

1 MR. RUBECK: Let me just say something on your  
2 open point because it's an opinion or view that I began  
3 my thinking with, that is shareholders are smart enough  
4 to make their own decisions.

5 Let me tell you what changed my mind --

6 CHAIRMAN SHAD: Mr. Rubeck, if you would raise  
7 your voice and pull up the mike.

8 MR. RUBECK: What made me change my mind a little  
9 bit about that --

10 COMMISSIONER PETERS: In other words, you don't  
11 think shareholders are smart enough to make their own  
12 decisions?

13 MR. RUBECK: In this particular circumstance what  
14 happens is managers have the ability to set the agenda,  
15 and decide what the shareholders get to choose between; they  
16 determine what's on the amendment. Under no circumstances  
17 they can put things on the many -- in which all choices  
18 from shareholders. And that's the circumstances which the  
19 cohesion --

20 As to your second point, if they could be  
21 compensated -- Commissioner Grundfest felt that your example  
22 of the solution that I present, I would think that's fine.

23 COMMISSIONER PETERS: Professor Gordon?

24 MR. GORDON: Yeah, it seems to me that it would  
25 be very hard to devise a formula that would compensate

1 shareholders for loss of the vote. In a sense, we have a  
2 formula for that. It's called a leverage buy out. And  
3 it seems to me that the dual class recapitalized firm has  
4 all of the -- it's sort of like a leverage buy out with  
5 none of the advantages. That is to say, the advantage of  
6 the leverage buy out is that theoretically is that it puts  
7 managers under the gun. They have to produce, and there are  
8 the bond holders breathing down their necks. This will  
9 make them more efficient. It will reduce agency costs,  
10 as it has been called.

11 But managers in the leverage buy out firm have  
12 all voting control.

13 Well, by contrast in the A/B recapitalization we  
14 have managers once again in that impregnable voting position  
15 but they don't have bond holders or anyone else in power  
16 to oust them in case of bad performance breathing down their  
17 neck.

18 So, it seems where managers are prepared to  
19 essentially draw in outside capital as to a leverage buy out,  
20 or raising debt, then perhaps they can buy out the public  
21 shareholders; otherwise, I think they are essentially using  
22 their control over the proxy mechanism to obtain approval.

23 I mean, in response to your very first point, I  
24 think it's important to distinguish between shareholder votes  
25 in ordinary times and shareholder voting in extraordinary

1 times.

2 I think here in your typical annual meeting  
3 shareholders don't pay much attention, but when it comes  
4 to a merger proposal, or a tender offer, obviously that  
5 grabs everyone's attention. And is that right to essentially  
6 exchange your vote, exchange your share, and, thus, your  
7 vote at takeover time that gives bite to the marketing  
8 corporate control, and that's why shareholder voting matters.

9 COMMISSIONER GRUNDFEST: Commissioner Peters?

10 If I may pick up, you earlier raised a point with Mr. Phelan  
11 as to whether there should be a requirement for a super-  
12 majority. Mr. Gordon just made the point with regard to  
13 these being extraordinary situations. I'd like to add to  
14 that the observation that Professor Buchanan, who just won  
15 a Nobel Prize for his work in the areas of public choice,  
16 pointed out that there's a distinction between voting on  
17 what's called a constitutional provision, and voting for a  
18 matter which is subject to the vote under the pre-existing  
19 constitution, and that there is a good, rational reason  
20 for requiring a higher supermajority in a situation where  
21 you take up a vote of a constitutional magnitude. For  
22 example, whether to give up the vote then if you're simply  
23 voting on a matter that's already on the agenda.

24 COMMISSIONER PETERS: I think that's an interesting  
25 point. I would just -- if the Chairman would be indulgent,

1 point out that I think that while I agree there may be  
2 some circumstances under which you might want a higher  
3 standard percentage-wise with respect to the vote, I do  
4 not agree that -- I think that all of those circumstances  
5 are equally cohesive to use Mr. Ruback's terminology.

6 MR. GORDON: I just want to -- one caution about  
7 the New York Stock Exchange proposal for a supermajority  
8 approval by public shareholders, as I'm sort of elaborating  
9 in the paper that I've written, "Ties that Bind: Dual Class  
10 Common and the Problem of Shareholder Choice," copies of  
11 which I submitted as part of my comments. The New York  
12 Stock Exchange supermajority rule will, in fact, backfire.  
13 It will have just the opposite result. The effect will be  
14 to whipsaw public shareholders into situation where they are  
15 more likely to vote for dual class common than otherwise.

16 And the reason for that is the disparity between  
17 state law requirements, which are the simple majority only  
18 in most circumstances, and the New York Stock Exchange  
19 majority of public shareholder requirements.

20 Well, if management simply says we are going to  
21 recapitalize, if we get a simple majority vote, whether or  
22 not we get the New York Stock Exchange requirement for  
23 majority of public shareholders, then the public shareholders  
24 are in a position in which they will almost certainly vote  
25 for the recapitalization of the company.

1 which starts off in typical firms with up to 30 percent of  
2 the stock, if management is going to get the simple majority  
3 in voting against the recapitalization, they will only make  
4 their situation worse because they will lose the Stock  
5 Exchange listing.

6 I don't know if this is all clear in what I've  
7 spelled out, but again, it's not at all clear to me that  
8 the New York Stock Exchange rule won't, in fact, make things  
9 worse than better on its supermajority --

10 CHAIRMAN SHAD: Commissioner Cox?

11 COMMISSIONER COX: Thank you, MR. Chairman.

12 First I would like to continue along and ask some  
13 questions about the voting problems, or with this panel as  
14 it has come to be known, the well-known collective action  
15 problems of shareholder voting.

16 Now, I guess first I would like to know whether  
17 Mr. Rubeck's study was an empirical study or not because I  
18 am reminded that in the context of tender offers we had  
19 heard quite a bit on how two tier tender offers posed a  
20 prisoner's dilemma, and that we would find people in those  
21 cases tendering their shares into a two tier offer where  
22 they came out worse off than for in any or all offer, and  
23 when that was examined empirically there were no cases.

24 But, continuing on, and this would go to any of  
25 the people who mentioned the voting problem. it really seems

1 as if the -- what's being posed has wider implications  
2 because it's almost -- comes across to me as saying, well,  
3 shareholders should certainly be allowed to vote, should  
4 preserve one vote per share, but they just shouldn't be  
5 allowed to vote on a really important issue like whether  
6 they retain their voting rights or not.

7 And I realize one response was that, well, the  
8 management can set the agenda, but still I guess aside from  
9 comparing these voting problems with some ideal, when it's  
10 compared to the way things work, the way corporations  
11 actually work, things that are voted on, as opposed to things  
12 that are not voted on, the way voting systems work in general,  
13 do you reach the same conclusions about the problems with  
14 voting and the problem with voting on voting rights.

15 MR. RUBECK: If I can start, since -- but first,  
16 let me say that my study was not an empirical one. My review  
17 of the empirical work was done today by your own office,  
18 as well as the work that Megan Partch has done, and Jeff  
19 Gordon, and others, that my sense was that empirical work  
20 was fine, and there was no sense to look at the numbers  
21 again.

22 What I was most concerned with was pricing through  
23 the economic effects. There was also a conceptual study  
24 done. Maybe if I just contrast the difference between the  
25

1 done.

2 In the two tier tender offer case, you have a very  
3 active market for corporate control, this is common --  
4 and prevent cohesive two tier tender offers from, in fact,  
5 cohesing.

6 As the SEC Chiefs -- studies shows that the  
7 premiums tend to be, as I recall, as high as any and all  
8 bids, but that's not necessarily the first bid. What happens  
9 is the competition comes in, there's a two tier offer, and  
10 subsequent bids come in as two tier offers so that the  
11 blended price rises.

12 In this case with recapitalizations, there's no  
13 room for another bidder to enter this competition. In some  
14 sense what the recapitalization does is gives insiders an  
15 unfair advantage to buy voting rights because there's no  
16 place for other people to enter the competition. There's  
17 no place for other bidders to enter the competition; the  
18 insiders, existing insiders have an unfair advantage.

19 With respect to voting issues, your second point,  
20 I think it is clear the proxy mechanism could use some  
21 refinement.

22 COMMISSIONER COX: Professor Weiss?

23 MR. WEISS: I think both you and Commissioner  
24 Peters have put your fingers on what is a troublesome

25

1 helped to organize earlier this year which one of the themes  
2 that emerged was the importance of shareholder voting, and  
3 in a way the relatively limited amount of serious thinking  
4 that has gone into analyzing issues raised by shareholder  
5 voting.

6           If I can try to put it in context by drawing  
7 an analogy, if one goes back ten or fifteen years in the  
8 corporate literature, corporations were viewed more or less  
9 as a black box. There was a kind of assumption in the  
10 literature that the managers of corporations would consistently  
11 take that course of action to serve the corporation's best  
12 interest.

13           Then we had a body of scholarship theorizing  
14 an empiric vote that suggested that there were often  
15 situations in which the interested managers conflicted with  
16 those of corporate shareholders, and out of that has flowered  
17 a whole body, I think, of better understanding of the  
18 dynamics of corporate life.

19           I think in this same way we have tendered for  
20 many years to view the voting process rather simplistically  
21 as another kind of black box. One of the real dilemmas  
22 that gets posed is if one discounts voting, the significance  
23 of voting decisions, what else do we have, what other  
24 expressive mechanisms do we have to allow shareholders to



1           The one thing that I think there is consensus on  
2 is that voting is significant in one context. Votes are  
3 for sale when you buy the shares that they're attached to.  
4 And in that context, voting is significant because it does  
5 operate as a mechanism for displacing corporate managers.

6           If those votes aren't for sale, then the mechanisms  
7 for displacing corporate managers have been largely limited  
8 to those of the product market in terms of the threat of  
9 bankruptcy.

10           Now, I guess my philosophy on this is more a  
11 cautionary one. I'm not sure what the right answer to the  
12 broader voting problem is. But it seems to me we have a  
13 system that has functioned at least tolerably well with a  
14 vast predominance of one share, one vote corporations.

15           I think there is the prospect that if the Stock  
16 Exchange's rule amendment is approved, and if the Commission  
17 does not take action applicable to the AMEX and the NASDAQ,  
18 many, many corporations will lock in a dual class common  
19 structure that has many worrisome features. And as worrisome  
20 features in terms of the kind of issues that Deputy Treasury  
21 Secretary Donovan was talking about a couple of weeks ago.

22           And, that, therefore, as a counsel of prudence  
23 for this Commission, in effect, is to do something that  
24 preserves what is, in fact, the status quo, at least until

25 we have a higher degree of confidence in the market

1 sensible strategy to pursue, and whether allowing these kinds  
2 of massive deviations, which I think are likely to occur,  
3 is a good one.

4 COMMISSIONER COX: Professor Gordon?

5 MR. GORDON: Commissioner Cox, you fairly raised  
6 the question of sort of what are fact here with respect to  
7 shareholder voting. And as so far as I know, I'm the only  
8 one who has actually done any empirical work on the actual  
9 New York Stock Exchange recapitalization, the only published  
10 empirical work.

11 Professor Partch's work was actually on a series  
12 of recapitalizations across all Exchanges beginning in the  
13 1970's, and only considered six New York Stock Exchange  
14 recaps just because of the end point of the study.

15 There are two conclusions I would draw, one of  
16 which is the -- the order for recapitalizations to be  
17 justified, they have to increase shareholder wealth,  
18 otherwise why would shareholders vote for them.

19 And if you look at the rationale that have been  
20 proposed as to how they do that, there are a whole bunch  
21 of them, I've set them out in my paper, they could be  
22 organized under two categories, one of which is to prevent  
23 rating, and the other which is to prevent shareholder  
24 welching, essentially on various firms of -- various forms  
25 of implied deferred compensation agreements with management.

1           Those arguments are anything more powerful in the  
2 case of the firm with dispersed shareholders. That is to say,  
3 if, in fact, shareholder wealth maximization were the driving  
4 motive for dual class recapitalizations, we would tend to see  
5 it more with firms with dispersed shareholders, not as is  
6 the pattern firms where managers virtually have the power to  
7 strip public shareholders of their voting rights at will.

8           The second point relates to a lot of empirical  
9 discussion that Professor Fischel referred to, and others,  
10 and some of the Commissioners, as to the wealth effects that  
11 have been shown by empirical studies for the dual class  
12 recapitalization.

13           Event studies which are all these studies, have  
14 many limitations. It's hard to know exactly what effect  
15 their pointing to.

16           For example, I do my own study of the NYSE  
17 recapitalizations, and I find no significant negative wealth  
18 effects, although for certain kinds of recapitalizations I  
19 do find some negative wealth effects that are statistically  
20 significant.

21           But I think the basic reason for that is because  
22 there are two effects in conflict. Frequently the reason  
23 that firms say as to why they want to undergo dual class  
24 recapitalization is so that they could issue more equity

1 control of the present family management block.

2 Well, that's good news. Ordinarily when a firm  
3 says we've got a way to increase, to do much better, to  
4 explore new investments, that's good news. You would expect  
5 share prices to go up.

6 The fact that the recapitalization proposal which  
7 bundles both the loss of voting rights, and the good news,  
8 doesn't show any net wealth effect. It seems to me perhaps  
9 to suggest that there is the positive effect of the good news  
10 being cancelled out by the negative effect of the recapitaliza-  
11 tion.

12 COMMISSIONER COX: Professor Karmel, you had a  
13 comment a minute ago.

14 MS. KARMEL: Yes. I was going to say I think the  
15 question you posed as to whether the SEC should override  
16 a desire for private ordering on the part of shareholders  
17 really is the hardest question in these proceedings. It  
18 seems to me it's a question that really goes to public  
19 policy more than any of the other questions involved, and  
20 would simply answer it by saying that I think the real  
21 danger in letting shareholders do this is that it eliminates  
22 what for many, many years has been the key accountability  
23 mechanism for public corporations.

24 So, it's really to me more of a political question  
25 than anything else but I think the case is

1 COMMISSIONER COX: Professor Steinberg?

2 MR. STEINBERG: Yes. I have a couple of points.

3 The first is that if we're going to look at share-  
4 holding behavior, I think a very good analogy is to look at  
5 how the anti-takeover positions have been, namely, the poison  
6 pills, that generally speaking shareholders have approved these  
7 plans although some of them have not gotten through, even  
8 though the Commission's Office of Economic Policy, I believe,  
9 has done an empirical study, and has concluded that these  
10 poison pills deflate stock value.

11 So it seems to be that shareholders do not always  
12 vote on what may be their best interests.

13 COMMISSIONER COX: Although -- let me interrupt --  
14 I thought that the problem with the poison pills was that  
15 they were not voted on, and that's what was raising concerns.

16 MR. STEINBERG: Yes, well, a number of them have  
17 not been voted on. They have been approved unilaterally  
18 by the Board of Directors, which is permissible under  
19 Delaware law; however, a number of the plans have also been  
20 adapted by the shareholders pursuant to an amendment in the  
21 Articles for Incorporation.

22 I might add that when we look at the dual voting  
23 framework, and whether sweeteners will be added, no sweeteners  
24 have been added with respect to situations in which corpora-  
25 tions have adapted

1 and the like, even though these corporations are less likely  
2 to be taken over.

3 As a further point, I think that this point is  
4 one that may be overworked, and is important, is the effect  
5 of the SEC's approval of the New York Stock Exchange rule,  
6 may well cause even more corporations to incorporate in  
7 Delaware.

8 The reason for this is that many states, such as  
9 Maryland, for example, give shareholders the right to appraisal  
10 if there's an alteration of contract rights, which include an  
11 amendment to the Articles of Incorporation.

12 Under Delaware law the shareholder is only entitled  
13 to appraisal if there is a merger or consolidation.

14 I might add that more and more companies are  
15 incorporating in Delaware, are moving ahead --  
16 there for a couple of reasons. The first is, as you may well  
17 know, the Delaware legislature recently passed a statute  
18 which permits corporations by inserting a provision in the  
19 Articles of Incorporation to eliminate monetary liability  
20 for directors for breach of a --

21 And, secondly, the analysis for the determina-  
22 tion of poison pills under Delaware law, if these pills  
23 are adopted by directors in order to keep the company  
24 independent, the analysis used has been the business judgment  
25 rule. And under many other states, other states have

1 refused to apply the business judgment rule to poison pills.

2 The effect of this will cause even more companies  
3 to incorporate in Delaware. I might add that the 1985  
4 revenue that Delaware received from franchise tax revenues  
5 totalled \$138 million in 1985, which was the state's largest  
6 source of income after personal income tax.

7 To me, in spite of what the empirical studies  
8 say, I am concerned about corporate accountability and  
9 fairness to minority shareholders, and here we have a state  
10 that is in its financial best interest to have corporations  
11 incorporate within that state, dragging a very substantial  
12 amount of revenue which is the largest determiner in  
13 determining the legitimacy of corporation law in this  
14 country.

15 So I believe that this is another adverse effect  
16 if the Commission approves the New York Stock Exchange rule,  
17 and, again, my position is that the only way out of this,  
18 and to treat all the Exchanges and NASDAQ system fairly,  
19 is to promulgate pursuant to Section 19(c) a one vote, one  
20 rule requirement for all our national traded securities.

21 COMMISSIONER COX: Professor Mikkelson?

22 MR. MIKKELSON: Along the theme of what is the  
23 evidence, first let me just reiterate what you began to say,  
24 and that is want to build upon your point, in that I'm not  
25 aware of any evidence of negative stock price reactions to

1 proposals voted on by shareholders.

