest their own resources, they spend more time and they are more informed, and they are also more creditable to get support of other people to change the policies.

We are noting you bear some financial risks. That might affect how much you do when you undertake these transactions.

Then we have to sort of note the realities of the marketplace and the proxy process are dramatically and profoundly different from what they were a few years ago when these access proposals first came to the Commission's attention, and I guess when academics were writing articles saying shareholders are completely powerless or when the public pension funds were proposing this.

The number of hedge funds has dramatically increased. They are very active in the proxy process.

I was at a conference yesterday where we were starting to see the first of empirical papers where people are looking at what these funds do and are they successful.

We find they are very successful in having their policies, suggestions for strategies, to replace the directors, to fire the CEOs, to lower their salaries, they have very high success rates compared to sort of the other types of proposals or proponents of change.

There was one paper that found over 60 percent of the times when they engage in a proxy fight, they win, or they get their proposals adopted. They don't even have to engage in the fight. There is a deterrent effect.

When one of these funds gets a position in a firm, we find like within a day, there is a huge turnover in the shares and other funds are involved in this.

You do not have sort of these powerless shareholders.

They also have the resources to devote to being more informed, like to find out what is going on in these firms. I think this is just changes to what we are thinking about if we are thinking about sort of an access proposal.

You have investors who have real resources who are involved in this. It changes the whole marketplace. They can take any firm. Some of them specialize in industries. When you have this going on, it makes a difference in terms of thinking about are shareholders unable to do anything in this context of elections.

Let me stop there. I think even though we are saying proxy fights are more expensive than having a nomination process, we found these costs are going down, and we have a new set of investors who are engaging in this practice in an active way.

MR. DUNN: Thank you. I would like to take one

step back on something Vice Chancellor Strine said. Two things. One, you said we don't authorize precatory voting, that was something you had mentioned under Delaware law.

The question in 14a-8 land that we always deal with when we get shareholder proposals, one of the first basis to exclude it is it is inappropriate under state law.

Whenever we get a precatory proposal, nobody ever argues to us that they don't have authority to raise it under state law, which I find interesting.

Every time we get a binding one, we get competing state law opinions, one of which says from the company that 141 doesn't allow this, and then we get one that says 109 does allow this. We sit there and go we don't know. We are going to say you haven't met your burden of proof because we have competing opinions.

If in fact Delaware law doesn't authorize precatory proposals, why do we not get that argument, and the second thing, and this is for everybody, how far does 109 push past 141? I know there are no decisions on it. Just in theory, at least.

VICE CHANCELLOR STRINE: In terms of the why don't you get the argument, you all made it up. We are fine with it. It is kind of a prisoner litigation for stockholders sort of thing. Maybe it has societal value of therapy.

We are not quibbling with it. Here's the reason

why no one cares in Delaware. It's precatory.

What matters now is the tools you give with it, which is the reason why people are giving in now is not because they have passed a precatory proposal, it is because stockholder influence is real under the rules of state law, and people can replace boards.

Maybe it is a form of dialogue. We don't contemplate it, but nobody is sitting there -- we are not John C. Calhoun. You guys are doing it. It's fine. If you want to run Fantasy Island, that's cool.

I think the real issue is when you get to things that are real, and this has been a frustration. 109 and 141, there is an interplay between them, and I would tell you this. I think in Delaware, people have often thought that things that are more process oriented, that get at how the corporation does its business, is more likely to pass muster than something that says you must do X, Y and Z when you are the directors.

One of the prime areas where you could have -- I think the recent statute indicates it -- is things dealing with the electoral process. No one has proposed a by-law to my knowledge dealing with reimbursement of expenses. I won't speak to that.

I think where we have had some frustration, and I think the Commission has been more reticent to exclude

proposals, there was a time where there were some people who got things excluded on the grounds that state law made them clearly improper when there was no decision of the Delaware Supreme Court or even the Delaware Court of Chancery.

I think those of us from Delaware would say one of the things the Commission could do to facilitate this is to make clear that if it's uncertain under state law and it's a by-law proposal, then it shouldn't be excluded and they should be able to put it on absent some showing, and then leave it to us, hold us accountable, and if we make the wrong decisions, you can bet we are going to hear about it from the institutional investor community and from the management community.

I would advocate for the Commission to look at John Coates' article from a few years ago in Business Lawyer, which is a very good exploration of what you might do through a by-law that wouldn't get into the core of management, but the more it is about things like you're talking about, which is the electoral process or things like that, I think the more the Delaware lawyers would tend to admit that's more the proper province of a by-law than no, you can't build a widget plant in Des Moines.

MR. BALOTTI: Let me take a crack at that, Marty, if you would. I think precatory resolutions are authorized by 211, which says that a stockholder can bring before a

meeting anything that is proper for a stockholder to act on.

I believe that it is proper for stockholders to ask directors to do whatever, as opposed to telling directors to do whatever.

The 109 and 141, as I mentioned, it is an unresolved question, how far stockholders can get into the business and affairs of the corporation.

I ask Vice Chancellor Strine to correct me, but isn't there before the legislature the second leg of a constitutional amendment which will allow the Commission to certify questions to the Delaware Supreme Court?

VICE CHANCELLOR STRINE: Yes.

MR. BALOTTI: It is expected that will pass, and when that passes, perhaps some of the ambiguity will be eliminated because there will be the ability of the Commission to have these questions of state law resolved by the Delaware Supreme Court.

Of course, the Court doesn't have to accept every question which is certified, but I expect there will be some more certainty in the near future.

PROFESSOR ROMANO: There is a legal precedent for precatory proposals, and that is the New York case, Auer vs. Dressel, where the shareholder wants to sort of -- it is really a contested proxy fight, but the president was taken out of office and he was a shareholder, and they litigated

this because he wants to put up a proposal that says he should be the president and the Court says, well, they can't make him be the president but there is nothing wrong with saying we think Auer is a swell guy and we are giving you advice to think of him.

There is one case. It is not a Delaware case. I have always thought that was how you got the justification for saying at all that you could put these things up that they want to vote on in an advisory format.

That was done in an actual meeting that these people were putting up.

VICE CHANCELLOR STRINE: We have always had people come and pop off at meetings. We have no case law on it. The idea is this.

PROFESSOR ROMANO: I agree.

VICE CHANCELLOR STRINE: You put up something real. For example, you pass a by-law and then the directors amend it back to the way it was. The ordinary point at that point is kick the bastards out of office; right?

That's the way it works. That is familiar to most of us who took civics class. I think that is the ordinary thing.

If you do a real by-law amendment, the directors then use their power, you run the election.

PROFESSOR BAINBRIDGE: One of the questions that I

think the Commission might want to consider with regard to precatory proposals would be to re-visit not only 14a-8(i)(1), but also (i)(5) and (i)(7).

When I taught 14a-8 in my business associations class a few weeks ago, besides the usual discussion of sort of is there an SEC exemption to the First Amendment, we got into the whole question of well, would we really want to see sort of our least favorite political cause using 14a-8 as a soap box for getting attention.

One of the students suggested, and I was happy to see this, the SEC ought to adopt a rule that would limit shareholder proposals, that would exclude shareholder proposals unless a reasonable shareholder of the specific company in question would regard the proposal as having material economic importance for the value of the shares.

This, I think, would get us away from cases like the old Lovenheim case, where the foie gras proposal comes in, even though it was clear that it had no material economic impact on the company.

It would help us solve cases like the Dole case from the 1990s on whether or not proposals relating to national health care came in.

Basically, if we are going to continue to have precatory proposals, and I agree with Leo's analysis of sort of why precatory proposals and Frank's analysis of sort of

why precatory proposals are not invalid under Delaware law, but it was the Commission, right, that really set up this model to make it easy to have precatory proposals that have relatively little to do with the economics of the company.

It seems to me that you would have to do fairly explicitly, but you could go back and take on cases like Medical Committee for Human Rights and Lovenheim and Dole and some of these other cases that have given 14a-8(i)(5) and (i)(7) very limited ability to exclude proposals, and really tie proposals to something whether it is social or governance or what have you, but having to do with a material impact on the value of the shares.

To my mind, one of the solutions that solves is it may get you away from interpreting state law. Right now, you have to sort of say or you may be asked to say 109, 141, which trumps.

If, however, you had a preliminary requirement that you assess the materiality of the proposal, which is something the SEC is very good at, you might find that a lot of these questions about 109 versus 141 would fall out because the proposals would fall out.

CHAIRMAN COX: Would you feel just as comfortable with such an SEC proposal that state law were explicit on the point that proposals such as that were allowed?

PROFESSOR BAINBRIDGE: I'm sorry.

CHAIRMAN COX: What if state law said a proposal that hasn't any necessary material impact on the value that a reasonable shareholder would attach to the value of his investment were explicitly --

PROFESSOR BAINBRIDGE: And then the Commission would allow that?

CHAIRMAN COX: The Commission would disallow it because it doesn't meet your standard. You are saying the value of this is we don't have to look to state law, but if state law were explicit on the point?

PROFESSOR BAINBRIDGE: If state law were explicit on the point, you might have a problem. As far as I know, there is no state law that is so explicit, and my guess is Delaware would not rush to adopt such a law.

As long as I have your attention, as a fellow Californian, Leo used a metaphor that he's used in a number of his writings, "republic plus." We live in a "republic plus" land, where we have a governor, we have a legislature, and we can have 14, 15, 20 propositions on the ballot.

I would ask you if we think of those propositions as the functional equivalent of shareholder proposals under 14a-8, whether that process has made our government in California more functional or less functional.

If you agree with me it's the latter, maybe the Commission ought to think about that analogy as it applies to

14a-8.

CHAIRMAN COX: Unfortunately, I don't, but that is only for analogous purposes. It doesn't get to what we are doing here.

MR. BALOTTI: A thought on the question of whether 14a-8 ought to permit proposals that state law specifically endorses. It seems to me there is a real difference whether a shareholder can get up at a meeting and make a proposal, and the question of who is going to pay for the solicitation.

Maybe a way to resolve it is adopt Steve's point of view as to who is going to pay for the solicitation. It has to be something that relates to the economic well being of the enterprise versus what nut can stand up at a meeting and make what proposal, different question, and state law might allow that.

CHAIRMAN COX: I was just a little bit flip with Professor Bainbridge. I understand your point. If your point is the voters are getting these big, thick books to look through, and happily, that is not the case with our proxy solicitations thus far. I take the point entirely.

MR. JOHN WHITE: I guess I would like to move us towards our second topic, as we started this panel, which is the Federal role. I realize we have touched on that a little bit already. I knew we could never stay on topic anyway.

Going back to the very beginning, Mr. Balotti

described I guess what I will at least characterize as several of the core rights under Delaware law with respect to director elections and by-law changes.

We obviously have the Federal proxy rules that have disclosure requirements and procedural requirements that have an impact on these core rights or exercising these core rights under Delaware law.

Professor Coffee, I guess I would like you to give us your insight on where we are on the Federal side.

PROFESSOR COFFEE: Thank you. I will do that, and I will try to maintain some continuity with what has been said already, because I think there are some interesting points of contact, and I agree with some of the comments that have been made, but where they lead you is an interesting question.

First of all, Section 14a authorizes the Commission to adopt any rule that is either in the public interest or for the protection of investors in connection with a proxy solicitation.

A proxy solicitation is a jurisdictional prerequisite but that is a very broad grant of power. It has been put to very broad use over the years, not only do the Federal proxy rules cover the obvious disclosure and anti-fraud elements, they have regulated for 50 years or more the following things:

The form of proxy, and in a very mandatory way, because state law says next to nothing about the form of proxy, whereas 14a virtually prescribes every element of the standard form of proxy.

It also governs access to the shareholder list, 14a-7, trying to establish rules of equal playing field for the contestants in a proxy fight.

It also regulates the term of the proxy and the amount of discretionary authority. All of this is generally not dealt with very prescriptively by state law.

Finally, it covers this special field of shareholder proposals. There, state law, as we have just heard, basically says the shareholder may exercise voice. The shareholder may have a vote at the meeting or may make a proposal. It is Federal law that sort of underwrites that and says and we are going to reduce the cost of all this by making it mandatory that these proposals will be included in the shareholder proxy statement sent out by the corporation, and that does vastly expand shareholder voice, because it reduces the costs.

The Commission's two major initiatives, besides just addressing disclosure, have been to reduce costs and try to level the playing field in shareholder fights.

How has the Commission done in this area? I'm going to suggest to you, picking up on what has been said

already, that the Commission has essentially in some areas given us a little too much democracy and in some areas, a little too little democracy.

This is not really the full effort of the Commission, because the Commission's efforts in this field have been substantially constrained over the years by the Federal courts.

Let's talk first about this area of shareholder proposals, where as I think we have heard, state law is relatively silent. There is nothing detailed or prescriptive about shareholder proposals.

I agree that Auer vs. Dressel says there can be a vote. It doesn't say that the company has to send out all these notes at its cost to everyone out there.

To exclude a proposal, the Commission has always tried very hard to winnow, to ration, screening devices to withdraw some kinds of proposals that were unlikely to have any significant shareholder support.

Over the years, the courts have just about negated that effort. I am speaking here about the Medical Committee decision and the Lovenheim decision, which said even a proposal asking the company not to buy pate foie gras from France producers and put it on American delicatessen shelves was too important to social policy to be excluded.

Once the courts say that, the Commission was

significantly constrained and it couldn't do much. That left the Commission only with one means, which was its interpretation of its ordinary business exclusion.

Frankly, over 50 years, and other commentators have said this, and no one to my knowledge has said anything different, the ordinary business exclusion has been interpreted in an inconsistent haphazard and fairly sort of trendy way. It becomes popular and it moves from being ordinary to being extraordinary and suddenly, shareholder proposals go in.

This is functionally similar to what Professor Bainbridge said to the provision in many western states that give shareholders a power of initiative. There is one very significant difference.

The significant difference is before you get a shareholder proposal on the ballot, even the State of California, you probably have to get a very significant number of shareholder nominations. It takes some time and effort and at least you find out that somebody out there, maybe a minority, but a minority that cares intensively, wants this proposal on the ballot.

We have nothing similar to that under the Federal proxy proposal rules, and as a result, we are subject to the tyranny of the 100 share shareholder with a deep ideological commitment to a particular issue.

I understand people do. We all have deep ideological commitments. That doesn't mean we should have full access to the corporate treasury.

I would submit to you this is the area where we have too much democracy and it goes far beyond what state law permits in a functionally similar field.

The way to even the playing field here might be to require for at least many forms of shareholder proposals, perhaps those that don't have an immediate and obvious business significance, that there be a substantial showing of shareholder interest, perhaps a test such as either one percent of the shares or one million shares, whichever is smaller, and I don't mean to be specific about the actual specific quantum here, but something like an one percent test or a million vote nomination process is feasible today, and to make it feasible, the attempt to obtain those votes should be exempt from the proxy solicitation mechanism.

There is very low prospect of fraud here if you are seeking to propose rules about pate foie gras, and if you can get one percent of the shareholders to support it, that doesn't sound like ordinary business exclusion any more.

That would be a way of saving costs and I think focusing proposals on matters that in the most part are economically significant to shareholders. That is an area where I think you give too much democracy.

Now, with respect to too little democracy, we have just heard also that the shareholder nomination process is not much addressed by state law.

It just says the shareholders may nominate directors. This is not an area where there is a significant conflict between state law and Federal law. State law is pretty skeletal, pretty simple in terms of nominating shareholders.

It is Federal law and Federal law for 50 years that says you cannot use the proxy statement to nominate directors, as 14a-8(c)(8). You may think that is a good rule or a bad rule. It is, however, not a rule that is motivated to any extent by difference to state law.

I do not know any reason why a shareholder by-law amendment adopted pursuant to 109b of the Delaware law saying that the shareholders shall have the ability to add to the corporate proxy two names that are adopted by a shareholder vote of X percent would not be a valid shareholder by-law.

I admit there could be an intense debate, and I expect later today, there will be an intense debate, over whether shareholder nominations of directors pursuant to the proxy statement is a good idea or a bad idea, but it is not an idea that is in any respect barred by state law.

State law says the company has power -- the Board of Directors has power over the business and affairs. 109

talks about business and affairs, and then goes on to talk about the rights and powers of the directors and the shareholders.

I think it is part of the rights and powers of the shareholders to make a nomination.

Debate the issue of shareholder nominations pursuant to the proxy statement as a matter of what is good policy or bad policy, it is not an area where state law significantly confines you.

Thus, I am suggesting in some areas, we have a little too much democracy, and in some areas, Federal law right now gives us no ability to have shareholders attempt to engage in greater democracy through by-law amendments.

On that note, I will turn the floor back to you, John.

MR. DUNN: I will take one thing very quickly. I think I owe it to everybody on the staff who does shareholder proposals to say that under (i)(7), we do our best not to be haphazard in our interpretation of it. We work extremely hard to be consistent on that.

I do agree with you that there is a creeping significant social policy issue under (i)(7).

I really like your notion of allowing folks to get together to meet a certain threshold. I wanted to get everybody else's opinion on the current thresholds under

14a-8 and whether they match any notion of under state law how things would actually work, whether they work counter to what we are supposed to be doing here.

The last time it was changed, when it was first adopted, then 50 years later the Commission made the bold move of making it 2,000 in 1998. It hasn't moved since then.

I will turn to Leo to start this off. I want everybody's views. Is there some notion that the small threshold there is allowing a little bit of -- I don't want to say a tyranny of minority -- a notion of smaller shareholders having a larger say than people think they should or shouldn't?

VICE CHANCELLOR STRINE: I actually think the thresholds probably do not matter as much. The thing is foie gras, I love foie gras, so I'm conflicted on it. Most Americans eat like force fed geese anyway. I don't know why we are complaining on their behalf.

I think the issue is a balance question. I think Jack is right about what is the threshold cost. I think there is an elegant -- one of the elegant ways out that would deal with what Jack is talking about is stockholders actually have the ability to shape a lot of these electoral systems themselves, and they are increasingly vocal through precatory proposals about ideas about that.

I think what we are sort of saying is if the proxy

proposals facilitated the presentation of by-laws that were company specific, then the stockholders could propose a reimbursement scheme if they liked. They could propose a proxy access thing.

The SEC would be facilitating the presentation of that without having to design a system.

You do question, and here is where I would get in a little bit on the precatory proposals, if stockholders are increasingly exercising voice and power over real things, is there potentially an argument to cut back on the imaginary things.

Which is if 25 years ago really real things never got done by stockholders, and you needed this sort of outlet to express things to managers so they would at least hear something, if now stockholders are acting in ways that are binding, perhaps the room for them to just exercise pure voice about other things should be reduced a little bit, and where the thresholds that Jack and Steve are talking about would come in, they could not restrict it altogether, but make sure that it is someone with a real economic stake.

By the way, this is something for the Commission to watch, how long have they held the stake potentially, which is how long have they been around. Have they just bought in to make this proposal? How long are they committing to it? Are they actually long the company, which is

another thing I hope we will get into through the day, which is do they actually have an interest that is aligned with the best interests of the company itself or are they short the company, which is something we often don't know.

PROFESSOR ROMANO: I would like to take a shot at this, too. I think in some sense, the view of this by corporations as democracy is inept, because in democracy, we think of things as one person/one vote, and it is people's visions of the good.

Whereas, corporations are not really a polity, and they are there to serve as engines of efficiency in terms of the allocation of resources and the production of goods and services, and the concept of that is one share/one vote and not one person/one vote, because we think the more financial interest you have in the firm, the more likely your voting will be for increasing the value of the firm and with the other investors.

The thresholds of 14a-8 is really like an one person/one vote, because you can have a trivial investment and you have the same equal access to using everyone else's resources in the proxy statement as those who have a large block.

One could do this in two ways. One could do sort of what Jack was saying, something like a percentage of a threshold. I would sort of prefer to think about this more

as making people have to invest their resources in it.

If it is a high enough threshold, I guess they would have to invest resources to get other people to be in a block with them, but the other way would be to try to figure out what the expense is to firms of doing this.

Obviously, one could say the expense is very low because the marginal cost of adding a paragraph or a page to a proxy statement is minimal, but there is a lot of other expense that goes in. They have to spend time and effort in responding to this. You have to have staff doing this.

Maybe if the Commission could get a sense of what the cost is or what firms think the cost is of having these kinds of proposals, one could say this is the kind of cost that we are going to impose someone to pay, sort of like a bond, but if you succeed, we would follow the state law approach that says, well, people who succeed in a proxy fight get reimbursed.

So we would have people have to put up some up front costs, which I think would also make them more serious in devoting their resources of what makes sense to put up, and then if they succeed in getting enough votes, one could say a majority of 50 percent, but one could have some substantial amount of votes that showed support, 40 percent or some other sort of measure, I'm not sure what the right one would be, and then we would reimburse them. If not, they

would bear that risk. That is another way to think of this and get it more to be like the one share/one vote as opposed to the one person/one vote, and thinking more about sort of what we think corporations are.

They are not really supposed to be political systems. They are not intended to be democracies. If they were, that would not really be serving why we have these business enterprises.

MR. JOHN WHITE: Professor Coffee?

PROFESSOR COFFEE: I think the Vice Chancellor's idea is a worthy one. You could well have a system that tries to integrate a Commission default rule with the possibility of override by shareholder action with either a higher or lower standard.

The advantage of the Commission additional default rule is if nothing is done, there is going to be a fair amount of corporate waste going on because of what I keep calling the tyranny of the 100 share shareholder.

The real cost here, and this is sort of a response to Professor Romano, it is not just the costs incurred by the company. It is the costs incurred by shareholders reading proxy statements.

If it is too easy and you get 100 proposals on the proxy statement, it will look like the Peking Wall in 1962. There will be so many different social issues that none will

get attention.

You do need a mechanism that prioritizes and one of the things might be to put the top ten proposals in terms of shareholder support or the top five. I do not think you can evaluate the costs just in looking at what it costs the corporation.

Shareholder attention is a precious commodity and it is not going to get spread very far, and thus, minimizing these proposals actually gives more weight to the more serious proposals.

MR. JOHN WHITE: I would like to take us back to where you were a few minutes ago, Professor Coffee.

If I understood your description of where the Federal role is, the Federal role is both, I guess I would say, over inclusive and under inclusive, if that is a way to describe it.

We have been talking about the precatory side a fair amount. If we could come back for a moment to what I will call the under inclusive side.

If I understood your description, you think the Federal rules really do interfere with shareholders exercising some of their core rights under state law.

I guess my question is -- I think you were pretty clear on that. I guess I would like to pose that question to the rest of the panel to see whether others agree with your

view that the Federal rules are getting in the way.

Professor Bainbridge?

PROFESSOR BAINBRIDGE: This is an issue that I hoped we would have a chance to address. I would like to begin to get at it by agreeing with Roberta that notions of corporate democracy and Leo's phrase "republic," really obscure what we are about.

It is important to recognize that what we are dealing with in the corporation is an unique entity, a legal fiction that represents the line the law has drawn around a set of complex implicit and explicit contracts between multiple constituencies.

There is no "their" there. There is no book that you can own and say this is the corporation and I own it. You do not own legal fictions. You have contractual rights that relate to this fiction. We have to get away from the notion of shareholders as owners.

This goes to the answer to your question, that I wrote an article that was published in the UCLA Law Review called "The Case for Limited Shareholder Rights."

I would just like to take a minute to lay out that argument. If we think of the directors as being the central body that exercises fiat with respect to this complex set of contracts, the directors are not the agents of the shareholders.

The shareholders come to the corporation and make a deal. The deal basically is we are going to give you our money, in return for which, we are going to receive a liquid investment that represents the claim on the residual, whatever is left over after all other corporate claims have been satisfied.

The rights that we get with that are certain rights of liquidity and we get a limited right to participate in corporate governance to hold you accountable for how you run the company on our behalf.

The problem, of course, is that authority and accountability are in constant tension.

When I teach this issue in class, I say to the class imagine that the Dean is sitting in the back row with a stack of money representing my monthly salary. The Dean initially says Steve, go teach business associations however you want.

But he's sitting in the back row. Every time I do something he doesn't like, he takes some of my monthly paycheck back. I can see him doing that.

Pretty soon, I am going to be teaching the class to keep him from reaching to the stack.

The power to review is in some sense the power to decide. That is the basic problem of corporate governance, that to the extent that we empower shareholders to review

what boards do, we are necessarily limiting the scope of the board's authority. That means that we have to be very careful when we talk about shareholder rights to remember that those rights potentially impinge on what makes the corporation work.

Roberta Romano has written, of course, a wonderful book, "The Genius of American Corporate Law," which makes the case that competitive federalism is the genius.

I would make the case that it is the separation of ownership and control that is the genius of American corporate law.

This is really what I wanted to have a chance to say to the Commission today, which is it seems to me that the Commission was founded on the Burley and Means premise that the separation of ownership and control is a problem seeking a solution.

Whereas, I would put it to you that the separation of ownership and control is the fundamental source of the success of American corporate governance.

We have a system of governance in American corporations that I have called "director primacy." In order to make director primacy work, we have to remember that holding directors accountable inevitably undermines their authority.

I think that there is a very useful way of sorting

out the state and Federal roles in this area, and that is the decision that was issued back in the 1980s when the Commission adopted Rule 19c-4, and the D.C. Circuit in Business Roundtable vs. SEC, said okay, what are the purposes of Section 14a? Nothing in the 1934 Act was intended to let the Commission regulate the substance of corporate governance.

Section 14a is not an exception to that. Your powers under Section 14a are limited to disclosure and process.

Substance of corporate voting rights was left to the states. That is significant because it is the substantive ability to constrain directors that poses the real threat to their authority.

It is substantive empowerment of shareholders that creates the risk that the power to review becomes the power to decide.

Where Federal law has, I think, to a certain extent gone beyond the Business Roundtable area, has been through the use of what we might call "therapeutic disclosure," where you are adopting what purport to be disclosure rules that really seem to most observers to be intended to impact the substance of how corporations behave.

