

"ONE SHARE, ONE VOTE"
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SECURITIES AND EXCHANGE COMMISSION

COPY

In the Matter of:)

PUBLIC HEARING ON NEW YORK)
STOCK EXCHANGE'S PROPOSAL)
AMENDING "ONE SHARE, ONE)
VOTE" RULE)

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BEFORE THE
UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:

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

Wednesday
December 17, 1986

Room 1C30
Judiciary Plaza Building
450 Fifth Street, N.W.
Washington, D.C. 20549

The above-entitled matter came on for public
hearing, pursuant to adjournment, at 9:35 a.m.

BEFORE: JOHN S.R. SHAD, Chairman
CHARLES C. COX, Commissioner
EDWARD FLEISCHMAN, Commissioner
JOSEPH GRUNDFEST, Commissioner
AULANA PETERS, Commissioner

APPEARANCES:

On behalf of the Securities & Exchange Commission:

JEFFREY DAVIS
Director, Economic and Policy Analysis

LINDA C. QUINN
Director, Corporation Finance

RICHARD G. KETCHUM
Director, Market Regulation

BRANDON C. BECKER
Associate Director, Market Regulation

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APPEARANCES (Continued)

On behalf of the SEC (continued)

LINDA D. FELDNER, ESQUIRE
Associate General Counsel

GREGG JARRELL
Chief Economist

TONY LE M. TRI
Senior Economist

For the Institutional Investor Panel 9:30 - 11:30:

GRETA E. MARSHALL,
Investment Manager
California Public Employees' Retirement System

HARRISON J. GOLDIN
Comptroller
City of New York

ROLAND M. MACHOLD
Co-Chairman
Council of Institutional Investors

EDWARD C. JOHNSON, III
Chairman and Chief Executive Officer
FMR Corporation

ROBERT A.G. MONKS
President
Institutional Shareholders Services, Inc.

JAMES E. HEARD
Deputy Director
Investor Responsibility Research Center

KENNETH E. CODLIN
Executive Director
State of Wisconsin Investment Board

EDWARD J. WAITZER
Styikeman, Elliott
representing
Canadian Institutional Investors

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APPEARANCES, I.I. Panel (continued)

EDWARD DURKIN

Assistant to the General President
United Brotherhood of Carpenters and
Joiners of America

For the Public Company Panel 11:30-12:30:

A.A. SOMMER, JR.

Alliance for Corporate Growth

RICHARD H. TROY

American Society of Corporate Secretaries, Inc.

CHARLES P. JOHNSON

Chairman of the Board
General DataComm Industries, Inc.

T. BOONE PICKENS

Mesa Limited Partnership/
United Shareholders Association

RAMOND A. MUELLER

Chairman-Elect
National Association of OTC Companies

For the State Securities Regulators Panel 2:00-2:45:

CHRISTINE BENDER

Chief Deputy Commissioner
California Department of Corporations

F. DANIEL BELL, III

President
North American Securities Administrators Assn.

For the Individual Shareholders Panel 2:45-4:30:

EVELYN Y. DAVIS

Editor
Highlights and Lowlights

LEWIS D. GILBERT

FRANK B. GOPEN

GEORGE E. HALL

HANS R. REINISCH

MACO STEWART

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P R O C E E D I N G S

CHAIRMAN SHAD: Ladies and Gentlemen, let's start.

This is our second day of hearings on the New York Stock Exchange proposed revision of its one share one vote rule.

In order to give everybody the opportunity to comment, and the Commission and Senior Staff the opportunity to ask questions, the game rules for the hearing are, please begin by clearly stating your name and affiliation. Each panelist will be given five minutes for an opening statement, and if you don't get to finish your opening statement because the red light goes on, why you can be sure that there's a good possibility at least that the Commissioners will ask you additional questions to amplify your views.

When the green light flashes, that means you have three minutes remaining. The yellow light indicates one minute remains, and you should start to do your summation at that point. And the red light means that your time has expired. We'll then go on to a round of questions.

Taking the participants in alphabetical order according to the listing of their affiliations, let's start with Greta Marshall, Investment Manager of the California Public Employees Retirement System.

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1 STATEMENT OF GRETA MARSHALL, INVESTMENT MANGER, CALIFORNIA
2 PUBLIC EMPLOYEES RETIREMENT SYSTEM

3 MS. MARSHALL. Thank you very much, Commissioner.

4 My name is Greta Marshall. I am the Investment
5 Manager of the California Public Employees Retirement System.

6 Thank you for the opportunity to testify on this
7 important issue.

8 I would like to restate the six main reasons, as
9 outlined in our July 21st letter to Mr. Shad which we would
10 incorporate as a part of this testimony.

11 The main reasons we're opposed to the proposed
12 reduction by the New York Stock Exchange in their long-
13 standing one share one vote listing requirement.

14 Number 1, such action, we believe, threatens our
15 free enterprise economic system, essentially based on the
16 broad based publicly owned corporation run by a management
17 team responsive to shareholder owners.

18 Number 2. We believe such action is potentially
19 harmful to the long term viability of the equity capital
20 markets. If one of the major characteristics of ownership,
21 the ability to vote in proportion to our investment in the
22 equity capital of a firm is diluted, equity ownership becomes
23 less valuable as an investment medium.