2           The best example being anti-takeover amendments.  
3 A large number of adoptions of anti-takeover amendments  
4 I'm not aware of any systematic evidence that those votes  
5 have led to decreases in stock price.

6           The second point, again on the theme of evidence,  
7 with respect to equity offerings, the prospect of eventual  
8 equity offering being a possible explanation for a positive  
9 stock price effect, possibly negating a negative stock price  
10 reaction of creating --voting shares, I'd expect just the  
11 opposite. There's very strong evidence -- it seems a little  
12 strange when you first hear it, but there's very strong  
13 evidence that the market reacts unfavorably to news of  
14 equity offerings. And, if anything, the problem Professor  
15 Partsch say with her study was that these stock --  
16 issues of the limited voting shares would be a source of  
17 the negative stock price reaction because of its equity  
18 offering effect. The fact that she finds no effect is  
19 surprising and suggests that there may even be a positive  
20 stock price effect of these changes that's being probably  
21 offset by the news of a subsequent stock offering.

22           Third, I guess I'd like to propose a change in  
23 language. These proposals have been described several times  
24 as cohersive. I fail to see the cohersion. I've not been a  
25



1 voting shares, but it seems as though at worst a stockholder  
2 who holds shares on these firms is -- comes out at least  
3 whole, if not better off in the sense that many times they're  
4 provided with higher dividend payouts than they would if they  
5 retained the limited voting shares.

6 So I don't see any coersion. I guess I would use  
7 the word compensation in many cases to stockholders who  
8 choose to go the limited voting share route.

9 Finally, again on this theme of evidence, I think  
10 it should be pointed out that for decades firms within the  
11 American Stock Exchange and over-the-counter that have had  
12 relatively little ownership of equity by the managers, have  
13 not opted for a classified share structure. I don't know why,  
14 but that has not been the experience.

15 It's unclear why one would expect at this point  
16 a different experience in the future for New York Stock  
17 Exchange firms. My own conscience of what's going on here  
18 is that criticisms of the one share, one vote proposal on  
19 the New York Stock Exchange is based on speculation of the  
20 future behavior of firms will differ from the past behavior  
21 of American Stock Exchange firms and over-the-counter  
22 Exchange firms.

23 COMMISSIONER COX: Thank you, panelists. And  
24 -- Professor Seligman?

25 MR. SELIGMAN: Just very quickly, and this is in

1 prior response that other question from Commissioner Peters.

2 As the evidence does clearly indicate, you don't  
3 get votes purely on do you want to recapitalize to an A/B  
4 structure. They're almost always tied in with proposals  
5 to change dividend rights, or proposals that in some other  
6 way offers sweeteners.

7 If you want to have a fair assessment of share-  
8 holders' determination of the wisdom of A/B structures,  
9 adopt a rule that prohibits the simultaneous offering of a  
10 sweetener.

11 Under those circumstances, I would predict you  
12 would see virtually no firm successfully persuading a majority  
13 of their shareholders to go with the rule.

14 What you see here, and the reason you're not  
15 seeing the irrational shareholder votes, is basically they're  
16 saying, yes, we will vote for higher dividends, so, yes, we  
17 will vote for some other form of sweetener. But it  
18 thoroughly obscures the merits of the debatable voting  
19 procedure, and, in effect, even a shareholder prefers one  
20 share, one vote, and is probably better off voting for the  
21 A/B structure of the highest dividend regarding selling the  
22 stock and buying some other stock with equal voting rights.

23  
end 5A

(Continued on the next page.)

24

25

T6 flws star  
MOOM-1

1 CHAIRMAN SHAD: I thank you, panel for a very  
2 interesting and fulsome [sic] discussion of the issues raised  
3 by Commissioner Cox.

4 I would like to go back to my question that was  
5 raised by Commissioner Fleischmann, concerning the SEC's--  
6 well, let me preface it by saying that certainly in this  
7 distinguished panel as well as two of the prior participants  
8 Mr. Phelan and Mr. Levitt, there seems to be an overwhelming  
9 view that rather than adopt the -- or approve the New York Sto  
10 Exchange's proposal, the Commission should require all  
11 the exchanges and over-the-counter market to come out to  
12 the equivalent of the present of the New York Stock Exchange  
13 requirement.

14 And Commissioner Fleischmann raised the question  
15 as to the FCC's authority to do so, and Professor Selgman  
16 said we probably have the authority. Commissioner Karmel  
17 said possibly have the authority; and I would ask if any  
18 of the other -- is that a fair --

19 MS. KARMEL: No, I didn't say possibly. I said  
20 I think the Commission has the authority and there are  
21 various possible sources for that authority. But I think  
22 looking at section 19, the authority is there.

23 CHAIRMAN SHAD: And, Professor Seligman, was your  
24 word "probably" have the authority?

25 MR. SELIGMAN: I think in response to

MOOM-2

1 Commissioner Fleischmann, I thought it was the overwhelming  
2 probability to find a little cautious particularly in light  
3 of the experience you had with rule 3(b)(9).

4 CHAIRMAN SHAD: 3(b)(9).

5 Well, let me -- I want to ask the other side of  
6 that coin -- are there any members of the panel that would  
7 express it in the opposite fashion that the Commission possi-  
8 bly or probably does not have the authority to require the  
9 others to come up to the New York Stock Exchange's present  
10 voting requirements.

11 Anybody says we probably don't or possibly don't?

12 Mr. Steinberg?

13 MR. STEINBERG: Well, when you phrase the issue,  
14 "possibly," I think there's always a doubt. After all we've--  
15 when one is adopting a possible route, that the Commissioners  
16 really never adopted such a rule like they would adopt in  
17 this case; so therefore, there is no judicial authority  
18 for this, at least in recent times with the New York Stock  
19 Exchange audit requirement. That situation was not adopted  
20 pursuant to SEC rule.

21 My feeling is along with Professor Seligman and  
22 Karmel that the Commission does have the authority, that  
23 if I were to bet on it, I would bet 2 to 1 in the Commission's  
24 favor; but I think there is a plan 3 --

25 (Laughter)

MOOM-3

1 MR. STEINBERG: I think that a court may rule  
2 it invalid.

3 I also feel along with Professor Seligman, if  
4 the Commission's authority under rule 3(b)(9), it was much  
5 less likelihood, there is much less likelihood that that  
6 rule would eventually stand scrutiny as we've seen as with  
7 this proposal.

8 CHAIRMAN SHAD: And Professor Gordon?

9 MR. GORDON: Yes.

10 On the question of authority, it seems to me that  
11 when Congress mandated that the Commission establish the  
12 National Market System, it did not intend that where the  
13 National Market System would be a success, it would therefore  
14 make it impossible for the New York Stock Exchange to main-  
15 tain selective corporate governance listing requirements.

16 Surely, because the National Market System --  
17 I mean the reason the New York Stock Exchange suffers com-  
18 petitive problems today, put it under the pressure that  
19 it faces is because of the success of the National Market  
20 System.

21 I don't think that it could be concluded that,  
22 fairly read to be any part of the Congressional intent that  
23 a consequence of the National Market System success would  
24 be to subvert the ability of the New York Stock Exchange  
25 to maintain this "one share, one vote" requirement.

MOOM-4 1 And I think that in adopting the rule of the kind  
2 that I suggested or that some of the other panelists have  
3 suggested, you would be simply essentially working out,  
4 as it were, the details of how the National Market System  
5 meshed with the New York Stock Exchange and the AMEX.

6 CHAIRMAN SHAD: Let me go to a suggestion by  
7 Mr. Gordon, Professor Gordon that--that companies would  
8 be prohibited from delisting from the New York Stock Exchange.

9 Is that--

10 MR. GORDON: No, the proposal is that if they  
11 were to be delisted from the New York Stock Exchange for  
12 violation of the "one share, one vote" rule, then they could  
13 not be listed by the AMEX, or the --

14 CHAIRMAN SHAD: All right, and that suggestion,  
15 I believe, was endorsed by Professor Seligman.

16 MR. SELIGMAN: Yes, as an alternative if you  
17 were not predisposed to adopt a "one share, one vote"  
18 generic rule of some sort.

19 CHAIRMAN SHAD: Well, what would be the effect  
20 on new listings? Maybe it would inhibit the listings, but  
21 what about new listings on the New York Stock Exchange?

22 MR. GORDON: Well, there are really two responses  
23 to that. One of which if I am right in that the New York  
24 Stock Exchange single-class common rule provides a bonded  
25 guarantee that capital structure won't be renegotiated,

MOOM-5

1 that is to say, that public shareholders won't find themselves  
2 subject to an opportunistic recapitalization, then firms  
3 will continue to find the New York Stock Exchange the most  
4 desirable place to list.

5 The second point is I don't think that the competi-  
6 tive harm that the New York Stock Exchange will suffer even  
7 if it loses some, even if it may possibly lose some perspecti-  
8 new listings is going to be very great.

9 MR. SELIGMAN: Just one more section, if I might,  
10 Chairman Shad?

11 CHAIRMAN SHAD: Yes.

12 MR. SELIGMAN: I would strongly recommend, I  
13 think, the generic rule as preferable, if partly because  
14 of the new listing problem--in part because if you put this  
15 in historical terms, the real change in stock market regula-  
16 tions since the 1934 Act was adopted has been the maturing  
17 of the OTC market and the NASD market. It has reached the  
18 point -- and this was, in fact, implied by the '75 Securities  
19 Act amendments where it would be subject to comparable rule.

20 CHAIRMAN SHAD: Professor Weiss?

21 MR. WEISS: Mr. Chair, if I can. I think there  
22 is a dimension implicit in your question that I tried to  
23 address in my written testimony. The discussion is so far  
24 ignored, which is that one thing we don't know, and I would  
25 suggest it is very difficult to predict, is how state courts

MOOM-6

1 are likely to react should the use of what we call "dual  
2 class," or "A/B capitalizations" become common.

3 There are a range of possibilities which I attempte  
4 to outline with their being really three models, a kind  
5 of preferred stock model of very limited rights for low  
6 vote stock; (a) controlling shareholder model, which would  
7 basically leave those in control with great freedom to  
8 engage in transactions other than those that were clearly  
9 discriminatory in their effect in terms of providing selective  
10 and special benefits to those holders, and a -- the model  
11 offered by the law of closed corporations, which involves,  
12 at least, in some jurisdictions a much higher degree of  
13 judicial intervention, in effect substituting litigation  
14 and court supervision for marketplace supervision of manage-  
15 ment decision making.

16 And I think to respond to the kind of question,  
17 one of the kind you just asked Jeff Gordon, one needs to  
18 make some assumptions about what the alternatives look like,  
19 and this is one big aspect of those alternatives--that we  
20 just don't know about yet; and we can't very well know  
21 about it, unless we create the situation where the courts  
22 are forced to choose.

23 CHAIRMAN SHAD: Former Commissioner Karmel?

24 MS. KARMEL: I would suggest that, if the SEC  
25 does not want to go so far as to mandate a "one share, one



MOOM-7

1 vote" positive for all National Market System securities  
2 wherever traded, it would be better to distinguish between  
3 various public issuers and the manner in which the Commission  
4 has done under the S1, S2, S3 categories instead of this  
5 kind of suggestion that a company would be delisted from  
6 the New York Stock Exchange, and then not be able to trade  
7 in any public market.

8 It seems to me that would really disadvantage  
9 the shareholders of those companies even more than their  
10 being disadvantaged already by having a vote taken away  
11 from them.

12 CHAIRMAN SHAD: Let me see if I understand how  
13 far you would go.

14 If I put the generic rule applying to a New York  
15 and the American and NASDAQ, and then there's the third  
16 area, the pink sheets, where they are total over-the-counter  
17 market--would companies be willing, or be prohibited. Would  
18 companies be -- would you also require "one share, one vote"  
19 for all companies that are publicly owned, that it meet  
20 any of the threshold requirements, or could they conceivably  
21 go to the worse market, now, which could readily develop  
22 into a good market because of the large number of shareholders  
23 involved in the activity.

24 MS. KARMEL: No--

25 CHAIRMAN SHAD: But go off of NASDAQ, go off of

1 the New York Stock Exchange, and go off of the American  
2 Stock Exchange into this pink sheet market?

3 MS. KARMEL: Given what I think the SEC's mandate  
4 is, under the '75 Act amendments, I think the SEC should  
5 approach this problem with power to define qualified securities  
6 under the Exchange Act, and in that regard I think because  
7 the Commission's powers are limited in that Corporate  
8 Governanced area, it probably would be best from a legal  
9 standpoint and policywise for there to be some class of  
10 a publicly-traded companies that would not have to comply  
11 with the "one share, one vote" policies.

12 I wouldn't go so far as your suggesting to have  
13 such a policy cover all public companies, but rather only  
14 qualified National Market System securities.

15 CHAIRMAN SHAD: And so, regardless of the market  
16 in which a large company was publicly traded, it would be  
17 required to have "one share, one vote"?

18 MS. KARMEL: Yes.

19 MR. SELIGMAN: Only in the over-the-counter market,  
20 I think it is very, very important to focus probably on  
21 the National Market System list of the NASDAQ securities,  
22 not all NASDAQ securities, and you clearly made distinctions  
23 in the regulation of that list to date.

24 CHAIRMAN SHAD: Professor Steinberg?

25 MR. STEINBERG: Yes, I'd like to express my

MOOM9

1 disagreement with the view that if a company is delisted  
 2 because it does not meet the New York Stock Exchange  
 3 requirements, that it should not be able to trade on the  
 4 NASDAQ market.

5 My feeling is that there are many companies  
 6 traded in the NASDAQ market today, for many reasons. One  
 7 of those reasons may be that the NASDAQ company, although  
 8 of sufficient size, and shareholders to be listed on the  
 9 New York Stock Exchange believe that it is in their best  
 10 interests not to list on the New York Stock Exchange perhaps  
 11 because it does not wish to comply with the New York Stock  
 12 Exchange listing rules.

13 I believe that if a company is listed on the New  
 14 York Stock Exchange, and knows that it is in their best  
 15 interests to have unequal voting rights, and a rule is  
 16 adopted that requires the New York Stock Exchange to maintain,  
 17 its "one share, one vote" rule that that company should  
 18 be able to delist from the Exchange and go to the NASDAQ  
 19 market like many other companies have throughout the years  
 20 which are sufficient size to be traded on the New York Stock  
 21 Exchange.

22 CHAIRMAN SHAD: Could we -- Mr. Jarrell, would  
 23 you care to respond to some of the comments made concerning  
 24 the empirical studies of the impact on the market prices  
 25 of various defensive tactics and being prospective delisting

MOOM10 1 of some of the New York Stock Exchange stocks?

2 MR. JARRELL: No, I wouldn't.

3 (Laughter)

4 MR. JARRELL: I think that we had a couple of  
5 confusing points made, and I think that we can straighten  
6 them out very quickly.

7 Poison pills are not voted on, and I'm not aware  
8 of any case where poison pills have been voted on and approved  
9 There have been a couple of cases where the referendums  
10 were taken, but I understand that the poison pills were  
11 just gone ahead and put in anyway even though the vote  
12 was unfavorable.

13 CHAIRMAN SHAD: I think that Professor Steinberg  
14 said that many poison pills are going to prove by shareholders

15 MR. JARRELL: Well, I think maybe here the term  
16 "poison pills" is getting bandied about a little loosely,  
17 but poison pills are devices that do not require shareholder  
18 approval, and that is part of their definition almost.

19 What happened -- I think what the professor was  
20 talking about -- I think what the professor was talking  
21 about was other types of anti-takeover amendments such as  
22 "supermajority" provisions and the very, very common  
23 fair price provisions.

24 The Office of the Chief Economist has studied  
25 them extensively as well. There's over 600 cases of these

MOOM 11 1 types of animals, while in the "early days,"--"early" meaning  
2 mid to late 1970s -- you can find cases where although the  
3 anti-takeover amendment decreased share values, it still  
4 met with shareholder approval.

5 You can find those cases early on. It is very  
6 difficult to find those cases in the last three or four  
7 years. There is some evidence that shareholder voting works  
8 very well today, and particularly fair price proposals  
9 have no negative effects on average on equity value, and  
10 they are the most common device that we see voted on today.

11 So, the poison pill, I think, stands out; it has  
12 negative effects; it is a very strong deterrent, but it  
13 does not require shareholder approval, so it sort of fits  
14 in with the scheme that we have been talking about.

15 Is that what you wanted, sir?

16 CHAIRMAN SHAD: Thank you.

17 Yes, Mr. Rubeck?

18 MR. RUBECK: If I may comment on Mr. Jarrell's  
19 restatement. I think it's important when you see these  
20 empirical results to interpret the framework in which the  
21 market's reacting. They represent the market's best estimate  
22 of the impact of the action on the present value of future  
23 claims to that corporation.

24 In the case of certain anti-takeover amendments,  
25 like the Fair Price Amendments, that were just referenced,

1 those amendments may, in fact, be rather innocuous in the  
2 sense that they require bidders to restructure their bids  
3 for the corporation, but need not change the price of the  
4 corporation, or provide substantial impediments to a takeover.

5 If you look at other more seemingly insidious  
6 anti-takeover devices, those that would seem more effective,  
7 like "poison pills," like supermajority provisions, like  
8 standing boards, you also don't find dramatic declines in  
9 stock prices, but that may very well be because the market  
10 expects the SEC and the courts and others, fiduciary respon-  
11 sibility of the board of directors to intervene and prevent  
12 them from using those devices fully.

13 And, so, once you take great care in interpreting  
14 those empirical results, as the market assessment of how  
15 the impact of that change, if it was foiled exactly, because  
16 that is not what the market's reacting to. It's reacting  
17 to a probabilistic assessment of the probable use of the  
18 action, which may be none.