Of course, there are long-standing examples like the requirement for fairness opinions and going private

transactions. A lot of people might say that the executive compensation rules are examples of these.

I think that the Commission has to be sort of aware of the Business Roundtable line and ensuring that as you adopt disclosure rules and process rules, that you are really not stepping over the Business Roundtable line and getting into the substance of corporate governance, the substantive allocation of shareholder rights which to my mind is appropriately left to state corporate law.

MR. JOHN WHITE: Before I ask our panelists to give us their closing thoughts, looking at my watch and seeing the time here, are there any questions from any of the Commissioners?

COMMISSIONER NAZARETH: I have one reaction that I feel compelled to make in response to the last statements by Professor Bainbridge, which I guess is that again, I would analogize what the shareholders are doing with respect to the Board of Directors as more like the faculty people who are deciding on tenure, sitting in the back of the room and checking occasionally to ensure that the people getting tenure are meeting certain quality standards and not necessarily going to the specifics of every action and every class that the professor is teaching.

I understood the analogy, but I thought if I were making an analogy, it would a bit different.

I would be happy in your responding to that comment.

MR. JOHN WHITE: Professor Romano?

PROFESSOR ROMANO: I do think that is really the issue, is the nomination substantive or procedural. I think the line is it is not obvious where that is because this is sort of like substantive due process and the procedure teachers who do that because sometimes having that really becomes the substantive right. I think that really is a question on this.

I would feel more comfortable in a process that sort of blurred that issue, if we thought that the people doing this had financial responsibility, and the way the structure is, even if we sort of get rid of all the precatory proposals and we used the materiality test, but we still said set up by-laws.

And I agree, I think shareholders have the right and should be able to put up by-laws, but if we do that and keeping in the current structure, you have whatever the people have.

You don't have people who can put these nominations up who have the resources available or devoted to a staff person who could find a nominee or can finance a nominee to do the research or a hedge fund or private equity funds, who have substantial pools.

When they put someone on a board or running people, they can also give them the support to making informed decisions.

Mutual funds, pension funds, they are not managers of real assets. That is not what their skills are. It is not clear how they can actually use this in a productive way.

I think you want to sort of -- if you are going to move in this way, you really have to re-think what that threshold or the reason or how you allow people to be able to put these things up. I think that is really what the heart is of the issue with the whole sort of the 14a process.

It is state law when people can put these up at meetings, they have to sort of be present and if they want to get the support before, they have to use their own resources.

It's sort of that point about the financial incentives. I agree with you. Tenure procedures are very substantive of who we are putting on that faculty, and they stay there forever. We don't have mandatory retirement now. It has expensive ramifications when we do that.

MR. JOHN WHITE: Commissioner Campos?

COMMISSIONER CAMPOS: First of all, I have appreciated the discussion. It seems to me the last comments by Professor Bainbridge sort of bring up some of the most fundamental issues regarding corporate law, and that is who is the owner and who is subject to accountability or not.

I don't know. It is an interesting discussion. I have had academics and others say to me, well, you know, the true value proposition is management. After all, they are the ones who know how to turn assets into value and so forth. Forget about shareholders. Forget about directors. All of them are just there essentially as enablers.

Professor Bainbridge is sort of saying, well, wait a minute. Directors shouldn't be accountable at all. Essentially, directors, if you are going to hold them accountable, then you are reducing their power. That is rather -- I don't know if "shocking" is the right word -- it does not seem to me to comport to all of the basic corporate law that I remember studying in my days. Maybe it is out of date. Maybe it is not popular any more.

I always thought that shareholders were owners and they were principal agents essentially, and you held directors accountable.

To throw away that proposition, to me, is very much getting us into exactly the basis of corporate law, which is substantive, at the state level.

I find that interesting. I am not sure if that goes way too far. I do not think the Commission has a mandate to change substantive American Anglo-Saxon corporate law from that perspective.

MR. JOHN WHITE: This is interesting. I can see

everyone on the panel wants to respond to this. Maybe we are lucky enough that we are also at the point where we would like to ask each of the panelists to give us their closing thoughts and suggestions for the Commission.

Perhaps at the same time that you give us your closing thoughts, you can respond to Commissioner Campos' remarks, if that works.

We will start with Professor Bainbridge.

PROFESSOR BAINBRIDGE: Commissioner Campos, I was obviously not suggesting that directors should never be held accountable. What I was trying to suggest is there is a tension between authority and accountability, that holding people to account necessarily infringes on their authority.

Clearly, there are times that you want to do that, despite the fact that telling directors you can't steal from the corporate treasury is a limitation on their authority, it is a limitation we would all support.

My point simply is that one must recognize that there is always a tension between authority and accountability. One has to try to resolve that tension in ways that are appropriate given the nature of the problem at hand.

For example, where we deal with a simple claim that the directors were negligent, the business judgment rule, of course, makes it very difficult to hold directors accountable

for decisions that are merely negligent.

Where we talk about directors engaging in self dealing, the duty of loyalty comes into full play, and with potentially very severe consequences.

My point is not that directors should be unaccountable. My point simply is that we have to remember there is this core tension. That core tension traditionally has been resolved at the state corporate law level.

My point is whatever the SEC does, they should recognize that they have very limited authority under 14a-8 to change the balances that have been struck by state corporate law in this area.

It is always a matter of balance. It is also a question of who gets to set the balance.

MR. JOHN WHITE: Mr. Balotti?

MR. BALOTTI: I, like Steve, believe that directors should be accountable. It is the system by which they should be accountable that I think is important.

Certainly, they should be accountable through the court system. Certainly, they should be accountable in the sense that if the stockholders don't like the job they are doing, they don't elect them again.

Should the stockholders have a vote on whether we are going to build the next plant in Washington, D.C. or Delaware? No, I don't think so. Accountability in that

sense, I think, is a mistake.

Let me comment very briefly on Jack's thought of under inclusiveness. I think the balance, save one area, is just about right. I am not one who favors discriminating among shareholders by reason of size.

I do not think we need to make it easier for the large shareholders who can afford to use the existing proxy system to shift that burden to the corporation and the other shareholders.

I like Steve's idea of a materiality test, that only those proposals which affect the wherewithal, the business of the company, should go forward. I would draw the line there, not on the size of ownership.

The area that I said maybe is one that can be relaxed a little bit is the ten shareholder rule. Shareholders can only talk to fewer than ten shareholders before they have to have a proxy on file. I do not understand the rationale of 10 versus 12 or 13 or any other number.

As far as I'm concerned, I'd let sophisticated shareholders talk to sophisticated shareholders. Maybe that is one area where I would discriminate among shareholders. I truly do not care if hedge funds lie to hedge funds. That is not something that bothers me. Let them straighten out in their own world if there is fraud between them.

I think I would let them talk to each other and if they want to make changes in the way the corporation is run, I think the by-law area is wide open. Let them enact by-laws that relate to the power of directors and stockholders and the methodology by which the corporation is run, and then the stockholders will have spoken for a different regime at that corporation. Let it go forward at that basis.

MR. JOHN WHITE: Professor Coffee?

PROFESSOR COFFEE: I think it is mandatory that I start by responding to Stephen Bainbridge who made an interesting and provocative suggestion.

I would tell the Commission first of all that frankly, the separation of ownership and control, which is where he started, is now declining, with the rise of institutional investors, we don't have the same separation in the past, and inevitably, whether we like it or not, the allocation of power between the board and the shareholders is going to change, in an era where institutional investors are large and concentrated ownership is quite possible with the minimum of effort between them.

That means the world is changing and I think SEC rules have to recognize that.

What I would suggest that you recognize, and here I am going to sound like the classic spokesman of Delaware, I think you should recognize that corporate law is enabling.

By "enabling," it means the shareholders have some power to design the rules of the game.

I do not mean that there should be by-law amendments telling you where to build a plant or what color to make the plant. That is classic ordinary business.

I do think, however, the shareholders have great power to adopt by-laws addressing the shareholder nomination process, which is much more clearly governed by 109 than by 141a, and there could be any number of by-laws in that area, and maybe they can even get into expense reimbursement, although that gets to be a closer question.

Where there is some tension is by-law amendments addressed at issues such as the "poison pill." Is that 141 or is that 109?

If Delaware adopts a procedure by which the courts will tell us, I think it is perfectly appropriate in a system of federalism to try to give the courts some role in doing that, but I do think when we are dealing with the basic issue of the nomination process and the voting process, that shareholder power to establish the rules of the game is part of an enabling system of corporate law.

To say the board has all the authority, that is, and I love to use this phrase, because it has been used against me many a time, that is an "one size fits all" model. It says the board has all the power, no one else can do

anything.

There can be all kinds of modifications. Intelligent sophisticated shareholders and institutional investors often own 70 percent or more of our largest companies, and they are not going to deliberately injure themselves, and they are probably making prudent thoughtful decisions.

In that kind of world, dealing with the rights and powers of shareholders, which is the nomination and voting process, I would think an enabling system should recognize that shareholders can redesign the balance of power at least marginally, and I am not going to disagree with Frank that you cannot tell the board where to locate the plants or what color to paint them.

By the way, for a brief shining moment, I even agreed with my friend, Franklin, here. I think the ten shareholder rule probably is out of date. It means less than 1993 when the Commission did de-regulate communications among institutional investors, so long as they were not seeking proxy authority.

I do think you could have greater communication and even proxy authority for purposes of things like shareholder proposals.

The assumption here that when you say we have to have an one percent or one million vote test, we are just

giving all power to large shareholders, it isn't really true.

The true small shareholder told that he can communicate with others and using a web site could very quickly, using the web site, if it was de-regulated, get one million votes for an issue that really was important to all the shareholders, even though it might strike us as a moral or ethical issue that wasn't meeting a materiality test.

I would not tell you to go solely down the materiality road. I would say if shareholders really care about a moral issue, you get one or two percent, whatever your threshold is, to band together, and you permit them to do this without any serious regulation, then they will use web sites and you will find 100 shareholders aggregating together and being able to satisfy that kind of test.

I think if you give shareholders more voice, they will like it and it will help the system in the long run.

Today, however, we do have the tyranny of the 100 share shareholder, and that person is often an ideological partisan rather than a person who has a true interest in the interest of the corporation.

I would also tell you that the current system of the ordinary business exclusion under 14a is not working. I am not saying the Commission does not work hard. There is no real standard for what is "ordinary" versus "extraordinary." It shifts with the time.

I think it would be better to use a more democratic solution that looked to an expression of shareholder interest.

The hot issue is by-law amendments. Later panels will deal with that. I do think there is a line drawing issue here, and the line drawing has to be what is corporate governance and what is ordinary specific business decision making, and I think you can draw that line.

MR. JOHN WHITE: Professor Romano?

PROFESSOR ROMANO: I want to say one response to Commissioner Campos and to something Jack said, and then I want to take a slight diversion and say something about the interesting idea of a proxy forum.

To Commissioner Campos, I want to say I agree completely. My whole view is that shareholders own the firm. The directors and the managers are their agents. We have to understand corporate law and securities regulations as means to reduce agency problems.

I do think the separation of ownership and control is not what people have emphasized. In fact, I think the whole point of 14a-8 is based on a premise of separation of ownership and control and you have to subsidize them because there are collective action problems where you have little investors, and that is not what we have today.

Not only do we have hedge funds who have large

blocks, but the institutional investors who I think are small, I think CalPERS and the unions who look big compared to the individual, they are not big investors. They do not have a lot of resources and informed people, but these people have collective groups. You have the CII. You have ISS. There are other sort of means that deal with the old collective action problem.

In that sense, 14a-8 is an outmoded approach, but that is what you have.

To pick up on the "one size fits all," and the enabling view, the real thing that I think would be -- although it is beyond what you are thinking about -- is to let firms opt into your system or opt out of their system.

If firms want to have precatory proposals, they should be able to put them up, if that's what their shareholders want. If they don't want to have any of these proposals, I really think that what you really want to sort of think about is whether it is a super majority vote or whatever, have the shareholders vote to say do we want to be in this system as it is.

Do we want to modify it, and we are going to have the $1 million shareholder or we will put in some of our own sort of limits on who can put these things up and who can't, and I think that would be one way sort of if you are really talking about the voice of the shareholders and thinking of a

system, one might want to think of this as authority of enabling firms to modify somewhat their system.

CHAIRMAN COX: I do not want to interrupt closing statements, but just a quick question. Is your thought that you have just expressed that the shareholders would essentially have a referendum on whether to opt in or opt out of a --

PROFESSOR ROMANO: That is right. The firms put up to their shareholders they could vote to say do we want to be in this regime. They could say we want to be partially in this regime or to modify whatever, sort of in your regime, but we will modify piece A of it.

Say we want to have a three percent requirement or we don't want any requirement, anyone can put it up. I would say to think about this, here's my regime, but you have the choice to sort of not follow this if you can get a sufficient number of shareholders to agree with you on that.

I really think that is in the full spirit of this. You would not have to worry. If shareholders want to do precatory and that is what they approved, if they don't, they just want mandatory by-laws, that would be their system. I do not really think -- I would sort of take it that way.

I did want to say something about proxy forums, which I thought was a very interesting idea. When you think about this in terms of you wonder about unintended

consequences about something like this.

My thought is we think about sort of managers of firms. They have a hard time as it is just doing what their job is, which is to try to run the firms efficiently and make profits. There are these market constraints.

There is a study by Steve Kaplan that just came out to show the CEO turnover has dramatically increased. They are like in office for maybe five or six years on average. They have hedge funds and the like.

There are concerns here about nominations and these other proposals that disrupts management, distracts them, the media harasses them. How do we get them to focus their attention?

It does have sort of this nice idea that you get these things off the proxy process so shareholders can be in these deliberations, sort of chat rooms, but then you think what does that mean?

The management is going to have to have staff that monitor this all the time because they have to be responsive. Will it be a breach of their fiduciary duty if they don't participate? Then they will have to have staffs full time looking at what is going on, what are people saying. I had not thought of it as the tyranny of the 100 shareholders, but if anybody can put things up, that is where all of these things are going to go, but it won't really avoid some of the

problem.

Under the Investment Company Act, this is not a fiduciary obligation to sort of participate in this.

I think it is a really interesting idea, but I don't know how that will affect whether or not it is just something they are going to have to do even more than what's done in the proxy process.

CHAIRMAN COX: I think we will get into that more in subsequent panels. I would just observe shareholders get a chance to blog on the Internet, whether you like it or not. Maybe somebody ought to pay attention anyway.

PROFESSOR ROMANO: I agree they should. I agree with you completely on that. They do have to do that. Should the Federal Government then sort of make it into -- the question would be does that impose more obligations on all the other investors to participate as well.

I do think it is sort of related also to just the whole general shareholder proposal process. That is why I think the issue of the nominations has caught so much attention, because managers are worried that you have someone who is not fully interested in the firm who could use this process.

I would go back to emphasizing the cost of the process and maybe Jack is right. Maybe I am too narrow to

look at the firm, and in thinking about what the cost is, you have to add other costs.

You could get information about how much it costs to do a proxy fight, which I think has gone down over time, given sort of the greater ability to coordinate with other investors. That might give a better handle on how to craft what you want and getting them to also have financial responsibility.

MR. JOHN WHITE: Vice Chancellor Strine?

VICE CHANCELLOR STRINE: Roberta's mention of this sort of referendum idea actually is a great intro into sort of my biggest picture point, which goes to Commissioner Campos' comments.

The separation of ownership and control we continue to obsess over is this idea that the people who manage entities that deliver services and make products are going to exploit everyone else.

I guess we have this assumption that people who manage money for a living are people of higher ethical caliber than people who manage companies that deliver products and services.

It is not the most intuitive assumption about human nature I have ever heard, but it is the one that we continue to make. What do I mean by that?

There has to be accountability on the part of

directors and managers, but to whom. I am an ordinary American. That means I now have to save for my retirement. I have to put money in the market every month. I also know something about corporate finance. I have been taught by good professors up here that I am not likely and no one else is likely to engage in an act of trading strategy that over time beats the market.

I invest through index funds. I don't read these proxies. Someone else reads them for me. I am investing primarily for college and for retirement, like most Americans.

The money managers who often manage my money, they are not incentivized in terms of their compensation on a time horizon that is consistent with that of their investors. Many of them brag that they have set up proxy voting units that are separate from the people who make investment decisions, and they brag about the fact that the people who invest your securities are totally different from the people who vote them. Think about that. Think about who you are giving power to.

What I call it is separation of ownership from ownership. The people in the middle are influencing corporations and they are now proposing very specific strategies, business strategies, most of which involve increased leverage, increased pay outs of short term cash.

These are often proposed by very short term investors who will not be around to eat their own cooking. When it goes bankrupt, when the strategy fails, they will be around buying the distressed debt. The index investors will still be in.

The thing about the precatory proposals, who will advise the 1940 Act companies on how to vote on whether to opt out of precatory proposals? Institutions which make their money because they get paid to advise on these votes.

These firms that advise, you allow them to represent both management and stockholders, and they market themselves as knowing more about the electorate and how it will vote than anyone else. Why not? They get paid to make advisory decisions to stockholders.

There is a basic question about who you are empowering. Are you empowering the general electorate or the primary electorate, and how are you aligning the incentives of people in the middle?

I think it is a very big picture issue to think about. Some more specifics, and I just want to finish on that. When you are an old passive stockholder and you vote, and you left it to the managers, if the managers made mistakes, they were accountable. They could be sued. If you are now a stockholder and you influence a board to change these policies and then you are gone, are you a fiduciary? What responsibilities do you have?

We are seeing compromises right and left. The rise of the independent director affects this in a big way. A lot of the independent directors now make their living as independent directors. They don't want to oppose anything at a particular company which will get them in trouble with the advisory institutions.

They are more than willing to compromise. They look like elected officials, but not the most courageous ones. They look like the ones who want to stay in office.

A lot of what they are doing is making accommodations. In the political process, we know globally, compromise is vital. If you talk to each other, if you paper over a difference and don't blow each other up, thank the Lord for that. That is a blessing.

In the business world, that is not as clear. It is not clear that we want every public company's business strategy to be compromised a little by people who want to stay in office.

I think part of what Steve is saying is managers would make mistakes but to a diversified investor, allowing different management teams to pursue the long term profit overall works out really well for the United States. We have to be careful about balancing it.

A couple of specific solutions. One way in which you are actually in the way is we have annual meetings in

Delaware. Vice Chancellor Lamb will probably talk a little bit more about this. Both he and I face situations where there are corporate catastrophes, no regular filings, and the company can't solicit proxies.

What do they do? They don't hold annual meetings. You need to have a rule that deals with this up front. It should not be that you come to us as the school marms and we have to order them.

Stockholders need annual meetings more than ever in these corporate catastrophes. There has to be a way so that the incumbents don't go in totally naked without proxies. There should be some accountability measures. That may be where proxy access would actually be a facilitator, to put a penalty on a management where you can't file financials, but to open up the access.

Here's what happens. In Health South, I have a completely written opinion in the drawer on this. Vice Chancellor Lamb issued a very good decision.

The stockholders of Health South didn't pick the new board. The lead plaintiffs picked the new board. There was a compromise.

A lot of these things are getting worked out that way, and it is almost back to a form of cumulative voting, where the most active institutions come in and get some representatives in the board room, and so this annual meeting

thing could be a fix.

The other basic point that I think everyone on the panel will agree with is if you let binding by-law proposals go on the ballot that relate to the election process, not that Strine is a jerk, you know, if I'm running for office, I would think that is what you are relating to the election, you can't have let's have a precatory proposal that Strine is a jerk, maybe inarguable, but it's not really proper.

If it relates to the actual system of elections, let the state courts determine that. That will allow stockholders to have innovation and actually elegantly gets you out of the middle of this, which is you are facilitating change of the electoral process, responsiveness to stockholders, without a single solution to myriad circumstances.

You are giving life to the state law right. I actually do not think you need to go to the Delaware Supreme Court every single time. If it is uncertain, you put it on the ballot. You let it come out. If there is a fight about whether it is valid, frankly, a lot of times the boards go along with it voluntarily once there is a stockholder vote.

That is my thoughts. I appreciate the opportunity to be here with you all.

MR. JOHN WHITE: I would like to thank all the panelists for being here. We will take about a ten minute

break and convene with the next panel.

CHAIRMAN COX: I just want to join in on behalf of the Commission. That was just an absolutely superb discussion. Thank you very much. I think you really helped us a lot.

(A brief recess was taken.)

PANEL TWO

THE PURPOSE AND EFFECT OF THE FEDERAL PROXY RULES

MR. JOHN WHITE: Thank you. We will get started with our second panel, the purpose and effect of the Federal proxy rules.

I will begin by introducing our five panelists, starting on the left, Jill Fisch, Professor of Business Law at Fordham University School of Law, and currently visiting at the University of Pennsylvania Law School.

Second, Steve Lamb, Vice Chancellor, Court of Chancery, State of Delaware. Third, Don Langevoort, Professor of Law at Georgetown University School of Law. Next to him, Ted White, strategic advisor to Knight Vinke Asset Management and also a consultant to the Council of Institutional Investors, and fifth, John Wilcox, head of Corporate Governance at TIAA-CREF.

As you can see, this panel is somewhat tilted, not quite as much as last time, towards academics and the judiciary, as we continue our discussion.

The topic for this panel is the purpose and effect of the Federal proxy rules. I don't know that I was particularly successful the last time through with breaking it up into topics, but I am at least going to say that I am going to try to break it up into topics. Who knows where my success will end up.

I had thought we would try to do this in three parts. The first being the effect of the Federal proxy rules generally on shareholders' exercise of their state law rights, and then to look specifically at the impact on binding shareholder proposals and how the Federal rules, I guess, to use Professor Coffee's comments, are limiting or under inclusive in that area, and then third, move to the impact on non-binding or precatory proposals and how our rules may be over inclusive or too expansive there.

If I can, I will start with Vice Chancellor Lamb, and then go to Professor Langevoort, on the general question of do the Federal proxy rules -- what is the impact of the Federal proxy rules on the exercise of state law rights.

I guess I should actually ask us to look particularly with respect to proposing matters to be voted on at annual meetings.

Vice Chancellor?

VICE CHANCELLOR LAMB: Thank you, John. It is a pleasure to be here.

There is, I think, an anomaly in asking a state court judge to be the first one to answer the question about the impact of Federal proxy rules.

MR. JOHN WHITE: You mean on state laws. Got it wrong already?

VICE CHANCELLOR LAMB: I am willing to give it a try. I am especially happy for me to be here since I served on the staff of the Commission from 1978 to 1980, and I have only the greatest respect for the work of the Commission and the people who both serve as commissioners and who devote themselves to the work of the staff.

Having said that, I am now a state court judge, or I sit on the state court. My view of these things is mostly shaped from that direction. Although from time to time, I get matters before me that require me to sort of put my SEC staff guy hat back on to examine the SEC rules, and to see how to make them work with state law.

John has tried now to limit my opening comments to one issue, and I will address that issue, but I think I will mention another one as well.

The first is really an observation that it is to my mind anyway somewhat anomalous that at the time the Commission was examining the whole question of whether or not to adopt a very complex system of proxy access that the interpretation the staff took of one of the sub-rules of

14a-8 precluded from inclusion in company proxy material proposals to adopt by-law amendments at the corporate level, company by company.

That would have included, for example, proposals to establish a different system of election at the corporation.

The prior panel talked about the state law issues raised by that, and I think at the end, there seemed to be an agreement, even Frank Balotti seemed to be agreeing, that a by-law that was simply process oriented probably would stand up under the conflict between 109 and 141a.

Maybe more question about ones that had financial implications, but those are all questions that can be and some day I guess will be addressed and answered by state courts, and in particular, maybe first and maybe not, by our court and by the Delaware Supreme Court.

The rule that the Commission has keeps those matters off the ballot. At the same time, the Commission is thinking about adopting or had been thinking about adopting this very complex "one size fits all" system.

It just seemed in great tension with the normal state laboratory sense of allowing corporation law and state corporation law to work those problems out.

I think the Commission really would do well to examine that rule or the staff's interpretation of that rule, and if the rule needs to be amended, to do so.

I will just also mention something that Vice Chancellor Strine said at the end of his remarks about whether or not there is a tension or conflict between state law requirement that companies hold annual meetings and interpretation of Rule 14c that prevents companies that are delinquent in their public filings from soliciting proxies.

I know that is not why 14c was adopted. Section 14c was adopted to prevent companies from having meetings without soliciting proxies. If you go back and look, that is what it was all about. It is being used by the staff, because of the way it is written and interpreted by the staff, to prevent issuers from soliciting proxies when they don't have certified financial statements.

A problem I suppose a few years ago might have been less rampant, but at the moment, given the option of back dating problems, it is a problem that is widespread, and really, I think, does call for some attention by the staff and the Commission to work out a system in which companies' managements will be able to have meetings and issue proxy material and even solicit proxies with the proper disclosures.

Maybe as Vice Chancellor Strine suggested, some penalty against what management can do, and perhaps also to have some other benefit to the shareholders who wish to have a meeting and wish to be able to elect a new board of

directors, at a time when one might perhaps -- in the worse of these cases, when it is the most important time for the shareholders to be meeting for that purpose.

One observation. I had a case a few months ago or six months ago in which a company which did not have certified financials, it was a very small company that owned a cell phone company in the Republic of Georgia, not the State of Georgia, the Republic of Georgia.

They wanted to sell their cell phone business. It was their principal asset. They were advised that you can't have a meeting to do this. What we are going to do, even though you are not insolvent, we are going to put you in bankruptcy so that you can hold a meeting under the supervision of the Bankruptcy Court.

The effect of that was to give the preferred shareholders rights in connection with that decision which they did not have under the company's charter or under state law.

It really had a very deleterious effect on the rights of the common shareholders. I told them to come back to the Commission and try to get an exemption. I ordered them to do that. In the end, the deal went away and the issue wasn't resolved.

It is something that I think needs to be addressed by the Commission.