24 CHAIRMAN SHAD. Ms. Marshall, I think you're going
25 so fast, we can't quite get it all. You might, I know you

1 have a problem, but --

2 MS. MARSHALL. I'll slow down.

3 Number 3, such action would make it easier to
4 erect anti-takeover measures by concentrating voting power
5 in the hands of incumbent management or by diluting the voting
6 power of potential hostile acquirees.

7 Number 4. Such action would lead to a decline
8 in corporate accountability. Under the one share one vote
9 system, corporations may be the targets of takeover trans-
10 actions when bidders become convinced that they could manage
11 the assets of a firm more efficiently than the current managers.

12 Number 5. Such action would lead to a concentration
13 of power in the hands of incumbent managers, and would
14 diminish the independence of the board.

15 Number 6. Such action violates the Council of
16 Institutional Investors Shareholders' Bill of Rights. The
17 California system is a member of the council.

18 The important concept of one share, one vote
19 has suffered serious erosion from other corporate antimerger
20 and antitakeover devices, such as poison pills, green mails,
21 staggered boards, super majority provisions, etcetera. We
22 probably already have one share, 7/10ths of a vote today,
23 and declining at an alarming rate.

24 We, as owners of securities, believe this trend
25 must be reversed for two main reasons. To preserve the

1 viability and competitiveness of the U.S. Securities markets
2 and to insure the maximum economic efficiency of the U.S.
3 economy.

4 We further believe that this reversal must be
5 accomplished by an integrated set of regulations. One share,
6 one vote must be mandatory for all companies listed on any
7 exchange or participating in the NASDAQ National Market
8 System. All antimerger or anti-takeover devices, especially
9 poison pills, super majorities, and green mail, must be
10 subject to an annual vote of all shareholders if not outright
11 prohibited.

12 Any action deemed to have a material impact on the
13 value of shares, particularly tenders, recapitalizations,
14 acquisitions, etcetera, must be subject to either truly
15 independent directors, or vote of all shareholders.

16 Since most of these practices are in reaction to
17 management's concerns about hostile takeovers, we believe
18 the particularly odious practices of excessively leveraging
19 or dismantling companies as a part of a proposed takeover
20 must be controlled. For example, any significant proposed
21 increase in debt must be approved by any remaining security
22 holders, both equity and fixed income, unless all outstanding
23 securities are redeemed on an equal basis.

24 As a first step in this campaign, we urge you
25 to reject the New York Stock Exchange proposal. Further,

1 we believe it is highly probably that the Securities and
2 Exchange Commission, in order to eliminate unfair competition,
3 is empowered to enforce equal voting standards in the various
4 securities markets.

5 For this reason, we respectfully encourage you to
6 require equal voting standards on the American Stock Exchange
7 and on the National Association of Securities Dealers markets
8 rather than eliminating them for the New York Stock Exchange.

9 We thank you very much for the opportunity to
10 express our opinions.

11 CHAIRMAN SHAD: Thank you very much, Ms. Marshall.

12 Mr. Kurmel is not here, and so we'll go to
13 Harrison J. Goldin, the Comptroller of the City of New York.

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1 STATEMENT OF HARRISON J. GOLDIN, COMPTROLLER, CITY OF
2 NEW YORK.

3 MR. GOLDIN: Thank you very much, Mr. Chairman.

4 I'd like to stipulate at the outset that in
5 exchange for my reading at a comprehensible speed, if I'm
6 in the middle of a sentence at the expiration of my time,
7 I'll be allowed to finish.

8 CHAIRMAN SHAD: Thank you. Noted.

9 MR. GOLDIN: I'm Harrison Goldin, and appear before
10 you as the Comptroller of the City of New York, and a share-
11 holder. For as comptroller, I am the asset manager or
12 custodian or trustee of five public employee pension funds,
13 whose advocate assets exceed \$25 billion. Those assets
14 which are invested in more than 1300 American companies
15 represent the retirement security of nearly 400,000 current
16 and former New York City employees.

17 It is for them and the millions of New York
18 taxpayers who contribute to our public pension funds whose
19 interests in this regard are coterminous with those of
20 millions of other Americans, that I oppose the rule change
21 proposed by the New York Stock Exchange. For if you allow
22 the Exchange to abandon the principle of one share, one vote,
23 the value of the assets I hold in trust for these beneficiaries
24 will be diminished severely.

25 Your own studies verify that.

1 That this should be so is no surprise to us in the
2 public sector, for full enfranchisement promotes account-
3 ability, which engenders a high degree of care which promotes
4 a high standard of stewardship. Indeed, that is the founda-
5 tion of our political system. In a world of public ownership
6 of companies, if corporate democracy is to mean anything at
7 all, that is what we should require too in the structure of
8 corporations.

9 Even as in our political lives, we have certain
10 inalienable rights. So too should we as corporate share-
11 holders. Rights which reflect values that are so basic
12 they must be protected specially, procluding even a majority
13 of one generation of shareholders from compromising them
14 enduringly.