19 CHAIRMAN SHAD: Let's go all around the staff  
20 for further comments or questions.

21 Ms. Quinn?

22 MS. QUINN: I guess just to summarize, if I under-  
23 stood Professor Karmel, and Professor Seligman, and Professor  
24 Weiss, the issue isn't really the specific vote on whether  
25 or not to go to A/B capitalization either through

1 recapitalization, your concern really is going forward from  
2 there and saying you have a corporation in which the insiders  
3 control who is going to be on the board of directors and  
4 are not accountable to shareholders, and essentially eliminat  
5 ing any viable voting situation.

6 The issue really shouldn't be whether you have  
7 an informed vote or not vote on the recapitalization, because  
8 in fact, it is hard to argue that, if you set out all the  
9 facts, and people vote one way or the other, that that's  
10 a good or bad decision for them, at that time.

11 CHAIRMAN SHAD: Professor Seligman?

12 MR. SELIGMAN: In economic parlance, it is a  
13 question of monitors; in old corporate law parlance, it  
14 is a question of accountability, but it is much broader  
15 than just the narrow issue of do you recapitalize. It has  
16 to do with how corporations are run.

17 MS. QUINN: Right.

18 The concern is going forward, not whether share-  
19 holders on that particular vote are being abused.

20 MR. SELIGMAN: Yes.

21 MR. WEISS: Well, I would add just a small caveat  
22 to that. I have not conducted an extensive empirical review.  
23 I did get one very recent proxy statement when I knew I  
24 was going to come to these proceedings, and I saw a corporation  
25 that had adopted a dual-class capitalization.

MOON 14 1 And it struck me that the informational content  
2 of the statements matters have been provided in justification  
3 of this action were almost nil.

4 I didn't tag on to my testimony, and I may want  
5 to tag on, since it is not my preferred alternative, the  
6 notion that really in a way picks up on what Commissioner  
7 Grundfest says, that these transactions bear a resemblance  
8 to the leveraged buyouts or going private transactions,  
9 and that there is clearly substantial room for improvement  
10 of disclosure, should the Commission decide not to set forth  
11 some kind of a universal prohibition, and that I think the  
12 form 13E3 transaction statement provides a fairly useful  
13 model for the kinds of disclosures that might be required,  
14 at least if the Commission decides that the shareholders  
15 ought to have the opportunity to vote on these plans.

16 MS. QUINN: But let us assume that we get the  
17 disclosure requirements precisely the way you wish them  
18 to be and these matters still got voted on favorably. You  
19 would still be concerned.

20 MR. WEISS: Yes. Yes.

21 MS. KARMELE: I don't think I would go quite as  
22 far as my colleagues here at the table, as I've indicated  
23 in my testimony. I would tend to draw a distinction between  
24 situations where shareholders are disenfranchised and other  
25 situations. This really gets back to the questions that



MOOM 15

1 Commission Grundfest was asking and was trying to distinguish  
2 between what he called market mediating and loading mediated  
3 decisions.

4 I don't think going private or leveraged buyouts  
5 should be prohibited, and surely those are situations where  
6 shareholder votes are taken away.

7 I think in an ideal world it would be great if  
8 we could just continue with "one share, one vote" policy  
9 for everybody. But I think that in view of the context  
10 of this problem--that is the whole environment of hostile  
11 tender offers, and the reaction of many managements to the  
12 abuses in that market, probably that ideal policy is not  
13 feasible at this time, at least, unless there are changes  
14 in the Williams Act.

15 So, in my testimony, I suggest a variety of  
16 exceptions that the Commission could fashion from a "one  
17 share, one vote" policy. I don't know that these are pre-  
18 cisely the exceptions that ought to be written in. I mean,  
19 they are really just tentative suggestions on my part.

20 But they indicate the possibility of drawing a  
21 distinction between disenfranchisement situations and other  
22 situations.

23 MS. QUINN: I understand that. I guess I was  
24 trying to focus on the fact that not everybody is at these  
25 two days of hearings because they are worried about the

MOOM 17 1 one vote being taken. They are here because they are con-  
2 cerned about the long-term impact of the consequences of  
3 affecting A/B capitalization.

4 MS. KARMEI: Yes. Yes.

5 CHAIRMAN SHAD: Director Ketchum?

6 MR. KETCHUM: Professor Mikkelson, if I could,  
7 I would like to spend a second focusing on the dual findings  
8 of Professor Parch, on the one hand finding no negative  
9 wealth of facts after announcement of recapitalization;  
10 on the other hand, finding that the limited voting shares  
11 traded at a discount from the superbowl shares, a finding  
12 that, I believe, has been even perhaps in more dramatic  
13 fashion identified with respect to Canadian companies where  
14 you have a broader range of companies that have dual capitali-  
15 zation.

16 If you have an efficient market, how does the  
17 efficient market go about determining there is no negative  
18 wealth of facts, not changing the price, given that recogni-  
19 tion of difference in discounts, unless there is some "good  
20 news" also in there to suggest that the price of both the  
21 shares will not at least go down.

22 By recognizing as I should that there is going  
23 to be a discount down the road, don't I need some good  
24 news up front to offset that if I am going to efficiently  
25 value that at the same price? Or am I missing something?

MOOM 18 1

MR. MIKKLESON: When you say "offset 'that,'" what do you mean by "that"?

MR. KETCHUM: All right, I mean that, recognizing that historically, the lower voting stock is traded at a discount both in the United States and Canada, with respect to dual capitalization companies.

MR. MIKKELSON: Yes. It turns out that I was involved in the research that documented the price difference between the two classes of shares; that was not part of the study by Professor Parch. It is beside the point, I guess.

The evidence is that very soon after, if not immediately after implementation of these A/B share structures the superior voting class shares traded a premium, on the order of 3 to 5 percent in the United States, maybe higher in Canada. You can find some isolated cases in which the premium -- in the neighborhood of 20, 30 percent--

Resorts International is a great example of that that is going on today.

But that's not inconsistent with the absence of any price reaction at the time of the first announcement of the change to an A/B structure. It just implies, and I think -- because this is one of the official market, implies that there is some prospect that the class of shareholders with superior voting rights, at some point in the future, could receive a higher payout, say, in the

MOOM 19 1 event of a takeover.

2 Harry D'Angelo and Lynn D'Angelo, of the University  
3 of Rochester, documented four cases of takeover in 1980,  
4 of firms with two classes of shares, where the class of  
5 superior voting rights received a dramatically higher payment,  
6 than the limited voting shares.

7 There was a larger number of cases in which both  
8 classes of shares received the same payoff. So, in terms  
9 of the notion of marked efficiency, what I think is going  
10 on in terms of the premium paid to the superior voting class,  
11 that the market recognizes that there is some prospect,  
12 not necessarily for -- there is some prospect of a higher  
13 payoff to the superior voting shares in the event of a take-  
14 over.

15 And I may have to also quickly add again that  
16 that's not inconsistent with negative stock price reaction  
17 when the change was first proposed.

18 Again, both classes of shareholders have the same  
19 distribution of votes, ownership of votes, the same distribu-  
20 tion of ownership of cash flows before and after the change  
21 to A/B shares.

22 MR. GORDON: Mr. Ketchum, for a minute?

23 One characteristic of the current round of dual  
24 class recapitalization that appears to be different from  
25 many of the firms studied in the Partch study. It's really

MOOM- 20 1 an excellent study. It's got to think a problem of end  
2 point.

3 The current recapitalizations involved senior  
4 voting stock that cannot trade, because the way that  
5 management assures that it will never lose control of the  
6 firm is to provide that unless the shares are limited in  
7 their transfer to sort of you know successor family groups  
8 or family trusts, they are divested of their supervoting  
9 quality.

10 So, first of all, I think that demonstrates the  
11 extent to which these recapitalizations have been used as  
12 an inchon of management entrenchment.

13 And it also makes easy translation between the  
14 Partch and D'Angelo studies, to the present problem a little  
15 bit difficult.

16 MR. MIKKELSON: Certainly, there are some cases  
17 in Mr. Partch's sample where the superior voting shares  
18 were not traded.

19 CHAIRMAN SHAD: Any other staff questions or  
20 comments?

21 Associate General Counsel Fiernberg?

22 MS. FIERNBERG: Thank you.

23 I just wanted to follow up on the Chairman's  
24 questions about authorities, and perhaps get more specific  
25 responses.

MOOM - 21 1 I look at section 19(b), if we are to disapprove  
2 the proposal to the New York Stock Exchange, I think that  
3 we would have to find that it is inconsistent with other  
4 provisions of the statute, or any other rules thereunder,  
5 and I was wondering what you might point to that we, that  
6 the Commission could assert or find that it was inconsistent  
7 with.

8 I guess I have to address that to Professor Seligman  
9 or Karmel.

10 MS. KARMEL: I think that one of the principles  
11 is inconsistent with sticking to the National Market System  
12 provisions. For a moment, it is the principle that the  
13 securities qualified to be included in the National Market  
14 System should depend primarily on their trading characteris-  
15 tics. It seems to me a kind of regulatory race to the  
16 bottom, or regulatory competition that has been talked about  
17 this morning, is not the kind of competition that Congress  
18 had in mind when the National Market System provisions were  
19 enacted.

20 So, I would say that the fairness and competitive  
21 characteristics of the National Market System. In addition  
22 to that -- and this is sort of my possible other sources  
23 of authority, I think there are principles in the proxy  
24 provisions that certainly contemplate some sort of voting  
25 rights on the part of public shareholders not necessarily

MOOM 22 1 "one share, one vote," but some sort of voting provisions.

2 I also think that permitting corporations to abro-  
3 gate shareholder voting rights could be argued to tilt the  
4 neutral balance of the Williams Act in such a fashion as  
5 to give the Commission some additional authority in this  
6 area.

7 MR. SELIGMAN: Ms. Fiernberg, I'll, give you  
8 a copy of the article which has spelled out the sources  
9 of authority, but let me also suggest that you take a look  
10 at Jack Coffey's piece, which particularly focuses on the  
11 Williams Act.

12 CHAIRMAN SHAD: I think this has been a superb  
13 panel. I am most grateful for your contributions to our  
14 deliberations.

15 We will now break for lunch and reconvene at  
16 two-thirty, with the Shareholder Interest Group Panel, which  
17 will include Senator Metzenbaum and other distinguished  
18 participants.

19 Thank you.

20 (Whereupon, at 1:00 p.m., the conference recessed  
21 for lunch, to be reconvened that same day, Tuesday, Decem-  
22 ber 16, 1986, at 2:30 p.m.)

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

2:36 p.m.

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CHAIRMAN SHAD: We're continuing the hearings concerning the proposed change in the New York Stock Exchange's "one share, one vote" rule, and we are very pleased to have a distinguished panel for this afternoon.

And when your turn comes to speak, it would be appreciated if you would identify yourselves for the record, and rather than go through it one by one at this point.

The rules of the proceedings, in order to give everyone an opportunity to express their views and to have questions from the Commissioners and Senior Staff, please begin by stating your name and your affiliation.

The green light will flash when three minutes remain; the yellow light when one minute remains, and the red light will flash when your time has expired.

We would like to request each of you to give a five-minute brief opening statement, and then afford the Commissioners the opportunity after the full panel has been heard from to ask questions.

With one deviation from that schedule, we are very privileged and appreciative to have with us this afternoon Senator Metzenbaum, who has left Senate hearings to be with us, and so we'll call on him first, and I will direct any questions you may have to him and then proceed



MOOM 24

1 with the rest of the panel.

2 Senator Metzenbaum.

3 SENATOR METZENBAUM: Thank you, Mr. Chairman.

4 Members of the panel. I don't know if this machine is  
5 on or not.

6 CHAIRMAN SHAD: It's nice to change the tables  
7 for a change and have you appear before us.

8 (Laughter)

9 SENATOR METZENBAUM: My time is coming.

10 (Laughter)

11 CHAIRMAN SHAD: Be gentle on us, Senator.

12 STATEMENT OF

13 THE HONORABLE HOWARD M. METZENBAUM

14 UNITED STATES SENATOR FROM OHIO

15 SENATOR METZENBAUM: Mr. Chairman, and Members  
16 of the Commission.

17 I am very pleased to be here today. It is a  
18 fact, I left the Intelligence Committee, and some very  
19 important hearings are going on today, because I thought  
20 the issue before you today is one of the most important  
21 decisions probably that this Commission or any of its  
22 predecessors has made or will ever make.

23 This Commission has been in operation for 53 years,  
24 as I figure it, and I don't believe that any single decision  
25 is more far-reaching in its impact than will be this one.

MOOM25 1 because I believe in this decision you are talking about  
2 the whole issue of corporate democracy, you are talking  
3 about the right of shareholders to participate in the cor-  
4 porate world, the owner of one share of stock, the owner  
5 of a hundred thousand shares of stock, to have a right  
6 to vote his or her position for or against a particular  
7 proposition.

8 And I believe very firmly in the free enterprise  
9 system, and I honestly believe that if you affirm the  
10 New York Stock Exchange request, and I don't fault them  
11 for making it, and I understand the reason behind it; but,  
12 if you do, I believe that you will, that it will be a blot  
13 upon the escutcheon of corporate democracy and the SEC for  
14 years into the future.

15 This is question -- the question is simple: Do  
16 I or you, or any other single individual have the right  
17 to participate in the corporation's affairs even though  
18 that right may sometimes not be very meaningful.

19 But the fact is you have the right to cast your  
20 vote, and it is a question of economic democracy, and it  
21 is also a question on the other side of whether or not  
22 you are going to permit management to be so entrenched that  
23 they can do anything they want to do that there will be  
24 no limits as to what they can do, or won't, or will do or  
25 won't do. There will be no responsibility. There will

MOOM 26

1 be nobody in a position to call them into account, and I  
 2 would say to you, having been the head of a corporation  
 3 listed on the New York Stock Exchange, a corporation listed  
 4 on the American Stock Exchange, a corporation listed on  
 5 the Over-the-Counter Market, that I believe the overwhelming  
 6 majority of management really have a sense of responsibility,  
 7 but that isn't unanimous. There are many who do not.

8 Now, I understand that this proposal is made as  
 9 a way to stop harmful takeovers, but I firmly believe that  
 10 there are better ways to do that.

11 I promise you that Congress will address itself  
 12 to the issue of takeovers, that we are concerned about the  
 13 issue of two-tier tender offers, that we will move in an  
 14 effort to stop greenmail, and that we will try to change  
 15 the law, and hopefully will change the law with respect  
 16 to the 10-day window, and to shorten that to two days.

17 We will attempt to take some actions to slow down  
 18 or to stop corporate takeovers, although I do not mean  
 19 to suggest that all corporate takeovers are bad, because  
 20 it is a fact, and we know of many instances in which the  
 21 shareholders have done very well, by reason of takeovers.

22 There are four groups that are concerned on a  
 23 takeover: one is the shareholders; one is the community;  
 24 one is the employees; and one is the management. And I  
 25 think that this body concerns itself primarily with the

MOOM 27 1 shareholders. It is the shareholders' concerns to which  
2 we address ourselves today, and I think that Congress will  
3 try to do something about the other problems.

4 But I believe that moving in this direction  
5 is so wrong, and the answer is made, "Yes, but, Senator,  
6 we have shareholder approval."

7 And The Wall Street Journal today had a list of  
8 the percentage of votes that gave shareholder approval.  
9 I understand that. Many shareholders don't understand  
10 what they're voting on. Many shareholders have such con-  
11 fidence in management that they do whatever management  
12 suggests; and, in too many instances, there has been a bonus  
13 given if you will vote affirmatively to deny yourself the  
14 right to have equal voting rights with all other persons  
15 within the corporation, or to provide for yourself a limited  
16 right.

17 Now, if you should move in the direction -- and  
18 I don't do, I want to confine myself within the time limits  
19 that have been suggested by the Chairman -- if you should  
20 move in the direction of permitting companies to be listed  
21 without "one share, one vote," then I think if you do so,  
22 there ought to be certain requirements that are made for  
23 those companies on the American Stock Exchange, the Over-  
24 the-Counter Market, the New York Stock Exchange.

25 I think there ought to be periodic approval. I

think the directors ought to have to go back to the shareholders at least once every two or three or five years.

I think that every broker should be obligated to disclose when he's selling the stock of a particular corporation that has limited voting rights, to make a disclosure to that effect, because there is no question that there is a lesser chance of gaining from a takeover offer under those circumstances.

I think that there ought to be some standard designation with respect to stock that doesn't have full and equal voting rights. I think there ought to be, so that everyone would know this is an X kind of stock, or a Y kind of stock, or an asterisk kind of stock, and I think that ought to be indicated when the newspapers list the stock, saying (\*) this means that you don't have full voting rights when you buy stock in this company.

I think that there ought to be proxy material, and that in all the proxy material it ought to indicate that the stock has limited voting rights, and that whenever a public announcement is made with respect to a new underwriting, or some other kind of disclosure to the shareholders, it ought to be made imminently clear that there are different kinds of stock and some shareholders have more voting rights than others.

I believe the SEC ought to go actually in the

ROOM 29

1 other direction. I think that the rule with respect to  
2 the "one share, one vote" ought to apply to all exchanges,  
3 but I am a realist enough to recognize that a number of  
4 companies have been operating on the basis of different  
5 voting rights over a period of many years. They have been  
6 listed on the American Stock Exchange, and in the Over-  
7 the-Counter Market.

8 I think that perhaps the SEC might come down with  
9 a rule banning any company being listed in any one of the  
10 three markets that didn't have "one share, one vote," except  
11 that you might Grandfather in as of January 1, 1986--and  
12 I choose the date advisedly, saying that any that had been  
13 listed prior to that time, any that had come to market prior  
14 to that time, there might be a distinction.