MR. JOHN WHITE: Before I turn it over to Professor Langevoort, just to comment. What you are suggesting is that we allow the solicitation of proxies when the financial statements that are out there cannot be relied on and the company is in the middle of a restatement and there are no available financial statements?

That obviously presents an issue and there is not a clear answer.

VICE CHANCELLOR LAMB: It is a situation which can persist for years; yes.

MR. DUNN: I would say before we move on, the interaction between 211 and 14c and 14a-3 is truly a rock and a hard place situation for us, as I think you appreciate.

You said they don't necessarily conflict, but you can see from our side, it is put in a tough spot. What we generally try to do with folks is we have not had a situation yet that I am aware of where absolutely push came to shove.

In the situations we have, they have settled or they have agreed to do something and then they didn't meet the situation they had, and at the same time, when we have done it and we have recently had discussions with a few folks on this, and you are exactly right. It can't have the effect that it would have if read literally, you are dead right.

We have actually had some conversations with folks where we think push it going to come to shove and we need to

come up with something. I could not agree with you more that we need to find a flexible way to apply it.

VICE CHANCELLOR LAMB: Marty, I would urge you, allowing the company to solicit proxies may be the farthest out thing you could do. I am told by people who come before me that you will not allow them to call a meeting. The meeting is supposed to be called by the management. You will not permit them to have a meeting.

MR. DUNN: No. I think that is what they tell you we tell them. We can't tell them whether or not they can have a meeting. We can tell them if you call a meeting and solicit proxies, and don't satisfy the proxy rules, you have a problem, which is what we do, and then they take that to mean that they can't call a meeting.

CHAIRMAN COX: Let me offer a suggestion as Chairman of the meeting.

MR. DUNN: Thank you.

CHAIRMAN COX: That we note that this 14c problem having been raised repetitively is a serious one and a real one that we need to deal with. We will by all means do so. It is at least germane to what we are talking about here because we are talking about the importance of the annual meeting of shareholders. Let's move on.

VICE CHANCELLOR LAMB: I am all for that.

MR. JOHN WHITE: Professor Langevoort.

PROFESSOR LANGEVOORT: Maybe the best way to start this is to pick up on some things that were said in the first panel and build.

If you start with the analogy that the Commission has used, at least since the 1940s, that what we are trying to do in 14a is create as much parity between the person attending the meeting and the people who are forced to vote by proxy, cannot attend the meeting, what you are dealing with is solving two problems.

When we teach shareholder voting, I think we all focus on these two problems rather considerably. One is informational, and that, the Commission does very well at resolving. The other is the collective action problem, that it is costly and there are free rider problems, there are a whole bunch of things that stand in the way of shareholders, when you are talking about 10,000 or 100,000 of them, acting differently from the way a small group of people sitting in a meeting would.

I have always thought the Commission's authority, Section 14a, is a legal matter, and can very nicely be summarized as the Commission has been given the power by Congress to help shareholders solve the informational and collective action problems associated with exercising their rights.

You posed the question what has been the effect in

the last 50 to 60 years of the particular rules that the Commission has put forward.

There are two sets of events. Again, I think both were raised at least obliquely if not directly in the first session. Effect number one, there are two provisions, 14a-7 and 14a-8, access to shareholder lists and access to the ballot, that are subsidies.

They provide a mechanism by which the cost of communicating and the cost of putting an issue forward is much lower than it would be without those rules.

With respect to those, simple economics teaches that the effect is going to be very predictable. Behavior will seek out the lowest cost mechanism of pursuing what you want to pursue.

If you have a cheap access to the ballot, as opposed to other mechanisms for putting an issue on and trying to rally shareholders, you are going to pursue it.

For example, Leo Strine mentioned that to this day, we still do not have a square ruling by the Delaware Courts on the appropriate relationship between by-laws and shareholder rights, the tension we have been talking about.

Yet, because the Commission has drawn that line in exception number one that shareholders can't exceed their powers in state law, there has been immense attention by the legal community, academic community, this is an obsessive

issue, the by-laws issue. That is just an example of the Commission having drawn that attention to that by the way it has written the rules, because that is where the subsidy is. Therefore, attention has moved in that direction.

With respect to the subsidy issue, of course, behavior has followed it. It has avoided those places where the expenses remain heavy.

The other kind of issue that we need to talk about and it only came up briefly in the first session today, is the opposite effect. The Commission's proxy rules also have costs imposed on those who would exercise shareholder rights.

The costs associated with preparing a proxy statement when a proxy statement is necessary. The fear associated with 14a-9 when opening your mouth may expose you to the risk of liability. The group issues under 13d as well as the proxy rules on when you have become a force that triggers the laws.

Those are costs that weigh on the process. I often believe that one of the justifications for fairly strong SEC subsidies, ala my first group, in helping out the process of shareholder exercise of rights, is the fact that the Commission has also imposed costs.

If we are going to get a reasonable degree of shareholder democracy and an active shareholder voice in the public corporation, we have to be very sensitive to that

whole group of costs.

My bottom line answer, and maybe this tees it up nicely, is when you think about the proxy rules in terms of their dollar impact, the fact that behavior follows those incentives should surprise nobody.

MR. JOHN WHITE: Let's see if we can focus first on the impact on binding proposals and put off precatory proposals and non-binding proposals for a moment, just to try to separate the two.

Professor Fisch, can we start with you on the binding proposal side and impact?

PROFESSOR FISCH: Thank you. I am not sure I can strictly adhere to that separation, but I will try.

Your first question was on the effect of the Federal proxy rules overall, and I think the comments that we have heard so far, they make it pretty clear that the Commission has largely taken over regulation, not just technically of proxy solicitation but of shareholder voting.

This had a couple of effects. I think it has pushed us in the direction of certain kinds of shareholder voting, substantive issues, that shareholders vote on precatory resolutions, that we favor precatory resolutions, the social policy exception to the ordinary business exclusion pushes us toward more social policy proposals and for a long time, pushed us away from arguably corporate

governance proposals dealing with things like the voting process, executive compensation, independence of directors and so forth.

At the same time, we take certain things off the table, as Vice Chancellor Lamb said. We don't get the opportunity for courts, Delaware Courts in particular, but courts and legislatures to determine the appropriate balance of power, the extent to which shareholders should have voice on a lot of binding -- as Leo said -- things that count.

When I heard some of the discussion in the first panel, it struck me that we were aiming a little bit too low in the effort to solve this.

We talk about the fact that we don't want shareholders to micro-manage the company. I think we also don't want the Commission to try to micro-manage the voting process. Why don't we want that? Because it is a delicate balance between how much power shareholders should have vis-a-vis directors and management.

It is a balance that may change in response to the rise of different groups, different types of institutional investors, the effect they have on the process, the effect which the power of certain groups either reduces the agency costs that we are worried about, or creates other agency costs, agency costs between shareholders and so forth.

The courts and the state legislatures are really in

an ideal position to weigh that balance. The Delaware Courts have traditionally done this in a very incremental way.

If you think about the takeover era, the Commission considered and Congress considered trying to find the right answer, solving the policy problem.

What the Delaware Courts did is they took a little step in this direction, they looked to see what is the effect on the market. They took a little step, some might argue, in a different direction, but they tried to do it through this sort of step-wise approach, rather than coming up with the absolute right answer.

We have the state law system and the company specific system. It gives us a real opportunity to do that.

In terms of getting in the way, one of the places that we are getting in the way is with binding proposals, to the extent that we have a rule that prohibits a company from prohibiting policy oriented proposals or establishing a higher minimum threshold for shareholders to introduce proposals, we are getting in the way of the ability of companies to experiment and then the ability of the Delaware Courts and the legislature to evaluate that experiment and see does it make sense. Is it consistent with the agency issues that the Delaware Courts have addressed in the Blasius case. Are they getting it right or are they going too far?

I will stop there.

MR. JOHN WHITE: Mr. White, do you want to give us your views on this?

MR. TED WHITE: Yes. Let me just add my thanks for the invitation. It has been a very thought provoking conversation, and hopefully we will keep up that effort on this panel.

First, to your overall question, as a practitioner and somebody who has been in the position of using proposals and part of engagements with companies, responsibilities for voting a very significant number of proposals, I have sort of seen all sides of it.

I certainly understand where some of the frustrations in the system come from, and it is not perfect. There is no doubt about that.

I could not emphasize strongly enough the value, the long term value to the market that the SEC has provided in a level of consistency and a role as an arbiter and in setting some of the standards for the proposal process.

I think you are right to make a distinction between binding and non-binding and look at the two, and clearly the Federal rules have facilitated more non-binding, but I have to admit I sort of bristled a little bit at the first panel in that I had the distinct impression that non-binding proposals are second class citizens at best and have no value.

I think that is wrong. They are distinctly different. I would not argue with that, and certainly, binding proposals are more direct to very significant governance issues than probably more short term, intermediate term performance issues.

Non-binding proposals, I think, have served an unique purpose in our market in which they have been this almost incubation tank for what have turned out to be over the course of a decade best practices.

Some of the things that shareholder proposals a decade ago were putting in were considered somewhat of a joke, frankly, and yet they have matured to the point through a form of public debate and precatory proposals to the point where they have become accepted.

I think you see that even with some of the proposals right now, as they quickly mature and they focus on the things that the market will tend to accept.

One of the other things that I sort of took notice of out of the first session is we still have tended to have a focus in the last couple of years on the regulatory and legal process as a governance, sort of the primary governance tool, and even the debate today is very focused on the legal issues.

There is a whole other element to the market's oversight, and that is the active manager, the role of the

owner.

I loved the exchange there. I would certainly associate myself more with Commissioner Campos' comments on sort of the role of the owner. I view it as extremely valuable.

Again, the governance of systems and institutions, I think Vice Chancellor Strine was correct, you have to look at that. There are a lot of moving currents in that. It is also an effective tool. It is separate and distinct from the proposal process.

I think we make judgments about the proposal process and its value based solely on the type of proposals or the numbers that come out in the public that we are missing a big part of what goes on in the marketplace.

From my personal experience, I probably left, I am going to guess, less than ten percent of the proposals I ever put into companies on ballot that anybody would have ever seen. If you have judged my actions based on the number of proposals, even the type that have come, you are missing most of the picture.

I think from the academic standpoint, they have been terribly frustrated with really understanding the interaction between owners and companies, and they are making judgments upon proxies in some cases that are weak proxies for how that actually happens and how we influence each

other, frankly.

I think the markets and active owners are unfortunately a somewhat under utilized tool for effecting long term behavior. I do not like the characterization that hedge funds are something you can identify as all types of investors, lump them in a pool and consider them all to be short term. That is simply not true.

Some of them are short term. Some of them are long term. Some of them are intermediate term. That is the way markets work.

John, I am afraid I am probably very guilty of drifting from your question. Just to reiterate, I think that your influence in this has been extremely powerful. I have a lot of respect for what you have done at the staff.

I realize that Marty and the folks that work on that probably age in dog years in the few months they have to go through these, and it is not a pretty job. It has helped.

I think even from an issuer standpoint, having some level of consistency has helped.

The comments in the last panel that your interpretations have evolved, how could they not have evolved? You have to evolve with the markets and you have to do it in a responsible manner. I think largely you have done that.

MR. JOHN WHITE: Staying, if we can, on again the

binding side, Mr. Wilcox, as a large investor can you give us your perspective of where the federal proxy process is affecting again binding proposals?

MR. WILCOX: Yes. Let me start first by just talking a little bit about how TIAA-CREF views the rules in the federal proxy process. It is a very, very important tool for us. Vice Chancellor Strike said earlier that he's unhappy with the way that some institutional investors brag about the fact that they have separate voting and investment decision-making.

That's the way TIAA-CREF works. We don't use -- we don't look at government issues when we make our investment choices. We are largely indexed, so we own everything. We have over 6,000 securities in our portfolios.

But as soon as we become an owner, we view our responsibilities as owners very seriously. And the group that I head at TIAA-CREF is responsible for looking at governance issues and for voting our shares in all of these companies.

When economic issues are first and foremost, we go and speak to our analysts and our portfolio managers. It's not as if the economic issues are completely separate. When our governance -- when we're looking at governance issues or issues of shareholder rights, we are always looking at the economic impact of those issues.

I have set down here electronically a copy of our policy statement on corporate governance, which has just recently been revised. And it reflects the thinking of our trustees. And you have to recognize that large institutional investors have trustees behind them, and these individuals view their responsibilities with a great degree of seriousness. They are fiduciaries.

And so when we look at our voting responsibilities as owners, we take them very seriously. And we have made a very strong effort to integrate our concerns about shareholder rights, our proxy voting powers, and the ultimate economic objective that we are trying to achieve for the 3.2 million individuals whose retirement assets we have.

Now, often it is said to us, well, gee, TIAA-CREF is very special, and isn't it a shame that more institutional investors aren't like TIAA-CREF. I don't really believe that that's an appropriate comment at all. I work with a lot of other institutions, and sometimes there's a little bit of good cop/bad cop going on.

We take advantage of the more aggressive tactics of some of the activist investors to seem more reasonable, and that enables us to get in the door a little bit more easily and have a substantive discussion with the board and managers of a corporation rather than getting instantly into an adversarial relationship with them.

It works very well. But there's a lot of collaboration that goes on amongst different types of institutional investors, and even special interest groups. We work very closely with some groups who are advocating issues such as human rights, Darfur, the environment.

So in general, we find the proxy rules to be a very, very important part of the way that we fulfill our fiduciary duty to those individuals who have entrusted their assets to us. It is a major part of our job, not just picking the stocks, but monitoring the behavior of the companies and making sure that they are well-governed, and taking action when there is a problem.

With respect to binding versus non-binding proposals, we rarely have to end up submitting a shareholder resolution. We use them. For example, this fall we submitted a majority vote resolution, non-binding, at ten companies. And they were all companies in which we held large amounts of stock. They were all Delaware companies. They were all companies that had not taken voluntary action with respect to a majority vote in director elections.

In the end, we had meetings with every one of them, and they all adopted bylaw amendments. It didn't matter whether we had submitted a binding or non-binding resolution to them. What was important was a process of discussion that ensued, and one that ultimately led to a change by the

company.

This is a very important part of the process, and I urge the Commission to recognize that it's important to look at the overall impact of this process and not to dwell too heavily -- although it's obviously part of your job to do so -- on the distinctions between federal and state law. Those distinctions don't matter as much to us, as a practical matter, as they do to judges and lawyers, and I guess to regulators as well.

We prefer non-binding resolutions. When we are looking at resolutions that have been submitted by other shareholders and we are trying to decide how to vote on those issues, we prefer them to be non-binding because it is very important for us to not micro-manage the internal decision-making of the company and to focus primarily on the board of directors as our elected representatives.

So we look to the directors as the group whom we want to hold primarily responsible for the preservation of our rights and for looking after our interests. We don't want to go down into the next layer of influencing the behavior of management. We want the directors to do that. And we also do not want to interfere with the flexibility of companies to organize themselves in ways that they think are appropriate for their own business situation.

We are extremely happy with the new disclosure

rules with respect to executive comp, but what we are happy with in those rules is the opportunity that they create for corporations to tell their own story, to write a narrative in which they explain to us how their plan works, how it's performance-based, how it is responsive to the particular business needs of the company at that time, how it is customized to the particular requirements of their business, and how it is ultimately going to drive long-term value creation.

Now, we're not finding that narrative this year. I don't think we've found -- we're looking for them right at the moment. But I think what's happened is that most corporations have focused on getting the numbers in the right boxes and organizing themselves -- and the outside counsel have been writing a lot of these things -- have found that companies do not have a compensation philosophy, but they will have one in a year or two.

So we're very optimistic. This is the way we think that the proxy process ought to operate, in that it allows the managers and directors of the company to communicate to shareholders, and it gives the shareholders an opportunity to respond in response to what management has done, to tell them if they think they've done a decent job or not, and to engage in a discussion that is going to ultimately improve the long-term performance of the company.

MR. JOHN WHITE: I'm going to avoid discussing the new executive comp rules.

Commissioner Atkins, you had a question?

COMMISSIONER ATKINS: Yes. I guess just in response to what John and Ted were talking about, the SEC is a disclosure agency and, for example, we want to try to have things done in the open. And part of our rule regarding nomination of directors requires a company to disclose shareholder groups that have approached the nominating committee with respect to putting forward certain nominees.

And here you're talking about basically large institutional investors, who have no duty to other shareholders, pushing behind the scenes particular measures that we've seen at company after company, when these are actually put up for a vote, they fail.

But you're saying that because of your behind-the-scenes maneuvering, you've been able to actually have the company adopt those or take steps. So I'm just curious how that jibes with our disclosure regime, and isn't that something that perhaps we need to have some more focus on through our proxy disclosure system.

MR. WILCOX: Do you mean disclosure by us, or disclosure --

COMMISSIONER ATKINS: No. By the company, or how these things came into effect, or what the behind-the-scenes

maneuvering may be because other shareholders obviously are not clued in to that.

MR. WILCOX: If those ten companies had not agreed to adopt bylaws, bylaw amendments -- which were authorized also under Delaware law; there had been some changes, and there had been a fair amount of public discussion about this issue, as I think you know -- if we had reached an impasse with the company, we would have left our resolution in the proxy and it would have been fully disclosed, and there would have been a shareholder vote on the resolution, and the outcome of that vote would have then influenced how the company -- what the company chose to do.

So I think that also on that particular issue of the majority vote in director elections, the case had already been made -- and I think it was an easy case for us to make; there was very little resistance to the adoption of the majority vote, at least as set forth by us -- but I don't think there was any sacrifice of disclosure there or any lack of transparency because our style is to meet privately with companies.

Because it's easier for them, and we don't want to shame them. We don't want to create a public discussion as a way of pressuring companies through publicity. But we will do that if our discussions do not then achieve a negotiated result.

COMMISSIONER ATKINS: Well, but it still is sort of like arm-twisting because in other companies, these sorts of things have failed. And so you are using your particular influence, the threat of shame or whatever it is, to try to get the company to acquiesce to your position. That essentially is what it's come down to.

MR. TED WHITE: If you don't mind, I'd actually love to respond to that because you raise a point that I kind of wanted to discuss. And that is, on a macro sense, how do you judge the legitimacy of proposals? You kind of touched on that, that there seemed to be a sense that precatory proposals are illegitimate because they deal with sort of silly policy issues.

But first to your very specific question. To show you -- to demonstrate to you what I see as the typical pattern of respect for the barriers between the things that shareholders should and could be involved in and what management should and could be involved in, and how we would tend to escalate pressure, if you want, during a relationship.

Every one of my engagements with a company that dealt with something that would be disclosed, like the recommendation of a director, we started with the types of qualities that we want to see in a director. So our discussion and recommendation to them would start, number

one, around tell me how you evaluate the performance of your board and the individuals, and tell me how, over time, you assess the needs and bring in the type of skill sets that you need to have.

Surprisingly, a lot of companies fail that question, or have historically over the course of the last decade. And one of the things that we bring is, let me tell you as an independent observer of the company, okay -- I don't hold any -- there's no way they hold a sway over it; I can tell them what I really think -- let me tell you what I see.

And you can tell me that, well, it's just the disclosures are wrong, and you don't really understand it, and we'll do a much better job of telling you what the skill sets are. Or in some cases it's been, you know what? You're right. We have a hole. We have an existing hole or we have something that we can't deal with in the future. And that's been companies that have grand-scale plans to expand internationally and have absolutely not international experience. It's been things as simple as that. Okay?

And so that's where our involvement has been. And I think that you would recognize that that is a responsible role for a shareholder to sit and push those questions on them and let them deal with them. It has not been prescriptive to say, I want Mr. Langevoort on your board and

I'm going to pressure you until you do it. Now, there are strategies that get that far, and that's sort of a very different environment than what we've been talking about.

COMMISSIONER ATKINS: Although that has been your experience, and I'm sure there are lots of other examples of behind-the-scenes pressuring that might not be so salutary as what you're talking about. But enough said.

MR. WILCOX: I think the arm-twisting is actually not in the behind-the-scenes talking, but is in the actual proposal. It's something that we want to have happen. We want dialogue between companies and shareholders. And when we go and knock on the door, half the time what we find is that we haven't properly understood the issue.

In the case of these ten companies on the majority vote resolution, some of them had started a process of a voluntary arrangement that fell short of what we recommended in our own policy and which we actually had adopted ourselves. But we still agreed in those cases that that would be satisfactory for the moment.

So there was a fair amount -- I mean, I would not characterize it as a smoke-filled room, this discussion. I would characterize it as kind of throwing a softball rather than a hardball at a company first as a first stage of what ultimately we all agree is a public process that shareholders are certainly entitled to use.

COMMISSIONER ATKINS: I just want to leave it -- I mean, to me it's just sort of a tyranny of the minority, frankly. And a lot of these things probably -- maybe not the one that you mentioned, Ted, but some of these others, when they are actually put up to a vote, they fail at other companies.

But yet because of this behind-the-scenes maneuvering, you have been able to achieve something through which -- I mean, you would not be able to achieve in a more public type of process. But anyway, enough said. Thanks.

MR. JOHN WHITE: I guess I'd like to, if we could, maybe on this topic, while we're still -- before we move over to the non-binding side, any comments from the judicial and academic end of the table before we -- Vice Chancellor Lamb?

VICE CHANCELLOR LAMB: Certainly a couple things that come into my mind. And one is -- and again, I'll have to say, John, I'm not sure that it exactly fits into what you just asked me --

MR. JOHN WHITE: You mean that you're at the judicial and academic end of the table, or something different?

VICE CHANCELLOR LAMB: I guess I'm just not used to being asked questions.

VICE CHANCELLOR LAMB: But I just wanted to put on the table a couple of problems that do seem, at least from

our point of view, to be creeping in. And one of them is that there's some evidence that really because of the way the CD or the depository trust process operates and the broker -- what is that, the ADP brokerage counting votes thing operates, and I think it's subject to SEC regulation -- it appears that shares of stock are voted two times and even three times in the same election.

And it's not something that state law can do anything -- we really have any way to do anything about. But I would urge the Commission to think about it and see what can be done from your point of view. Because I do think you can do something about it.

For example, shares that are held at Merrill Lynch from my account may be loaned by Merrill Lynch to somebody else, who votes them or who sells them, who may vote them and then sell them. And the person who buys them might vote them again. And so long as the total number of votes that are being added up inside all these positions don't exceed the number of shares in the position, the votes count or can be counted.

I mean, I think that's a real problem. Someone can actually go out and borrow 10 million shares and vote them -- never own them, but vote them. And the votes -- so long as there isn't an over-vote, the votes can be counted. And I do think that is something that could be dealt with.

I wanted to ask, with all the new majority voting bylaws that are coming into operation, is the Commission requiring those companies to put "vote for" and "vote against" on the proxy?

MR. JOHN WHITE: Wait a minute. I thought I got to ask the questions.

VICE CHANCELLOR LAMB: Marty, are you making people say "vote against" or "no"?

MR. DUNN: I don't make anybody. The rules do. The way the rule works, if it's with holds versus majority, then you do the abstain and it counts against it. But if it's a true majority vote where you're voting for or against, then it says "against." 14a-4 contemplates both, and it depends on how it works.

VICE CHANCELLOR LAMB: But are you making them actually print their proxy cards that way, "vote against"? Because I remember I had a case a couple years ago where the company, for some reason, had a bylaw that required a majority vote to elect.

MR. DUNN: Well, if the vote is truly for or against, then that's what it has to say. If it's not truly for or against, then it doesn't. That's the way the rule works.

Steve, while I have you, can I ask one question? It strikes me on the majority vote -- and I know you're not

used to this, and you'll say something else anyhow -- but is part of the -- and John keeps talking about majority vote and the effect it's having.

Is part of it -- and anybody else can answer this -- Delaware changed Section 216 to say that if shareholders adopt a majority vote, then only shareholders can do away with it. That was mentioned on the last panel.

Is one of the reasons why there's a particularly leveraged effect this year the fact that boards want to get ahead of that and adopt their own, and so they're more willing on this topic than on others?

VICE CHANCELLOR LAMB: Well, you're not really asking me. I have no idea.

MR. DUNN: Okay. I'll ask anybody else, then.

MR. WILCOX: Well, you mean are they companies trying to do it in such a way that the shareholders don't have the --

MR. DUNN: They'd much rather cave into pressure and adopt their own.

MR. WILCOX: If they cave into pressure -- and I'm not saying that that's the right term -- but if they adopt their own, then they get the flexibility to amend it. So isn't there a little more leverage you have when you bring it to the table?

MR. DUNN: I don't think so. I'm not that cynical.

I think this is an issue in which the substantive arguments in favor of a majority vote won out, and the technical concerns were pretty minimal. It's what's done in almost every other country of the world, and we require a majority vote on every other item presented for shareholder approval. I just think people realized it really was not worth fighting over.

PROFESSOR FISCH: If I could, I wanted to follow up on some of what Vice Chancellor Lamb said about disclosure because I think it kind of nicely highlights the distinction between the disclosure and the sort of market development area where the Commission has real expertise, and some of the stuff we've been struggling with about, well, gee, how much voting authority should shareholders exercise?

I think the whole growth of intermediaries, both intermediaries on the ownership side, the institutional investors, and intermediaries in terms of who's voting the stock, who's passing on the information, who's dealing with the mechanics of the voting process, who's dealing with the tabulation of the votes -- I think that's something the Commission really has to look at more carefully.

As I understand it, the contractual provisions and the regulatory system and the role of the SROs really makes this something of a mess and creates a whole layer of agency problems about who's going to make sure that the process is

working properly.

And if we have majority voting, if we have -- and see, I can tie this to binding resolutions because if we have binding resolutions so the shareholder vote really matters, I think we care a lot more about getting the shareholder vote right.

And I think these days it's very hard to be confident that we're doing that. It's hard for institutional investors to monitor the process and even be sure that their vote has been reflected accurately. And then you've got issues with loaned stock and empty voting and multiple voting and so forth.