15 Chief among these values is that management holds
16 assets proportionately for all shareholders. Hence, all
17 shareholders must have the same right to participate in
18 equal measurement in determining how those assets are to
19 be managed. Certain critical decisions affecting the value
20 of assets inure definitionally to owners; not to management
21 nor to the New York Stock Exchange.

22 As shareholders, we reject the notion that we need
23 protection from ourselves, but we do need protection of our
24 fundamental rights. Those rights are threatened today by
25 the tyranny of a minority so afraid of accountability and

1 the danger it poses to their comfort that they threaten to
2 disrupt the very system that has allowed them to prosper.

3 Only a handful of the hundreds of firms that have
4 chosen the benefits of public listing on the New York Stock
5 Exchange have chosen to challenge the Exchange's one share,
6 one vote rule that has protected the rights of all shareholders
7 for sixty years. Indeed, so ingrained is this tentative
8 corporate democracy that only a handful of firms listed
9 on the American Stock Exchange and the NASDAQ market system
10 have abandoned it, too.

11 Yet, with the explosive growth of the American
12 Exchange and NASDAQ, indeed of the entire public securities
13 market, a few selfish corporate managements that seek to
14 entrench themselves, have been able to apply competitive
15 pressure beyond their numbers. While the governors of
16 the New York Stock Exchange are understandably concerned,
17 the Exchange should not be allowed to sacrifice lightly
18 the fundamental principle of one share, one vote.

19 Indeed, all environments in which the shares
20 of public companies trade should be elevated to the higher
21 NYSE standard. Corporate managements that dilute the votes
22 of some shareholders contend that it is to protect their
23 companies from hostile takeovers. In fact, all too often,
24 the action protects only their perks. Indeed, it's ironic
25 that in protecting themselves against a takeover, they

1 perpetrate on shareholders the ultimate takeover, one without
2 investment or risk.

3 In the interests of corporate democracy, we should
4 reject this rationalization. To the extent warranted, the
5 abuses of the current climate should be remedied in ways
6 that do not do violence to the most basic of all incidences
7 of corporate democracy, a pro rata right to vote.

8 Indeed, it is not possible to define in the abstract
9 by law or regulation, the distinction between takeovers that
10 are good and bad. That determination varies from situation
11 to situation, from company to company, depending on timing,
12 circumstances, strategy and need. The decision should be
13 the prerogative of shareholders.

14 The abolition of the one share, one vote rule
15 would deny us that right. While we do not want to inhibit
16 the vitality of securities markets by overregulation, our
17 basic rights as shareholders must be protected. Companies
18 are in the main governed by state law and bidders by Federal
19 law. If the stock exchanges are going to abrogate their
20 responsibility to us to preserve the essence of corporate
21 democracy, equality in voting, then we must turn to you,
22 the SEC.

23 Clearly, you have the ability to intercede on our
24 behalf. You should act to stem this abandonment of minimal
25 standards, this rush to the bottom. The solution is simple

1 and it is within your power. Do not allow the New York Stock
2 Exchange to lower its standards; force the other exchanges
3 and the over-the-counter market to raise theirs.

4 Finally, as investors whose participation in the
5 nation's securities markets furthers the essential purpose
6 of those markets, namely to facilitate capital formation
7 in the interests of growth, and a fuller realization of value
8 of assets, as investors whose general interest is, in the
9 long term, growth of corporate America, we shareholders have
10 confidence in our ability to decide what is best for us;
11 To protect ourselves, if we're given that chance.

12 Our systems of government in business are so
13 extraordinary and resilient because both are founded on
14 the same democratic ideals. The most basic is full in-
15 franchisement. We should resist any incursions on that
16 principle on the one, as we do in the other. It is the
17 foundation of a compact on which we have all prospered.
18 It is a compact we should not break.

19 Thank you.

20 CHAIRMAN SHAD: Thank you, Mr. Goldin.

21 The next person would be Mr. Machold, the co-
22 chairman of the Council of Institutional Investors.

23 Forgive me if I mangled your name.

24 MR. MACHOLD: You're not the first. I'll give you
25 a spelling test afterwards.

1 STATEMENT OF ROLAND M. MACHOLD, COCHAIRMAN, COUNCIL OF
 2 INSTITUTIONAL INVESTORS

3 MR. MACHOLD: I'm Roland Machold, Director of
 4 the Division of Investments, State of New Jersey. I'm
 5 appointed by a non-partisan State Investment Council and
 6 in my role as Director of Investment, I have no affiliations
 7 with any political party.

8 My remarks today are my own, acting as fiduciary.
 9 of the funds under my supervision, and do not reflect the
 10 views of New Jersey or the present administration in New
 11 Jersey.

12 I'm also here as cochairman of the Council of
 13 Institutional Investors, an association consisting of
 14 41 members for the aggregate assets of approximately \$200
 15 billion. The purpose of our organization is to protect
 16 the rights of security holders in a rapidly changing
 17 economic and regulatory environment. The impetus for
 18 our formation in 1984 was the prevalence of green mail
 19 payments which favored one group of shareholders at the
 20 expense of another, and proposals by American corporations
 21 to institute a wide variety of shark repellents in corporate
 22 by-laws and in legislatures across the country.