15 But I don't want to address myself to the details  
16 of what you do or how you do it. My basic premise is that  
17 the New York Stock Exchange application should be denied,  
18 but if it is granted, then there ought to be limitations,  
19 but I would hope that the SEC would move in the opposite  
20 direction to ban one share, to ban any company from being  
21 listed that didn't provide "one share, one vote," but that  
22 they would provide some exceptions going backwards for  
23 those companies already listed so that you do not disturb  
24 the marketplace, and not disturb their normal business opera-  
25 tions.

MOOM 30 1

Mr. Chairman, I probably could speak on for a longer time, but my guess is my five minutes has just about expired.

CHAIRMAN SHAD: Well, thank you very much, Senator Metzenbaum.

Now, we would like to go around the table and afford each of the Commissioners the opportunity to ask a question, and I would like to start it with a question concerning -- there is a question concerning the SEC's authority to require all the other markets to adopt the "one share, one vote" provision.

Now, in the event that the Commission were to approve for the main reasons that they inspired the New York Stock Exchange concerning competitive equality, their proposed rule change. Do you all anticipate Congressional action to impose legislatively a "one share, one vote" rule across the board?

SENATOR METZENBAUM: I would say to you, Mr. Chairman, that I think there will be great support in the Congress for a "one share, one vote" legislative proposal.

I haven't discussed that with some of my colleagues because, as you well know, we have been out in recess.

But I think that there would be great support along that line, and if time permits I hope to have the opportunity to share some of my views on some of these

MOOM 31 1 matters with Senator Proxmire yet this afternoon, because  
2 his committee and my committee both have jurisdiction as  
3 pertains to some aspects of this question.

4 But I think that there will be, if the SEC acts,  
5 I would guess that there would be some legislative movement  
6 in this direction, but I don't wish, in any way, Mr. Chairman,  
7 to suggest that my appearance here has any kind of saying,  
8 "Don't do this, or we will," because I don't come on that  
9 basis; I come here hoping that I can prevail upon the SEC  
10 to take the right course of action, because I have a feeling  
11 that the legislature, the Congress, has a full enough plate  
12 without getting into this issue, but I would guess that  
13 we very well might, and my guess is more probably would  
14 take a look at it if the SEC moves in that direction.

15 Yes.

16 CHAIRMAN SHAD: Thank you.

17 Commissioner Cox.

18 COMMISSIONER COX: Thank you, Mr. Chairman.

19 Senator Metzenbaum, in speaking about what you  
20 believe would be the results of approval of the New York  
21 Stock Exchange proposal, raised a question in my mind as  
22 to how many companies do you think would move toward dual-  
23 class capitalization given that it has been possible for  
24 NASDAC companies and American Stock Exchange Companies  
25 for quite sometime; yet, we find a fairly small percentage



1 of companies in those two markets that have dual-class  
2 capitalization, so would there be a rush by New York Stock  
3 Exchange companies, or would it be a small percentage  
4 there?

5 SENATOR METZENBAUM: I would guess that there  
6 would be a tremendous rush, because I think that realistical  
7 speaking, there has been such acceleration of the whole  
8 takeover move within recent months and years, particular  
9 months, that I have no doubt about it, that in my mind,  
10 I think the Wall Street Journal article today says that  
11 a number of companies are just waiting to move in that  
12 direction, after your commission acts.

13 And I think that any reasoned observer would  
14 conclude that that would indeed be happy if they are permitted  
15 to do so.

16 I think that many companies at this point have  
17 not concerned themselves about such a procedure. When I  
18 headed up some companies, I certainly thought about whether  
19 somebody might come in to take over the company and never  
20 really thought that much about different kinds of voting  
21 rights.

22 But I think this is a very much upper, very much  
23 at the top of the list in the minds of many corporate execu-  
24 tives, who are not thinking so much about the shareholders  
25 but thinking about entrenched management.

MOOM 33 1

COMMISSIONER COX: Thank you, Senator.

2

SENATOR METZENBAUM: Thank you.

3

CHAIRMAN SHAD: Commissioner Peters?

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COMMISSIONER PETERS: Senator Metzenbaum, generally, when--it is my understanding when we consider the New York Stock Exchange's proposal with respect to amending or modifying its listing standards, we are enjoined by the Act to determine, make a determination as to whether that proposal was consistent with the purposes of the Securities and Exchange Act of 1934.

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If we do as you suggest and urge us to do, to decide to deny the New York Stock Exchange's proposal, and indeed go a step further and impose a "one share, one vote" requirement across the board for all national markets, do you think that we will then have crossed the line from ensuring protection of the shareholders and integrity of our markets by fostering full and complete disclosure into the realm of merit regulation by saying that only the particular kinds of corporations can have access to our national markets?

21

22

SENATOR METZENBAUM: I'm not sure, Commissioner, that I understand the question.

23

24

25

COMMISSIONER PETERS: Well, it was my impression, at least when I joined the Commission that we, at the federal level, shied away from merit regulation and focused our

MOOM 34 1 efforts in regulating the securities markets by emphasizing  
2 disclosure, and, indeed, much of the Securities Act of 1933,  
3 and the Securities and Exchange Act of 1934, focuses on  
4 disclosure and requirements and reporting requirements.

5 For us to mandate a "one share, one vote" require-  
6 ment seems to me to go beyond that, and perhaps fall into  
7 the arena of merit regulation, which is what we generally  
8 leave to the states to do.

9 All right, I'm asking you if you think that that  
10 is where we would be headed?

11 SENATOR METZENBAUM: I understand the thrust of  
12 your question now, and I cannot -- I appreciate the fact  
13 if you were to mandate "one share, one vote" that very well  
14 may be going a step further than you have in the past, or  
15 that maybe you're even authorized to do, and I have not  
16 explored the legislative aspect of that question.

17 If that should be the case, and you were trying  
18 to move in that direction, I would say to the Commission:  
19 "Come to us in the Congress, and ask us for that authority  
20 if you think you should have it," and my guess is we would  
21 be receptive to it.

22 Let's face it: the disclosure provisions which  
23 were enacted 53 years ago, somewhat modified since then,  
24 were thought at that time to be a major step forward, and  
25 the major step forward was in the effort to protect the

DOM 35 1 shareholders.

2 Now, we've gone a long way since then, and when  
3 any shareholder today gets a prospectus, it is so over-  
4 whelmingly filled with words and phrases that are totally  
5 unfamiliar that the disclosure has become almost a "nothing."  
6 The shareholder doesn't understand it, and good legal scholars  
7 have difficulty in going through all of the pages.

8 I know that I myself have looked through them.  
9 I thought I was a good lawyer. I think I am a good lawyer,  
10 but it's very boring reading, and you've got to read it  
11 very closely.

12 So, I would say to you that maybe it's time for  
13 the SEC -- and maybe not in connection with this particular  
14 case--but maybe it is time for the SEC to say to itself:  
15 should we possibly be doing something more to protect the  
16 shareholders, because, let's just face it, in the last  
17 analysis, the only protection that the average shareholder  
18 has in this country, the basic one is to look to the SEC  
19 and he or she feels that they are getting protection from  
20 you.

21 It is true: there are legal rights to going  
22 to court, very expensive process, but in the main the SEC  
23 is considered sort of the guardian of the shareholders,  
24 of corporate democracy, and I am saying to you that if you  
25 move in this direction, as proposed by the New York Stock

MOOM 36 1 Exchange, then you've moved the wrong way.

2 With respect to your suggestion, are you asking  
3 us to go further than we have a right to do under the law?  
4 You may very well be right in that, and I would respect  
5 the opinion of your legal counsel.

6 If that be the case, and you think that's what  
7 you should be doing to protect the shareholders, and to  
8 protect the market place, then I think you ought to come  
9 to us, and say to us, please amend the law, so that we have  
10 the right to do this, or to change the law specifically.

11 COMMISSIONER PETERS: I would just say that you  
12 have answered my question, Senator, but I would just like  
13 to clarify the fact that I think, that I intended it to  
14 be more of a philosophical question rather than a legal  
15 question, because I am not so sure that we don't have legal  
16 authority to do so, but I was questioning whether it would  
17 be a philosophical departure from our approach in the past.

18 SENATOR METZENBAUM: On the philosophical, I would  
19 like to urge upon the Commission, that it move its philosophy  
20 a little bit further to the point of stronger and more  
21 effective protection for the shareholders, and maybe you've  
22 done well; I think you can do a little bit better--probably  
23 so can I as a Senator.

24 COMMISSIONER PETERS: Thank you.

25 CHAIRMAN SHAD: Thank you, Commissioner Peters.

MOOM 37

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Commissioner Grundfest?

COMMISSIONER GRUNDFEST: Thank you, Chairman.

Senator, I share your deep concern over the fundamental implications of New York Stock Exchange's proposal I think the very fact we are having these hearings, that we have a room full of people, that we have as many panels as we do reflects the fact that the Commission understands the gravity of the question.

As I understand it, there has only been one time in the previous history of the Commission that we have had hearings of this nature, and I don't believe those hearings were quite as extensive, or drew anywhere near as much public attention.

But rather than address some of the details of the dual-class proposals that we have sitting before us today, I would like to address some of the underlying forces that I think you have correctly analyzed with regard to this recent rush towards dual-class capitalization, and that's the presence of takeovers in our public capital markets.

You observed that on occasion some takeovers would be good, and that one of the dangers of these dual-class capitalization schemes is that they could act, in a sense, as the ultimate poison pill. They could forever prevent some takeovers from taking place.

MOOM 38

1 I wonder if you could expand on that theme and  
2 articulate for us your views as to regard which takeovers  
3 could be perceived as "good," whether hostile takeovers  
4 would ever be any good, and how we might be able to tell  
5 the good takeovers from the bad.

6 SENATOR METZENBAUM: Well, I think that where  
7 you have two-tier takeovers, I start off saying those are  
8 bad, they are wrong, and should be barred as a matter of  
9 law.

10 I think that where you have takeovers where the  
11 takeover party acquires a percentage position, or a dollar  
12 amount position up to the law, and then arranges with puts  
13 and calls with a number of brokers to go around the law  
14 so that he is -- or she, whomsoever -- is able to acquire  
15 a sufficient position and buy stock at a lower price at  
16 that which is properly its real value at that point, had  
17 the rest of the shareholders known about it, I think those  
18 are bad.

19 I think there is a concern as to what impact the  
20 takeover is going to have on the community and the employees.  
21 I think we get in -- here we get into a legislative question,  
22 and I'm not certain, as I sit here that I know exactly how  
23 you make a determination in connection with the impact on  
24 the community and the impact on the employees, but I think  
25 it is a matter of legislative responsibility, at least to

1 explore that question.

2 In the main, I would say to you that a takeover  
3 which is precluded by reason of a greenmail buyout, in my  
4 opinion, is 100 percent bad, because it means that all the  
5 rest of the shareholders in the company are--their dollars  
6 are being used in order to buy out somebody who is ostensibly  
7 attempting to takeover the company.

8 So, I think I have to say, Commissioner Grundfest,  
9 that you can't just make a broad-base statement saying that  
10 any that are done by this group of people or that group  
11 of people--I think some have worked out well. I think that  
12 we all know, and I won't enunciate the specifics, but we  
13 know of some takeovers that have occurred where the share-  
14 holders have come out in very, very good shape. We know  
15 of some takeovers where the company was moved by reason  
16 of the takeover effort to go out and find a so-called "White  
17 Knight."

18 In some that worked out well, and in some it didn't.  
19 We know that a big company in my own city, seven, eight,  
20 ten years ago--about seven years ago, I think it was, when  
21 EXXON was trying to take over Reliance, and the company  
22 didn't want them to take it over, but they did in spite  
23 of that fact.

24 We now know that in recent days that that which  
25 we were saying seven years ago in committee hearings has



MOOM 40 1 now come to past, and the company has decided to give it  
2 up.

3 I don't think you can use any generalization,  
4 but I do believe that it is a matter that deserves much  
5 immediate attention by Congress, and a cooperative role  
6 by the SEC.

7 But I am not prepared to sit here and say that  
8 all takeovers are bad, or all takeovers are good, but I  
9 am prepared to say which ones I think seem to fit more within  
10 the public weal than others.

11 COMMISSIONER GRUNDFEST: Thank you, Senator.

12 SENATOR METZENBAUM: Thank you.

13 CHAIRMAN SHAD: Commissioner Fleischman?

14 COMMISSIONER FLEISCHMAN: Senator, I was particularl  
15 struck by your emphasis on the possibility of entrenchment  
16 of management and a failure of accountability.

17 We expect a lot of testimony this afternoon about  
18 accountability.

19 Drawing on your own background, even prior to  
20 becoming a distinguished public servant, do you think that  
21 a stock exchange rule is so crucial to accountability of  
22 management?

23 Are there not other forces, structural, internal--  
24 personal, even--that impel management to act as faithful  
25 stewards of their companies?

MOOM 41 1

2 SENATOR METZENBAUM: I can't think of any that,  
3 in my opinion--and I may be -- I could be enlightened on  
4 this subject, but I can't think of any in my opinion that  
5 provide more of a prod or a sort of a guideline for management  
6 than the right of the shareholders to vote.

7 Realististically speaking, it seldom happens that  
8 the management is voted down, or voted out, but I believe  
9 that once you eliminate the right of shareholders to have  
10 any vote--and none of us can kid ourselves about the fact  
11 that we have small shareholders and we have institutional  
12 investors as well; and, if the actions of management are  
13 sufficiently egregious -- and I have seen some that I think  
14 have been sufficiently egregious -- but I believe that if  
15 they are even more egregious than some that I have witnessed  
16 to date, and I think you would if you approved the New York  
17 Stock Exchange rule -- then I think that managements may  
18 very well do some things for themselves that are even much  
19 worse than those that they are presently doing.

20 I think that they may be putting into place as  
21 a routine "golden parachutes," which they have been using  
22 to a fare-the-well, in order to protect their position when  
23 there have been hostile takeovers.

24 I look unfavorably upon that kind of action, but  
25 I would guess that you would find those kinds of provisions  
becoming a routine procedure. I think there are many other

1 things that management may very well do for itself if they  
2 have no rights to vote at all.

3 COMMISSIONER FLEISCHMAN: Thank you, Senator.

4 SENATOR METZENBAUM: Thank you. That's a lengthy  
5 answer to a short question, Mr. Fleischman.

6 CHAIRMAN SHAD: Senator Metzenbaum, thank you  
7 very much.

8 SENATOR METZENBAUM: Thank you very much, and  
9 thank you for your courtesies. I want to know how you print  
10 the name up so fast, while I'm still here.

11 (Laughter)

12 SENATOR METZENBAUM: Thanks very much.

13 CHAIRMAN SHAD: Well, I perceive that the rest  
14 of the panel in the order listed in our program, which is  
15 in alphabetical order to the various groups that you repre-  
16 sent -- American Society of Utility Investors, Dr. Spang.

17 Would you start it off?

18 STATEMENT OF

19 JAMES SPANG

20 AMERICAN SOCIATY OF UTILITY INVESTORS

21 MR. SPANG: Mr. Commissioners, fellow panelists,  
22 honored guests, Mr. Chairman.

23 It is a distinct pleasure and honor to be with  
24 you today, as you deliberate the merits of a New York Stock  
25 Exchange request to abandon its historic requirement of

MOOM 43

1 "one share, one vote."

2 The American Society of Utility Investors stands  
3 squarely on the side of retaining the Exchange rule for  
4 a number of reasons:

5 One, it promotes needed competition.

6 Two, it provides a small element of control to  
7 individual shareholders of company policy, thereby reducing  
8 risk.

9 Three, it is democratic.

10 Four, it is a property right that enhances stock  
11 value.

12 Five, it gives substance to the notion that the  
13 capital stock of the company represents the proprietary  
14 interest, and

15 Six, it clearly separates ownership from management.

16 The Society is a 6,000-member national association  
17 of utility investors. These investors, according to a recent  
18 survey of the membership are primarily senior citizens,  
19 and truly represent Main Street America.

20 Three-quarters are retired, and semi-retired.

21 Sixteen percent are below the age of 60; 31 percent are  
22 between the ages of 61 and 70; 39 percent are between the  
23 ages of 71 and 80; and 14 percent are more than 81 years  
24 old.

25 These shareholders are not sophisticated money

MOOM 44

1 barons.

2 It is our position that these small independent  
3 investors can be seriously victimized by the managements  
4 they trust.

5 Not surprisingly, the reason most often given  
6 by these shareholders for investing in public utilities  
7 is safety, and, as a supplement to their social security.

8 Our purpose is to serve the interest of these  
9 independent utility shareholders as a shareholder advocate.  
10 Although in our judgment highly inappropriate, it is easy  
11 to understand why some current managements would wish to  
12 perpetuate their own tenure at any price, including greenmail,  
13 disparate voting rights and poison pills.

14 In defense of their positions, they are likely  
15 to plead -- and they even believe -- that their responsibility  
16 is not so much to the real or imagined short-range monetary  
17 advantage of the shareholders but to the long-range interest  
18 of the company, its shareholders, its employees, the community  
19 of which they are a part, and to the general public.

20 And in the final analysis, who better is prepared  
21 to lead the company to the promised land than its current  
22 management?

23 All of these may be cogent arguments for keeping  
24 the status quo. It is the same position taken by some of  
25 the original colonizers of America who wished to acquire

MOOM 45

1 property and preserve it unto themselves and their heirs  
2 in perpetuity.