So I think that's a real issue, and I think really that's within the heart of the Commission's expertise.

MR. JOHN WHITE: Yes. The reason I'm not taking the bait to ask more questions on this is that as Chairman Cox mentioned in his introductory remarks, the next of our three roundtables is going to be focused particularly on this issue. So I was not playing it out as each of you have commented on it.

I guess before I move to non-binding proposals, to the extent we haven't already discussed them, any questions from the Commission before we move to the other -- to the next topic?

Well, Professor --

CHAIRMAN COX: Yes. Actually, I think I have one sort of overarching question because these have all been useful comments. And I wonder if we could just ask the participants to tie them back to the thematic question, which is: How much of what you've described is a function of the proxy rules as you find them?

We've described a little bit what's going on. One of the topics we really want to dive into is how much of that is a function of the proxy rules having an influence on the process. And I think, Mr. Langevoort, you mentioned to us that to the extent there's a subsidy involved, obviously that drives behavior.

Anything else about the proxy rules that you think is responsible for things being the way that they are?

PROFESSOR LANGEVOORT: It's a focal point. I guess the game to play is imagine you repealed all of the proxy rules. What kind of -- in today's institutional environment --

CHAIRMAN COX: That's actually an excellent question. I mean, if we didn't have them, what would happen?

PROFESSOR LANGEVOORT: Yes. Where would behavior be different from what we -- first of all, I suspect that behavior would be less different than we might think because of alternative technologies and methods of communication and the growth of alternative ways of exercising influence. I

suspect they'd be pretty much in the same direction.

I do think, and I agree with what Ted and John have said, that the ability to put a precatory vote up creates a salience to the issue. It attracts media attention. It's a nice way of framing the issue. And if you didn't have the subsidy, you'd have investors, I think, looking in different directions for ways to accomplish the same thing.

But again, salience, subsidy, that's really the economic effect of the rules we have.

CHAIRMAN COX: Professor Fisch?

PROFESSOR FISCH: Yes. If I can just add to that. There's one more thing, and that one more thing is legitimacy. By having rules that say, this is a shareholder power, this is a shareholder right, in essence the Commission is saying, we want shareholders to act this way.

And I think that's a big issue with shareholder access to the proxy and shareholder nomination of directors. I think there are classes of shareholders -- and it's not true and this doesn't apply to hedge funds -- but I think there are classes of investors who look at the Commission's continuing to revisit this issue and not passing a rule. And they say, okay, this is a message. We're not supposed to be doing this.

And I'm thinking in particular -- because I've done some empirical research in this area -- I'm thinking in

particular of public pension funds. There's a dramatic difference between public pension funds, activity, participating in the shareholder nomination process -- and I'm not talking about a formal nomination; I'm talking about any role, informally suggesting people, meeting with management, running by names, whatever, versus serving as lead plaintiff.

They think about it completely differently. Why? Well, there are a lot of possible explanations. But at least one possibility is Congress said in the PSLRA, we want public pension funds to serve as lead plaintiff. We're legitimizing this, and public pension funds are the kinds of institutions that respond to that message.

I think the Commission, at least thus far, has sent the opposite message with respect to shareholder nomination. And I think it's something that you all should be conscious of when you think about how to structure the rules.

MR. WILCOX: With respect to the choice between acting as a lead plaintiff or acting through the proxy process, we much prefer to try to address issues before the war has been lost and all there are are some crumbs to pick up.

We don't act as lead plaintiff. We have a lot of discussions about it internally, and we look at the cost to us and so forth. But we prefer to act earlier. And the

proxy rules are a very important route for us. And I think our trustees would emphasize that their duties as they see them in terms of the proper management of the assets entrusted to us and the focus on long-term performance of the companies whose stocks we own is enhanced by our ability to operate through the proxy rules and to influence the behavior of companies.

So it's a very important issue for us. There is obviously some tweaking. Sometimes Rule 14a-8, particularly the ordinary business issue, will require that a resolution has to be drafted one way rather than another. And I think we've seen some this year dealing with the shareholder advisory vote have been drafted in a way that's slightly more awkward than we would like to see them simply because the proponents were advised that they would have an ordinary business resolution if they did it in a simpler form.

So those kinds of tweaks I think are of only minor importance, but they are ones that you could address, certainly.

MR. JOHN WHITE: Mr. White?

MR. TED WHITE: I would agree with some of the comments that the rules facilitate in particular the use of precatory proposals. But I think there's a number of other reasons why they have been more prominent. And as John kind of articulated, one is that, frankly, they're considered less

intrusive. And so it's kind of -- it's one reflection of a responsible way to have some influence before you need to bring out the bigger guns. So that is part of the equation.

And I think the other thing, to get back to Commission Atkins' question earlier, that's an interesting topic here is: Who is the right to judge of what is legitimate? For us to propose and to re-propose, obviously the thresholds are relatively low. And so it's easy.

But I for one don't think that that's a real great role for the Commission to be in, the business of saying which proposals are the best ones for the market to submit. I think that's actually better done by the market. And I think what Commissioner Atkins was getting at is proposals that come in and lose, should they continue to be able to propose those?

And I think the market is the perfect place for that to be judged. And bad proposals lose. You're right. Things that -- that's the right audience to judge the economic impact of proposals. And I don't know where the right thresholds are. I know it's not 45 percent to resubmit and I know it's not 1 percent to resubmit, but somewhere in there.

But the market, I think, is the good place for that. I think it's a very difficult place for you guys to be in to make those judgments.

MR. JOHN WHITE: Mr. Casey?

COMMISSIONER CASEY: Yes. If I could just follow up with a question on that.

Recognizing that the view is that the market would be the most effective means of testing that legitimacy, how concerned should the Commission be, though, if there are those circumstances where you've identified as strategies where it's -- this is our guy, and you're -- and again, appreciating the value that comes from the kind of dialogue that you believe the proxy rules provides in resolving issues earlier or without having to put forward a proposal in the proxy, how concerned should we be about the disclosure aspect that doesn't allow that kind of testing in the marketplace?

MR. TED WHITE: I'll take the first crack at it, and if John wants a chance, too. But the first panel, I think, was very clear in that -- while maybe not to Professor Bainbridge's liking as far as it would go.

But the current model is already a director supremacy. And as much as the newspapers would make you think that me as the big mighty investor can make these companies do whatever I want, it is not true.

And they have a responsibility to say no, and they say no a lot. And it can lead to a public debate, and it can lead to a proposal. And I think that's the right mechanism. It's a great thing for the public markets to do. I will win

if my arguments are right and I will lose if my arguments are wrong.

And I like that test of legitimacy rather than, well, I'm a million shareholder and Don's a hundred shareholder; therefore, I'm much smarter than him. That's wrong, and I think those things that are set upon size are the wrong element. And I think that most of the active managers in this strategy, if you look at them, are very focused on the quality of their arguments and they tend to do better. And that's right.

Now, as far as disclosure, I would have no problem of companies willingly or even were required by the Commission to disclose that, hey, we had a conversation with a major shareholder and we debated about this topic. I think that would be perfectly healthy and I would have absolutely no problem participating in that disclosure.

Hopefully I answered your question.

MR. JOHN WHITE: Okay. So having learned -- oh, I'm sorry.

MR. WILCOX: I was just going to say, if you're talking about access now, we're talking about getting a shareholder-sponsored candidate onto the management proxy. I think we're at a very, very early stage of thinking as to how that ought to work or even if it should work.

Shareholders, I think, want the right in concept.

But I know I've talked to our trustees, and I don't get any sense on the part of our trustees that we want to be in the director search business or that we would even feel comfortable being involved in that process separate from the company and its nominating committee.

We certainly do not want to have our own representative sitting on the board because that would interfere with our ability to buy and sell securities, and it would create all kinds of issues for us. So clearly, we don't want to do that.

I think access needs a tremendous amount of careful thought. And as I suggested in a letter that I sent to the Commission after the AIG v. AFSCME ruling, I think that the shareholder proposal process is a useful way to test different approaches as to how that might work. But I don't think we're even close yet on an idea of how it should work.

MR. JOHN WHITE: Okay. So having learned my lesson the last time, we're going to start the closing part earlier this time. According to my watch, it's about three minutes each. And if you don't have enough to fill up your three minutes, tell us what you think the federal rule ought to be.

But we'll start with you, Professor Fisch.

PROFESSOR FISCH: Just briefly, I think the federal rule really should focus less on figuring out what at this particular time in this particular climate is the right level

of shareholder power and more on enabling a mechanism in which the market, the courts, the shareholder proposals, can sort that out.

I think the Commission will be much better positioned to evaluate questions like, well, gee, are there going to be too many shareholder proposals, are shareholders going to nominate unqualified candidates, will special interest groups take over, if we allow some experimentation and we don't try to judge at the outset and predict what's likely to happen. Because even between the time that we're sitting here today and the time that any rule or rule change takes effect, market developments could cause our production to be inaccurate.

And I think there are a lot of safety valves. We've talked about the safety valve of other shareholders having to go along, right, if it's going to be a binding bylaw. And then the shareholders have to approve it. But there's safety valves in addition to that. The market is one check. Another is the courts.

Another is the state legislatures. Right? The state legislatures might decide, gee, binding resolutions aren't the answer, or majority voting isn't the answer -- I mean, Delaware has decided the opposite way on that -- but so that it's not all something that has to be solved at the outset before we have that kind of information. And I think

the Commission really is very powerful in the statement that it sends about the kinds of experimentation and the kinds of innovation that are appropriate.

MR. JOHN WHITE: Vice Chancellor Lamb.

VICE CHANCELLOR LAMB: I completely agree with everything Jill just said, and I join in her remarks.

Going back, if I could, just for a moment to the question that the Chairman asked, I thought that the things I was talking about were all things that reflect how the federal rule works, are working now with state law. And I wanted to add one other thought, and I'll use this by way of summary, I guess.

When you focus just on how the proxy rules are affecting, say, contact between large shareholders and management, there's another set of rules that you have, the 13(d) rules that are also implicated in that process and are important. And I think it's important to take a look at how large shareholders -- and I'm thinking even in terms of people who own in excess of 10 percent of the stock -- from time to time file a 13(g) disclosure form rather than a (d), and perhaps are masking an intent to influence management.

So I would suggest you look at the (d) and (g) triggering points, and look at particular instances in which people have switched from a (g) to a (d) and at the same time proposed a slate of directors. One way of thinking about it

is, is more disclosure required of a (g) filer, for example, contacts with management or contracts and arrangements that have been entered into by a (g) filer for the purpose of or at least laying the groundwork for making a charge at a company because sometimes when the (d) finally gets filed, it's filed too late.

And if I could just -- one other thought on that is -- and maybe this is for your next panel -- I have seen situations where people who are actively engaged in a proxy solicitation with respect, say, to a merger don't have a (d) on file and don't disclose -- or do have a (d) on file and don't disclose short positions they hold in related securities.

And I think that's a weakness in your disclosure, and the case I'm thinking of, I guess, is well-known. But I even had letters written to me by counsel for this one stockholder who was urging me to do something because people who were long in a particular security might have some interest in conflict with other shareholders, at the same moment this stockholder was short in the security in a very significant way and didn't disclose that fact to me or publicly.

PROFESSOR LANGEVOORT: Quickly, a couple of thoughts. First of all, checks and balances probably is the best way of thinking about whether we need to expand the role

of institutional voice through any of the tweaking to the proxy roles we can imagine.

It does strike me that, although I appreciate Commissioner Atkins' concerns and agree with him with respect to many companies, there's a great diversity of companies. And there are many where the private benefits of control are still being extracted fairly aggressively. And if you don't empower some check or balance, then I think our only choices are through greater institutional voice.

Then the balance is going to get out of whack. Yes, it is balance. But we have to remember, the collective action problems associated with shareholder democracy are severe, and they haven't been solved yet. And the thumb on the scale I think still needs to be in favor of weighing shareholder voice a little bit more than it has been.

The other point I would make is I hope the Commission is not shy about its statutory authority to address these kinds of issues. As I said before, the solution to both the informational and collective action problem seems a fair way of describing what Congress wanted to give you. And it does strike me that as we think about the costs and the fact that the Commission is subsidizing in so many ways, it's already walking down the path of saying, where is the right balance?

We've talked a lot at Delaware. And I have a lot

of respect for Leo and Steve and the Delaware judiciary. But Delaware isn't everything, and I don't think the conversations we're having today that do occur in Delaware are occurring in every state around the country. I think the Commission is a place where some of the best thinking is going on on these subjects. And I think it's a fair reading of Section 14a and the right thing to do for the Commission to take a fairly bold leadership role in carrying out these responsibilities.

MR. TED WHITE: I agree with a lot of comments that have been made in summary here to date, and in particular, one of the concerns that I would have with the state, with relying too much on the state laws, is that it's an uneven playing field for us as investors because there's obviously a number of states with very different approaches to the proposal process, and we're forced with very different dynamics in different companies.

And the federal level proxy process and the ability to put in precatory proposals and its consistency has been, I think, a net benefit. And I know have an issuer later, and that would be a good question to ask Cary. But I'd even think while they have some frustrations with the proposal process, they would agree that the consistency has been valuable, and hopefully they learn from shareholder opinions over time on that. And I'll just close with that.

MR. WILCOX: Well, I approached this with the thought of putting together a wish list for the Commission. And when I thought about it, and I had a big laundry list of things, I realized that they all really could come under one wish, which is one easily granted by you but may be hard to implement, and that is transparency.

The process, as you will discover in the subsequent roundtables, has lots and lots of hidden elements in it. It's a black box. It's complicated. It's expensive. There's no audit trail. There's no end-to-end vote confirmation. There are all kinds of issues like that.

I would like the process to be transparent. And I think that is the way to make it achieve the highest level of integrity and fairness and one in which it will operate most smoothly.

The wish for transparency also extends to what Vice Chancellor Lamb was discussing, and that is information about the ownership of institutions such as TIAA-CREF. I think there needs to be more information, particularly as of record date, about the ownership positions and what's hedged, what's out on loan, and where these shares actually are. This is part of a wish for transparency in the communications process.

And as Commissioner Atkins suggested, we don't want to have back room deals going on. We would be very happy to

be completely transparent in our discussions with companies. I think that's a healthy thing, and there isn't, obviously, on the part TIAA-CREF, anything that's hidden.

But transparency is one of the fundamental principles of the federal securities laws. And I think it really holds the key to making this process one that we can all have greater trust in.

MR. JOHN WHITE: Okay. I would like to thank all of the panelists. We very much appreciate your being here. And we will now take a break, and resume again at 1:30.

Chairman Cox, do you want to --

CHAIRMAN COX: On behalf of the Commission, thank you to every one of our panelists. This was outstanding. And this is a good opportunity to say thanks as well to John and Marty for being excellent moderators.

(Whereupon, at 12:23 p.m., a luncheon recess was taken.)

A F T E R N O O N S E S S I O N

1:36 p.m.

PANEL THREE

NON-BINDING PROPOSALS UNDER THE PROXY RULES

MR. JOHN WHITE: Good afternoon and welcome back.

This afternoon we have two panels which will be taking a more in-depth look at non-binding and binding shareholder proposals. Marty Dunn will be taking the lead in

moderating the discussions this afternoon. I introduced him this morning, but I'll do it again.

Marty is the deputy director of the Division of Corporation Finance. He also has led the Division's efforts to respond to no-action letter requests in the 14a-8 world for many, many years, about 400 of them this year. I don't know how many in prior years, Marty, but I know it's a massive project every year.

So he's quite an expert on this topic. So Marty, I'll let you introduce the panel.

MR. DUNN: I will. Do you want to say anything? Are we good?

CHAIRMAN COX: Well, I want to welcome this panel formally. We're looking very much forward to learning from you. I want to thank our moderators once again. And I think the other commissioners will join us in due course, but we want to be punctual and respect your time as well. So let's get on.

MR. DUNN: As John said this morning, we talked a good bit about where federal and state law intersect and, more importantly, I think, for today's discussion, where they should intersect. And hopefully we'll get to that a little bit as we go along today.

But what I want to try to do in our panels this afternoon is really get a little bit more detailed on how

they intersect in practicality, and what we learn from them, and how they work, and some alternative ways we can go about possibly doing this.

So without wasting more time, I'd like to introduce our five. I'll start at the end. Rich Daly is the chief executive officer of BroadRidge Financial Solutions. I'm still getting used to say that. Welcome, Rich. Amy Goodman is with Gibson Dunn & Crutcher. Did I get it right, Rich? You looked at me like I was wrong. No? Okay.

Stan Keller is at Edwards Angell Palmer & Dodge. Cary Klafter, who is vice president, legal and corporate affairs, and corporate secretary at Intel. And Paul Neuhauser, who's a professor emeritus at the University of Iowa College of Law. Thank you all very, very much for your time. We've come across each other many, many times on these topics so that hopefully this will go well today.

What we're going to focus on first this afternoon is non-binding proposals. And I'd like to start off by just discussing the practical -- how people see them playing out in reality. And then I want to talk about how much they're a creature of 14a-8 or not.

So I think a good way to start is with Professor Neuhauser, which is: Your area of expertise, the area we see you come across our desks most often, is more with socially responsible investors. And my question for you is: Their

proposals go more towards behavior and ethics and less towards governance, as a norm. I'm sure there are exceptions to that.

I was just wondering: Your clients, what do they see as their motives and what do they see as the role of these proposals in corporate governance? I think that's a good place to start.

PROFESSOR NEUHAUSER: Well, I guess I'd answer that by saying that their primary objective is to make capitalism work better. If you think of the big economic machine, and there may be some areas where, as a societal matter, there's a clear clashing of gears -- that is to say, they're not meshing properly -- how about applying a little grease to try and make them work a little better?

The underlying idea would be that while they're all investing for a return -- I mean, you're talking about such things as the retirement plan of the Sisters of Whatever, or of the Methodist Church, or of socially responsible advisors whose clients are not going to stay if they're not going to get a market return.

But they believe that in addition to the return, that if some aspect off a given corporation's business is ethically questionable, morally repugnant, or something along those lines, the corporation may need some prodding to try and get more in line with broader society's needs and

understandings. South Africa would have been a classical example of that.

Secondly, the corporation sometimes may need some prodding to better recognize some long-term risks of operating in certain matters. The most classical example of that would be environmental stuff. Charitable proposals on environmental issues go back at least to 1973, long before we had the Clean Air Act, the Clean Water Act, and various other things.

You can think of it in some ways as sort of them acting as the canary in the mine, with some bringing to the attention of corporations some issues that are maybe long-term risks for that industry, that company, or the society, and asking them to take some actions, usually to change a policy or to report on what they're doing about a given perceived problem.

In my experience, SRI shareholders have frequently been ahead of the curve on that -- I mean, the environmental thing is one example of that -- and raised issues before they were generally recognized by the corporations. That doesn't mean that they're always right.

Just like anybody else, they may be raising an issue, and it may turn out to be a real issue, or it may turn out in the long run that they were wrong about that. There's no guarantee that because it's put in by a socially

responsibly investing group, that they're right on that given issue.

But the other thing I'd say on that is also that I would agree with what John Wilcox said earlier, that basically most of these things should be resolved in discussion. My view is that if the proposal goes on for ballot, it goes onto the proxy statement, there's been a failure either on the part of the company, or the shareholder, or both, because most of these things are things that should be able to be resolvable without going to the mat, i.e. going to a shareholder vote.

MR. DUNN: I want to follow this up with Cary in a second, but there's one thing. And you mentioned the canary in the coal mine part of this.

And that is: Both John and you have both said, we put these precatory, non-binding proposals in with the goal of getting a discussion, not so much going into the proxy. Is that the right role of the proxy process, or should there be something else necessitating those discussions other than the costly precatory proposal and everything that comes up out of it?

PROFESSOR NEUHAUSER: Yes. That's hard to say. I mean, what the 14a-8 does is allow for a threat, if you want to call it, that there will be some consequences if you don't talk.

Now, companies today -- and I was talking with Amy about this at lunch -- companies today are much more willing to talk to their shareholders. But maybe that's because of 14a-8, or at least in part because of 14a-8. And I was telling Amy about an experience in the mid-'90s, not representing an SRI group but representing an institutional investor, that had 9.9 percent of a company.

And the company simply wouldn't meet with them. So they got a shareholder proposal from them on the issue. And it was a corporate governance issue, not an SRI issue. And without the backstop of the ability to say, yes, we will ask the other shareholders to give their view on this matter, my guess is that there would be a lot less dialogue.

MR. DUNN: Cary? That obviously opens up to you. And we get a lot of non-binding proposals. We see them in letters from companies. And according to the things I read, there are about 1100 proposals this year alone, and I'd have to imagine two-thirds or three-quarters of them are nonbinding. You deal with their proponents all the time.

My question to you is: What's the company experience with it? What do you find thereafter, and how -- at the company level, when you get a proposal, what's the thought process? What do you go through in deciding whether or not to include it, whether or not to try to exclude it, whether to meet, how you go about it?

MR. KLAFTER: So we get all the possible scenarios that you can think of. You have people who come in and they talk with you. They want to talk with you. And we talk with everybody. That's our policy.

And what we find in a fair amount of circumstances is that if you talk with people and you educate them, you can come to some sort of a position which may involve no change at all in your behavior, and it won't involve any kind of new policy, but they will know more about you. Because oftentimes, as you might imagine, these proposals are coming in to hundreds of companies. And you're nothing special, and they don't know anything about you or your policies. So there's that.

You have people who submit proposals, and they won't talk to you at all. And this is oftentimes individual proponents as opposed to institutional proponents. You call the person up. You want to negotiate. You want to find out what's really behind all of this. And there's just no give and take whatsoever.

And at that point, you're basically thrown to either adopting the policy, or coming to you guys and asking for a no-action letter with respect to the proposal, or just putting it into the proxy statement. So the opportunity to negotiate doesn't exist.

And then we have circumstances where you get a

proposal before anybody has spoken with you. It's definitely an aspect of leverage. They drop the dime on you, and at that point you have to pick up the telephone and start talking. We would have talked earlier, but that's the first gambit.

And so sometimes maybe we'll adopt the proposal. Maybe we'll come to some negotiated middle ground. Or maybe we'll agree to disagree, and then once again we'll come and visit you, or we'll put it in the proxy statement, depending upon what it is.

So when you're thinking about the proxy rules and you're thinking about the behavior that's occasioned by the regulations, you have you have to understand that it's all different kinds of behaviors. You have people who are going through the step-by-step process. We'll talk, then we'll propose. But you have a lot of people who are just going to propose and not talk.

And you have a number of people -- apropos of the commissioner's comment in the earlier panel -- there's lots of dialogue with folks that does not involve any kind of formal proposals. And it oftentimes does not get up to the CEO level. It does not get up to the board level. It involves people coming in and saying, well, you have this environmental issue, and we want you to do this and we want you to do that. And maybe it's implicit or explicit that a

proposal will follow if you don't do something.

But very oftentimes, it's resolvable at a staff level. The people come in. You talk to them. You either don't change your behavior but they're satisfied, or you change your behavior and they're satisfied, and that's the end of the matter. And so it doesn't rise to the level of a proposal.

MR. DUNN: Amy or Stan, I'd ask you guys to follow up on that, maybe. When you have your corporate clients, how do you advise them when they get that kind of a proposal? Turn on your microphone there, Amy.

MS. GOODMAN: As Cary indicated, I think most companies would much prefer, if a shareholder has a concern, to come and talk with them. I think we're in a very different place than we were in the mid-'90s. I think there are a number of reasons that companies are communicating much more with their shareholders.

There's New York Stock Exchange listing standards that require companies have a means to communicate with their shareholders. There's SEC rules that require companies to disclose whether or not they have a means of communicating with their shareholders. There's the Internet. There's additional press attention to governance and related issues. So for a variety of reasons, companies want to talk to their shareholders.

So we are seeing a lot more dialogue taking place. For an example, there was a popular proposal this past season dealing with the disclosure of political contributions. And while you may have gotten a few requests from companies seeking to exclude it, most companies resolved the proposal by having discussions with proponents and coming to a compromise agreement over disclosing certain information on their web sites about their political contributions.

So I think in general, the bias today by companies is to try to have this kind of dialogue with proponents, irrespective -- or with shareholders, irrespective of whether they're proponents or not.

MR. KELLER: Let me jump in on that. I think it's important to do some differentiating. I agree with what Amy said and what Cary said. But, one, you have to ask who are the shareholders, and the approach may differ depending upon the nature of the shareholders and what you think their motivation is and what you think their past track record is as to how you approach it.

I think the other differentiator that we have to keep in mind is what is the nature of the non-binding proposal. And they really do come in different stripes. I mean, the social responsibility types of proposals are at one level, and I guess there the question is, do you really do think it's socially responsible? Do you think it's

tangential? Does it go to the core? Is it something of interest?

Then there are the governance types of non-binding proposals. And in many cases those come in, even though they could be binding proposals, because it's a way of circumventing the difficulties that may be encountered dealing with the state law issue of whether or not it's permissible. You can get to the same result by, if you will, going the easy route with a non-binding proposal.

And then there are those proposals, and the ones that I think, as we have seen the increase in shareholder activism and aggressive activism by the new breed of investors, what I'll call tactical, which are really the proposals may be made for other motives. It may be to embarrass the corporation; indeed, it may be to put the corporation in play.

So I think this is kind of multi-dimensional and you do have to realize that there are differentiating factors.

MS. GOODMAN: Marty, I just wanted to add that while we keep talking about non-binding proposals, these non-binding proposals can have legal significance. For example, ISS will recommend a withhold or against vote against a director if a company has received a majority vote on a shareholder proposal for one or two years, depending

upon whether it's a majority of outstanding or votes cast.

But if a company has gotten a majority vote on a shareholder proposal and has chosen not to implement it, or the board has chosen to implement it in a different way than the proposal was phrased, ISS will recommend an against vote against the directors.