23 One of the shark repellents which has most
 24 concerned the Council of Institutional Investors is the
 25 erosion of the one share, one vote rule. Our members have

1 met with representatives of the major exchanges and have
2 expressed our views, our opposition to the listing of several
3 classes of stocks of differing voting and other powers.
4 Furthermore, we have met with state legislatures and have
5 opposed laws which would limit the ability of shareholders
6 to vote their shares.

7 Of necessity, the council's initial activities were
8 reactive and in opposition to a wide variety of corporate
9 legislative actions. However, from its inception, the
10 council members have wanted to establish a positive agenda
11 and a constructive dialog with corporations and legislatures
12 and regulatory agencies. With these objectives in mind,
13 the council promulgated a shareholders bill of rights in
14 April, 1986.

15 This Bill of Rights was distributed in draft form
16 so as not to preclude further dialog and is attached hereto
17 for reference. The bill of rights represents four basic
18 principles: namely, one share, one vote; equal and fair
19 treatment of all shareholders; shareholder approval of
20 certain actions, including green mail, poison pills, golden
21 parachutes, etcetera; and independent approval of executive
22 compensation and auditors.

23 Our Bill of Rights is a carefully considered
24 document, and is not a polemic, which simply states an
25 uncompromising position of a small group of investors. It

1 attempts to find a common ground with corporate management
2 for issues of common concern, to both management and all
3 shareholders.

4 For instance, it permits green mail and various
5 shark repellents subject to shareholder approval, and it
6 leaves compensation issues to the companies outside directors.

7 A great deal of thought was given by the council
8 members to the statement of the one share, one vote principle.
9 However, we concluded it was the one principle that should
10 be inviolate and should not be subject to modification by
11 corporate management or even by the shareholders themselves.

12 In reaching this conclusion, we expressed our
13 concern that one group of shareholders could disenfranchise
14 another group of current or prospective shareholders, and
15 that the creation of multiple classes of common shareholders
16 would create conflicts between shareholder interests and
17 create inefficiencies in capital markets and capital forma-
18 tions.

19 We support the one share, one vote principle
20 for both practical and conceptual reasons. As a practical
21 matter, we recognize that shares with limited voting powers
22 have less value on the market than do similar shares with
23 votes. I understand that this conclusion has been confirmed
24 by independent studies and by preliminary studies within your
25 department.

1 On an earlier occasion, I testified that I believed
2 the value of a vote depended on the individual circumstances
3 of the company. In a case of a regulated utility where
4 corporate earnings and management actions were prescribed,
5 the value of a vote is likely to be slight. In the case
6 of a company which is actively courted, it is likely to be
7 very considerable.

8 In one instance, a brokerage firm offered \$2 a
9 share to borrow some shares which were trading at a price
10 of \$21; the loan was to coincide with a shareholders meeting
11 and in effect, the vote was worth 9.5 percent for that meeting.

12 We are also troubled that shares with limited
13 voting rights limit the accountability of corporate management
14 to shareholders. As I've stated before, it appears to me
15 that corporate managements can only be accountable to three
16 parties; namely, either themselves, the government or the
17 shareholders.

18 The first would be a return to the oligopolies
19 of many years ago, and the second would represent a substantial
20 modification of our free enterprise system. I believe that
21 accountability to shareholders, the owners of American
22 corporations, permit natural market forces to create a dynamic
23 and efficient economic system.

24 I would now like to consider both the attributes of
25 stocks with limited voting rights and the purposes for which

1 they are at issue. Such a security is not simply a stock
2 with an altered appearance. A stock without a vote is no
3 longer a common stock, representing a real ownership inter-
4 est and accompanied with the ability to approve or dis-
5 approve of management. It is an uncommon stock. In the
6 essence of any contractual relationship with the issuing
7 company, uncommon stock is the feeblest of all securities.
8 No more than a perpetual loan without any assurance of
9 any return.

10 The value of such stock is at the mercy of corporate
11 management, a management which is no longer accountable to
12 shareholders. In a hierarchy of financial investment, secured
13 or collateralized debt would rank at the top, to be followed
14 in downward order by unsecured debt, preferred and preferred
15 stocks, and finally the common stock. The shareholder has
16 accepted a subordinate position in exchange for his full
17 ownership participation with respect to the company's earnings
18 and assets and his ability to oversee management.

19 To limit a shareholder's vote is to render his
20 ownership academic and to reduce his ability to oversee
21 management. In effect, an even lower class of security
22 is created, a junk stock, if you like. In order to provide
23 value for this uncommon stock, management may resort to
24 an infinite variety of contractual rights in the form of
25 conversion privileges, puts, contingent voting rights,

1 dividends set by formulas, etcetera.

2 An example of such contractual terms can be seen
3 in the General Motors E stock which has been the subject
4 of recent public notice and which illustrates the conflicts
5 which can be created by such stocks. I believe that if the
6 New York Stock Exchange is permitted to list multiple classes
7 of stock, then we will soon see the issuance of many uncommon
8 stocks, each with its own complex contractual features.