3 It is elitist in concept and practice; it is  
4 reactionary; it would deny competition, property rights,  
5 and the fundamental right of change, which has catapulted  
6 America to the undisputed leadership of the free world.

7 Twenty-five hundred years ago, Plato carried the  
8 same message in his ideal republic: misery, corruption  
9 and class conflict were to be managed by rulers who would  
10 be especially trained to provide justice. These rulers  
11 were to be freed of any notions of economic exploitation,  
12 and their work in the public welfare would be assured by  
13 the acceptance of rigorous standards of conduct.

14 Plato's concept of the quality of its rulers was  
15 highly idealized, and he ignored the corrupting influence  
16 of absolute power.

17 No one likes competition except the disadvantaged.  
18 It is their only guarantee of a better life, and has  
19 significantly contributed to a steady stream of immigration  
20 that still shows no sign of abatement.

21 In the past we recognize that competition was  
22 our lifeblood. It brought growth and vast riches to the  
23 American people. As a matter of public policy, we must  
24 continue to protect and encourage that competition. The  
25 current "one share, one vote" requirement of the

1 New York Stock Exchange is at best a minimal protection  
2 for investors.

3 Rather than abandon the requirement, a level  
4 playing field must be assured that the development of  
5 standards by the U.S. Securities and Exchange Commission  
6 to be applied to the other Exchanges.

7 In closing, the American Society of Utility Investo:  
8 believes that the "one share, one vote" standard adopted  
9 many years ago by the New York Stock Exchange must be  
10 preserved. The alternative is anti-competitive, anti-  
11 capitalist, and anti-investment.

12 The Society has welcomed this opportunity and  
13 would welcome all other opportunities to assist with any  
14 additional work that may be required.

15 Thank you.

16 CHAIRMAN SHAD: Thank you, Mr. Spang.

17 Mr. Eskin?

18 STATEMENT OF

19 JORDAN ESKIN

20 DEMOCRACY FOR SHAREHOLDERS

21 MR. ESKIN: Good afternoon.

22 My name is Jordan H. Eskin. Thank you for allowing  
23 me speak here today.

24 I am an attorney practicing in New York City.

25 I am president of Democracy for Shareholders, a nonprofit

MOOM 47 1 corporation formed to enhance shareholder values and secure  
2 voting rights.

3           However, I am testifying here today as an individual  
4 I have led proxy fights for the control of the Boston Maine  
5 Railroad and the Chicago, Milwaukee and St. Paul and Pacific  
6 Railroads.

7           I am probably one of the few people here besides  
8 T. Boone Pickens who have done so. I have the scars to  
9 prove it. I have some idea of why they are fought, and  
10 the pitfalls. We are a dying breed unfortunately for  
11 stockholders' corporation in the country.

12           In addition, I have previously testified against  
13 the Williams Act, against Hart-Scott -- and at various  
14 other proxy rules injurious to stockholder interest.

15           I warned in 1968 that, if the Williams Act passed,  
16 it was the end of proxy contests, and that is exactly what  
17 happened.

18           In light of my experiences, perhaps my views  
19 will shed a practical light on what appears to be a difficult  
20 problem.

21           I urge you to retain the "one share, one vote"  
22 rule as the last symbol of corporate democracy. The proposed  
23 abandonment of the rule, at first blush, appears to be another  
24 tragic episode in the litany of crimes against the stockholders  
25 of the American corporation.



1 But upon analysis, believe it or not, the revision  
2 of the rule is not terribly important, because the meaningful  
3 ness for the vote for directors by shareholders has already  
4 been lost.

5 This is sort of the coup de grace after the prisone:  
6 is dead!

7 It may affect who gets the business--the New York  
8 Stock Exchange, the American Stock Exchange or the Over-  
9 the-Counter Market.

10 There are actually only two interests who have  
11 a vote today--management and a group or company that has,  
12 for example, one billion plus to buy 51 percent of a company,  
13 and is ready to spend another 20 million-plus in expenses  
14 to fight for it. That person has a vote.

15 The rule should be retained to the extent that  
16 we wish to encourage major acquirers--and I believe they  
17 should be encouraged as one of the few saviours to fear  
18 on the corporate scene for stockholders, although I believe  
19 the number of takeovers is statistically small in relation  
20 to the total number of public companies, some six to ten  
21 thousand; but no one else has a meaningful vote--47 million  
22 shareholders are disenfranchised.

23 I have heard testimony here about pouring holy  
24 water on a matter by submitting it to a stockholder vote.  
25 In today's context of the law, that's ridiculous.

MOOM 49

1 Management's proposals, or organized work done  
2 by hundreds of people supported by millions of dollars;  
3 shareholders' opposition, no dollars -- no organization;  
4 it's a sham. Who will prevail? Obviously, the management.  
5 The stockholders have no workers; there's a rubber stamp.

6 Just isn't the larger issue the problem of  
7 entrenched management and the fact that they have inspired  
8 over a period of many years a complex series of invidious  
9 laws in corporate mechanisms that have defeated shareholders'  
10 voting rights and severely impaired share values.

11 The only present salvation for shareholders are  
12 those lucky enough in a few situations to have the likes  
13 of T. Boone Pickens, Carl Icahn, et cetera, take action  
14 to have the market reflect the real values.

15 What is required is new federal legislation covering  
16 a range of factors in order to make a stockholder's vote  
17 meaningful, instead of a sham.

18 I want to refer to you all, to a paper, "Who Owns  
19 the Corporation--the Management or Shareholders?" just  
20 written by Edward Epstein, and published by the Twentieth  
21 Century Fund.

22 I quote from page 13, under the section entitled,  
23 "Truth About Corporate Democracy, the Fallacy of Electoral  
24 Democracy":

25 "Since they offer the voter no real choice, these

MOOM 50 1

2 elections are democratic only in a limited sense. They  
3 are procedurally much more akin to the elections held by  
4 the Communist Party of North Korea than those held in Western  
5 democracies. To begin with they normally provide only one  
6 sleight of candidates.

7 "In 1985, in well over 99.9 percent of corporate  
8 elections, shareholders had to vote on a single list of  
9 directors chosen by management. So, we are talking about  
10 "one share, one vote" in one out of a thousand situations.  
11 So, why are you worrying about voting stock at all? The  
12 shareholder was disenfranchised before the possible abandon-  
13 ment of the "one share, one vote" rule. Don't fool the  
14 public. The shareholder may be able to vote, but not for  
15 directors. So, you are really talking about a non-voting  
16 stock."

17 The SEC is pouring holy water on a dictatorship  
18 of managers. What are the summary of some of the troubles  
19 with the system, and the remedies? You've got to read my  
20 testimony from page 16 on to 21 for a thumbnail sketch of  
21 what's wrong and what ought to be done.

22 There's no vote today --

23 CHAIRMAN SHAD: Mr. Eskin, I have to interrupt  
24 you. We will look forward to asking you further questions  
25 on your testimony.

MR. ESKIN: Thank you, Mr. Chairman.

MOOM 51 1

CHAIRMAN SHAD: Now, the next item -- the next  
2 participant will be for the Fund for Shareholder--Stockholder  
and T7 3 Rights -- Carl Olson.

## 4 STATEMENT OF

5 CARL OLSON, CHAIRMAN

## 6 FUND FOR STOCKOWNERS RIGHTS

7 MR. OLSON: Good afternoon, Mr. Chairman,  
8 Commissioners.

9 My name is Carl Olson. I am the Chairman of the  
10 Fund for Stockowners Rights. Our organization is a nonprofit  
11 educational group whose purposes include assisting stockowners  
12 in encouraging their corporations to support free enterprise  
13 in the Free World.

14 We have pursued this educational function by  
15 conducting and publishing research, and by urging stockowners  
16 to bring up significant corporate governance issues at their  
17 annual meetings.

18 We have broken quite a bit of new ground in terms  
19 of significant corporate governance resolutions which have  
20 appeared in proxy statements in several major corporations  
21 over the past ten years.

22 We have, I believe, generated unique experience  
23 with the issue of one vote per share during  
24 votes on resolutions at two major corporate annual meetings  
25 during 1986.

MOOM 52

1 I will speak about the significance of those votes  
2 later on in my presentation here.

3 But first I want to address the major premise  
4 of the reason we are here today. It is not really the  
5 one vote per share issue; rather, it is the vital concern  
6 of ownership control over our corporations and our corpora-  
7 tions' management.

8 If we stockowners are deprived of a constantly  
9 functioning mechanism of complete control over the governance  
10 of the corporation, we stockowners are no longer the owners.  
11 We will become a lowly class of contingent creditors over  
12 those assets of the corporation.

13 We would bear all the risks of the corporation's  
14 business life, though without any effective means of influ-  
15 encing a successful outcome or removing an offending manage-  
16 ment.

17 There has been a lot of controversy these days  
18 about corporate buyout takeover activities. This proposal  
19 to abolish the one vote per share rule is probably the most  
20 insidious type of takeover scheme that was ever devised.  
21 This would allow a small clique of insider corporate elites  
22 to takeover corporations at the flick of a wrist. I call  
23 this wrongdoing as "corporate gerrymandering." Such an  
24 insider elite would not even have to put up much money to  
25 wrest a majority voting control away from the legitimate

MOOM 53 1

majority.

2

The cardinal rule of capitalism would be violated

3

that says, if you want a business, you have to pay for it.

4

If this rule can be circumvented, the only way would be

5

by some form of expropriation of the real owners' assets.

6

Expropriation of assets is exactly what the viola-

7

tion of the one vote per share rule means. The expropriation

8

would not just be in the present when the disenfranchisement

9

is carried out, but would extend far into the future by

10

removing the major incentive for efficient and profitable

11

performance by the management.

12

The insider corporate elite will be able to set

13

its own agenda regardless of its effects upon the financial

14

health of the corporation, and the continued prosperity

15

of America's economy.

16

As I mentioned earlier, I sponsored resolutions

17

to preserve the principle of one vote per share to major

18

corporations this year. Now, the resolution itself was

19

a very simple, one-line resolution which read, "Be it

20

resolved by the stockowners to recommend that the board

21

of directors take the necessary steps to prevent the issuance

22

of any common or other voting stock, which includes more

23

than one vote per share. The two corporations where these

24

were voted on were Merrill Lynch and Company and Unival

25

Corporation. Both of these corporation's managements had

MOOM 54

1 exhibited decidedly anti-stockowner attitudes during the  
2 previous year.

3 Before I give you the results of the voting, I  
4 want to point out that I am a small stockowner and did not  
5 conduct an expensive proxy contest. I can assure you that  
6 the corporate managements spent thousands of dollars from  
7 the corporate treasuries to fight the adoption of these  
8 resolutions.

9 In regard to the percentage voting results, you  
10 should be aware that the typical stockowner originated  
11 resolution perceives about a 2 to 5 percent favor, and 10  
12 percent would be astonishingly high.

13 Further, I cannot tell you how many votes in favor  
14 came from institutional stockowners, since very few of them  
15 ever publicly disclose their votes.

16 I had heard quite a bit of verbal support for  
17 the idea of the one vote per share concept for various  
18 institutional stockowners including many government pension  
19 funds, but as yet I don't know how they voted.

20 Now, for the vote results: at Merrill Lynch,  
21 39 percent voted against the management's recommendation.  
22 This broken down to 18 percent in favor, 21 percent absten-  
23 tion, and 61 opposed. Merrill Lynch's management was so  
24 chagrined at this amazingly high vote of no confidence that  
25 they refused to announce the vote count at the annual meeting

MOOM 55 1 and it was not until a few days later that I was given the  
2 vote total.

3 A unit count of the votes was similar: 26 percent  
4 voted against management, 18 percent of abstention, and  
5 74 percent opposed.

6 It's instructive to contrast this with the usual  
7 2 to 5 percent in favor. For the upcoming year, I understand  
8 that the one vote per share resolution will come up at the  
9 annual meetings at IBM, Occidental Petroleum, Mobil, EXXON,  
10 Merrill Lynch and BankAmerica.

11 In conclusion, I would like to observe that in  
12 America's economy when in the midst of a great civil war,  
13 Abraham Lincoln spoke about the immense casualties that  
14 had occurred there. In today's world, we are looking at  
15 the forces of the insider corporate elite numbering about  
16 50,000 arrayed against the stockholders of America numbering  
17 about 50 million.

18 I trust the Commissioners can appreciate the  
19 SEC was chartered to provide an effective defense with the  
20 50 million stockowners against all incursions and usurpations.  
21 I expect the Commission to do its duty and repel the impending  
22 Pickett's Charge by the corporate insider league.

23 Nobody has the right to expropriate the voting  
24 rights of the owners of the corporation, not the insider  
25 league, not the New York Stock Exchange, not government



MOOM 56 1 regulators, or other stockowners of the corporation.

2 Thank you very much.

3 CHAIRMAN SHAD: Thank you very much, Mr. Olson.

4 The next speaker for the Interfaith Center on  
5 Corporate Responsibility, Mr. Neuhauser.

6 STATEMENT OF

7 PAUL M. NEUHAUSER

8 INTERFAITH CENTER ON CORPORATE RESPONSIBILITY

9 MR. NEUHAUSER: Thank you, Mr. Chairman.

10 My name is Paul Neuhauser. I am pleased to appear  
11 before you today on behalf of the Interfaith Center on  
12 Corporate Responsibility which is a coalition of 17 protestant  
13 denominations and agencies, including in general Roman Catholic  
14 religious orders, and about a dozen Roman Catholic dioceses.

15 The investment portfolios of the members of the  
16 coalition aggregate in excess of \$13 billion.

17 You have my prepared remarks. I'd like, if I  
18 can, to try and address myself to some of the matters that  
19 I have heard come up today, some of the questions that the  
20 Commissioners asked this morning, and some of the other  
21 matters that have come up in the course of the discussion,  
22 so it won't be quite as smooth a presentation that Mr. Olson's  
23 just was, because it will be written from notes, rather  
24 than in reading.

25 Let me say, first, that it seems to me that the

ROOM 57 1 basic question is whether it's likely that many or a great  
2 number of the largest United States corporations will adopt  
3 dual common stock structure.

4 This has been a matter of some debate today. It  
5 is clearly a matter of debate with Mr. Fischel's paper,  
6 and I think how you come out on this issue may very well  
7 be determined by how you come out on that question.

8 The reason I say that is because if a large number  
9 of the larger American corporations do adopt dual-class  
10 common structure, assuming that the New York Stock Exchange's  
11 new proposal goes through, such an action, it seems to me,  
12 is likely to lead to a crisis, to legitimatization of economic  
13 power exercised by corporate managers.

14 As we have, people have talked about from time  
15 to time, it will create a situation where there will be  
16 self-perpetuation of management who will own a minute per-  
17 centage of the stock in our largest corporations.

18 What is the legitimacy of their exercise of that  
19 power? They will really have no theoretical justification  
20 for that situation. If such a crisis and legitimacy occurs,  
21 it is likely, in my view, to lead to a situation that politi-  
22 cally will lead to a jeopardizing the capitalist system  
23 as we know it in the United States.

24 If there is no accountability of the management,  
25 the society will not let that continue. They will provide

MOOM 58 1 for accountability one way or another. We have provided  
2 for accountability by four methods, which I will talk about  
3 in a moment. If those are effectively destroyed, there  
4 would only be one place that we will turn to, and that,  
5 I believe, will be the government, to provide for that  
6 accountability.

7 We, in the legal profession, can tend to talk  
8 about corporate accountability. And the economists, I  
9 think, tend to talk more about monitoring; but, as our  
10 system has been structured, there have been four methods  
11 of doing that. A proxy fight on the voting rights, a tender  
12 offer, the use of outside directors, the law suit, the end  
13 of -- or the use of dual-class common allowing management  
14 to have complete control with a minute percentage will  
15 effectively destroy the first three of these.

16 The value of the proxy fight is not that it is  
17 every going to occur in a given situation. My understanding  
18 is that there have only been, on average, four or five  
19 successful proxy fights per year, even prior to the recent  
20 decline in the number of fights in the use of tender offers.

21 It is the inter rerum effect; it is the fact that  
22 it exists that keeps management consciously looking over  
23 its shoulder and making sure that it performs efficiently  
24 and effectively.

25 Similarly, a tender offer does not have to take

MOOM 59

1 place in order to keep management on its toes. Both of  
2 those will disappear if we do not have public-voting stock.  
3 Furthermore, as was commented by some people this morning,  
4 the use of outside directors to monitor will also disappear.  
5 If those outside directors are elected by the management,  
6 we will be in no different situation than we were at Occidenta  
7 Petroleum when Armand Hammer had the undated signed resigna-  
8 tions of all the directors in his pocket.

9           Those three will be gone; we will be left with  
10 only a lawsuit as an effective monitoring system. That  
11 will not work as our legal structure is presently set up  
12 because a lawsuit is unable to insist on effective economic  
13 performance. It can do certain things about self-dealing  
14 but it can't insist on effective economic performance, and  
15 therefore there will be no accountability; there will be  
16 no monitoring; the result will be that society, I would  
17 submit, is unlikely to let that situation last for long.

18           Instead of worrying about whether Congress will  
19 impose a "one share, one vote," we cannot think, expect  
20 that sooner or later--and it may be not immediately; it  
21 will be after there have been sufficient number of scandals  
22 combined with a recession--they will enact legislation that  
23 will provide accountability in a way that will control the  
24 internal decisionmaking of the corporation in a way that  
25 will probably be undesirable to most everybody sitting in

1 in this room.