And with many companies having switched to a majority vote standard, as we discussed early today, you can start to see, and I think we will start to see, the potential for directors actually not receiving a majority vote because the company board, in the exercise of its fiduciary duty, decided not to implement the shareholder proposal.

MR. DUNN: That actually leads me to my next question, which we hadn't planned on but I think it follows from that, and that is: If you look at non-binding proposals, the votes they get, you have a category of them that get about 10 percent or so. You have a category that caps out 25, 30. And then you get some that always get more than a majority vote.

When the vote comes in and you look at what's there -- and this is for any of you all to answer -- how do you advise the board or how do you advise the proponent as to what next steps to take, depending upon that vote? I realize if it's a majority vote, they're going to be faced with a bit of trouble the next year.

But what if it gets 30 percent? What if it's a non-binding proposal that shows some true interest, but not enough that it's going to hurt you later on? How do you advise the client?

MS. GOODMAN: Well, I think usually at that point it's initially handled, depending upon the proposal, by a board committee, often the governance committee. And depending upon the type of proposal -- for example, I'll give you one like classified boards -- they are getting higher votes.

A client a couple of weeks ago got a significant vote. It was under 50 percent, but they got a significant vote on a classifies proposal. They're setting up a meeting for -- they're inviting in a variety of academics and other people, the governance committee, to come and talk to them about the pros and cons of classified boards to help them reach their decisions.

So I think once the proposals start to get a significant vote, there's no question that companies take them seriously. They just may decide, for a variety of reasons, either to implement them differently or not to implement them. And that's where the rub comes in.

MR. DUNN: I wanted everybody to kind of get a feel for what we see on non-binding proposals. And you just mentioned, and Stanley mentioned just a minute ago, you see a

lot of non-binding proposals on subject matters that they could be binding proposals.

You just said classified board. Well, you could submit a bylaw change that would do away with or implement a classified board. And yet they come in as non-binding proposals.

And a question I wanted to ask Stan is: Has 14a-8 shaped the fact that these are non-binding proposals because people know that they can get a certain effect? Or would they have been binding but for 14a-8? I'm trying to get the interplay between those two.

MR. KELLER: Well, one, I think there's no question, as we heard from this morning's panels, that 14a-8 in and of itself I think has created the non-binding proposal. I think as a matter of state law it really didn't exist outside of 14a-8. And just permitting it as a practical matter -- and in some states, like mine, I can't tell you whether it's permissible in Massachusetts or not, for example, for any shareholder to just toss anything out there. So the fact that 14a-8 permits it indeed encourages the proposals and may encourage the courts in deference to the federal rules to allow them to come through.

I think the ability to exclude binding proposals as not being consistent with state law certainly has moved, and let me say the ease of probably getting opinions in many

cases that it is inconsistent with state law has moved the playing field to taking advantage of the non-binding proposal.

But I think there's another dynamic which is in the vote itself. If you were advising proponents, I think you'd say, look. You're likely to get a higher favorable vote if it's non-binding because there's less at stake with the non-binding proposal. You're probably not going to get as much active opposition from the company. Shareholders are going to be more willing to vote for something that sounds good than if there are consequences, legal consequences, that flow from a binding proposal.

PROFESSOR NEUHAUSER: Yes. I agree, at least with part of what Stan says. One is concerned about whether the vote would be less if it's a binding proposal. What I would disagree with is that the bifurcation between binding and non-binding is one being created by 14a-8 and not the other. They're both created by 14a-8.

You don't have bylaw proposals coming in without a proxy fight without 14a-8, whether it's binding or non-binding. 14a-8 provides the vehicle that allows for, depending upon your view, either to solve the collective action problem or a free ride. It depends upon whether you think it's a good idea or a bad idea.

But that's true whether it's binding or

non-binding. The non-binding are in there, I think, because not only the possibility of a lesser vote on a binding, but also, if you go back to what the vice chancellor said this morning, intrusions are not desirable. People basically don't want to command the company to do X. They'd much rather say, hey, I suggest strongly that you ought to do X.

You could think of it in terms of the corporation's doing something, whether it's SRI corporate governance or whatever. You could think of it as, what do you want to use to try and prod them? Do you want an elephant gun, i.e. let's have a proxy fight and kick out the board. Do you want a spear and throw a spear at them, i.e. a binding proposal? Or do you want to use a fly swatter and try and get their attention?

And I think that's the function of the non-binding proposal, is to get their attention without being intrusive and without going after them with an elephant gun.

CHAIRMAN COX: Marty, I think that that last explanation that Mr. Neuhauser made is a very useful one in helping us with the discussion we've been having about binding and non-binding.

Within the universe of non-binding proposals, I think we've had it laid out fairly clearly here. There are those that could be made binding and those that couldn't. One of the questions that I hope this panel can tackle is

whether or not with respect to the latter, the federal proxy rules -- not necessarily the ones we have, but the ones we ought to have -- should, as a normative rather than a descriptive matter, should facilitate shareholder proposals on subjects where shareholders can't direct management or the board of directors under state law.

MS. GOODMAN: I was going to say I think that's what the ordinary business exclusion in 14a-8 was intended to do. But with the addition of the significant social policy exclusion from the ordinary business exclusion, we've gotten away from that. But at least it seems to me that the genesis of the ordinary business exclusion was to not permit non-binding proposals on things that shareholders couldn't deal with under state law.

PROFESSOR NEUHAUSER: Well, that, I think overstates it a little, Amy. Of course, you could always have knocked out a proposal on the grounds that state law didn't allow it long before the exception. The exception goes back at least 35 years, and maybe more.

MS. GOODMAN: But isn't state law -- state law is ambiguous, as I think we heard this morning, as to where the appropriate line is with respect to ordinary business matters being the subject of a proposal. I think that's part of the problem here.

PROFESSOR NEUHAUSER: Well, I think if you're

talking about a non-binding proposal, Matter of Auer v. Dressel, which was referred to this morning, is the classic case -- maybe the only case, but certainly the classic case -- which says that you can have a precatory proposal on anything.

In that case, it was endorsing the administration of the former president, put in by the former president who happened to have 52 percent of the vote and was sure to get it passed. But that went to the Court of Appeals, the highest court in New York, and the highest court said, yes. That's perfectly fine.

So that as a matter of state law, you could put in -- and I think most people assume -- Stan, you said you weren't sure what Massachusetts would say. It simply doesn't get raised. But people assume that Auer v. Dressel is the common law rule that, going back what the Chairman said at the opening this morning, what do you have?

You have this meeting where shareholders could come in and raise whatever they wanted to raise, and you're trying to replicate that under the proxy rules. And if they can raise whatever they want without it -- as long as it wasn't non-binding, then 14a-8 makes perfect sense.

What you've got to avoid is people using 14a-8 in such an outlandish way that it has nothing to do with the company. You need some kind of rules to exclude. We have,

what, 13 now that we have as substantive exclusions. You need some of those things because you don't want someone to have a proposal that -- and this goes back to one of the reasons why we have one of those rules.

A shareholder proposal was presented back in the '40s to -- I can't remember whether it was to endorse the antitrust laws or ask the antitrust laws to be repealed, one or the other. Inappropriate. Has nothing to do with the company.

So you need some kind of exclusions. You can't simply -- it's the equivalent of the Chairman's analogy to the town meeting kind of thing. When you had a small corporation when all the shareholders were local back in the 19th century, everyone could show up. I guess the chair could rule out of order something as saying it's not relevant to this meeting, and the chair ruling it out.

That's the function as I see it, of the exclusions, the substantive exclusions, under 14a-8, is to rule out some things as saying, this is not germane to what's going on at this company. Therefore, it's not appropriate to raise it here at this meeting.

MR. JOHN WHITE: I'm sure I know what your answer to this is, Professor Neuhauser. But I just wonder if I could get the rest of the panel.

If we take this category of non-binding proposals

that couldn't be binding, if that's, I think, the category we're talking about, are they really -- I mean, why is it that we have 14a-8 addressing those at all, and where does that fit in the process? Is that part of the role of the federal proxy process? I guess I'll put that to the other panelists. I can guess where you are.

MR. KELLER: Well, that is a fair question. One way to approach the question is to say, should there be a mechanism for communication from the shareholders to the company to let their views be known? I suppose if you take the meeting model as the paradigm, people can come to the meeting and they can say whatever they want until they were ruled out of order.

The problem is -- and they could say what they want if given the floor. But for any action to be taken, there's the state law concept of notice of the meeting so all shareholders can come and express their own view. So it's informal communications.

And one could ask, as you do, why in fact are there non-binding proposals if it is just making a point of view known? And if there's going to be a communication system, isn't that better dealt with outside of the formal proxy rule structure and, if you will, the annual meeting framework governed by 14a-8.

MR. JOHN WHITE: I'm also asking the question: Is

that what Congress had in mind back in 1934?

MS. GOODMAN: And we're also talking -- historically, we're talking now in a time where there are so many more avenues of communication possible. I think what Congress was concerned about with 14a was that there were things that were going on at meetings where shareholders didn't have appropriate notice and opportunity to vote.

And I think that was more of a concern, while today there are so many different communication mechanisms available, we're in a very different place.

MR. KLAFTER: I think you also have to look at this in terms of the physical document that you're creating. The second we start coming out with our CD&As, we start hearing a lot of commentary out of Washington about, holy Toledo, look how long they are, and they're not in an active voice, and all of this other good stuff.

The fact of the matter is, when you have a set of regulations which require lots of disclosure, you're going to get lots of disclosure. If you want to open up the proxy statement to every possible topic, you will have 300-page proxy statements year in and year out.

No one will read them. They'll be impossible to figure out. But that's what the document is going to be. So if you guide people and force people to that particular kind

of behavior, that's exactly what's going to come out at the end.

MR. KELLER: But we have a system where there has been precatory proposals and there have been this opportunity for shareholders to communicate. And I frankly don't see us wiping that off the table. And to me, the challenge is to find let's call it a streamlined way that permits that communication process to take place, if you will, to explore whether there's a workable alternative to the existing 14a-8 system, which kind of is something of a mismatch and in some ways undermines those proposals or those aspects of the annual meeting that are important.

MR. KLAFTER: But this is a really big-picture sort of a point, i.e. what are we talking about here? What is supposed to happen at the annual meeting? What could happen at the annual meeting? What do you want to put in the documentation which memorializes the annual meeting to come? Or do you want to shift and start looking toward some other kind of mandated or other form of shareholder communication system intended to bleed off a number of these topic areas from the annual meeting?

You could very well say that the annual meeting is, to a fair degree, an obsolescent concept. It used to be 14 guys sitting in a room and wondering whether the ship was going to come back from Singapore in the 16th century. But

now it's theoretically 3 million people, in my case, sitting in a room and voting on assorted topics as to which, for a fair number of them, they really have very little knowledge and very little interest.

Some have a lot of knowledge. Some have a lot of interest. Some of them have been stockholders for a day and a half, and some of them have been stockholders for 20 years, an amazingly disparate sort of group. So query: What are the topic areas that you're going to raise within that context?

I was reading in the paper that Warren Buffett had a six-hour Q&A at his annual meeting recently. That's a fair amount of discussion to be had, presumably not involving stockholder proposals at all, and perhaps technically not even part of the annual meeting. They adjourn and then they have their six hours' worth of Q&A. That's another format to consider.

I think under German law you have to keep the annual meeting going until the last question is asked and the last answer is given, a really debilitating sort of a concept, as you might imagine.

MR. JOHN WHITE: But German.

MR. KLAFTER: But German, yes.

MR. DUNN: As I've already said, we're going to cut off at 4:45 today. But Stan, I want to get back to the

broader notion of the under-inclusiveness or over-inclusiveness of non-binding proposals. But since Stan brought it up, I think this is a good time to divert away.

Stan, you and I talked way too many years ago for me to recall about the potential for some kind of alternative. If there was some kind of an alternative -- and I want to turn to Rich after you answer to give us details about what's possible -- but if that was some kind of alternative, what should it try to accomplish? How do you think it should go?

MR. KELLER: Well, it seems to me the question is whether you can take the non-binding proposal out of the annual meeting framework governed by 14a-8 and create an alternative method of communication using modern technology as that means of communication. One could think of the chat room as a starting point, and I know this is something Richard can address, and certainly the technical feasibility.

I think if it's going to be a sufficient equivalent or substitute for the 14a-8 non-binding proposal approach, you really have to get beyond what I'll call kissing your sister, the chat room type, and think more of the American Idol model, where people are in a position to, if you will, vote, express a viewpoint so you could get to a conclusion.

Okay, what was the sense of the relevant constituency? How you define that is another issue. And you

can certainly set up a mechanism which permitted shareholders meeting an eligibility level -- and you can define an eligibility level; either it defined now or you could raise the bar somewhat -- to submit proposals and to ask that that be subjected to the kind of electronic voting regime, with shareholders having PIN numbers or whatever -- I won't get into the mechanics of it -- which the company could then monitor, control, and, if you will, facilitate.

And have a defined period in which people could record their view on it, and then the company has a sense of what the view is. I think you'd accompany it with the company disclosing the results.

And to me, you would then ask the question, are there any consequences that should follow from that vote? And I think, as we've seen using the disinfectant of full disclosure, at some point after the process the board indicating what action they took in response to the proposals, and if they didn't take action, the reasons for not taking the action. So you've got both a dialogue taking place and an opportunity for the company to communicate and for the board to demonstrate that, indeed, they fulfilled their fiduciary duty.

And to me, the benefit of that, taking it out of the 14a-8 system, is, one, you probably improve that system. You make it easier for the staff to deal with this whole

area, and you improve the communication process between companies and their management. And you take it out of this realm where it really has this dramatic focus.

Just to test it, I said, now, how do I distinguish this from something I do not favor, which is the legislation making its way through Congress to have mandated non-binding -- interesting oxymoron -- mandated non-binding votes on whether you like the company's compensation policies or not. And that's a proposal in my own mind is misguided because you don't know what the vote means, and it could be misused and create mischief.

And to me, the distinction is if you have one out of the 14a-8 system as a more routine matter, it's important but it doesn't have the same significance and focus. Certainly it doesn't have that significance if it were mandated by Congress, where everybody has to assume it has important meaning if there's an adverse vote.

MS. GOODMAN: What would you do in terms of, for example, ISS, which has such significance today, and how they would view this kind of vote, and what importance they would give to it?

MR. KELLER: One, I think you have that problem already. Two, it really gives management, the board, the opportunity to state its own position, both in the front end and in the back end, as to how it has reacted to the vote

that it received.

MR. DUNN: If I could jump in, every letter we get from Rich always says, I don't say anything about policy. I can tell you what's technically available. So before we get into some policy and some discussion on that, if I can turn it over to you. This concept of finding some way to better have shareholders speak to themselves and to management, you know better than any of us up here what's possible.

MR. DALY: Sure. Well, first of all, thank you for the opportunity to be here.

We had been asked by the Commission a little over a year ago would it be feasible to create a secure chat room. And very quickly, we were able to come back by looking at the existing system and saying, yes, it can be expanded to create an environment that would have an alternative to the proxy. Let me quickly describe the existing system and then what that alternative would be.

We currently act as agent for 850 custodians. These are both brokers and banks. And these are the largest custodians in the country. And behind them, there are about 90 million shareholder accounts. We link those 90 million shareholder accounts to the 13,000 corporations that have annual meetings in North America.

It's about 350 million ballots. Each of those ballots, whether it's electronic or on paper, has a unique

PIN number. All right? And we worked this out with the SEC when we rolled out electronic voting and telephone voting that there's a 1 in 3 million chance of guessing a live PIN number. And if you come in three times, we block you from going back out. So it's a very secure environment.

Half of those ballots right now are without paper. Sixty percent of the shares are electronic. And all in all, in today's process, on the records we receive, we have a Big Four firm come in on a quarterly basis and they verify that the voting results on the records we receive are 99.9-plus percent accurate.

Now, taking that infrastructure that could be expanded if those who decide policy, the policy-makers, believe it would be in the best interest to have an alternative to a proxy, what could be done is as follows.

Now, this could be as of the record of for the annual meeting. It could be as of any other record date desired. Okay? Because all that simply matters is in that plumbing I described, every day we have a level 4 data center -- actually, it's two level 4 data centers that back each other up -- that connection with each of those 850 institutions and draw down all the long positions for the company whose record is of that date. We're not limited to a specific date a year, and it could be multiple times a year, for example. So there aren't constraints of that nature out

there.

Through that PIN number process, though, that would be the get-in card, the entitlement to get into a discussion room. So you would be in there only with other shareholders through that PIN number.

Now, you have the ability to comment. If it was so desired, those comments could be recorded in terms of that not that your identity would have to be disclosed, but once you decide to comment versus just observe, we could sequentially number you so that you could never come back and misrepresent who you are.

So if you were the 1,010th participant to comment, you would always be 1,010, 100 shares. You couldn't come back a day later and say that you were 1,000 shares, 5,000 shares. You would always be controlled to your actual number of shares -- again, if this was so desired.

Things could be proposed there. Now, I think it would be a little different than American Idol in that we would know exactly who was doing what, and that we would not have an identity of who was coming in. And there would also be the ability to track people to be accountable for their comments. So if somebody slandered a CEO or a director, we would be able to unwind that position ultimately to go back to know who that was.

Now, going this route, there are significant

consequences, as in all of these activities, when policy-makers decide that it's appropriate to make a change. Marty, as you pointed out, we're not here to say what the right policy would be. We think we're experts, though, on processing, and we certainly are confident that we could lay out on a very, very accurate basis what these consequences would be, and that the devil is really in the details. Let me give you a couple of quick examples.

If you were to just put a proposal out there in a non-proxy, pure poll environment, unless someone put effort into getting people to go to the web site and look at the proposal, I would suspect that the activity would be very, very limited. All right?

If this was tied to a notice and access process where somebody said, well, I have a proposal out there and I want to send a notice out, but I'm not willing to spend money for mailing; I'm only willing to notify those who have electronic links right now to handle this, in a large cap you'd cover 60 percent of the shares.

If somebody wanted to go and then say, I want everyone to be aware of this, they could do a full notice to all holders or they could turn it into the traditional process of today. So there's lots of different avenues available.

This goes to some of the dialogues that we talked

about earlier in terms of who is paying the freight to get this done, the free riders, so to speak. And all of these are policy decisions that give you options. But I would argue that the technology can go well beyond where we are today. The devil's in the details, and the consequences need to be thought out.

MR. DUNN: I want to turn this over to everybody else, but I want to ask you one last question before I do.

Within such a structure, would it be able -- you know, everybody loves to be able to go online, and you vote and it shows your results right away on ESPN Nation or whatever about whether Tiger Woods or Michael Jordan are great, or something like that.

Would that kind of capacity be in there? Would it be any realistic capacity, or would it just be -- would it be the American Idol, if it was a vote?

MR. DALY: I think the capacity for very, very timely results are indeed in the street process. So, for example, Motorola is having their meeting today. Within a half hour of that meeting closing, we'll issue a final certified, never-to-be-changed vote. There's probably 40- to 50,000 man-hours of audit that went into that vote already. And as you know, on the registered side it's likely going to be several weeks before less than 10 percent of the vote ultimately gets sorted out in terms of what the final results

are.

So we have a technology advantage in that for every meeting, for every investor in every meeting, we're using the same process. It's very heavily system-driven. For those of you who aren't familiar with a level 4 data center environment, there aren't that many in the country. It's a massive environment. And I can't guarantee it would be real time, but it would be near real-time results.

MR. DUNN: Anybody want to -- go ahead, Stan.

MR. KELLER: Let me -- just so the distinction isn't lost, I was trying to draw a distinction between what I'd call the chat room, which one could call idle chat, or basically you get views tossed up by whoever is interested in tossing up their views; and one that really replicated to some extent the proxy system, where you got a meaningful expression of views, which was accompanied by advocacy explaining the views, so that what you ended up with was, in fact, what one could consider a meaningful expression.

Let me also add that if the Commission were to go down that route, I would certainly clearly do it, at least at the outset, on an opt-in basis. So, for example, if you opted into this kind of system, which -- and again, keep in mind it's not just limited to the annual meeting, but it would be during the entire year, effectively -- that if you opted in, then non-binding proposals would not be subject to

the 14a-8 regime, so that there was a carrot that was offered.

And to me the interesting question is whether, one, from the company's perspective, there would be any appeal to this, assuming it was workable and manageable; and two, from the investor perspective, whether they think this would accomplish their objectives, or would they lose something.

MR. JOHN WHITE: Just one other mechanical question. We had some comments earlier today that shares can be voted once or twice or three times as they're borrowed and lent and so on. Does that issue -- how does that work out here?

MR. DALY: Sure. I specifically made the comment of the records we receive. We have a very rich securities market, where we have more individual participation than any other market out there. So, for example, on the most simple transaction, if I buy 100 shares, and I buy it on 50 percent margin, and those shares are ultimately lent out -- I'm sorry, short sold and then resold, and the next person buys 50 shares, there are pre- and post-reconciliation dialogues that go actively in place right now in the brokerage community.

For someone who uses a post-reconciliation -- I'm sorry, pre-reconciliation; excuse me -- the margin holder would be netted down to 50 shares, the other 50 shares would

be out there, and the 100 shares is all that would be voted.

For someone who uses a post-reconciliation process, my 100 shares that I brought, I'd still be give a proxy to vote or a ballot to vote 100 shares, and those other 50 shares would be out there. And in the very rare exception in a retail environment where that firm who treats those positions as being fungible -- they don't track individual 100-share buy and sells; it's all continuous net settlement through DTCC.

And in that situation, if there was a very rare case where my 100 shares couldn't be voted, now with this new over-voting reporting service we have, we would notify the broker and he would net those shares down.

And I gave you a very simplistic example of why -- and firms have different views on, should the owner of those 100 shares, who still has the economic gains and losses tied to 100 shares, be able to vote those 100 shares, if the shares are available to vote or not. Then when you get into fails and other activities, it becomes more complex.

Now, in additional dialogues with the Commission, if everyone went to a pre-reconciliation, you still wouldn't be addressing the reality that I could be long 2 million shares in Firm A and short a million shares in Firm B, and still have the right to vote the 2 million shares.

My suggestion here is as follows. Technology can

enable us to go forward and provide additional reconciliations. And at times, although it may not sound like that, I completely agree with John Wilcox in terms of the transparency. But it's a matter of taking technology and reconciliations forward, and recognizing what technological capabilities that exist today are versus at the time it was necessary to write the rules.

MR. DUNN: Cary and Amy, I'd like to ask you guys. Cary, you advise at least one board, and Amy, you advise a bunch. If something like this came along, if there was some alternative for some portion of 14a-8, or just in general to 14a-8, that was out there to provide shareholders a better means to interact with each other and with your board, how would you advise the board? And if it was purely voluntary. How would you advise them? Do you think it would be something they would want to do or should do?

MS. GOODMAN: Well, I think it would depend upon the facts, I mean, how the system is sorted out and what the benefits were. Because as I mentioned earlier, there are already informal communication means, and I think people would prefer to err and rely on the informal communication means, especially if we're going to all of a sudden have year-round voting on these matters. Because they do take a lot of time.

I think people are looking for alternatives to

putting all these precatory proposals in their proxy statements. So I think they would look favorably upon the idea, but question whether we need something so mechanistic to do it.

I mean, it seems with the proxy rules, that could almost -- any shareholder who really has something significant they want to share with other shareholders will have a way of doing that. So I think it's very much an open question.

MR. DUNN: Cary?

MR. KLAFTER: It all depends on the detail. Right? If what you're actually creating is a kind of proxy proposal light system, or if it's something else, that's really going to be determinate as far as companies are concerned.

My expectation is that a fair amount of the overlay that you currently have in the proxy system would follow this new system. What does that mean? That means ISS is going to look at these proposals and is going to advise with respect to them. And there will be pressure brought to bear in connection with the voting.

Some of the issues will become -- let's say that you have no bar any more with regard to the kind of proposals that can go in. So for a number of the proposals, the companies won't care, a lot of the holders won't care, and you'll get a very low vote.

But for a number of the issues, because they will have now been pushed to this new system, pushed by new regulation, people are going to care quite a bit. And so you're going to have the same potential for a proxy contest, so to speak, as you have under the current system.

The current view of a lot of issuers is that we are entering the era where every vote is a potential proxy contest, with majority vote, as far as directors are concerned; with ISS, as Amy explains, really putting it to you if you don't follow a majority vote with respect to even a precatory proposal.

As you suggest, in the olden days you worried about this 3 percent vote threshold under the rules, whether someone can resubmit or not. But 3 percent is old news. Only the most marginal of proposals are getting 3 percent or even less. You have all of these proposals getting 20, 30, 40 percent.

You remember when it was giant news that a stockholder proposal would get 10 or 15 percent. But that's nothing these days. So everything becomes very, very important. And all of the detail with regard to this kind of proposal becomes very, very important.

And let me just say one further thing. I'll leap forward to your next roundtable. And I won't get into the detail, but you're going to hear a lot at the next roundtable

about how the current plumbing operates and how it's relatively limited in terms of who can play what particular role in this process.

And I would caution you very greatly with respect to thinking about creating an entirely new process that only involves a very small number of potential players in the system. I mean, if as Stan says this is starting to look somewhat in the nature of a chat room with voting, there are a lot of people who can do chat rooms with voting if they have proper access to the stockholder lists. And you should encourage that sort of thing.

MR. DUNN: You're next, and then I'll go to Commissioner Atkins. And can I interrupt before you start? To the extent that shareholders would or would not view this to be an attractive alternative, if you don't think they would, what would need to be in it for them to do so?

PROFESSOR NEUHAUSER: I'm sorry?

MR. DUNN: If you were going to say that from the shareholder viewpoint this would not be an attractive alternative, I'd like to know what would need to be in there to change that.

PROFESSOR NEUHAUSER: I don't know. I mean, the mechanics, as explained, obviously solve some problems on it.

CHAIRMAN COX: Marty, I wonder if we can simplify the question a little bit because I think part of the

difficulty in answering the question is that we've said it's an alternative.