9 This can only lead to confusion in the market place
10 and inefficient pricing of such securities.

11 I have listed in my testimony a series of examples,
12 including ITT, LTV, Litton Industries. I won't pause to
13 describe them individually.

14 CHAIRMAN SHAD: Mr. Machold, I'll have to interrupt
15 at this point, but I hope we get the benefit of your further
16 thoughts in the course of the questions and answers.

17 MR. MACHOLD: Okay.

18 CHAIRMAN SHAD: We now go to Mr. Edward C. Johnson,
19 III, Chairman and Chief Executive Officer of FMR Corporation.

20 Mr. Johnson?

21 MR. JOHNSON: Thank you, Chairman Shad.

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1 STATEMENT OF EDWARD C. JOHNSON, III, CHAIRMAN AND
2 CHIEF EXECUTIVE OFFICER, FMR CORPORATION

3 MR. JOHNSON: Thank you, Chairman Shad.

4 My name is Edward C. Johnson. I'm CEO Fidelity
5 and responsible for \$65 billion for the money of two million
6 voting shareholders.

7 Eliminating the one share, one vote rule is
8 a fundamental shift in the way corporations are governed,
9 and not just the contraceptive to prevent unwanted takeovers.
10 It is a step that, once taken, is almost impossible to reverse,
11 Like voting for a dictator, they are easy to install, but
12 painful to get rid of.

13 The real issue is management accountability to the
14 majority of equity ownership, which is essential not only
15 to productive investment, but to society as a whole. The
16 one share, one vote principle recognizes that the interests
17 of corporate managers and owners are not always alike.
18 corporate directors are there to protect all shareholders
19 against major management abuses.

20 Some independence from management is essential.
21 If managers control the voting power, then they control
22 the directors. The fox is left guarding the chicken coop.
23 The Commission should take the Chairman of the American
24 Stock Exchange's advice, and require all securities markets
25 to adopt the one share, one vote rule.

1 Fidelity takes its corporate voting responsibilities
2 seriously. We have consistently voted against proposals to
3 dilute shareholder rights. Without full voting rights,
4 institutional investors will be powerless as individual
5 investors to influence corporate actions. The knowledge that
6 shareholders have the power to vote against them is often
7 enough to deter management from taking action that could
8 harm investors.

9 In conclusion, we oppose weakening the one share,
10 one vote rule. Corporate management should be held more
11 accountable, not less accountable. Voting rights should be
12 protected, not abandoned. Communications between shareholder
13 groups about their mutual self-interests should be encouraged,
14 no discouraged.

15 We urge the Commission not to allow the New York
16 Stock Exchange to alter its voting rules.

17 Thank you.

18 CHAIRMAN SHAD: Thank you, Mr. Johnson.

19 Robert A.G. Monks, the President of the
20 Institutional Shareholders Services, Incorporated. Mr. Monks?

21 MR. MONKS: Thank you very much, Mr. Chairman.
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1 STATEMENT OF ROBERT A.G. MONKS, PRESIDENT, INSTITUTIONAL
2 SHAREHOLDERS SERVICES, INC.

3 MR. MONKS: Thank you very much, Chairman,
4 Commissioners.

5 In our written testimony, we present three arguments
6 for disapproving the New York Stock Exchange's proposal.
7 First, the proposal fails to meet the procedural and
8 substantive standards of the 1975 Amendments to the '34
9 Exchange Act. The securities industries' unique system
10 of self-regulation is predicated on scrupulous adherence
11 to procedural safeguards, to make sure that the rules they
12 produce benefit the public interest.

13 In the legislative history, Congress expressly
14 stated that its intent was to hold the self-regulatory
15 organizations to the standards of policy justification of
16 the Administrative Procedure Act. As we explain in our
17 submission, the Exchange has not come close. The SEC has
18 no alternative but to disapprove it as a matter of law.

19 The second problem is the proposal's failure to
20 provide an exchange guarantee. As Professor Rubeck explained
21 yesterday, the process by which shareholders are offered
22 a choice in dual class recapitalizations is inherently
23 coercive. The result is that inside management can effectively
24 take over the company by purchasing votes without purchasing
25 the underlying stock. Just the kind of advantageous dealing

1 that the SEC works to eliminate in regulations like the
2 all-holders rule.

3 These two problems relate to the specific proposal.
4 In both cases, sensible solutions have been proposed. The
5 New York Stock Exchange can resubmit its application based
6 on a thoughtful consideration of the issue. The record
7 for this proceeding provides a good starting point.

8 And a revised proposal could permit only non-
9 coercive recapitalizations. For example, by requiring
10 repurchase of outstanding stock at market value, and the
11 issuance of new classes of limited voting shares. This
12 would eliminate the transfer of value from one class to
13 the other, and assure the valuation of voting power by the
14 market.

15 The third problem, the failure of the vote guaranteed
16 particularly with respect to institutions, is more general
17 and more intractable. It applies not just to recapitaliza-
18 tions, but to all kinds of proxy voting. Institutions do
19 possess the expertise to understand the impact of their
20 voting behavior better than individuals, but they are known
21 to have frequent conflicts of interest and a history of
22 selling shares rather than confronting management.