2 CHAIRMAN SHAD: Thank you, Mr. Neuhauser.

3 We'll be back to you with questions.

4 The next participant, Mr. O'Hara from the National  
5 Association of Investors.

6 STATEMENT OF

7 THOMAS E. O'HARA, CHAIRMAN

8 NATIONAL ASSOCIATION OF INVESTORS CORP.

9 MR. O'HARA: Mr. Chairman. Members of the  
10 Commission, and staff.

11 My name is Thomas E. O'Hara. I am Chairman of  
12 the Board of Trustees of the National Association of Investors  
13 Corp.

14 NAIC is an organization with a current membership  
15 of 121,000 individuals who belong to NAIC through over  
16 6500 investment clubs.

17 Our surveys show the personal security holdings  
18 of our members average \$84,000, and if that average holds  
19 to the total membership, their assets, their security  
20 holdings are \$10 billion.

21 The National Association of Investors Corp. has  
22 been in operation since October of 1961. Its purpose is  
23 to introduce individuals to the investment process and to  
24 provide a program for them of investment education and  
25 information, which will assist them in becoming successful

OM 61

1 investors.

2 In our 35 years of operation, we have introduced  
3 more than 3 million people to the ownership of common stock,  
4 and we are very proud of our investment, of the effectiveness  
5 of our educational program, because our surveys show our  
6 members have an average performance about earning the 500  
7 Standard and Poor Index, most of the last 26 years.

8 In the more than 35 years that NAIC has been in  
9 operation, we have seen a steady deterioration in the position  
10 of the individual investor in the Nation's securities market.  
11 The tax laws of the Nation have been slanted more and more  
12 to induce individuals to place their investments in various  
13 institutional forms.

14 The Commission costs to the smaller individual  
15 have been increased to 10 times or more than of the larger  
16 investors. To develop a market and communications technology  
17 has put the individual who has a trading philosophy at a  
18 substantial disadvantage. The combination of these develop-  
19 ments has greatly reduced the brokerage industry's interest  
20 in the smaller equity investor, and consequently its services  
21 to that investor.

22 Recently the activities associated with takeovers  
23 and raids has subjected the individual investor to a host  
24 of abuses by holders of greater economic strain.

25 The subject of today's hearings is just one of

MOOM 62 1 the problems growing out of this area.

2 The National Association of Investors fears that  
3 eliminating the "one share, one vote" rule would be one  
4 more step in weakening the position of the individual  
5 investor. We believe it is very important for the integrity  
6 of the securities market for every investor to have voting  
7 power equal to that of any other investor with equal ownership.

8 That was the tradition upon which corporate democracy  
9 was built, and is the principle upon which the public ownership  
10 of industry must rest.

11 We believe different classes of stock with different  
12 voting rights creates different classes of owners and results  
13 in unequal ownership privileges which damage the credibility  
14 of our capital markets.

15 We recognize that part of the question here today  
16 is equal competition between the different securities markets.

17 One of our Nation's three largest securities markets  
18 is currently subject to the "one share, one vote" rule,  
19 while the other two are not. This obviously puts that market  
20 into a difficult, competitive position. Originally, that  
21 rule was used as a means of giving that market a higher  
22 standard of credibility than the others. We believe that,  
23 rather than sacrificing that high standard, we would urge  
24 the SEC to use its considerable influence to bring about  
25 a situation where all securities markets are subject to

MOOM 63

1 the same rule.

2 It would be unfortunate to lower a superior princip  
3 of corporate democracy for the purpose of equalizing competi-  
4 tion among the Nation's securities markets, when a better  
5 solution is possible.

6 We recognize that a more desirable situation of  
7 having all securities markets have a "one share, one vote"  
8 requirement might take considerable time to achieve.

9 In the meantime; we believe there is a method  
10 that has been worked out by a few corporations that helps  
11 meet the need to slow takeover attempts; and, yet, over  
12 a period of time, still maintains the principle of "one  
13 share, one vote."

14 The procedure we are referring to is where the  
15 shareholder receives more holding power after holding the  
16 stock for a period of time such as a year--

17 CHAIRMAN SHAD: Mr. O'Hara, we'll have to stop  
18 now, but we will be back to you with questions in a moment.

19 Let's go to Mr. McElroy of the Shareholders  
20 Consulting Group.

21 STATEMENT OF

22 JAMES H. McELROY

23 SHAREHOLDERS CONSULTING GROUP

24 MR. McELROY: Yes, sir.

25 I am Jim McElroy, president and principal owner



2 of the Shareholders Consulting Group, Inc. of Chevy Chase,  
3 Maryland.

4 The Shareholders Consulting Group is in business  
5 to provide to services to shareholders to raise the stock  
6 price of companies that are undervalued in the stock market.  
7 The Shareholders Consulting Group does this by helping existin  
8 shareholders of undervalued companies organize themselves  
9 into company specific shareholder associations, to support  
10 new management initiatives and accomplish the restructuring  
11 spinoffs and other asset reorganizations necessary to bring  
12 the market value into line with the highest and best use  
13 of companies' resources.

14 I entered this business five years ago in 1981  
15 to organize Marathon Oil Company's shareholders, to obtain  
16 for themselves the increment in marathon vaoue between the  
17 next worth of its assets, \$200 per share, and the value  
18 of its stock on the stock market, \$40-50 per share.

19 After a proxy fight, the Marathon Shareholders  
20 Committee I formed initiated an appraisal action in Ohio  
21 courts that is now befofe the Ohio Supreme Court after  
22 an appraisal, after an Appeals Court reversal of a Findlay,  
23 Ohio, court, Marathon's home town, appraisal that was very  
24 unfair to appraising shareholders.

25 I also organized the Shell Oil Company Shareholders  
Committee to protect interests of dissenting shareholders

1 in the takeover of Shell Oil Company's minority shares by  
2 Royal Dutch Shell.

3 This effort also resulted in an appraisal now  
4 before Delaware's Chancery Court.

5 During the five years since I began the practical  
6 work of organizing shareholders to exercise their rights  
7 as owners, much has happened with shareholders. Three  
8 changes are:

9 One, shareholders of undervalued companies are  
10 much more likely today to be aware of the undervalued condi-  
11 tion of their companies.

12 Two, shareholders today are much more sophisticated  
13 about management and about how little management often  
14 cares about shareholder interest.

15 Three, shareholders are ready and anxious to  
16 use their vote in ways they never have before if given the  
17 opportunity.

18 My firm is in the business of providing that  
19 opportunity.

20 Existing shareholders of undervalued companies  
21 do not have to sell their interests to others in order for  
22 profit-generating management initiatives and restructurings  
23 to take place, but they must organize and assert the authority  
24 they already have as shareholder-owners if they want  
25 restructured advances to them to occur in the absence of

MOOM 66

1 a takeover.

2           Whatever outside new owners can do when they acquire  
3 companies can be done just as well by organized existing  
4 shareowners and it can be done more efficiently and with  
5 less economic disruption than takes place with existing  
6 shareholders are bought out by outsiders or through leveraged  
7 buyouts by existing managers.

8           Organizing existing shareholders for new management  
9 initiatives and restructurings and redeployment of company  
10 resources requires no tender offers with the associated  
11 risk of insider trading.

12           It requires no junk bonds, since there are no  
13 buyouts of existing shareholders, and existing shareholders,  
14 particularly long-term shareholders are not forced to sell  
15 stock they would otherwise like to keep.

16           Furthermore, such an approach by shareholders  
17 keeps all the intrinsic value in the company for the share-  
18 holders, and deprives outside raiders, or inside managers,  
19 of the opportunity for using their superior knowledge of  
20 companies' value to the disadvantage of existing shareholders.

21           Moreover, since all this is done by existing  
22 shareholders there is no purchase debt that must be paid  
23 down, so there is no pressure for inappropriate asset sales  
24 that are not in the long-time interest of shareholders.

25           Additionally, since existing shareholders are

MOOM 67 1 much more likely to have diversified portfolios than are  
2 outside raiders, existing shareholders are in a much better  
3 and more appropriate position to carry risks associated  
4 with new initiatives and restructurings.

5 Shareholder voting is all-important to the share-  
6 holder organizing I do. Without the vote, shareholders  
7 have no leverage, no power; consequently, it is very important  
8 to me that shareholders' rights to vote not be diminished.

9 I am not expert enough to add much to what those  
10 who appeared this morning have said. I would, however,  
11 like to urge you to keep in mind all the justifications  
12 for universal suffrage in the political domain when you  
13 are urged --and I urge, considering the urgings of those  
14 who have, which had you restrict the universal suffrage  
15 in corporate governance.

16 I've thought about little else for the last five  
17 years on how to practically impact on corporate governance.  
18 No important --

19 CHAIRMAN SHAD: Thank you, Mr. Elroy -- I have  
20 to interrupt, but we'll be back to you.

21 Thank you.

22 The final speaker on this panel will be Margaret  
23 Cox Sullivan, the President of Stockholders of America.

24 (Continued next page)

25

MOOM 68 1

STATEMENT OF

MARGARET COX SULLIVAN, PRESIDENT

STOCKHOLDERS OF AMERICA

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MS. SULLIVAN: Thank you very much.

I am sure you are very weary from hearing all of this this afternoon, and I am going to be as brief as possible.

I am Margaret Cox Sullivan, and I am --

CHAIRMAN SHAD: Would you pull up the microphone please?

MS. SULLIVAN: Surely.

I thought my loud voice would carry, but maybe it doesn't.

My name is Margaret Cox Sullivan, and I am president of Stockholders of America, and we are a non-profit, non-partisan, national organization of stockholders, and we were established in 1972.

And, of course, you know that I appreciate this opportunity and privilege to appear again before the Commission, to express our views on the New York Stock Exchange's proposed rule change, and I know that the decision to do this by the Exchange was not an easy or a quick one, and certainly then you have heard so much about that subcommittee report; I won't go through that again, but I will want to prove and point out to you that the underlying cause

MOOM 69

1 of why they did this, why the New York Exchange did this,  
2 asked for this change in rule at this particular time has  
3 to be brought out.

4 I mean, from that report, that the subcommittee  
5 put out, we said at the time these standards were adopted,  
6 and, of course that was 1926, the hostile tender offers  
7 were virtually unknown. Well, they are not unknown today.  
8 That's for sure, and again, quoting from that report:

9 "And the many managements have become increasingly  
10 concerned with the possibility of unnegotiated tender offers  
11 for the stock of their companies, and to increase their  
12 ability to thwart such hostile offers many companies have  
13 proposed to their shareholders recapitalizations whereby  
14 two classes of common stock are created and one class having  
15 significantly greater voting than the other; and as a con-  
16 sequence of their adoption of the -- in violation of  
17 the New York stockholder listing standards several listing  
18 companies were either given up by their -- given up -- they  
19 had to give up the listing or they had to be notified that  
20 they would be delisted.

21 And that's where the most serious consequence --  
22 I mean this is something, and it cannot retake --

23 And a lot of people right now, knowledgeable  
24 people--writers, and thoughtful people--realize that the  
25 situation is really getting out of hand.

and that's very unfortunate.

2           There was an article in The Wall Street Journal  
3 that drew a parallel between the current rating craze to  
4 the stock bulls of the 1920s, and they went on to say how  
5 that crowd operated, and then there was an article by  
6 Peter Drucker in Public Interest--you know, he is a well-  
7 known, thoughtful authority, and he likened this wave of  
8 stock speculation to the 1870s, when the Drews and the  
9 Goulds and the Vanderbilts were battling over the control  
10 of the American railroads, and he said, we have a wave of  
11 hostile takeovers has already profoundly altered the contours  
12 and the landmarks of the American economy. It has become  
13 a dominant force, and some people say it is "the" dominant  
14 force in the behavior and the actions of American management,  
15 and almost certainly a major factor for the erosion of our  
16 American competitive and technological leadership.

17           Former SEC Chairman Harold Williams -- I thought  
18 this was rather good -- called the takeovers a "gift of  
19 foreign competitors that we cannot afford."

20           Time Magazine, it was about a year ago, Felix  
21 Rohatyn, said "At a time when we are trying to strengthen  
22 our important industries to make them more competitive,  
23 this weakens them." This article also said -- Mr. Rohatyn --  
24 "It would take a crisis to end this surge of takeovers,"  
25 and then quoted as "Some day there is going to be a major

MOOM 71

1 recession, major scandal."

2 Well, the major scandal of this prophesy of a  
3 year ago has taken place.

4 Now, because of time, I'm just going to sort of  
5 do it this way: in summary, Stockholders of America recommend  
6 that the New York Stock Exchange be given the authority  
7 for the rule change it has requested. With reference to  
8 the uniform listing requirements for the other national  
9 exchanges, we believe it is not necessary, or even desirable  
10 for this to be mandated.

11 Previous efforts in this regard have not met with  
12 acceptance. Nor is it desirable for the regional exchanges  
13 to have uniform listing requirements. The regional exchanges  
14 have developed at different times in our economic history,  
15 in different sections of the country.

16 You see what I'm really saying: we think that  
17 this change should take place, and that actually the hostile  
18 takeovers is the issue to be addressed.

19 Thank you so much.

20 CHAIRMAN SHAD: Thank you, Ms. Sullivan.

21 Now, we'll go around the table and afford the  
22 Commissioners to ask you questions, as well as the senior  
23 members of the staff.

24 I would like to start it with Mr. Neuhauser's  
25 statement with a basic question, as he phrased it:



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"Will a lot of companies adopt A/B capitalizations if the New York Stock Exchange's proposed rule is approved by the Commission?"

Mr. Neuhauser, now we were told this morning by Mr. Macklin from the NASD that notwithstanding the fact that the NASD does not require "one share, one vote" for trading on that system, only 5 percent have adopted A/B capitalization. They all could in theory.

How do you rank that? Or how does that respond to the implication of your question that many may.

MR. NEUHAUSER: Well, I think that they are likely to be in a very different situation. I am not sure how many hostile takeovers, or the likelihood of hostile takeovers in that group of corporations versus those that are maybe not the General Motors, but one level under that is taking place.

I'm not sure, in other words, that the statistics for the NASD market are going to be an accurate predictor of what is likely to happen on the New York Stock Exchange. The fact that the New York Stock Exchange is sufficiently interested in changing the rule, which is to be suggested that they think that they are a significant number of companies involved, in preparation for this I read somewhere--and I can't put my finger on it-- that there have been a large number of one of the companies that have suggested that

1 they were thinking of going this way, and calls for the  
2 New York Stock Exchange about it.

3 I don't know what the answer is. I suspect,  
4 though, that because of the fear of takeovers that a very  
5 significant percentage of the Fortune 500-type companies  
6 will, in fact, move in this direction.

7 I cannot guarantee you that. I cannot say that  
8 it will happen with certainty. But it seems to me that's  
9 what we're looking at, and it seems to me that's the worry.

10 I mean if Hershey and Dow Jones were the only  
11 companies, it really wouldn't make a great deal of difference;  
12 it doesn't seem to me in the past it has made a great deal  
13 of difference, that not all companies were subject to the  
14 New York Stock Exchange rules.

15 What seems to me to be the prime concern--to me,  
16 anyway, what the prime concern is--if a considerable number  
17 of the really big players move to a situation of self-  
18 perpetuation of control, that we will have a very serious  
19 problem both on the economic side, and the likelihood of  
20 efficiency of those firms, and on the political side of  
21 the acceptability of that kind of activity; and that the  
22 likely result will be, as I tried to say before that we  
23 will have the United States Government deciding to impose  
24 itself on internal decisionmaking questions in a way that--  
25 we are not talking about United States Congress passing

MOOM 74 1

2 a "one share, one vote." We are talking about the kind  
3 of thing that has happened in Europe, where the allocations  
4 of capital are determined by the Government.

5 And it seems to me one of the reasons perhaps--  
6 once again, I cannot cite you chapter and verse--but one  
7 of the reasons why the United States has been able to stay  
8 away from the nationalizations and the public control of  
9 corporations that exist in Europe is that, in fact, we have  
10 had a much better system for accountability and monitoring  
11 in this country, and the fact that they don't have, as was  
12 pointed out this morning -- in Europe, they don't have the  
13 ability to vote on the European companies, at least, with  
14 any effective way.

15 Maybe one reason why we have a different system  
16 that is a free economic system.

17 CHAIRMAN SHAD: Thank you, Mr. Neuhauser.

18 Commissioner Cox?

19 COMMISSIONER COX: Thank you, Mr. Chairman.

20 I noticed a variety of opinions regarding different  
21 aspects of corporate governance and takeovers expressed  
22 by the panel here today, but I would like to pose a question  
23 that is open to any of the panel members.

24 Perhaps someone who hasn't been involved in this  
25 question at all would find it surprising that if a group  
of spokespeople for shareholder interest groups was faced

OOM 75

1 with the question which is basically the following, that  
2 should shareholders have the opportunity to structure corporat  
3 voting rights as those shareholders design, that by and  
4 large the spokespeople would say, "No, they shouldn't."

5 A person not involved in it might think that  
6 certainly shareholders would like that opportunity for  
7 companies listed on the New York Stock Exchange, similar  
8 to the opportunities they have for corporations listed on  
9 the American Stock Exchange or traded on NASDAQ.

10 So, I know that Mr. Eskin has basically told us  
11 that shareholder voting doesn't work; it's a sham. But  
12 Mr. McElroy has stressed that shareholder voting is very  
13 important, and provides opportunities that wouldn't be  
14 available if the voting was modified.

15 So, my question is to the people that spoke today:  
16 do you really feel that shareholder voting doesn't work,  
17 or that it wouldn't work with respect to this question?  
18 Would shareholders somehow be fleeced out of their votes  
19 and make mistakes in approving recapitalizations, dual-  
20 class capitalizations for corporations where they were faced  
21 with this question?