So let us suggest that it's not an alternative, and that you're simply evaluating it on its own merits, so that you don't have to count it as a cost that you'll no longer have access to precatory proposals under 14a-8. Leave that to one side for purposes of analysis, and just address the desirability of this as an additional option. Then maybe we can focus on it on its own merits.

PROFESSOR NEUHAUSER: Thank you. That's well done. I think that it doesn't add a lot right now. Shareholders can communicate without impinging on the proxy rules. They can communicate even in favor of things that are going to show upon the proxy statement as a result of the 1993 amendments. They can always get together around common interests. And indeed, there are chat rooms that they can go into.

To the extent it looks like a chat room, it seems to me it is totally useless. I went on Saturday --

CHAIRMAN COX: I think Rich maybe went through some of this stuff quickly. But I'm having trouble squaring what he said and what you just said because there are so many dramatic differences between what's available now and what he just described, starting with anonymity; second, knowing that the only people that you're talking to are also shareholders

in the company; third, knowing in real time what percentage of shares are represented in that discussion.

And fourth, the ability to do this 24/7 year-round instead of once during the annual meeting; fifth, the opportunity of management to be notified at all times of what is the content of this discussion; and lastly, but certainly most significantly, the opportunity to conduct -- somebody put it here; was it you, Stan -- an American Idol -- who came up with the American Idol idea?

MR. KELLER: I'll take the blame.

CHAIRMAN COX: But there really isn't any useful mechanism for doing that with real shareholders right now.

PROFESSOR NEUHAUSER: Well, all those, I think, are very good points. Here are a couple things that I think need to be considered.

To the extent that you don't have someone chairing the meeting to rule things out of order, what are you going to get? I went on the Internet on Saturday evening -- I had nothing better to do -- and went to General Electric, which I picked out of the hat on Finance.Yahoo for the message board. And if you'll bear with me for a couple of minutes, I will read to you the topic headings of the 20 things, the first 20 that were listed out of 200,014.

Friday: "Six GIs, 71 Iraqis killed, 89 wounded."

The second one: "Enemy surging in Iraq."

Third one: The "fatal flaw in Zionism's defeat."

Fourth one: "Bush getting his chimpanzee-loving ass kicked."

Fifth one: "Islamo morons stone innocent girl to death."

Seventh one -- this is way out of line: "Market intelligence." Both words seem to me somewhat out of place on this web site.

Next one: "Low risk, high return."

Next one: "Sold GE, bought PLXS." Well, yes. I'm trying to get you to buy it, too, so my stock will go up.

"XSNX, the new solar Microsoft."

"10 percent down side this week globally." Appropriately using the moniker, "Buystocktank."

Next one: "Let me ask you neo clowns with indoor plumbing." I don't know what that one's about.

And so on. If you don't have someone to rule some things out of order on this chat room or whatever we want to call it, what are you going to get? And it seems to me that what you're going to get is however nicely one may have set up the idea that, hey, we could get a vote on X that would be useful, it's going to get lost, and no serious shareholder is going to pay attention to it. And management will pay no attention to it.

If you say it should be regulated in some way, then

who's going to regulate it? You're back to the SEC regulating it? Is the company going to regulate it? Will the shareholders say, hey, we think it's a fair chat room because the company is regulating it?

I think there are some serious problems as to whether or not what the product would be would be meaningful to shareholders and to management. And if the shareholders don't think it's going to be a meaningful product, they're not going to participate, and all you get are people like that.

CHAIRMAN COX: Paul, I think you've done a conclusive presentation on why what we have today is not workable. I take it that there was no requirement in order to post in that chat room that you be a financial stakeholder in that enterprise.

PROFESSOR NEUHAUSER: Well, yes. It may be that all these GE people are -- these are GE shareholders, for all -- I mean, we don't know the answer to that. But yes, maybe people spend their Saturday nights going on Finance.Yahoo as non-GE shareholders to put up silly messages. But I would assume that the majority of people who go to a chat room about a specific stock are in fact shareholders.

I have occasionally looked at things on stock I own. And I say occasionally because it's useless. I mean, I

don't have GE so I don't have these things. I have obscure stocks where there's usually nothing posted for weeks. But when they are posted, they're like this thing. Someone has bought or sold short and is trying to influence what's going on.

MR. KELLER: That's why I distinguish between chat room and a focused, workable expression of views on proper subject matter. So yes, some of the current trappings of the proxy system -- who's eligible to get it in, what subject matter can go into this expression of view -- would still be a necessary part of it, although hopefully the stakes become less important. It becomes more routine that you don't have to be as concerned about some of it.

So, for example, ordinary business matters may be acceptable, may be tied to their having a material economic impact on the company. And I would see it as the company monitoring it to make sure that there's proper material. And yes, you need some kind of dispute resolution. And not to get into a particular subject that's particularly sensitive now, there may be some arbitration system to deal with that.

MR. DUNN: If I could ask one last question on this. And I haven't forgotten about you, Commissioner Atkins. I'll get around.

That's why I wanted to go back to Rich, is the reason I wanted you to talk about the technology that's there

is I wanted to get a feel for whether it's possible for it not to be the Wild West that Paul's talking about. Is there a means to have it be a useful piece?

MR. DALY: I'd said earlier that the devil is in the details. So, for example, there could be, depending on the policy decisions, that these are the topics; that you could respond within a limited range of your views that could be predetermined up front. You could also have somebody have the able to -- for example, each time you go in, you're going to be the same sequential chatter.

So hypothetically, let's say you are a true shareholder and you happen to not be a fan of the company that you're a true shareholder in. The viewer could be given options to eliminate comments of a certain chatter number, just so they don't have to be bothered by it, if they wanted to get a sense of what was going on.

The company's management, of course, would have access; or based on a policy, I assume, the company's management would have access to view all this activity as well. Let's assume the board had access to view this activity as well. They could go in there, and if they wanted to get a sense but there was clearly someone who was every other comment and they didn't want to waste their time having to page through these comments, just eliminate them by number.

So there can be word searches done to eliminate activity. There can be far more disciplines put in here. I think the most significant thing, though, is that it would be for shareholders only through that PIN identification with a very high difficulty to get into any meeting. And then it gets compounded to get into a specific meeting by guessing a PIN.

So I believe, from a technology point of view, the amount of controls that could be put in place there could be loose to excessive, depending on the design.

MS. GOODMAN: Right. But you'd still have an arbiter, and the question is who the arbiter would be, whether it would be the Commission staff or the company, or exactly who would perform that role.

MR. DUNN: I don't know that you have to necessitate that because, as the Chairman said, if you view it purely as alternative -- I mean, 14a-8 stays as it is and this is purely additional so it's purely a benny -- I don't know that you have as much of that.

Commissioner Atkins, did we cut you off or did -- I apologize for that.

COMMISSIONER ATKINS: No. This line of discussion was very good. This is sort of a corollary to this because of course the SEC in particular, the staff, is caught in the unenviable position of being the arbiter of these various

proposals that come up.

And before I got here and before John got here, the staff apparently decided six or so years ago that they would only look at the four corners of the company's submission as to whether or not -- as to decide whether or not it was in bounds or out of bounds.

And Mr. Klafter, unfortunately you're the only -- in our four panels today, you're the only corporate participant. But I was just curious. From my perspective here, especially recently, some of the staff determinations have not been consistent.

And I was curious what your perception is. And perhaps the lawyers on the panel have something to say as well. But does that help you when you are looking at these things as to whether or not to go along with them or to submit a no-action letter? How does that -- if you've considered that, how does that affect your determination?

MR. KLAFTER: Well, there's a definite impact. And you're absolutely right. When you look at the universe of no-action letters, it is very oftentimes an imperfect pattern. Here's letter No. 1; it seems to say this. Here's letter No. 7; it seems to say something else, but you're not quite sure.

So ultimately you operate on the basis of resignation, that what comes is going to come. You put your

best foot forward in terms of all the arguments that you're going to be making with respect to the particular topic.

Sometimes you have clear precedent that's not in issue. Other times, as people have discussed, you have this looming specter of the substantial social policy interest, which seems to trump two of the three major exceptions that companies will tend to use.

They will look at ordinary business practice and they will look at relevance, and they will say, here's a stockholder proposal dealing with hardly anything that relates to what we actually do for a living, and therefore here are these two exceptions and we should take advantage of them. But lo and behold, we can't do that because this topic has been designated as having some super status, and there's nothing to be particularly done about that.

And then the third exception that we oftentimes look to is "substantially implemented." And "substantially implemented," both with the staff and with ISS, as a practical matter, is also oftentimes a kind of black hole because you think you're pretty much within the zone. You have people who say, yes, you've basically gotten there. But it turns out not to be the case.

So you put your best foot forward with the arguments. I think issuers would generally say, it is better to load it onto the staff than to fight with people in

lawsuits over the particular topic. So all other things being equal, it's probably the better way to go.

But it can be frustrating, particularly if you have a board and they're saying, well, what's the deal here? I mean, surely this is an ordinary business practice we're talking about. Surely this is completely irrelevant to our business because it represents virtually nothing in terms of revenues or profits. And there you are.

MS. GOODMAN: And I think it puts the Commission in a bad light in the sense that the staff is trying to provide guidance, but there are so many letters that have to be answered in a very short period of time that they generally indicate whether some exclusion applies or not without giving a reason.

A board, usually the governance committee, will be considering how the company should respond to this shareholder proposal, and you can't give them real guidance as to how the Commission is going to act. So the Commission looks arbitrary and capricious to them. Then when it comes time to the mechanics of handling the process, you may not be able to get an answer faxed back to you or e-mailed back from the staff because the proponent hasn't given a fax or e-mail address.

So the overall process becomes very confrontational and makes everybody look in a bad light. And so I think,

depending as you go forward, there are a number of things that I think could be done if the process is going to stay in place to improve it.

COMMISSIONER ATKINS: Well, the whole socially important thing has grown up. I mean, that doesn't really have necessarily any basis. If it got crafted or onto the rules over the years, should that be looked at?

MS. GOODMAN: Certainly.

MR. KLAFTER: Yes, absolutely. And maybe you even wind up building it into your rules when you take a fresh look at everything. But at the moment, it's just one of a number of real wild cards as far as the regulations are concerned, and so gives you a lack of predictability.

One of the things that Amy briefly noted is that when you get responses back from the staff, it's just the response. Yes, no, we agree with you on this point, not on this other point, but without a lot of reasoning. Now, that would add an additional load to the staff. But it would also require that there be the creation of something in the nature of a miniature opinion so that you could understand the reasoning and so all sides would have better guidance as to which way to go in the future in terms of how is some particular regulation being interpreted.

MR. DUNN: And then every time I issued one of those, the opinion would be challenged as I was adopting a

new rule. So I couldn't go forward.

Professor Neuhauser?

PROFESSOR NEUHAUSER: Yes. One always wants more certainty rather than less certainty. To the extent that one could get it, that's terrific. We have it on those occasions when I help draft things, which is not very often. But it's very useful to be able to know what we mean by "risk" or other things. But I'm not sure, as a practical matter, writing opinions is going to be within the realm of reality.

I'd make one comment, though, on the ordinary business exception. It technically isn't in the rule, but it's in all the releases, and the courts have said the releases are part of the rule. So it's pretty clear.

The economic one is in the rule, the economic exception, when it says new to economic unless it is -- I don't remember the exact phraseology, but it's the same kind of phraseology of an important matter. That's in the rule. It doesn't help much that it's in the rule.

MR. DUNN: Well, before we turn around to you all's closing remarks, I was going to ask the Commission if they had any other questions. But I don't think Paul is allowed to ask any more. So anybody -- he's not even listening to me. I'm giving him a hard time and he's not even listening to me.

The last 15 minutes, I think -- I'd like you all to

give your closing remarks here. But if I could give something I'd like to hear from you, which is: I want reading an article recently about the fact of junk news, and things become news just because people put it out. You suddenly see everybody finding an image of Engelbert Humperdinck in their grilled cheese because CNN.com will put that online. And so suddenly more and more people find images in their grilled cheese or in a potato or something.

And is that similar to what we have here? Is because of 14a-8, because of the press 14a-8 brings, because of the interest it brings, is that why we have non-binding proposals? I mean, as Leo mentioned this morning, they don't create these things. They don't negate them, either. But they really are not something that state law encourages or begs for. And yet it has become this thing.

And my question to you is: Is this thing there because of 14a-8, and is that right or wrong? Now, Rich, you never express a view on policy, but I'll start with you and you can feel to pass and then we'll just come down the table.

MR. DALY: I'm certainly going to pass.

MS. GOODMAN: Well, I think there's no question that the fact that 14a-8 is out there that creates this. For example, there are groups that come up with the idea of a particular proposal in a given years, whether it's majority voting or splitting the chairman -- let's take splitting the

chairman and CEO.

And people would tend to think that at some companies it's a good idea and at some companies it may not be. But you have proponents who submit that same proposal to a hundred companies without consideration beforehand of whether or not that proposal makes sense for an individual company.

And in that Credit Suisse, I would say that it's the non-binding proposal of 14a-8 that creates the mechanism that makes people want to do something like that.

MR. DUNN: Any other views on shareholder --

MS. GOODMAN: Okay. This is my last -- then I'll keep going. I'll keep going. And I don't think I thanked you for the opportunity for being here today, and I do want to thank you.

I'd like to make two points. The first relates to what you're going to be discussing at your next panel. And I know I'm a broken record on the issue of shareholder communications and the whole process, but I think it's very important, as was discussed earlier this morning, that some of these mechanical issues relating to over-voting, empty voting, be addressed.

And along with that, the Commission's shareholder communication rules that deal with communication with street name holders, the NOBO-OBO rules that go back to the 1980s,

we have a whole lot more technology available to us today to deal with these issues.

I think much as the Commission is looking overseas to answer some of these questions, there are systems in place in the U.K. and Australia whereby issuers know who all their shareholders are, including those in street name. And as we move towards a time and a process where communicating with shareholders is so much more important, I think this is a great opportunity for the Commission to look at those rules.

Finally, as a segue to the next panel, I want to suggest that whatever approach the Commission takes to dealing with precatory proposals, it not just move along of these precatory proposals into non-binding proposals.

We do have a means out there for shareholders to communicate with one another, and on a lot of these issues I don't know that we want to get so confrontational that everything that today is a non-binding proposal becomes a binding bylaw since, as the earlier panels indicated, it's still not clear under state law what is an appropriate subject for a shareholder bylaw.

MR. KELLER: I think, as I said, I think it is clear that non-binding proposals or precatory proposals are a creature of 14a-8, and really, by and large, don't exist as a practical matter, and in some cases, a legal matter independently as a matter of state law.

Having said that, I think they're here. And given the communication and the desire to increase communication, certainly informal communication, but where necessary and for those shareholders who in fact do not have access to the corporation, I think it would be moving backwards to just say, well, we created it and now we can eliminate it.

But rather, to me the challenge is to think through whether there are alternatives that would, one, dial down somewhat the significance of the non-binding proposal. And I think by taking it out of the annual meeting frame and to do it on a basis that in fact improve the communication, allow 14a-8 to operate where it should operate with those proposals, that -- I'll say in quotes -- "really means something."

That's not to suggest non-binding proposals don't. But for those binding proposals which should be the subject matter of shareholder action at the annual meeting, and to, as I said, just think hard whether there is an alternative system, chat rooms are one approach. Controlled chat rooms are certainly better than open chat rooms. But there also may be ways to keep score so that you get a meaningful response.

And then to think about the overlay of the disclosure regime so you've got management communicating back to shareholders how they are reacting to, responding to, the

proposals and how they are fulfilling their fiduciary duty, which is where the ball should stop.

MR. DUNN: Thank you. Cary?

MR. KLAFTER: There's no doubt that there's an industry that's built around 14a-8 with regard to non-binding proposals. And any kind of change that you make, whether you take advantage of Rich's proposal or you do anything else, it's going to move everybody in the system.

And so what I strongly recommend, what I think you'll hear from most issuers, is that you need to take a bigger picture look at topics rather than a narrower look. And that includes both the substantive public policy determinations as to what it is that you think ought to be within the purview of the proxy statement, and secondly, the whole topic, directly related, of shareholder communication and voting integrity.

As I mentioned before, all votes are potentially becoming contests. Are votes are becoming more and more important than they were in the '50s and the '60s and the '70s.

We've said in letters that we think the process itself is in a pre-scandal stage; that is to say, nothing big and horrible has happened as yet, but it seems inevitable, a statistical probability, that somebody big and horrible will occur when it comes to a really close vote. And there will

be so many more really close votes in the future that you need take into account all of the plumbing and whether it's in good shape or not in good shape.

And as Amy says, think out of the box. Think about all sorts of radical changes with regard to revamping the system in its entirety to do better as far as voting integrity is concerned.

MR. DUNN: Thanks. Paul, you get to go last.

PROFESSOR NEUHAUSER: I guess first I'd reiterate that while 14a-8 may have created the precatory proposal, it also creates the binding proposal. That is to say, can you think of proxy fights that were waged outside of 14a-8 to amend the bylaws, or are they done under 14a-8? They're done under 14a-8. It isn't that 14a-8 created precatory proposals. It created a mechanism for any kind of proposal.

The second thing would be that the concern, I think, that many proponents would have is that moving it off the proxy statement will mean it will literally be lost. The number of people who may participate in whatever system is set up is likely to be very slight. It will be even slighter if there is no control about what's said.

If there is control, you've got free speech problems. You've got SEC authority problems. If the company is running it, you'll have no trust in it. There are all those kinds of things. And as I commented earlier, it seems

to me that the availability of a fly swatter rather than an elephant gun is good for the system.

The final thing I would comment on is something that went on this morning when we were talking about do you need a million dollars' worth or a million shares or 1 percent or anything of the sort like that. Whether $2,000 makes sense or not, the 3 isn't important.

But the idea that the smaller shareholder should be able to participate is important. That's certainly our tradition. If you compare that with -- and I've been retired for a couple of years. I haven't talked comparative corporation law for a couple years; maybe things have changed -- but anyway, in France, you need a much higher percentage than the United States. I can't remember offhand what it is. And it is graduated depending on the size of the company. But once you reach that, there are no controls. Anything you want goes in.

Even more extreme, in Holland -- and I was involved in this back in the apartheid days with Royal Dutch Shell -- in Holland, 10 percent of the shareholders not only can put in a proposal, they call the meeting. They chair the meeting.

It seems to me that when you say, look at our system which says, we're going to protect the smaller shareholder and not give everything to the larger

shareholder, is a lot better system than having no controls if you've got $10 million worth of stock, or no controls if you've got 10 percent and you can replace the chairman with your own chairman to chair that meeting.

So it seems to me that one doesn't want to go very far down that road of restricting access to smaller shareholders and putting everything on the larger shareholders.

MR. DUNN: On the next panel, actually, we are going to be discussing some U.K. things on that.

With about three minutes to go here, I'd like to thank all you all. I've been doing 14a-8s for a long time, and over this long period all of you have been incredibly generous with your time with the staff and incredibly helpful to all of us as we've gone along. And I can't thank you enough. I really appreciate it.

With that, I will turn it over to the Chairman to close us out for this one and take our break.

CHAIRMAN COX: I thank you very much. I think you've not only done a good job of talking about the non-binding proposals with us, but also bridging to where we're going to be not only in the next panel but the next roundtable, raising a lot of interesting issues.

But at least within the four corners of the precatory proposals and non-binding proposals that we've been

talking about, you've made it abundantly clear to us that if we're going to rely upon the mechanisms of Rule 14a-8, then we have to first solve the problems of broker voting, over-voting, under-voting, OBOs, and NOBOs. And if we're going to use the power of the Internet to improve shareholder communications, then we have to solve the problem of spam.

So we'll take your advice very seriously and see if we can't solve all of these problems. Thanks very much.

(A brief recess was taken.)

PANEL FOUR

BINDING PROPOSALS UNDER THE PROXY RULES

MR. DUNN: Okay. At the risk of losing my job for starting without the chairman, we'll give this a go.

We're on to our final panel of the day and, for a complete change of pace, we thought we'd talk about shareholder proposals. And I'd like to introduce the panelists to start.

Starting from the end, we have Joe Grundfest from Stanford Law School, Jim Hanks, from Venable, who is also an adjunct professor at Cornell and Northwestern, Larry Ribstein, from the University of Illinois College of Law, Bill Underhill, who gets the award from flying all the way here from London today and flying back tonight -- thank you very much for that -- he's with Slaughter and May, and Ann Yerger, who is the executive director of the Council of

Institutional Investors. Thank you all very, very much for your time.

Our goal here is to be done by 4:45. There's a chance we may wind up a few minutes early as everybody is running out of gas and interest but, to the extent we're still rolling, we'll push through until 4:45.

As an introductory matter, it's important to remember under 14a-8 that there are procedural guidelines, you know, who can propose, when you can propose, how long it can be, one proposal, blah, blah, blah. There's also 13 subject matter bases upon which a company can say, no, we don't have to include the proposal. The first two of those go to is it legal under state law or appropriate under state law. There is, of course, ordinary business. There is does it relate directly to a dividend. You know, there's a full range of things in there.

And so the obvious question is that even those cases where you get past that first hurdle and it would be permitted under state law, if it hits one of the subject matter bases there it still doesn't go in even if you're an eligible shareholder.

And so I'd like to start off with Jim and follow up with Ann a little bit, but the first question is, okay, so with that outline as to how 14a-8 works, is there any examples of rights that 14a-8 provides shareholders that they

wouldn't have under -- of a right that they wouldn't have under state law absent the existence of 14a-8?

MR. HANKS: Are there any proposals --

MR. DUNN: Turn your mike on, Jimmy.

MR. HANKS: Are there any proposals that 14a-8 deals with or permits that would not be available under state law? My answer to that is no. The reason -- but you have to focus on the word available. And I think of shareholder access or the availability of being able to make various proposals in several different ways.

First of all, to me, shareholder access means the right to come to the meeting and observe it, say your piece. A second form of shareholder access is coming to the meeting, listening and then deciding how you want to vote. Third is shareholder access in the sense of getting something before the meeting, shareholder access to what happens at the meeting and the advance notice by-laws that virtually every public company that I know of has addressed that subject in detail and, finally, shareholder access in the sense of -- that we've been talking about it a lot here today -- shareholder access to the proxy statement.

But just because there may be various clusters of things that a stockholder might want to propose that for one reason or another -- and, you know, we can debate and have been debating the wisdom, policy, logistics, process and

otherwise of getting these matters into the proxy statement -- doesn't mean that shareholders aren't able to bring those matters before the stockholders at the annual meeting.

And, of course, as Amy and others mentioned earlier, there are lots of ways -- additional ways for stockholders to communicate with each other and with other interested parties.

I want to loop back just for a moment in connection with -- referring to advance notice by-laws, which have not been mentioned yet here today, to this question that was debated this morning or at least put out for discussion about whether state law authorizes precatory proposals.

I don't think that Maryland is much different from Delaware and other states in this regard, or Massachusetts, as Stan Keller mentioned. I think the answer is, surprisingly, it's unclear. You can look at the relevant statutes, as I have, and in fact they're not just unclear in a way -- and I'm not going to parse them and go through them here. I'd be happy to, upon request, later. They're not only unclear but, in a way, circular.

Putting that aside, I think that's largely moot. Why? Because of the advance notice by-law provisions. I think if you look at the typical advance notice by-law provision for stockholder proposals of new business, the companies themselves, in their by-laws, have ceded away that

question because the typical language is that a matter may be brought before the annual meeting in only one of three ways and one of them is following the advance notice procedures that then follow in the by-laws.

Now, whether companies are going to begin to reexamine that and try to draft to preserve some real or imagined right, I don't know. But I think that question that we were discussing this morning is largely moot because of the advance notice by-laws.

MR. DUNN: Now, to turn to the flip side of the question, as I said before, the 13 subject matter exemptions -- one of -- the first one is, is it appropriate under state law. And even if you get past that, there are a number of subject matter exemptions that, if a binding proposal fits within them, the company can choose to exclude it.

Given that, I'd like to turn to Ann and -- does -- do your members bump up against that a lot? Is there a true right under state law that -- and we know that, in theory, at least, there is a right under state law they can't practice. Does it really come into play that often?

MS. YERGER: Well, let me step back for a second and explain that most Council members do not file shareholder proposals. The minority who do, however, file a great number

of them. In fact, by our calculation, they file on average about 45 percent of all corporate governance proposals. So, Marty, you and your staff know my members who are filing these proposals very well.

I think -- I called a number of them before I came here, surveyed them on precisely this question and their feeling was by and large that they're really comfortable with the 13 exclusions. They understand what they are and, for the most part, it's not a barricade to them submitting issues that are of keen importance to them.

Now, certainly over the years there have been, I think, heated disagreements with how the staff has interpreted the exclusions and I think there have been frustrations about whether certain topics really should not be excludable under any of the 13 items outlined in the federal laws.

And certainly, most recently the topic was raised in the AFCSME proposal at AIG and ultimately that was litigated, something that happens, I think, very, very rarely. We, on balance, are very pleased with the outcome of that and where the SEC is on that. I think we agree with where Vice Chancellor Lamb and Vice Chancellor Strine were this morning about, I think, permitting -- having more of an enabling approach on some issues that are of keen importance.

I think there is no topic more important to our

members than the issue of the process for nominating and electing directors and we feel that's definitely an area that should be permissible under the shareholder proposal rules.

MR. DUNN: One follow-up on that before -- I was going to ask the professors a question, but following up on what the panel we just finished was talking about was significant social policy issues and its impact on ordinary business and how that relates to binding proposals and non-binding proposals, for that matter.

Any of you who wish to join in here -- does that leave us with the situation under 14a-8 that seems to be a little bit flipped on its head where you wind up with proposals that are very much social issue proposals, you know, sustainability reports, things like that that don't affect the daily operation of the company and those proposals go in and yet the vast majority of shareholders would indicate that they care more about the daily operation of the company and those proposals don't go in.