23 Economist John Pound concludes in his portion
24 of our written testimony that institutions are much more
25 likely to vote with management than individuals are.

1 This is not to say that they are right or wrong; good or
2 evil. It is simply that they behave perceptibly and
3 ascertainably differently.

4 Institutional shareholders who are fully accountable
5 to beneficial owners have every incentive and the ability
6 to ensure that the proxy mechanism fulfills its proper role.
7 The composition of the institutional shareholder group is
8 changing with the rapid growth of pension funds. These
9 new shareholders are all subject to the Federal ERISA law
10 and can be made publicly accountable for their conduct as
11 owners.

12 The SEC should encourage the Exchanges to develop
13 an improved voting system. A range of proposals has already
14 been advanced. For example, making the votes of institutional
15 shareholders public. This and the long list of other proposals
16 should be carefully examined. Once the proxy system begins
17 to function efficiently, the existence of such a large class
18 of pension fund voters and other institutions suggests that
19 the change of rules respecting one share, one vote may become
20 redundant. Rational and informed fiduciaries are the best
21 judges of the best interests of their beneficiaries.

22 To act precipitously, by either approving the
23 New York Stock Exchange's proposal, or by extending the one,
24 share, one vote rule to all of the exchanges, could have
25 serious unintended consequences, like forcing American

1 companies offshore and further eroding the competitiveness
2 of our capital markets.

3 Instead, respectfully, the Commission should embark
4 on a more complex and more thorough review of the proxy
5 process. Such an action might postpone the regulatory
6 resolution of the one share, one vote controversy, but it
7 would avoid the litigation and Congressional intervention
8 that is likely to follow from the failure of the New York
9 Stock Exchange to adhere to the appropriate process require-
10 ments for changing its rules.

11 The actual uncertainty might therefore be resolved
12 sooner and more constructively. We urge the Commission to
13 make these hearings the beginning of a rulemaking process
14 instead of the end.

15 This process should focus on two issues. First,
16 the Agency should examine the effects of different kinds
17 of recapitalization, and determine which call for explicit
18 regulation. Secondly, the Agency should examine the voting
19 process, possibly in conjunction with the Department of Labor,
20 and determine whether new disclosure or other laws or
21 regulations are necessary to ensure efficient voting.

22 Thank you very much.

23 CHAIRMAN SHAD: Thank you, Mr. Monks.

24 The next participant is James E. Heard, the Deputy
25 Director of the Investors Responsibility Research Center.

1 STATEMENT OF JAMES E. HEARD, DEPUTY DIRECTOR, INVESTOR
2 RESPONSIBILITY RESEARCH CENTER

3 MR. HEARD: Thank you very much, Chairman Shad.
4 I want to thank the Commission for the opportunity to be
5 here today.

6 Our organization does research for institutional
7 investors. We have about 300 clients including major
8 financial institutions and public funds. I'd like to under-
9 score the fact that I'm speaking only for myself today,
10 and not for our clients and not for our organization.

11 It seems highly unusual, if not unprecedented,
12 for the Commission to be asked to approve a proposal that
13 even its sponsor would rather not ^{do it} ~~about~~. The only reason
14 that the New York Stock Exchange is given in favor of its
15 proposal is that it finds itself at a competitive disadvantage.
16 The 1985 report of the Exchange's own subcommittee on share-
17 holder participation and qualitative listing standards did
18 attempt to give a number of reasons in support of the abandon-
19 ment of the one share, one vote rule.

20 The implications of the subcommittee's report is
21 that independent directors and sophisticated institutional
22 investors, together with the system of corporate disclosure
23 under the Federal Securities laws, provide alternative means
24 of accountability to the Exchange's voting standards.

25 As to directors, in the 15 years since Myles Mace wrote

1 "Directors: Myth and Realty," calling attention to the
2 institutional infirmities of corporate boards, some progress
3 has been made in strengthening boards. Yet, many directors
4 are still chosen by the chief executive officer, largely
5 on the basis of personal friendship or because they have
6 some business relationship with the company.

7 Recent developments such as the approval of poison
8 pills and such as the discharge of H. Ross Perot from the
9 GM Board also raised questions about how truly independent
10 directors of major companies are.

11 It is also very questionable whether institutional
12 investors yet play the role in the governance process that
13 the exchange suggests. Certainly their role is changing.
14 The founding of the Council of Institutional Investors two
15 years ago underscores the evolution that is taking place.
16 Public funds such as those represented here today have become
17 very active and visible in the corporate governance process.

18 There has also been a movement among bank trust
19 departments, insurance companies, and other financial
20 intermediaries, who manage hundreds of billions of dollars,
21 away from the so-called Wall Street rule of unquestioning
22 support for management on voting questions, to more independent
23 voting policies.

24 These developments have had a positive effect. At
25 the same time, however, other institutional investors have

1 succumbed to pressures to support measures that in many
2 instances are contrary to the interests of those to whom
3 the institutions owe a fiduciary duty. The pressures usually
4 have come from corporations seeking approval of anti-takeover
5 measures, where the corporations involved have business
6 relationships with the institutional investors who must
7 vote pension fund accounts or other fiduciary accounts on
8 these measures.