22 MS. SULLIVAN: I'd like to answer this. May I?

23 COMMISSIONER COX: Well, I would like anybody  
24 on the panel. I'm willing to go around to anyone who would  
25 like to comment on it.

MOOM 76

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MS. SULLIVAN: Thank you very much.

The reason I like this -- and we are standing behind, saying that, yes, the New York Stock Exchange should be allowed to modify the vote is because in that, their proposal, the outside directors would have to vote on any recapitalization, and the shareholders would have to vote. There would have to be a majority vote. So, yes, they would have a vote in the recapitalization of the company, and therefore that gives the stockholder or the shareholder or the investor protection.

And if that was not in there, I don't believe that we could say that they should be allowed to do it.

But they have it in there. And stockholder voting is important.

COMMISSIONER COX: O.K.

But Mr. Eskin essentially said, "Voting doesn't make any difference any more. It doesn't accomplish anything.

Is that a fair reading?

MR. ESKIN: Not quite, Mr. Cox.

Voting is very important if the vote is real.

Mr. McElroy was talking about a vote in appraisal situations, There the company can lose it, or win it; they really don't care because they are not going to lose their jobs. I'm talking about controlled voting, and that's what they are working the most to defeat. The whole complex of laws

MOOM 77 1 in the last 50 years, every time there is a bill affecting  
2 corporate law, or SEC law, the writer of the bill says,  
3 "in the interest of protecting corporations," "in the interest  
4 of preserving stockholder rights." And each time -- I've  
5 lived through proxy fights. I will tell you the purpose  
6 of the -- bill is to obstruct and diminish stockholder  
7 rights.

8 Why do you think that 99.9 percent of the companies  
9 had no slate put up? Can you believe that, in a political  
10 democracy as we have here?

11 Can you imagine it? The fact of the matter is  
12 the vote on things like reclassification doesn't bother;  
13 the only vote that bothers them is control--that's the one.  
14 They don't mind giving away the company's assets to preserve  
15 their own tenure, and call it "in the interest of the corpora-  
16 tion."

17 Don't they in greenmail? What's the difference  
18 in an appraisal? Greenmail, all right? You're buying out  
19 the stock.

20 But when it comes to control, you'll find a totally  
21 different situation, and the facts are you--I'll buy each  
22 one of you the book, Who Owns the Corporation? I didn't  
23 write it, but it -- and people are aware of this. The  
24 fact is, that you can't organize today an independent group  
25 and takeover a company. Only T. Boone Pickens for a billion

1 dollars plus plus 20 million in expenses -- companies are  
2 available. O.K.?

3 And is that so bad for the shareholder? The  
4 shareholder definitely has his first salvation. Here's his  
5 ten dollar stock, and someone thinks it's worth fifteen  
6 to him, because that someone can make twenty for himself  
7 on it.

8 Well, he finally has someone ready to buy it  
9 for fifteen, but he's got to guess--he's got to guess if  
10 that someone isn't going to sell out in greenmail.

11 But at least, he's going to move from 10 to 15.  
12 He didn't have that before. And he doesn't care if it's  
13 hostile, friendly. He wants a \$20 stock. If the other  
14 guy comes in he's got to take a \$15 stock, and sell his  
15 own.

16 But he wants the 20, and if he thought Mr. Pickens  
17 were going to stay and stay with this 40 or 50 percent and  
18 run half the company for him and half for Mr. Pickens, or  
19 -- Icahn did it, they'd stay around because those guys  
20 make money, most of the time, right?

21 And that's the -- the meaningful of the vote is  
22 the vote for control, and that's what managements have utterly  
23 destroyed. Just try to start a proxy contest. Just try. I  
24 dare you.

25 (Laughter)

MOOM 79

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COMMISSIONER COX: Mr. McElroy?

MR. ESKIN: No.

MR. McELROY: Yes. Hello -- just testing.

COMMISSIONER COX: We can hear you.

MR. McELROY: Well, first of all, when I was talking about vote, it wasn't about appraisals. That's a fallback. I mean, I've been involved in appraisals, but I think the world is different today than it was when I conducted the proxy contest with regard to Marathon, and that was surprising close what happened with Marathon.

I think today shareholders are aware of things that they weren't aware of five years ago, and I think there's a -- it's time for a resurgence of shareholder interest, and I've talked to literally thousands of shareholders in the last five years, and I'm impressed with how willing and interested they are in following and supporting moves to assert shareholder initiatives.

And so, while Mr. Eskin may be right about the history, I think it is a new world today, and I think shareholders are ready to support shareholder initiatives in ways they haven't in the recent past.

MR. ESKIN: This book came out in October, and I'll tell you, the facts are, they haven't won any fights.

COMMISSIONER COX: But, Mr. McElroy, if shareholders are willing to get involved and take an interest in the

T8

T9



MOOM 80

1 corporations, would they not take an interest in a proposition  
2 with respect to voting rights and make the decision that's  
3 in their interest?

4 MR. McELROY: Well, you know, how organizations  
5 and groups behave or associations behave, it has been  
6 very interestingly discussed by the recent Nobel winner  
7 Buchanan in the Calculus of Consent.

8 It's very complicated how that works. I think,  
9 you know, it's just that they will do things that are not  
10 in their interest just as people get coerced to tell they  
11 are estopped because they don't see a realistic opportunity  
12 of upholding it and doing better.

13 I think shareholders see in management initiatives  
14 to -- and a small carrot to support that initiative as if  
15 an original, rational shareholders will essentially diminish  
16 his vote.

17 I think the theory of all that has been -- it's  
18 just been well developed. I just think it's one of those  
19 things, just as the citizen can't forever sell his right  
20 to vote, and then he probably would if given the opportunity.

21 I think they should not have the right -- corporate  
22 should not have the right forever to sell their right to  
23 vote. I think it is too important a thing.

24 COMMISSIONER COX: Mr. Neuhauser?

25 MR. NEUHAUSER: Yeah. This was something that

1 came up this morning also. I think Commissioner Peters  
2 raised it, and some other people, and it seems to me it  
3 is an a valid question.

4 I tried to address it a little bit in my written  
5 statement, but let me go on and comment on it now.

6 It seems to me that there are two -- when to  
7 approach it from an economics point of view, when it refers  
8 to a collective action thing which you are familiar with.  
9 From a lawyer;s point of view, it's a question that virtually  
10 the same but slightly different terminology -- the organization  
11 of money.

12 If --I would have no trouble letting the share-  
13 holders vote on it, and say, yes, they could give it away  
14 if there were some method of providing for the same degree  
15 of money and effort on behalf of the shareholders as management  
16 will put into, in trying to get it back --

17 MR. ESKIN: That's the key issue.

18 MR. NEUHAUSER: If you want to look at a situation  
19 where that, in fact, was done, in a slightly different,  
20 somewhat different context involving removal for cause  
21 of a director --a case call Campbell and Loewy's in Delaware  
22 where they said if you are going to remove the director  
23 for cause, you must -- the corporation must provide that  
24 director with the resources, the access to the shareholders,  
25 the money, and let them spend the money for the proxy fight

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out of corporate funds just as the company does.

In that kind of situation, I would have greater faith in the outcome than I will in a situation where there is the organization and the corporate funds are being spent on one side, but not on the other.

I don't have the confidence that, in fact, the shareholders will go for their best interest when they only hear one side of the issue.

COMMISSIONER COX: Mr. Olson, you had a comment?

MR. OLSON: Yeah, I believe the issue of one vote per share is so basic to the corporate capitalism system in America, that it is a thing that should not ever be able to be waived.

Fifty-one percent of the shareholders of a corporation should not be able to do this to the rest of the company or to themselves. It is analogy to the political scene to believing that if 51 percent of the people who want it, who wrote it, to repeal the Bill of Rights, that you would be willing to live with that.

CHAIRMAN SHAD: Commissioner Peters?

COMMISSIONER PETERS: Thank you.

It's difficult to know which question to ask. Mr. Olson's last remark was very provocative indeed, and I think that the analogy of shareholder voting rights and the corporate democracies' interestingly one compares

MOOM 83 1

2 it to the political democracy in which we all operate as  
3 voting citizens, or some of us operate as voting citizens,  
4 realizing that not everyone exercises their right to vote.

5 But, which leads me into maybe the question that  
6 I will ask, and that is, all of you and the panelists  
7 who preceded you have acknowledged to a person the intrinsic  
8 value in this thing called the "vote" that attaches to shares,  
9 their issue to shareholders.

10 And I am one that does not question that it is  
11 a good thing to have the right to vote, since you all repre-  
12 sent entities that represent millions of shareholders, I  
13 would like to ask you, one, to what extent can you tell  
14 us that your members are active participants, in the  
15 corporate democratic scheme that currently underlies our  
16 capitalistic system.

17 Because I for one would find that information  
18 useful, and helpful. And finally resolving this issue,  
19 and too I would ask -- you, in particular, Mr. Spang, to  
20 what extent do you think that permitting a shareholder to  
21 give up this right to vote, whether it is an informed  
22 voluntary action or not -- to what extent is that really  
23 going to have an impact on competition in the corporate  
24 world as long as that shareholder has the right to  
25 sell his stock and thereby vote, as they say, with his  
feet?

1 MR. SPANG: I think your last statement is very  
2 appropriate, and I attests largely what happens is that  
3 most shareholders decide to throw in the towel, and to  
4 walk.

5 They leave; they sell their shares and get out.  
6 As far as the vote is concerned, it really is -- it is not  
7 terribly important to most of the shareholders because they  
8 never have an opportunity really to vote on anything that  
9 is earth-shattering, and management pretty well, you know,  
10 controls what is going to happen, and how it is going to  
11 happen and so on. It is only an occasion in which two  
12 behemoths, you know, come together; or some other group  
13 with a billion dollars that was mentioned here and so forth,  
14 and \$20 million for legal fees, and what-have-you, you know,  
15 that contests the managementship of the corporation, that  
16 the shareholder vote may actually be worthy of something.

17 I know that as far as the SEC is concerned, and  
18 I have attempted, you know, to introduce shareholder proposals  
19 and we usually get a letter from management, saying, you  
20 know, that this is not appropriate, and we intend to leave  
21 that out of our annual noticd.

22 And then we write to the SEC, and our attorney  
23 deals with that kind of thing, and the SEC, of course, writes  
24 back, and says, you know, well, that's very appropriate  
25 to leave the proposal out.

MOOM 85

1           And because I think it is a lot easier to deal,  
2 you know, with small potatoes such as ourselves, than it  
3 is to deal with management, you know, with millions of  
4 dollars at your beck and call.

5           What I think that we are saying, seeing here is  
6 that the one vote -- you know the "one share, one vote"  
7 issue is just the tip of the iceberg.

8           This is a far more important issue than that.  
9 I don't know or I can't believe that the Securities and  
10 Exchange Commission at least at the present time really  
11 has the stomach to tackle the really fundamental issues  
12 of shareholders' rights.

13           Now, there's where we get into a real problem.  
14 There's where we can have our committees going, I suppose,  
15 almost for the next year, almost to restructure merit, even  
16 with the takeovers; and with the takeovers, that is all great  
17 and well and done. And there is a possibility of upsetting  
18 management but possibly with a takeover.

19           You've got to realize that all these takeovers  
20 are done mostly with a leverage, a lot of leverage, a lot  
21 of debt--a lot of junk bonds. How many junk bonds can you  
22 get out there? Who's going to pick up all these junk bonds?

23           Now, right now, it's the name of the game; Everybody  
24 likes to take over because it means millions of dollars  
25 in somebody's pockets.

MOOM 86

1 But somewhere down the line, in another year or  
2 two, this whole structure is going to come toppling down.  
3 At that point, the SEC, the Congress, and everybody else  
4 is going to be very much interested in getting into the  
5 act and setting the record straight; but, until that happens,  
6 until we get that kind of situation, nothing much is going  
7 to happen. We will preserve the "one share, one vote,"  
8 because it is a relatively innocuous thing to do. It's  
9 popular, and I don't see any particular problems with that.

10 But let's go the other step--let's go that next  
11 step.

12 COMMISSIONER PETERS: Mr. O'Hara.

13 MR. O'HARA: I would like to second what Mr. Spang  
14 has said. I think you would not be having this hearing  
15 today if we were getting to the real, the problem that is  
16 the real crux of the matter, and that is the takeover and  
17 the rating problem.

18 If you ask the question whether individuals are  
19 interested in voting, I'm here today because a few weeks  
20 ago we had a meeting. There were more than 700 of our  
21 members there. This subject wasn't on the agenda, but it  
22 was brought up, and we had the liveliest discussion we ever  
23 had for over an hour; and the result is my members have  
24 asked me to come here and talk.

25 So, I know individuals are interested. I think

MOOM 37

1 individuals are -- I'd like to tell you just one case where  
2 we know individuals do vote.

3 Back in the '70s, there was a New York Stock Exchange  
4 company called Amcord that had taken over another company  
5 and almost went bankrupt in the takeover company. The Presi-  
6 dent because president of Amcord. He made many visits to  
7 our members and told them if they would buy his stock and  
8 stay with him as a manager, he would make that stock work  
9 \$20 a share. In five years, in 1979, early in '79, another  
10 outfit came in and solicited our members very heavily, and  
11 at that time our members owned 2.5 million shares of that  
12 company, and they went back to the president, and said,  
13 "Are you still going to get us \$20?" The offer was 14.  
14 They stuck with him, and six months later he got them \$34  
15 a share.

16 But we know when members, when shareholders are  
17 informed that they will vote, and they will withhold their  
18 vote when they have an opportunity to do so.

19 One of the problems today is in most of the  
20 takeovers, if you withhold your vote, you get stuck with  
21 a company that has been milked dry, and there is nothing --  
22 you will wind up with something you don't really want,  
23 and I think we've got to get with this whole problem.

24 We sent a letter to the President yesterday, asking  
25 him to appoint a Blue Ribbon committee to study this whole



MOOM 88

1 subject and we would be delighted if you ladies and gentlemen  
 2 on the Commission would join with us and ask for that same  
 3 thing because we think we are building up to a financial  
 4 crisis that can do this country a tremendous amount of  
 5 damage, and we think it's time to get on with the real basic  
 6 problem.

7 Thank you.

8 COMMISSIONER PETERS: Mr. Neuhauser?

9 MR. NEUHAUSER: I've got a quick answer and a  
 10 long answer. The quick answer is that people I represent  
 11 have obviously, if you are familiar with who they are--  
 12 been very active in pursuing their shareholder rights in  
 13 the last 15 years, and have introduced many shareholder  
 14 proposals of various kinds.

15 The long answer is that it may be worthwhile to  
 16 put this whole discussion in a context that goes back a  
 17 little bit further, and now I guess I'm wearing my professor's  
 18 hat.

19 Back in 1901, the State of New York passed the  
 20 first statute regulating voting trusts, in an attempt to  
 21 try put limits on and control the separation of voting  
 22 control for the economic interests in large publicly-held  
 23 companies.

24 New York State was followed by most other states  
 25 to a point where today I don't think you can find--for

1 decades you haven't been able to find any state in the United  
 2 States that doesn't have a voting trust statute attempting  
 3 to regulate this very problem of a separation of voting  
 4 control from the economic onus of the firm.

5 Now, what happened, of course, was with the  
 6 voting trust being the device that had been used in the  
 7 late 19th Century, they were outlawed by -- or very severely  
 8 restricted by these statutes. Lawyers being very clever  
 9 invented non-voting stock, and in that case in, I think  
 10 it was New Jersey, in 1917, upheld the validity of non-  
 11 voting stock, and then we had the situation over the next  
 12 several years of many large corporations starting to issue  
 13 non-voting stock.

14 At that point, that the New York Stock Exchange  
 15 rule comes in, to try and prevent this separation of voting  
 16 control from the economic power or the economic ownership  
 17 of the large publicly-held companies. This is backstop  
 18 when a few years later, the Securities and Exchange Act  
 19 of '34 is passed, which has a couple of very interesting  
 20 sections, section 14(a), which people made some reference  
 21 to, which deals with solicitation of proxies, but also  
 22 from your question's point of view, more interesting,  
 23 perhaps, section 14(b), which says that the SEC has the  
 24 power to prevent brokers from voting their stock, the stock  
 25 held in nominee name, without the permission of the economic

1 owner.

2 And this has been a problem that has been going  
3 on, I would submit, for not less than 85 years, as evidenced  
4 by the early New York statute, right to the 20s, right  
5 through one of the prime purposes of the '34 Act was to  
6 control the managements from using the proxy system under  
7 14(a), to keep themselves in power, or in cooperation with  
8 the brokers voting that without the economic interest when  
9 they had the stock in nominee name.

10 And you just went through a few days ago -- a  
11 couple of weeks ago, the promulgation of rule 14(b)(2),  
12 extending the same matter to the banks, and saying, "Banks,  
13 you can't vote this stock. You've got to pass it through."

14 It's the same problem, the same question that  
15 has been going on for 85 years, and it seems to me that  
16 there is a long history of societal concern about the  
17 separation of the economic interests and the ability to  
18 control the firm.

19 And what we see here is another fight about that  
20 created by a different set of purposes, perhaps, or worry  
21 about takeovers.

22 But, as set off, let's fight again, and said,  
23 Hey, we're going to put ourselves in perpetual control  
24 because we're worried about takeovers. And it seems to  
25 me it's of a piece, and my earlier comments, I don't think

MOOM 91

1 that in the long run society is going to let that happen.  
2 It hasn't in the past, in 1901. It hasn't in 1934, and  
3 hasn't in 1975, when they extended the -- not 1975 -- when  
4 they extended the -- when the Congress extended it to the  
5 banks to control over the nominee voting, and they are not  
6 going to continue on beyond that.