Does that create an odd situation -- I don't know, Jim, you're nodding your head, if you want to jump in.

MR. HANKS: Yes, I think it does create an odd situation and I think that your social responsibility exception is ill-conceived and I would urge you to reconsider it if you want to preserve the ordinary business exception.

MR. GRUNDFEST: Yeah. I mean, it is yet another

paradox in the remarkable panoply of regulations we have at the SEC and at other agencies where there's clearly a situation where if you were to show up on the floor of the shareholder meeting and abide by all of the requirements with regard to notice, you would be able to make a proposal that would go to the heart of the governance mechanism that would otherwise be precluded by the Commission's current interpretation, the staff's current interpretation under 14a-8.

We also know from the data that generally you get higher turnouts, higher support for governance-related measures and there's also some indication that -- from your research -- that governance-related measures actually make more of a difference, even though they are precatory, with regard to the operation of the corporation than social policy-related initiatives.

So if one thinks that the goal of the proxy process is to replicate the mechanism as it exists under state law and simultaneously to assure that shareholders actually have the ability to make the kinds of proposals that the empirical evidence suggests is most important, we have it exactly backwards.

MR. DUNN: Okay. Then my job is done here. Larry, I'll go to you next. In our exactly backwards system, in the binding proposal area, how backward is it, i.e., is it doing

its job if you read 14a to say that the goal of federal proxy regulations should be fair corporate suffrage and should be to replicate the meeting? Is it succeeding or failing when it comes to binding proposals?

MR. RIBSTEIN: Well, I mean, I think you're putting the question correctly. What I want to do is kind of step back a little bit and take my usual professorial kind of 50,000-foot perspective. But, you know, the question as to why -- I think it's clear from all the sessions so far today -- and we're sort of cleaning up here -- that the Commission has been making these distinctions based on its view of shareholder power and it's not clear that this view is actually supported by state law. Shareholders seem to have a lot more power to bring these kinds of proposals than would be indicated by the ways 14a-8 has been applied. So there doesn't seem to be this basis in state law for the way the rule has been applied.

Then the question is, you know, what is exactly state law on this. It was kind of interesting, last night I was looking at an old chestnut of an article that I used -- that I read many years ago and hadn't read again until last night, the Schwartz & Weiss Georgetown Law Review article from 1977 about shareholder proposals. And they asked the same question; what is state law? They didn't know then and we don't know now. It would be nice if we had a

mechanism for getting these things clarified better, I think.

Vice Chancellor Strine mentioned this morning why not just let them all through? Why even -- I think he implied why even have the state law -- the exclusion one apply? We just don't make a judgment at all about whether these things would fly under state law. Let them go through and get the state's determination.

Then the question is are you going to get some other kind of -- what kind of other screen are you going to have because, obviously, you would need some sort of a screen. And that, I think, depends on what the function of the rule is or should be.

We heard a lot of this morning about what the right amount of shareholder power is versus director power. I don't sign on to a particular theory of whether there's a right amount of shareholder power or director power. I think we've got a very dynamic, fluid, evolving kind of corporate structure and we don't want to lock in a particular view of what that structure ought to be.

We've also got a way of dealing with these questions which is state law on an evolving dynamic basis and I think that whatever the Commission does, it should maximize the ability of state law to evolve in response to changing circumstances.

Now, I notice -- as I was sitting in the audience

this morning, I was looking at the eagle behind me and the MCMXXX was -- IV on the date. I noticed that that's a long time ago, you know.

We're talking about MMVII today and when you think about what's happened since then, it's an awful lot. And we've heard about a lot of that today. We've heard about shareholder coordination, ISS didn't exist and MCMXXX -- it's late in the day and I don't remember the Latin -- but the ISS didn't exist. We have many social responsibility mechanisms that didn't exist in those days. We've got the Internet, we've got private equity hedge funds and so forth.

I guess one -- somebody asked this morning what would we do today about adopting the -- or should we get rid of the proxy rules today. I think one way to sort of ask that question is what if we didn't have the shareholder proposal rule today or what if we didn't have the proxy rules? Would anybody be proposing that we need some mechanism of shareholder coordination given ISS, given mutual funds, all kinds of institutional investors? Would anybody be thinking that shareholders are so weak today that we would need this kind of coordination mechanism? I'm not sure. I don't think it would be high on the agenda.

Now, I'm not actually sitting here proposing that we get rid of it. What I'm saying is, given that we have a very dynamic situation, given that we've got a mechanism for

dealing with the dynamic evolution of state -- of corporate law, which is state law, I think the SEC should take as modest an approach as possible and that would include, I think, shying away from any kind of merit -- what I would call merit regulation; that is, making substantive judgments about the kinds of proposals that ought to be brought. We've seen some of the problems with applying those 13 exclusions today. And, again, I think there should be some greater mechanism for deferring to state law.

MR. HANKS: If I may, one response to Larry's question about where would we be or what would we be doing today if we didn't have the -- if we hadn't had the proxy rules all these years. And my answer is we really don't know because if we hadn't had the proxy rules, we don't know what the state legislators might have done in the interim.

I think that there's at least a good plausible argument that if we hadn't had the proxy rules, that state law would have developed more fully insofar as legislating on proxies, forms of proxy, proxy solicitation process, contents of the proxy statement and so forth than it has now.

It's really touched only little pieces of that process. You know, there's some stuff about the term of the proxy and some states now legislate that -- on what an interest coupled with the proxy is and there are a couple of other things. You know, we did a few things -- and Delaware

has, too -- in Maryland a few years back on authorizing your proxy through the telephone and Internet.

But I think that if we hadn't had the proxy rules, this would have been a much more fully developed area of state law. Now, I'm not suggesting going back; I'm simply responding to Larry's question.

MR. DUNN: Okay. Ann and Joe both want to go and since I'm going to go out on a limb Ann will be quicker, why don't you go and then Joe will go after.

MR. GRUNDFEST: That was safe. That was a short limb.

MR. DUNN: It was meant as a compliment, Joe.

MS. YERGER: And an insult to me?

I guess let me just comment that -- just add some facts here.

I mean, I think even if the laws -- even if things change and somehow there is a more permissive environment for binding proposals, I just don't think you'd be getting many of them. I mean, the fact is that 97 percent of the corporate governance resolutions over the past couple of years are filed in a non-binding way and that's because the proponents I think are deliberately in many cases crafting them that way.

They use them as a way of dialoguing with companies. It's a way of communicating. It's a market-based

tool to get feedback from the market at large and communicate with management. In some cases it's been used to push very broad reform such as accounting for stock options, majority voting for directors, I mean, even auditor independence. This is where proponents or a group of proponents would file hundreds of resolutions on certain topics.

I mean, I think that what's happened through precatory proposals has been very profound over the years, has not only changed behavior behind boardroom doors, corporate governance practices at companies but also rules and regulations whether it's at the state level or at the federal level.

So, I mean, I know no one here is proposing that we sort of revert to a binding-only sort of regime or somehow go back -- somehow think about what would happen if the states were in charge. I think that the reality is that the proponent community is very relieved that the SEC sits and has the uncomfortable position of being the judge and juror on these resolutions but the fact that you are involved ensures that there is some consistency and uniformity and I think that's very important for investors who are diversified, they've got companies who are incorporated in states all around the country.

MR. DUNN: I might be wrong but go ahead, Joe.

MR. GRUNDFEST: I'll try to be as brief as I can.

With regard to Professor Ribstein's question in terms of where would we be without 14a-8, look at how much power shareholders have today and do they really need a lot more, it's an interesting kind of factual question to ponder because shareholders wouldn't be where they are but for where 14a-8 has let them be and we have data to support that.

So, in particular, we now have majority vote provisions at more than 50 percent of the S&P 500, whether they're done through Pfizer-type policies or whether they're done through by-law provisions. The situation is extraordinarily unstable, it's rapidly evolving. Directors at these corporations are discovering that they have to become much more responsive to their shareholders once they have these provisions in because the last thing that a director wants is to be targeted with a just vote no campaign aimed directly at that director which brings their level of notoriety in a socially non-positive way very much to the fore. So this is also acting very powerfully behind the scenes to increase shareholder influence.

A very recent paper by Randall Thomas and James Cotter, a January 2007 publication, looks at the data with regard to 14a-8 proposals over the last two years and demonstrates that the experience post-2001 -- actually, the last 3 or 4 years -- is extraordinarily different than the experience 2001 and before, extensive data analysis basically

showing that there's a greater focus on governance issues now than ever before, there's a significant increase in the percentage of proposal receiving majority support, significant increases in turnouts on a wide number of these governance measures, unions are concentrating their efforts on compensation-related proposals but those proposals are getting, to date, less shareholder support than many of the external governance proposals, and that if you look at the total universe of the 333 proposals they looked at, 33 percent of the full sample that received 50 percent of the shareholder vote were fully implemented by the board.

But there's a powerful time trend here. In '02, that percentage was 15.4 percent. In '04, it's 50.4 percent. So the probability that a proposal that gets majority approval in the 14a-8 process will actually be adopted by the board, notwithstanding the fact that it's precatory, is triple what it is today than it was in 2002.

MR. DUNN: Anybody else want to follow -- Larry, you can follow-up on your own question.

MR. RIBSTEIN: Well, actually, I wanted to follow up on something that Ann said and that is I want to make sure to point out that I'm not actually recommending a distinction between binding and non-binding. My point -- one of my points that didn't really come through clearly enough in my initial remarks is that whatever the Commission does is going

to -- and I think this is certainly consistent with what Joe just said -- is going to have an effect in channeling proposals, in channeling corporate governance activity.

And it's going to have that effect, again, in a very dynamic environment, which is why -- which really is why I suggested that the Commission proceed very carefully and make as few merit kind of based distinctions as possible, because of that channeling effect that whatever the Commission does in a very rapidly-changing dynamic environment.

MR. DUNN: The next thing we want to do is -- well, first off, I'm going to apply lessons learned from 20 years of being married and just say to Ann, I'm sorry if I offended.

But I'd like to turn it over to Bill next because, believe it or not, the U.S. proxy rules don't cover all jurisdictions in the world and I think Bill has great background with the Company Act and how it goes there and I'd like to turn it over to you for a few minutes to compare first off what the rights are of shareholders under the Company Act and, secondly, give us a little bit of a discussion about how you view the two systems comparably.

MR. UNDERHILL: Thanks. Well, if I may, I'm going to take those questions in the reverse order because I think it's important to start with the environment and then get

onto the rules. We have rules in this area which are generally much more open than yours. When I say we have rules, we have procedures for shareholders to have access. We don't have nearly so many rules as you seem to. You seem to have a lot of rules governing this area.

How is the environment different? First of all, I think, for U.K. corporates, there is a real and actual shareholder democracy in the sense that there is significant power in the hands of a relatively smaller number of institutional shareholders than perhaps you've got over here. So typically for even a large listed company, it may be possible to get to a 50 percent majority of votes with 20 to 30 institutions. And so the number of active conversations that management need to have in order to have security on where the voting power really resides is maybe many fewer than over here.

And that is against a background, however, that the directors' grip on office is perhaps more tenuous for U.K. companies than it is here. Directors in any company can be removed by a simple ordinary resolution, which is a simple majority of votes cast at the meeting, disregarding votes withheld. That's only votes for and against. You count them up and, if there's a majority, that director will be removed.

That, I think, goes hand-in-hand with the same phenomenon that we see in the context of the change of

control rules, which I think you have to see as part of the background against which these rules all operate. What drives the way directors relate to shareholders in part depends on what shareholders can do to the directors.

Change of control in the U.K., there are no poison pills, there are no defensive measures permitted. The simple 50 percent test on a tender offer will get control and there are relatively few restrictions on purchases of shares. So directors live in an environment in the U.K. where they have to keep on board, then, their shareholders. Fortunately, as I've said, it's relatively fewer.

It's also worth noting, I think, that there are many more things that U.K. companies have to go to shareholders for, anyway, than U.S. companies do. So, for example -- and I put together a list and I'll be as brief as I can -- changes to the by-laws, the articles, as we call it, but also authorizing directors to allot shares, authorizing directors to allot shares for cash on a non-preemptive basis; authorizing buy-back of shares; major acquisitions and disposals, and that's at a 25 percent level; transactions with directors or substantial shareholders will require shareholder approval; approval of share plans, long-term incentive plans need shareholder approval. Political contributions, as mentioned in the earlier panel, that also anyway requires shareholder approval for U.K. companies.

So there's a whole menu of things that shareholders get to vote on in any event. And maybe last but not least, executive compensation. We have this phenomenon of the remuneration report which is a detailed report describing the remuneration policies and remuneration of the executives that has to be put to shareholders at the annual meeting. It's voted on with a merely advisory vote but that's one that shareholders take seriously and management takes seriously and that's been the source of many upsets, in fact, where public companies have found they've had to rework their compensation plans and their bonus schemes in order to meet shareholder pressure.

So that's, if you like, most of the background. Perhaps two other things worth mentioning. One is there is also a broad consensus on corporate governance standards for public companies. We have what we called the combined code that dictates certain things such as splitting the chairman and chief executive, requires companies to comply or explain and that generally pushes companies to do what the code says.

So, again, the scope for shareholders to need to use these rights is less.

And then the final point though, to note, which is -- all of this is against a background where shareholders' access to the courts in order to enforce proper governance and proper standards by their directors is very much less,

perhaps, than it is here, that the prospect of class actions is very much diminished, that the ability to bring a derivative action, while that's changing, is still not going to be an open door.

So the courts aren't really an answer. All shareholders have is access to general meetings and that's why these rules are particularly important.

So if we look at what the rules are, in a U.K. company, any shareholder or shareholders who have 10 percent of the votes can require a general meeting to be held to consider the business that they propose to carry out at that meeting so they can propose resolutions to be put to shareholders at a general meeting. And the board is required to hold that meeting within a relatively short time of being required to do it.

Shareholders can also add resolutions to the annual meeting of shareholders, which must be held in each year and to do that, they need to have 5 percent of the votes or to have a hundred shareholders holding a hundred ten thousand pounds nominal capital of shares. What does that translate into these days? Probably 40 to 100,000 shares between the hundred shareholders in order to require a resolution to be put to the annual meeting. So that's a higher threshold, I think, than you have, but it's one that people -- that the institutions find easily manageable.

And the final right is to have a statement circulated, either before an annual meeting or a general meeting, that shareholders, again with 5 percent of the votes or the hundred shareholders with 10,000 pounds nominal of capital, can require a resolution.

In the case of the right to require a resolution to be put and to have a statement circulated, the Companies Act says that the shareholders can be made to pay the costs but in practice -- recommended practice and most companies don't require additional costs to be paid by the shareholders, particularly not if the requests are received before they have completed the printing and mailing of their notices. So a late request probably would incur a cost but if it gets in on time, it wouldn't.

I think the only other thing I would mention -- well, two other things, maybe, to mention at this point. First of all, there is no equivalent of the SEC process in reviewing and controlling this process of what shareholders can do. The board of a company has limited rights to go to court. Currently the law says they can go to court to ask for an order that they don't have to circulate something which they think is giving needless publicity to defamatory material.

That right is going to be changed as our laws change later this year but even then it will be necessary to

go to court and show abuse of the process. But the courts -- and these go back over a hundred years -- have said that directors don't have to convene meetings or put resolutions if there would be no purpose. So if the resolution would be ineffective, contrary to the by-laws or serve no purpose, then the directors can ignore that request. If the directors ignore it, then the shareholder is put to the expense of going to court to try to enforce those rights.

What does all of that mean in practice? I think what it means in practice is that companies and shareholders rub along pretty well together. There has been an increase in the kind of social responsibility precatory resolution is being put not least by U.S. institutions who are trying to use the practice they have over here in the U.K.

Those are dealt with relatively easily by companies; there aren't very many of them. They tend to get put. Companies don't look for technicalities to rule them out because that only attracts more adverse publicity and it's generally better to put the resolutions.

Examples in the last year for 1st Group and Shell suggest no votes against these kinds of resolutions of the 93 percent order, meaning that management are not particularly worried about that kind of resolution being put and shareholders don't tend to go to the bother of putting them.

One of the points that Cary made on the other panel

is that if there was no control, you'd have 300-page proxy statements. Certainly in the U.K. there is no control but we don't have that and I've been trying to answer the question as to why that might be. And I think it's a combination of all these things. It's the more direct access to the shareholders that control the vote. It's the -- maybe it's a U.K. reticence about institutional shareholders putting their heads above the periphery. But I suspect that institutional shareholders feel they don't need these rules; they have a good enough dialogue with directors that they will get their own way.

MR. DUNN: If I could follow up with a couple of things, just drive them home, because you mentioned them.

On the cost side -- Don Langevoort referred to it this morning as costs and subsidies of the system. Is the battle over costs ever large? To the extent a shareholder has -- because in our system here, if a company thinks it can exclude -- it has the obligation to -- it has the burden to show that it can exclude, you indicated there that if the company thinks it would be ineffective or invalid if passed, that they can take that position and the mechanism for effecting it is for shareholders to go to court.

Has that ever been an issue? Is that something that's pressed or do you think the cost/subsidies thing is not a problem because of the largeness of the shareholders?

MR. UNDERHILL: I think directors for U.K. companies are very reluctant -- would be very reluctant to take those steps. Failure to propose a resolution or issue a statement is a criminal offense -- sanctionable by a fine, but it's still a criminal offense, so that concentrates the directors' minds. If they fail to requisition a meeting properly, then the meeting can be convened by the shareholders and then the costs recovered directly from the directors out of their remuneration. That also focuses the directors' minds.

So when it comes to taking a fine judgment on a legal point as to whether the resolution is valid and can be put, directors would usually decide to spend the company's money and put the resolution, convene the meeting or circulate the statement rather than take risks themselves.

MR. DUNN: The other thing -- and I just -- just to confirm, in a lot of the examples we've seen that you shipped along -- the nature of the shareholder that was forcing an action was, in U.S. terms, very -- I mean, huge. It was 13 percent, 18 percent, 22 percent. Is that the more common situation, that you don't have to gather shareholders together to reach that limit?

MR. UNDERHILL: I would say so. And these divide the kinds of resolutions that we see and these rules being used in two ways. They can be used by truly activist

shareholders who are trying to change the policy of the company or who are trying to change the board. In that case, you would expect to see one, two, maybe three institutions gather together with sufficient voting power to make it into a real issue. They would have had dialogue with the company and failed to get their way and then they would be prepared to, having threatened to require a meeting to be convened or have resolutions put.

Then you have the corporate social responsibility-type precatory resolutions where there's enough shareholding power gathered in the ethical funds that can -- they can usually trip the 5 percent limit and they can require those resolutions to be put.

MR. DUNN: The last question I want to ask you is in a number of the readings we had that are in -- some of the materials, the readings from the professors today, there's a notion of concern regarding when one or two shareholders are able to force company action or force a vote on something, that there's a concern about a lack of fiduciary duties in that shareholder and the notion of a smaller shareholder effecting its will on others when it doesn't necessarily have a fiduciary duty to do as the board would.

If you have an individual shareholder with that kind of potential rights under the U.K. system, do you deal with that situation at all or does custom deal with it or how

does that work?

MR. UNDERHILL: I think the answer to that is that U.K. shareholders will rally around the board to protect it from a predatory shareholder largely on the basis that that -- they would say to themselves that shareholder wants to have that kind of influence over the conduct and management of the company, ought to be making a takeover offer, ought to be paying a premium, ought to be paying for control and they wouldn't want to see control ceded in that way.

I think the other technical element that needs to be borne in mind is that while we would accept mandatory resolutions, the idea that shareholders can dictate what the board will do, that would have to be at the level of a special resolution; that is to say, a three-quarters majority of shareholders voting, the theory being that it's the articles, the by-laws that create the delegation by shareholders to the board, more than the by-laws, and that a special resolution is capable of changing the by-laws, therefore that can change the nature of that delegation.

But an ordinary resolution -- and there is decisive authority on this point -- an ordinary resolution will not be sufficient. So a shareholder seeking to influence the policy of the company has got a higher threshold in order to get a change to the articles than he does in order actually to acquire control.

MR. DUNN: I can turn it over to anybody else here who wants to answer this. And Joe, you run the litigation database out there at Stanford so maybe you know some of this. How do you think such a -- if -- and this is purely theoretical so I apologize for that but what are the limits we have here in the U.S. that would keep something like that from succeeding or are there any?

MR. GRUNDFEST: Oh, my God. To summarize that wonderful summary of British law, as I understand it, there are fewer formal rules and much more shareholder access and interaction. So in other words, you're getting the result that many people in the United States want with a far simpler legal and regulatory mechanism.

And I think that there are cultural reasons for that and there are also legal reasons for that. Cultural reasons, you know, my goodness; where would you start? But basically I think there's a level of civility in British society that has been driven out of ours for a wide variety of reasons and on the legal front, you know, litigation is a little bit like the great American pastime.

I think it's, you know, ahead of baseball in many ways even though, as a practical matter, you have a look at the data that we keep, the volume of class action securities fraud litigation is down very significantly beginning as of the middle of 2005. So it's a separate debate about why

there's less class action securities fraud litigation but it's clear that anybody involved in this kind of an influencing process in the United States opens themselves up to potentially greater litigation risk than is the case in Britain.

MR. RIBSTEIN: I just have a very brief kind of reaction to that extensive summary, which is to emphasize the polycentricity -- what I call the polycentricity of the nature of the decision that you have to make -- that the Commission has to make about revising these rules. You can't just adopt a rule from the U.K. and expect that it will work in an extremely different environment.

And I think the same kind of polycentricity idea applies to the other -- the rest of the background for whatever you do in terms of broker voting and all kinds of shareholder voting rules, empty voting. That's just the voting rules, the litigation background and so forth, Sarbanes-Oxley. So it's very difficult to determine the effect of a given rule which I think supports -- or is another piece of support for what I was saying before, the need to act carefully and conservatively.

MR. HANKS: I think it's worth remembering, too, that as we talk about the rights of shareholders, which we've been doing a lot today -- it's worth remembering that -- and this is not a one-to-one relationship but to a certain

extent, as we empower shareholders more and more, there may be, often will be, a diminution or restriction of the board's power. And I think that ought to be recognized and it can be accepted or not.

But I think it's important to remember that shareholders do and legally can act in their best interests, in their own personal interests. Save the majority shareholder fiduciary duty concept, shareholders are perfectly free to act in whatever they perceive to be their self-interest. The board is not. Directors are under a duty to act in the best interests of the company.

I know my friend Steve Bainbridge disagrees with me about that; he thinks they must act in the best interest of the stockholders. You know, I think the law and opinion has moved beyond that. I think that it's well accepted now in Delaware, in Maryland by statute, which is second to Delaware in a number of New York Stock Exchange companies. We've got it in our statute, the board must act with a reasonable belief that what they're doing is in the best interest of the stockholders.

So as we view --

CHAIRMAN COX: I'm sorry. To the stockholders or the company? I thought you just made the point that it was the company.

MR. HANKS: I'm sorry?

CHAIRMAN COX: You said you've got it in Maryland statute --

MR. HANKS: Yes.

CHAIRMAN COX: -- the board must act in the best interest of?

MR. HANKS: Each director must act with a reasonable belief that what he or she is doing is in the best interest of the corporation.

CHAIRMAN COX: Of the corporation. Right.

MR. HANKS: Right. And, by the way, that duty is an individual duty that applies on a director by director basis, not a collective duty for the board.

And so recognizing that -- and, by the way, that's a standard that was taken from the Model Act as well, so all the Model Act states, which is about half the American states, have that.

So I think that we need to bear that in mind as we look at and legislate or regulate or allocate power between the shareholders and the directors, that the shareholders are acting for themselves, the directors should be acting for the company.

Now, I think a corollary -- I will cheerfully concede that a corollary of that is that if the directors -- given that responsibility of the directors, that's focused on what's in the best interest of the company

and when it comes to the director selection process, however, I don't think that that should be necessarily confused with what's in the best interest of the company. And I think the Delaware courts have shown that they understand that with cases like Blasius, et al.

CHAIRMAN COX: While we are on the topic, since I think we got a good summary from Mr. Underhill of some of the distinctions between Delaware, Maryland, other U.S. law on the one hand and the U.K. law on the other and the Companies Act, he mentioned that by a simple resolution of the shareholders in the U.K., shareholders can remove a director. Want to describe Maryland law for the removal of a director? It's a pretty elaborate procedure, isn't it?

MR. HANKS: I'm sorry, Chairman. I didn't hear your --

CHAIRMAN COX: If shareholders want to remove a director --

MR. HANKS: Yeah. Right.

CHAIRMAN COX: -- how does that work under Maryland law?

MR. HANKS: In Maryland? In Maryland, the statute is that directors can remove a director -- shareholders can remove a director at any time with or without cause by the affirmative vote of a majority of the shares entitled to vote generally in the election of directors unless the charter

provides otherwise.

And the --

CHAIRMAN COX: So can they simply propose at an annual meeting to do that by simple resolution and get a majority vote and address --

MR. HANKS: Subject to the advance notice by-laws, yes.

CHAIRMAN COX: Uh-huh. So actually that is the same, then, as the U.K.

MR. HANKS: That would be the same except -- your ordinary resolution -- is that a majority of shares entitled to be cast or majority of shares actually cast?

MR. UNDERHILL: It's a majority of shares actually cast.

MR. HANKS: So it would be a little bit different, then.

MR. GRUNDFEST: And you'll correct me, Mr. Underhill, but I believe that there's no requirement that you wait for the annual meeting; if you had 10 percent of the shareholders you could cause the removal at any time?

MR. UNDERHILL: That's correct. You would then use the requisition to require a meeting to be held. That's the 10 percent of votes test that you can require --

MR. GRUNDFEST: And a further very important difference between the British system and ours -- and again

I'm going to defer to Mr. Underhill on matters of British law -- I don't want to be accused of practicing without a license -- the takeover process in Britain is far simpler than it is here. No poison pills, all right, none of this mumbo jumbo. Bottom line, you got a bid, you put it on the table, you make it; it either passes or it fails, all right?