9 Banks and insurance companies are particularly
10 vulnerable to such pressures but few financial institutions
11 managing pension fund accounts are immune. Our own research
12 indicates that virtually all anti-takeover measures being
13 put to shareholder votes are passing. This is occurring
14 even at companies with very high levels of institutional
15 ownership. Some of the institutions involved have told us
16 that they have supported proposals as a result of outside
17 pressures, that they believe are contrary to the interests
18 of those to whom they owe a fiduciary duty.

19 Several have reported that independent voting
20 policies have been watered down or discarded altogether
21 in favor of blanket support of management. In 1985, the
22 Senate Government Affairs Subcommittee on Oversight of
23 Government Management began in inquiry into the role of
24 institutional investors and the governance process, as
25 a part of the review of the Labor Department's enforcement

1 of the Employee Retirement Income Security Act.

2 The Senate subcommittee's report, published in
3 April of this year, should be carefully read by anyone who
4 is considering accepting the New York Stock Exchange's
5 position with respect to the role of institutional investors
6 in the corporate governance process.

7 It should also be noted that a decision by the
8 Commission to permit the New York Stock Exchange to drop its
9 one share, one vote requirement is likely to undermine the
10 ability that institutional investors have to participate
11 effectively in the governance process. The voting process
12 can be made to work better but it is not going to work
13 if we abandon the one share, one vote rule.

14 A decision by the Commission to approve the
15 New York Stock Exchange rule is a decision to sanction a
16 race for the bottom that indeed already has begun. The
17 inevitable consequence will be to disenfranchise public
18 stockholders, to entrench corporate managements, and to erode
19 public confidence in our system of corporate governance.

20 The question before the Commission is not solely
21 whether it should approve or disapprove the New York Stock
22 Exchange's proposal, but whether it should take action on
23 its own initiative to protect the voting rights of shareholders.
24 Simply to reject the Exchange's proposal without taking
25 account of the current imbalances that exist regarding voting

1 rights, and the reasons for such imbalances, is to turn a
2 blind eye to the more fundamental questions that this
3 proceeding raises.

4 A two-day hearing called on short notice may be
5 adequate to address the merits of the New York Stock Exchange's
6 proposal, which in one form or another has been debated for
7 almost two years. The hearing also provides an opportunity
8 to begin deliberations regarding standards that should apply
9 to all securities markets. I would urge the Commission to
10 reject this proposal and to use this opportunity as the
11 beginning, as Mr. Monks suggested, of a deeper exploration
12 of what ought to be done to set minimum standards that would
13 apply to all markets.

14 Thank you very much.

15 CHAIRMAN SHAD: Thank you, Mr. Heard.

16 Kenneth E. Codlin, Executive Director of the
17 State of Wisconsin Investment Board.

18 Mr. Codlin?
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1 STATEMENT OF KENNETH E. CODLIN, EXECUTIVE DIRECTOR, STATE
2 OF WISCONSIN INVESTMENT BOARD

3 MR. CODLIN: Thank you, Mr. Chairman, members of
4 the Commission.

5 I'm the Executive Director of the State of Wisconsin
6 Investment Board. The Investment Board is an independent
7 eight-member board of trustees that is responsible for over
8 \$16 billion of retirement assets covering over 300,000
9 participants in the fund, and contributed to by over 4 million
10 taxpayers and citizens of the State of Wisconsin.

11 In a democracy, rates and responsibilities I
12 believe are inextricably linked. A strong effective democratic
13 system depends upon the responsible actions of informed
14 citizens. This is equally true, I believe, in our system
15 of corporate governance. In order for our system of capi-
16 talism to continue to be an engine of economic progress,
17 I submit we must strengthen, not dilute shareholder responsi-
18 bilities.

19 Responsible shareholders acting through an
20 elected, independent corporate board offer the best answer
21 to the question, to whom shall corporations be accountable.
22 Shareholders interest, unlike customers, employees, or
23 general members of the public, are aligned with the profit
24 goal of the corporation. Large corporations who weaken
25 their ties to shareholders risk weakening their natural

1 linkage with society,

2 I suggest it is not too extreme to believe that
3 without strong corporate accountability to shareholders as
4 owners, the continued existence of corporations as independent
5 profit-seeking legal entities may ultimately wither and
6 die.

7 While there may be defects to our present system
8 of shareholder ownership, the solution is to improve, not
9 weaken ties of accountability to shareholders. The
10 Securities and Exchange Commission has long sought to
11 broaden public ownership by assuring fair and open markets.
12 I suggest that the SEC should be equally concerned with
13 corporate democracy for the same reason.

14 The New York Stock Exchange proposal to eliminate
15 the rule requiring a single voting class of stock goes in
16 the wrong direction. Yet, I am sympathetic with their
17 competitive problems. They should not alone be forced
18 to be the instrument protecting the one share, one vote
19 principle. It seems to me that the question of one share,
20 one vote is of such fundamental importance that it should
21 be established and enforced at the Federal level for all.