7 The risk is that this will become an opportunity  
8 for a Christmas tree, and instead of it being limited to  
9 voting, if, in fact, a lot of companies have given up, have  
10 had situations where there is no accountability. We risk  
11 that there will be direct government intervention in the  
12 economic system in a way that we have not seen it in the  
13 past, either by naturalization, or more likely by direct  
14 intervention in the firm.

15 CHAIRMAN SHAD: O.K. We'll give a couple of  
16 others a shot at it:

17 COMMISSIONER PETERS: Sure. I --

18 CHAIRMAN SHAD: Commissioner Grundfest?

19 COMMISSIONER GRUNDFEST: Mr. Chairman.

20 Our sense of general but not a unanimous feeling  
21 for this panel that the idea of stepping away from the notion  
22 of "one share, one vote" is not such a good idea, and I  
23 won't have to -- and I understand it is not a unanimous  
24 impression that I am getting from this panel.

25 I want to explore the source of that impression

and I want to test the parameters, just how far you ladies and gentlemen are willing to go with that concept.

Suppose we have a large publicly-traded corporation and it decides that it wants to raise another \$10 million of capital, and it determines that it is going to do that it is going to do that by selling debts, publicly-registered debts. And this is going to be traded, and you will be able to look up the price of this debt in the newspaper just like you look up the price of a stock. Generally, the debt doesn't carry any voting right at all. Does anybody see any problem with the corporation deciding to raise additional capital for the issuance of debt that doesn't have any voting rights attached to it.

Are we all square on that? Everybody O.K.?

MR. McELROY: How's that different from what actually goes on?

COMMISSIONER GRUNDFEST: If you didn't like it, I was going to ask that question.

(Laughter)

COMMISSIONER GRUNDFEST: And you saved me the trouble, and gave me the pleasure at the same time.

The next question -- I take it that that suggests that it is possible in some situations to contribute capital to a corporation, without having a voting right attached to it, and that is not necessarily problematic.

1           Suppose the same corporation looks at the price  
2 that it can get in the event that it decides to sell, and  
3 you issue non-voting shares.

4           And it determines that he can get more, for a  
5 variety of reasons from a non-voting equity if sold in the  
6 stock market. Does anybody see any problem with this corpora-  
7 tion going out and then selling a new class of non-voting  
8 stock to a new group of stockholders?

9           Does anybody see any problem?

10          MR. NEUHAUSER: Under certain circumstances, yes.  
11 They may.

12          COMMISSIONER GRUNDFEST: What would -- now, let's  
13 explore these circumstances. All of a sudden people feel  
14 the slope getting slippery underneath then.

15          MR. NEUHAUSER: That's right.

16          COMMISSIONER GRUNDFEST: So they are not going  
17 to slide with me anymore.

18          (Laughter)

19          COMMISSIONER GRUNDFEST: It's O.K. --

20          MR. NEUHAUSER: I thought you were going to defer  
21 inbetween, but --

22          COMMISSIONER GRUNDFEST: No, no, no, no -- we  
23 haven't got all day.

24          (Laughter)

25          COMMISSIONER GRUNDFEST: The -- we were O.K. when

MOOM 94 1 we called the --

2 CHAIRMAN SHAD: Is there a bottom on this slippery  
3 slope?

4 (Laughter)

5 COMMISSIONER GRUNDFEST: That's what I want to  
6 find out. I want to find out just how long we can slide  
7 together and why.

8 (Laughter)

9 COMMISSIONER GRUNDFEST: Everybody was with me,  
10 when we called the contribution "debt." But now, when I  
11 am just calling it equity, and I am not calling it "debt"  
12 anymore, all of a sudden the brakes are coming on. I would  
13 like to hear from those that are putting on the brakes,  
14 why they are putting them on at this point? Sure.

15 MR. McELROY: It all depends on the terms of  
16 that equity offer --you know how it is going to change or  
17 provide for entrenching something that I don't want to have  
18 entrenched.

19 COMMISSIONER GRUNDFEST: It doesn't change the  
20 --the corporation has its existing shareholders. Not a  
21 single existing shareholder finds his voting rights influenced  
22 one whit.

23 In fact, the existing shareholder could arguably  
24 complain more if voting shares were issued because then  
25 their voting rights would be diluted by the issuance of

the further voting shares.

2

MR. NEUHAUSER: It all depends on the details.

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You know if there was preferred stock, where you can --

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there's that tradition of issuing --

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COMMISSIONER GRUNDFEST: So, it is a question

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of tradition?

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MR. NEUHAUSER: Yeah -- it's a question of the

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details associated with that --

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COMMISSIONER GRUNDFEST: Which details?

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MR. NEUHAUSER: -- that equity holding.

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COMMISSIONER GRUNDFEST: Which details?

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MR. NEUHAUSER: How it's going to relate to control,

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and what the returns are to that stock relative to other

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stock, particularly stock that votes.

15

COMMISSIONER GRUNDFEST: No promises -- straight

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non-voting equity, and anybody who buys it knows that's

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what they're getting.

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MR. NEUHAUSER: A share per share.

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COMMISSIONER GRUNDFEST: A share per share.

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MR. NEUHAUSER: They will share.

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COMMISSIONER GRUNDFEST: Pari passu -- a share

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for a share.

23

MR. ESKIN: Isn't that stock normally going to

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get a larger percentage of the profits because it has no

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vote? You may be giving up more --



MOOM 96 1

COMMISSIONER GRUNDFEST: No, no.

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MR. ESKIN: -- than a share of the profits.

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COMMISSIONER GRUNDFEST: No, no.

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MR. ESKIN: Is it listed under the New York Stock

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Exchange?

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COMMISSIONER GRUNDFEST: Let's assume -- well,

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what we could if he listed. That's where we are going

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to wind up going. Any other observations? Yeah?

9

MR. OLSON: I believe your phrase, "non-voting

10

equity" is a contradiction in terms.

11

When you talk about someone acquiring stock,

12

they assume kind of a risk of the company --

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COMMISSIONER GRUNDFEST: Yes.

14

MR. OLSON: -- and they become a part owner in

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the company, and they can't be divorced. That's a big

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difference -- preferred and preference stock can have

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no votes, and they become a part-owner in the company; and

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they -- they can't be divorced; that's the big difference,

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preferred and preference stock can have no votes, but a

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person that owns part of the company has to have a voice

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in running the company.

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COMMISSIONER GRUNDFEST: But there is such a thing

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called "non-voting common stock." And that's -- it exists.

24

MR. OLSON: That's true, but I think it is an

25

aberration. It shouldn't.

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MR. McELROY: But that's what this meeting's  
2 about. Should that --

3 COMMISSIONER GRUNDFEST: You would -- now we  
4 find people -- you would prevent a corporation from issuing  
5 a new class of common stock? And having purchases who know  
6 that they are getting no voting rights, and they know all  
7 of the risks associated with that, so you would prevent  
8 the corporation from issuing this new class of stock, and  
9 you would prevent even the most sophisticated investors  
10 in the marketplace from purchasing that.

11 DR. SPANG: I'd like a crack at that, sir.

12 COMMISSIONER GRUNDFEST: Sure.

13 DR. SPANG: The crack that I would like to have  
14 at that is that I think that that is a question almost of  
15 contrast. I think upfront that that particular group  
16 knows full well that they have no voting rights whatsoever,  
17 and in any event, that that stock would be priced accordingly  
18 on the market; it would be worth thus and such; without  
19 any voting rights, and I think that, you know, shareholders  
20 that wished to invest their money in that way ought to have  
21 a right to do it; and I think that the company ought to  
22 have a right to extend that kind of an offer.

23 So, I have no particular problems with that. What  
24 I'm concerned about is that once you have that contract,  
25 once you have that contract, once you have those people

1 who are ready on board, expecting to have a vote, all of  
 2 a sudden finds that that vote is either taken away from  
 3 him or reduced in some way by their fellow voters, in a  
 4 sense -- by a majority, that their property rights are  
 5 really reduced.

6 And whether that's anybody?

7 Well, now you might say, well, isn't that in the  
 8 Bylaws, and there is a way then to change that; and I suppose  
 9 that that too is true, but it is almost a -- I guess the  
 10 thing that it almost seems to be undemocratic; it seems  
 11 to be so improper that the owners would not have a voice  
 12 or that in some way that voice could be reduced.

13 At first, he would not compact, it has been set  
 14 up there in the front; if they had never started that way --

15 COMMISSIONER GRUNDFEST: Now, you've just --

16 DR. SPANG: I just don't have any problem with  
 17 it.

18 COMMISSIONER GRUNDFEST: I know you did, but the  
 19 distinction between one share one vote ab initio and  
 20 disenfranchisement as the cause of concern, and what I'm  
 21 trying to find out is whether your colleagues on the panel  
 22 agree with you, and the feeling that I get is that some  
 23 of them may not. Some of them may say no. There's some  
 24 sort of right out there -- I'm trying to figure out where  
 25 it would be, that if you are going to call something

1 "common stock" it has to have a vote.

2 MR. O'HARA: As far as I'm concerned, we would  
3 recommend to our members that they not touch that kind of  
4 a security.

5 COMMISSIONER GRUNDFEST: But would you stop  
6 other people from touching it if they thought it looked  
7 good?

8 MR. O'HARA: I don't believe we would, because  
9 I think that under the law they've probably got the right  
10 to do it, but we would be opposed to it philosophically.

11 CHAIRMAN SHAD: Could we come back to this, if  
12 there is time left?

13 COMMISSIONER GRUNDFEST: I think we're done.

14 CHAIRMAN SHAD: I think you posed a fascinating  
15 problem. If the majority agree that they could sell the  
16 non-voting stock, that would disqualify them from listing  
17 on the New York Stock Exchange, which is the contrary positio  
18 from what it has been taken.

19 Commissioner Fleischman?

20 COMMISSIONER FLEISCHMAN: Just as Mr. O'Hara  
21 was closing his remarks because time went out, he referred  
22 to a procedure that in effect vests ownership -- that is  
23 to say, builds up voting power after the stock is held  
24 for a period of time.

25 If I recollect -- and I did have the opportunity

1 to reflect on this for a moment this noontime with Professor  
2 Neuhauser.

3 If I recollect, that was the Potlatch Corporation,  
4 about a year ago, and in a circumstances to which "one share,  
5 one vote" couldn't have been allowed to apply, the company,  
6 in a sense, disenfranchised -- that is to say it submitted  
7 for its shareholders a vote, and received a favorable vote  
8 on a proposal that transmuted the stock, so that the rights  
9 of the theretofore existing stock changed, and from then  
10 on out, if you sold your stock, the number of boats was  
11 reduced from 10 to 1, or some such number, and if the  
12 new holder held the stock for a period of time -- whatever  
13 it was -- six months or a year, I think Mr. O'Hara made  
14 mention -- the ten votes were turned.

15 It was an effort to turn the shareholder body,  
16 at least, those in control of the bulk of the voting power  
17 into longer-term holders.

18 I'd like to ask the gentlemen and Ms. Sullivan,  
19 whether that kind of proposal doesn't respond to Professor  
20 Neuhauser's concerns about accountability?

21 And to Mr. McElroy's concerns about control, and  
22 to Mr. Eskin's concerns about division of ownership from  
23 management.

24 Mr. Spang's concerns about the meaningfulness  
25 of a vote, whether it doesn't generally have the advantage

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1 of benefitting what sometimes is referred to as the country's  
 2 larger-scale economic picture, and if any or all of that  
 3 is true, whether you can get there without approving the  
 4 Stock Exchange's rule proposal?

5 Mr. McElroy?

6 MR. McELROY: My comment to that would be if  
 7 I turn out to be wrong, it turns out the shareholders don't  
 8 care enough to be organized, and I guess my view would be  
 9 that you should not allow -- you should not allow that;  
 10 and that's a view that comes from being an economist--that  
 11 you are going to really slow down, a reallocation of resources

12 The shareholders both don't care, and you prevent  
 13 fast action by shareholders who want to take over a company  
 14 by making them wait a year after they had fast before they  
 15 can exercise the right to vote.

16 Was that clear?

17 COMMISSIONER FLEISCHMAN: I'm trying to work my  
 18 way back through your answer, Mr. McElroy, but it will be  
 19 clear when I chew it over for a minute.

20 Mr. Eskin?

21 MR. ESKIN: I don't think this is one of those  
 22 situations where aged meat is better than new meat,. I  
 23 think any group that wants to seek representation on a  
 24 board shouldn't have to put down \$10 and in one year have  
 25 that \$10 be worth one vote, two years later, two votes;

1 three years later, three votes.

2 We want to move the economy now, and under that  
3 theory, a stockholder who just sat on his chairs for  
4 20 years and knew the management would -- my god, what meat  
5 he'd have! All right?

6 I don't think it makes any sense at all.

7 MR. OLSON: May I respond to that?

8 MR. ESKIN: Incidentally, I do want to answer.  
9 I have a remedy of how to make stock vote real. We couldn't  
10 get to it in the five minutes.

11 COMMISSIONER FLEISCHMAN: Well, I'm sure --

12 MR. ESKIN: It's in your papers.

13 COMMISSIONER FLEISCHMAN: Thank you, Mr. Eskin.

14 MR. ESKIN: If you'll read the four pages of the  
15 end of my statement, that's the start of how to make the  
16 vote real. It's a big subject, though.

17 COMMISSIONER FLEISCHMAN: Mr. O'Hara?

18 MR. O'HARA: We get conversation that there is  
19 a necessity to move very rapidly, and we think that's one  
20 of the evils out there. We hear a lot of talk that there  
21 are incompetent management employees. Here are an awful  
22 lot of competent managements. Our members study companies  
23 pretty carefully before they buy them, and they buy them  
24 because they believe the management. Our goal is to make  
25 an investment and double our money in five years. Our

MOOM 103 1 members pick managements because they think they have that  
2 ability.

3 And they have had a great deal of success in  
4 seeing that kind of thing come through. It was just a case  
5 this last two weeks of Chesebrough-Ponds being acquired  
6 by another company.

7 Now, our members resisted voting in a year, in  
8 a year earlier when other offers were made for that company.  
9 Our members own over 6,000 shares in that company, and they  
10 were very convinced that that management had the ability  
11 to double the value of that company in the coming five years.  
12 and I think they only went along in this case because the  
13 price that came just about doubled their money, which was  
14 the goal they were looking for.

15 But there are a great many other cases where  
16 management -- he is involved in a program that takes two  
17 or three years, to build the value of the company, and we  
18 think that it is very wise to give that management the  
19 time to do that building.

20 I don't disagree with the other gentlemen that  
21 there are cases when maybe you would want to move a management  
22 out quickly, but there are a great many other cases, and  
23 that's where we think the danger occurs because we think  
24 if you get all the emphasis on a guy's got to have the price  
25 of his stock at the top value all of the time, you are



1 never going to get a guy that builds for the next five years  
2 and makes his company competitive with the Japanese or  
3 some of the other competition we have to meet.

4 COMMISSIONER FLEISCHMAN: Professor Neuhauser?

5 MR. NEUHAUSER: Yes, as we -- as long as we are  
6 commenting about this -- but it seems to me that on your  
7 technical question, it may be necessary to change the New  
8 York Stock Exchange rules but, of course, the present proposa.  
9 -- we change it well beyond that, and the corporation was  
10 really concerned about takeovers may very well not use that  
11 -- route, but go to a much more drastic route.

12 I would feel much more sanguine about a proposal  
13 by the New York Stock Exchange that limited that kind of  
14 a situation. One would have to be concerned about what  
15 the limits were, what the portions were, and so on, but  
16 in terms of the accountability concern that I expressed  
17 earlier, it would provide for probably two of the three  
18 elements of accountability that I've seen being lost by  
19 the present proposals.

20 It would allow proxy fights; it would allow an  
21 outside directors to have, to be installed, with monitoring.  
22 It would decrease sharply -- we would always have tender  
23 offers but it would maintain the other two.

24 MS. SULLIVAN: It would also -- that holding period,  
25 and I like to think of it that way, because we think of

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1 holding periods of stock always for capital gains, so that's  
2 nothing new to us.

3 I think that would have a very good effect on  
4 stopping these real vests -- you know, special hostile  
5 takeovers, and I think it would be a step in the right  
6 direction.

7 Does that answer your question?

8 COMMISSIONER FLEISCHMAN: Thank you, Ms. Sullivan.

9 Mr. Olson?

10 MR. OLSON: Just a short comment on the idea  
11 that a piece of -- shares of stock would lose their voting  
12 rights upon a sale is an abrogation of a person's property  
13 rights to deliver that property to the buyer.

14 It should not have a third party to be able to  
15 step in and abrogate part of those rights. A buyer should  
16 have -- what he pays for when he pays for it.

17 CHAIRMAN SHAD: This has been a very provocative  
18 and you have brought a wealth of background of experience  
19 and sound judgment to the issues that we are debating, and  
20 I do appreciate it.

21 Thank you very much.

22 MS. SULLIVAN: Thank you for your courtesy.

23 CHAIRMAN SHAD: The Commission will reconvene  
24 tomorrow morning at nine thirty, with an institutional  
25 investor panel.

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(Whereupon, at 4:30 p.m., the public hearing  
was recessed, to be reconvened the following day,  
Wednesday, December 17, 1986, at 9:30 a.m.)

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DOCKET NUMBER: ... --

CASE TITLE: PUBLIC HEARING: NEW YORK STOCK EXCHANGE'S PROPOSAL AMENDING "ONE SHARE, ONE VOTE" RULE

HEARING DATE: December 16, 1986

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Date: December 18, 1986

alan friedman

Official Reporter  
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1220 L Street, N.W.  
Washington, D.C. 20005