So much of the complexity that we have in our system, if you look at the history of the process, really evolves from decisions in the early 1980s where the regulatory process got in the way of the hostile takeover mechanism, where the poison pill was allowed to be adopted without shareholder approval, where the shareholders in effect revolted against that kind of a mechanism and we had a lot of this push and pull.

In contrast, Britain never went down that path. British corporations and their directors therefore knew that they had to make peace and work with their shareholders, otherwise they could be ousted fairly easily through the hostile takeover mechanism.

We are in this political mess in large part because it's the knock-on effect of us having stifled the hostile takeover market in the early 1980s whereas the British allowed it to evolve in a more civilized manner.

MR. UNDERHILL: Can I just say that I'm an observer at this point, I'm not recommending any particular system,

before I lose all my friends at the American Bar.

MS. YERGER: Well, if I could just note very quickly that I think it's been the power of the precatory proposals that a lot of these impediments have been removed over the past two decades, so I think it's important to note that.

MR. HANKS: I think that's historically accurate. I think it's also historically accurate to say that in regards to one of the forms of shareholder access that I referred to at the beginning of the session, that is, the right to come to a meeting, the right to get up and speak, 20 years ago, even as recently as 10, 15 years ago, we were talking about various people as corporate gadflies. Well, it turns out that a lot of things that they were beating the drums for in those days are now mainstream.

So that form of access I think is an important right that shareholders have and should not be overlooked.

MR. DUNN: Commissioner Campos.

COMMISSIONER CAMPOS: I just want to explore a little bit, without a big academic lecture -- but I understand the concept of the corporate entity and then directors owing a responsibility to the corporate entity and of course it's obvious to think about other stakeholders like creditors and in particular in a bankruptcy situation where, you know, those stakes are very different than shareholders.

But short of a bankruptcy and short of creditor rights, okay, how far removed is that duty from the interest of shareholders in terms of the directors to the corporation to shareholders?

MR. HANKS: Well, I think it depends. It depends on what your stockholder base is and what you know about it. If you've got a corporation where there's one shareholder and you're not that shareholder but you're a director, it's kind of easy to figure out --

COMMISSIONER CAMPOS: Let's stay with big.

MR. HANKS: Okay. I was getting there. I think one reason why the law is, as I believe it to be, that a director has a duty to act in the best interest of the corporation is that with a big corporation, it's impossible to figure out what the interests of the shareholders are.

Some may be young shareholders who don't care about income but care about growth that are investing for the long term. Others may be widowers and widows who are elderly and very much income-oriented and don't want to spend a lot of money on research and development.

COMMISSIONER CAMPOS: When wouldn't long-term returns be the predominant interest of shareholders?

MR. HANKS: Well, the example I just gave. With elderly shareholders whose life span is not that great, who are more income oriented and short term oriented, they might

like to see a lot of things like R&D and other things not done to maximize their dividends.

And it's not just a contest between shareholders with different interest. Even the --

COMMISSIONER CAMPOS: Well, how does the -- then tell me how you break -- how you make that analysis, okay? If you can't figure out what shareholders want, how can you figure out what the corporation wants?

MR. HANKS: That's where the board comes in. And the Delaware courts in Time Warner have said it's the duty of the board, the right and power and duty of the board to determine what the investment horizon over which the corporation is going to be operated should be.

So that's up to them to work that out. And they may look --

COMMISSIONER CAMPOS: And then if 50 percent of the shareholders disagree with the board?

MR. HANKS: They vote out that board or they turn down whatever charter amendment or merger --

COMMISSIONER CAMPOS: It seems to be converging to me but I'm trying to find the distinctions that you're making.

MR. HANKS: Well, at some level it should converge but only I think in an abstract sort of way assuming you had all the information that you could possibly get, which you

can never get, about all the shareholders and all of their interests and, by the way, even if you could get that, those shareholders are changing. The shareholders of Microsoft at the close of the market today are a different group than at the opening of the market today.

COMMISSIONER CAMPOS: But they can vote.

MR. HANKS: But they can vote. That's right.

MR. DUNN: Larry, do you want to jump in here?

MR. RIBSTEIN: Yeah. I know Commissioner Campos doesn't want a long professorial lecture so I'll give a really -- two really short responses because I've actually done a fair amount of research on that issue.

It's basically -- the provision that Jim is referring to is basically a statement of the business judgment rule which is that we're going to leave it up to the directors' judgment. I think the question is very appropriate in the current context because -- and I've been talking about the polycentricity of the rules that you're considering and fiduciary duties are part of the context.

And we do leave a lot of judgment up to the boards, which suggests that we need other kinds of constraints and I think it really all boils down to what is the best set of devices for constraining agency costs for constraining the directors.

MR. DUNN: One thing I was reading in a piece that

Don Langevoort wrote is -- and it ties into what we're doing here -- a lot of what we're talking about here is the primacy of state law and Steve Lamb referred to it as the state law laboratory this morning and whether that was functioning.

In Don's piece he referred to that as a theory but he viewed it not as a true laboratory because Delaware had one and that he viewed it as a monopoly instead of competition for corporate charters.

Any of you all up here -- how -- would you agree or disagree with Don?

MR. RIBSTEIN: I guess I would disagree. I mean, I think there's a lot of different ways to characterize the competition. It's been characterized by several commentators as a national competition with one dominant player, which is Delaware, and then 49 individual competitions where states, a lot of them adopting the Model Business Corporation Act, are competing to keep their corporations at home. So Delaware does not have -- it has a large chunk of the national market but it doesn't have that large a chunk of the state market.

And as Roberta Romano has asked in several articles, we don't know what an optimal competitive market would look like, so -- and we would need to know to decide whether what we have is sub-optimal. Unless we know that, we can look at general theory and the idea that competition is often better than no competition.

MR. DUNN: Let me go Joe and then Jim.

MR. GRUNDFEST: Marty, it's not at all clear to me that the state is the appropriate level of analysis if we're going to be looking at the question of experimentation. It may well be that the more vibrant level is really at the corporate level itself.

If you really believe in corporate democracy, then doesn't it inevitably follow that we can look to the shareholders of the corporation and the corporation itself to set the rules by which it wants to govern access to the corporations own proxy?

And even if you have two corporations, both of which are chartered in Delaware, their individual circumstances can differ in very, very dramatic ways and it could well be the case that the optimal rules of proxy access for one corporation are very different than the optimal rules of proxy for another and clearly different than a national standard set by the Securities and Exchange Commission which also as a practical matter requires content regulation by the staff under 14a-8 and also compels speech on matters that are very close to political, which is not necessarily the healthiest business for our government to be in.

So if you combine all of these different vectors, I wonder if the time isn't ripe for the Commission seriously to consider some form of devolution of authority, not

necessarily to the states but to the individual corporations which would then operate under appropriate state law and which would allow a much more interesting and vibrant form of tailoring of governance mechanisms to individual situations.

MR. HANKS: I think that characteristically for Joe that's a very interesting and provocative idea. And to get back, Marty, to your question, I think that the competition for state law legislation, state to state to state, is still very much alive and well. I agree with what Larry said and we need to look no further than just a few weeks ago when the North Dakota legislature passed something called the North Dakota Publicly Traded Corporations Act, which -- and I haven't really studied it but if I understand it correctly, after having just gone through it a couple of times, it's basically a public company supplement to the North Dakota General Corporation law.

Now, that's a very interesting idea. You have to be a North Dakota corporation to opt into this public company Act, which is a separate Act. But, as I say, I think it functions basically as a public company supplement to their law. Now, whether there are going to be institutional shareholders who start beating the drums for corporations to re-form -- reincorporate to North Dakota or not, we'll see.

I think there are a couple of big problems with the statute. One is, again, if I read it correctly, it's an all

or nothing proposition. You're either all the way in it or all the way out of it, with a couple of exceptions. So that means you can't have a class of five board, you can basically not have any significant advance notice provisions, all these various things, and I think that's a weakness.

And the other is -- and I'm a little bit surprised that they didn't do this -- the other is they make no provision for any attempt to replicate the Delaware Chancery Court. So, you know, it's a wonderful statute if you look at things from that perspective but it's missing the Delaware Chancery Court or the equivalent of a really excellent state business court.

MR. DUNN: If I could ask one last question before we get to closing statements here.

When the shareholder proposal rule was first adopted in 1942, I guess, it merely said any proposal that was -- I'm sorry, Paul. I'll get to you. I'm sorry. I didn't see that before I started.

Any proposal that was appropriate for shareholder vote was -- shareholder action was the standard. And then, as always happens, everybody is like, well, put more meat on that bone, give us more certainty, give us more certainty. And so you wind up with the rule we have now which has basically the first test which is, is it appropriate under state law and then is it ordinary business, which would seem

to be the parameters of what was intended in 1942, and then you've got 11 other things that have added on as we've gotten smarter over the years.

The question I have for you all very quickly is is that an improvement? Would it be better to go back to the basic test and say if it's legal under state law it's fine or have we gotten the better of it as we've gone along?

We'll start with Larry.

MR. RIBSTEIN: Well, as I said earlier, I'd even go further back and have some sort of economic test -- and I'm not sure what that would be, possibly a shareholding test, possibly something like what Roberta Romano has suggested in terms of looking at revealed preferences of shareholders in their votes on previous proposals, but I'm not sure I would retain any kind of merit standard which includes a Commission judgment on whether it's consistent with state law. So I'd even take out or consider taking out even that criteria.

MR. DUNN: Similar to what Leo was speaking about this morning. Ann?

MS. YERGER: Well, I will comment. Certainly, my members would say open the doors, we're happy to have the rules as loose as possible. But I do think they're comfortable, by and large, with those 13 exclusions. They weren't comfortable with where the SEC was on access proposals and they were very pleased with that change.

COMMISSIONER ATKINS: Yeah. I wanted to -- you referred to Professor Langevoort. I wanted to also alert to him as well when earlier he was talking about a large part of 14a-8 being a subsidization of, you know, some views versus others. So, in effect, I guess the many pay for the views of the few being put to the shareholders.

So I was just curious when Ann and others are talking about how the whole precatory proposal aspect helps to incubate some of these corporate governance changes, that's only one aspect of the precatory proposal that we've seen, I'd say probably a minor aspect of it. We have all sorts of other -- under the social important issue exception we have lots of other things coming in.

So I was just interested in exploring if we would change things because a lot of these corporate governance things could be done through by-law proposals and whatnot and how that might change if we started focusing on the precatory proposal aspect to either restrict it in some way or change the parameters.

MS. YERGER: Well, I'm not certain if what you're asking is, you know, if there'd be a shift more to a binding-only kind of regime, so why don't I try to tackle that question? I'm not going to comment on social -- I mean, the Council really focuses on corporate governance issues so I just don't have much experience in the socially oriented

resolutions. That would be a question more for Paul Neuhauser.

But I do think that our members would have a great deal of concern if there was a movement strictly to a binding-only kind of regime for shareowner proposals and I think that -- a few of the reasons I mentioned earlier. The first is that, you know, these are used for dialogue and I think there's a perception that a binding proposal is more of a stick and it doesn't help communication.

I think also, by their very nature, binding by-laws are prescriptive and in many cases our members don't want to be overly prescriptive. And certainly I think majority voting for directors is one area where, even though Delaware now explicitly allows owners to be filing by-laws, that most of those proposals are not filed in a binding capacity.

I also think there's some practical issues to consider and that is that the 500-word limit, quite frankly, is very challenging for proponents to craft a by-law with all its nuances and really work through those issues and then to file a meaningful supporting statement. I think that needs to be considered also.

And I think, finally, a big hurdle, to a certain extent, is that many companies have super majority voting requirements to amend the by-laws so that we're not even talking about a majority of outstanding votes. Even as

opposed to a majority of votes cast, we're talking about companies with, you know, over 75 percent outstanding shares to amend the by-laws. And I think that's such an extreme hurdle that it would really harm, I think, what the whole intent of the proposal process is.

MR. DUNN: Larry, did you want to follow-up?

MR. RIBSTEIN: Well, I definitely agree with Langevoort's point that any time you have a subsidy it's going to channel things into the subsidized category. So -- and that's one reason why I think that having these merit-based categories is a bad idea.

On the other hand, there may be a concern if we move to something like what I'm suggesting of having a substantial shareholding or reveal preference kind of approach, are we going to be slighting the social proposals that used to be filed as non-binding when we had the -- under the current system and I think that's something very important. I'm not sure it was even addressed in the last panel but I do think that the function of the corporation is what's going to be relevant to that.

And I think that the function of the corporation is as an economic entity and that concern really is not something that we should be too worried about but that's probably a subject for another panel on another day.

MR. DUNN: Joe and then Bill and then we'll wrap

up.

MR. GRUNDFEST: Can we all recognize that we're really not all that smart? I don't think that we are wise enough to be able to figure out what the right threshold is, how to implement review preference, how to do all of these different things in a way that would be right for every publicly traded corporation in the United States. We're bound by -- whenever we would try to set any one of these rules, especially at the federal level, we're going to make big mistakes. We're going to be over-inclusive, we're going to be under-inclusive, we're going to set the level too high, we're going to set the level too low. We're doomed to failure.

My general advice is if you look down a path and you realize that you're doomed to failure, don't go there, okay? The better way to go, it seems to me, is to recognize, again, that if we really do believe that shareholders will intelligently act in their own best interest, why do we not believe that they'll intelligently act in their own best interest with regard to framing a rule for access, whether it's over precatory or non-precatory mechanisms, in a way that best serves that individual corporation?

CHAIRMAN COX: I wonder on that point -- I know we're trying to wrap up here. I don't know how much time exactly we do have since it's the last panel but just to tie

a few loose ends together with all the assembled expertise that we have here, three things.

First, under the U.K. Companies Act, a proposal to nominate directors automatically goes on the company's proxy. Is that right?

MR. UNDERHILL: That's correct.

CHAIRMAN COX: And likewise with a proposal to remove a director.

MR. UNDERHILL: That's correct. If the thresholds are met in each case, that would go on the proxy.

CHAIRMAN COX: All right. And at least under Maryland law -- because we have that expertise represented here -- we can do this at an annual meeting through a normal resolution of shareholders and if we meet the advance notice requirements, that could be done certainly in person if present at an annual meeting.

What about through the 14a-8 process?

MR. HANKS: No, I don't believe that that could be done through the 14a-8 process.

CHAIRMAN COX: I mean, it's clearly legal under state law. What is the -- what kicks it out of 14a-8?

MR. JOHN WHITE: -- directors --

MR. HANKS: -- the election of directors --

MR. JOHN WHITE: -- because it relates to the election --

MR. HANKS: Yes. Correct. Yes.

CHAIRMAN COX: Or, in this case, the removal of a director. And the second question: can companies in the U.K. customize the procedures for precatory proposals or, if you will, proposals to nominate a director or is the Companies Act one size fits all in this respect?

MR. UNDERHILL: There is scope for some customization to the extent that for nomination of directors these days a public company's Articles would stipulate a minimum period of notice and information that needs to be provided before that person can be nominated. That doesn't apply to the removal. The removal of directors is a straightforward inviolable statutory right that shareholders casting an ordinary resolution can remove a director.

MR. JOHN WHITE: Just to clarify, when you said if you meet the threshold, there is a 5 percent ownership threshold?

MR. UNDERHILL: That's the 5 percent or hundred shareholders with 10,000 pounds of nominal capital.

CHAIRMAN COX: All right. And third and last, you mentioned that there is a super majority required to amend the by-laws in some if not all cases. How do those boundaries get established?

MR. UNDERHILL: That's established by the Companies Act. Again, that is part of the Act and can't be effectively

changed.

CHAIRMAN COX: So if I want to amend the by-law concerning the election of directors or the procedure for nominating directors, do I need a super majority for that by-law amendment?

MR. UNDERHILL: You need the three-quarters majority of shares voting at the meeting to do that. Just in that context, just picking up on one thing that Ann said, we do see what are effectively precatory resolutions put as mandatory resolutions, i.e., with a special resolution. The shareholders putting them don't expect them to be passed because they don't expect to get to the 75 percent level and yet they can lawfully and properly propose a resolution just in case it might.

So they can get the resolution on the table even though it's unlikely to be passed. It becomes effectively precatory because if they get a significant vote in favor, it has the same influence as if it were just put as a precatory resolution.

CHAIRMAN COX: And then you answered the question about whether you can customize proposal -- customize the procedure for nominating directors. What about customizing the procedure for precatory proposals?

MR. UNDERHILL: I guess that you could do that, that you could impose special limits within the Articles of

the company. It's not a question I've been asked before and I would suspect it's not a question that has crossed people's minds to --

CHAIRMAN COX: Because the practice is people can take them and do them --

MR. UNDERHILL: -- simply because everybody is living with the current system.

CHAIRMAN COX: But as far as the Companies Act is concerned, that would also fall into the realm of a three-quarters majority of those present voting, right?

MR. UNDERHILL: If you were changing the by-laws to do that, you would need a three-quarters majority.

MR. DUNN: Okay. We have about 5 or 10 minutes to go so I think we'll start with Joe at that end and everybody give anything you want to leave us with and Ann will get the last word.

MR. GRUNDFEST: I think I've basically spoken my piece. I -- what I'd like to do is liberate the staff of the Division of Corporation Finance so you don't have to go through the seasonal process of reviewing these 14a-8 proposals. I would hope that all of you would have better things to do with your time than that.

I'd like to see greater experimentation. I'd like to see greater individualization and if there really is a belief in the power of the shareholder voice, then let's

belly up to the bar and really accept what we believe and let the shareholders and the corporation also decide the rules for access for themselves.

MR. HANKS: Well, my closing remarks would be to congratulate the Chairman and the Commissioners and the staff on putting on this conference. I think over the years there may not have been enough cooperation between the Commission and people who are involved with state law, whether it's legislators or state corporate lawyers or state bar associations that are involved with corporate law, and I think this has been a wonderful opportunity to establish or at least enhance that kind of relationship and I hope that will continue.

I do have a couple of recommendations for your consideration. First, I think that some thought needs to be given to the issue of record dates, who's entitled to vote at -- not only on stockholder proposals but everything else, but since we've been talking a lot about stockholder proposals, I think that there needs to be some more careful thought about how record dates work, particularly in light of some of the voting issues that have been referred to earlier, empty voting and multiple voting and that sort of thing.

And I would also make the comment that the idea of the record date is a pretty old concept, you know, freeze the -- before the record date, you stop transfer and defer

the transfer books until you could vote. With modern technology, maybe we don't need record dates so far in advance of the shareholders meeting. Maybe they should be closer to the meeting so that the people who are voting at the meeting are -- more accurately reflect the current group of shareholders.

Second, I think that there's a lot of confusion among the corporate bar, among state corporate lawyers, on your view of voting for adjournments of meetings. You've got some unwritten policies that some people know about and some people don't know about and, you know, if you go to the right program and listen to, you know, the right staff members, you'll hear one view or another.

Adjournments are becoming an increasingly important thing in governance. Adjournments to win, adjournments for other purposes. If you've got a policy on adjournments or on the use of proxies to vote for adjournment, I think it would be helpful for that to be published in the usual way. And again, I think that's another area, like record dates, where we could work together with state corporate lawyers and develop a best -- if not best practice, a model provision.

Third, I would urge you to consider expanding the required disclosure for director nominees and particularly for proponents of director nominees and director proposals. In response to Commissioner Atkins' question, I'm fine on

expanding the substantive range of proposals that shareholders can take to the annual meeting and eliminating a number of the exclusions.

I would have some de minimus requirements just so we don't get the 300-page proxy statement but at the same time I think that more ought to be known to the shareholders about who the shareholders are who are proposing these things because they may have very, very different interests than other shareholders.

Next to finally, I think as was alluded to in earlier panels, there's a lot of work that's got to be done. Again, this is an area where I think federal and state law come together, overlap, should mesh on vote counting and getting it right. It's just amazing to me the things that I read and the things that I hear from the proxy solicitors and others about how this still isn't sorted out in any accurate or reliable way.

And finally, again, another issue of federal and state law and that's the availability of shareholder lists. I think a lot more work needs to be done in that area as well. I think there's some confusion. I think some of the state courts are confused, so I would urge you to take a look at that. And that's not an exhaustive list but thank you very much.

MR. DUNN: Thanks, Jim. Larry?

MR. RIBSTEIN: Well, just very briefly, I'm very much in sync with Joe's comments. I'm not sure that the Commission is ready to repeal 14a-8 so I guess my general perspective is what is the least intrusive way that the Commission can respond to what I think is possibly still a perceived need to provide a subsidy to the shareholders to effectuate shareholder coordination.

And, as I've said repeatedly, I don't think that merit-based or actually signing off on the substance of proposals is the way to go. It so happens -- and Steve Bainbridge alluded to this earlier -- I also think there's a First Amendment problem, which I won't get into, but in recognizing the difficulties of where the cutoff is going to be, what kinds of tests ought to be applied, I think that some kind of numerical test reflecting the economic stake or support that the shareholder has is possibly the least intrusive way to go although, frankly, if I ruled the world I might be willing to get rid of the rule.

MR .DUNN: Bill?

MR. UNDERHILL: Thanks. I think just a couple of things. One, the point already made but I think worth emphasizing that corporate governance systems are complex and plucking one rule from one system and plugging it in another could give rise to any kind of error or something you didn't want. So it's difficult to pick from other systems.

The other is a rather more specific response -- and maybe the answer isn't very brief -- but you discussed in the previous panel the idea of this sort of chatroom opportunity for shareholders to exchange views and maybe have votes. In the fear that we may become infected by any such proposal, which is always possible, I think the management that I know at companies who like to think that they have open dialogue with shareholders would find it a huge burden. I think institutional shareholders would find it a huge burden to know on a 24/7, 365 days a year which proposals on these web sites they had to respond to to avoid the vocal minority who are keen to use the web making their views known and having achieving a sort of apparent consensus for things for which there is no support.

I would go to the kinds of precatory resolutions that we've seen where we've seen massive institutional voting against them. Whether institutions would be sophisticated enough to pick up those proposals as they emerged through this rather less choate system is questionable. Plus I wonder whether the management time devoted to monitoring them would be worth spending in light of the alternative, which is a 300-page proxy statement with shareholders voting on a complete set of information, everything in one package. It may be not a question you wanted to ask me but I've answered it.

MR. DUNN: Ann, bring us home.

MS. YERGER: Well, today has reminded me that 14a-8 is the rule that everybody loves to hate. But I think that, from our members' perspective, this rule really has worked by and large to date and I think that the outcome of shareholder proposals have been profound changes to corporate governance practices and rules and regulations.

I think that our members take comfort in the fact that the SEC staff is playing a role in terms of overseeing these proposals. Of course we would be happy with a much more open-ended rule in terms of allowing more types of proposals. I think very clearly our members feel that resolutions addressing processes for electing directors should be permitted and the SEC rule should not stop that.

I think there were interesting ideas today including maybe revisiting Steve's concept of an override where perhaps a group of investors of some total amount of stock could override an SEC decision, perhaps on ordinary business.

I think that, finally, the integrity of the process is very important to everyone involved, companies and owners, and I think we're really supportive of the SEC tackling the thorny issues of empty voting, over voting, and we're very eager to see broker voting go away.

MR. DUNN: Okay. Well, I'm going to turn it over

to John in a second but, before I do, I wanted to thank everyone. I wanted to thank the Chairman of the Commission for letting me be here today and learn all that I learned. I'd like to thank all 20 of our panelists who were here and particularly I'd like to thank you 5. I appreciate it very, very much. Thank you for your time. I know how much effort it was. Thank you.

MR. JOHN WHITE: A couple of things. First, I certainly echo all of Marty's thanks. I also wanted to particularly thank three lawyers in corporation finance that have helped Marty and me put today's roundtable together and have it run so smoothly. They're all actually sitting over there on the corner to the Chairman's right.

Lily Brown, Tamara Brightwell and Ted Yew. We are certainly very appreciative for all of their help. I should also mention that Tamara and Ted actually led the 14a-8 team this year and got 400 no action letter responses out on time and Marty and I are very appreciative of that as well.

Final thing, I hope we'll see all of you on May 24 for the next roundtable when we will take up the topic that we've heard mentioned a number of times today in terms of mechanics.

With that, Chairman Cox, I'll turn it back to you.

CHAIRMAN COX: Thank you, John, very much. Once again, thank you to John White and Marty Dunn for being

excellent moderators for all of our four panels today. I want to thank our last panel particularly for helping us if not tie a bow around this then certainly to conclude the discussion today in very, very elegant fashion. I think we had a nice, truly global discussion of all of these issues. In particular, I want to thank Mr. Underhill for traveling on what I understand is an overnight in order to be here for this presentation, gives us a good opportunity to do some comparative law and some comparative policy analysis.

This, as John said, is the first of three roundtables so we'll be back at it very, very soon. We'll do this three times this month. The purpose of all three of these roundtables is to elicit comment and ideas just as we've seen today to help us as we fashion rule making that we expect to have ready by early summer in proposed form.

It's an important rule making because it involves such fundamental questions about what shareholders get to do and how they get to do it. We're starting, as we did today, with the legal framework. The next roundtable I know is going to be very popular with, if no one else, all of our panelists because everyone wanted to talk about a lot of the proxy mechanics issues. They're vitally important. We recognize that they're very closely connected to what we're talking about here.

And in the third roundtable we're going to listen

to the stakeholders about what works now and what can be made to work better. So we truly have a broad scale and we're now a third of the way into the first part. We have a lot more to do but you've gotten us off to a really, really excellent beginning.

So thank you very much and particularly to all the Commissions. As you've seen, we've had either all five or four of the five commissioners here with us all day long. This is obviously of enormous importance to the Commission as a whole and we hope and expect that our eventual work product will be very much the better for your contribution, so thank you very much.

Our meeting is adjourned.

(Whereupon, at 4:52 p.m., the meeting was adjourned.)