22 I am not urging excessive government action
23 to solve problems for which shareholders must accept
24 responsibility and act in their own interests, but we need
25 some simple, enforceable rules of the road to assure the

1 preservation of corporate accountability to shareholders.

2 Furthermore, I believe that the right to vote
3 in proportion to ownership is so fundamental that it should
4 not be transferrable nor subject to contractual alteration.
5 We do not permit individuals to buy and sell votes for
6 government office; neither should we permit the votes for
7 corporate directors to be bargained away.

8 The weakness that leads us to be discussing this
9 concern today I'm afraid, is that too many shareholders
10 do not give enough attention to their responsibility as
11 owners. And some corporate directors have forgotten the
12 important role that shareholders play. Instead, there has
13 evolved a sense of the shareholder as trader or arbitrageur
14 or speculator. Far too many investors fail, in my opinion,
15 to accept the inherent responsibility for corporate activity
16 that goes with owning a share of stock.

17 For example, since shareholders often pay little
18 or no attention to the election of corporate board members,
19 is it any wonder that directors sometimes find it difficult
20 to act in shareholders' best interests. Rather than weakening
21 further the corporate board accountability to shareholders,
22 I suggest that it be strengthened.

23 If shareholders are to fulfill their proper role
24 as owners, then it is fundamental that the one share, one
25 vote rule be maintained. And if this rule is to be accorded

1 the importance it deserves, the proxy question procedures
2 themselves are also deserving of increased attention.
3 Will shareholders become more effective in fulfilling their
4 responsibilities if given the chance? I don't know. The
5 past track record is not one to suggest optimism.

6 But changes are occurring. Like many imperfect
7 systems, the alternatives to responsible shareholder
8 ownership of corporations are even worse. I believe that
9 our efforts should be devoted to strengthening shareholder
10 democracy, not abandoning it.

11 CHAIRMAN SHAD: Thank you, Mr. Codlin.

12 Edward J. Waitzer, representing Canadian
13 Institutional Investors.

14 Mr. Waitzer?

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1 STATEMENT OF EDWARD J. WAITZER, STIKEMAN, ELLIOTT,
2 REPRESENTING CANADIAN INSTITUTIONAL INVESTORS

3 MR. WAITZER: Thank you, Chairman Shad,
4 Commissioners.

5 I'm a Canadian attorney and I'm appearing here
6 on behalf of Allenvest Group Limited, which is a leading
7 Canadian institutional brokerage firm, and 12 Canadian
8 institutional investors who collectively manage over \$51
9 billion Canadian dollars, which would be about \$37 billion
10 American dollars of Canadian individual savings.

11 And I propose to review in my oral remarks three
12 fundamental points that inform the more detailed submissions
13 that we have filed with the Commission.

14 Firstly, corporate law is fundamentally concerned
15 with the creation and internal governance of the corporation.
16 In particular, the relationship of shareholders to management.
17 It provides in effect a standard form contract in which
18 certain corporate powers have always been reserved to share-
19 holders. These formalities are intended to limit managements'
20 ability to alter unilaterally the corporation's basic
21 scheme of governance, precisely the issue with which we're
22 dealing today.

23 Over time, new regulatory structures may well
24 evolve as substitute regulatory instruments. For example,
25 the refinement of fiduciary obligations applicable both to

1 corporate managers and to institutional money managers,
2 may well over time provide a new framework of checks and
3 balances to ensure accountability within the system.

4 The question I suggest is not whether to regulate
5 but rather how best to do so. If the present system is
6 or becomes irrelevant, it should be reformed or replaced
7 through a deliberate policy process such as the Commission,
8 I hope, is embarking on today. To allow it to be developed
9 by default would, in our view, be unfortunate, particularly
10 as it will most likely be replaced again by default with
11 more interventionary forms of regulations.

12 The Canadian experience, I suggest, vividly
13 demonstrates both of these points. As the submission reviews
14 in Canada, the use of restricted shares in various forms
15 has become commonplace, there was a policy review undertaken
16 in 1980 which was reopened in 1984, and the Commission
17 decided not to intervene, partly because they came to the
18 conclusion that what had been done was difficult to undo.

19 The other lesson from the Canadian experience is
20 that having accepted by default the proliferation of restricted
21 shares, we are now beginning to see substitute regulatory
22 instruments emerge. For instance, the Commission unilaterally
23 conferring on shareholders or classes of shareholders, votes
24 that they aren't otherwise entitled to as a matter of corporate
25 law or as a matter of corporate contract.

1 And these substitute regulatory instruments are
2 proving often to be costly, confusing and leading to con-
3 siderable uncertainty in the ability of all players in the
4 marketplace to regulate their affairs. We suggest that the
5 SEC enjoys a timely opportunity to arrest, or at least
6 suspend, a troublesome development in your marketplace
7 at a stage where that development is relatively nascent.

8 And to decline to take that opportunity will, if
9 the Canadian experience serves as any lesson, lead to much
10 more difficult policy issues in the near future.

11 Thank you.

END T1

12 CHAIRMAN SHAD: Thank you, Mr. Waitzer.

BEGIN T2

13 Edward -- is Edward Durkin here?

14 VOICE: Yes.

15 CHAIRMAN SHAD: Edward Durkin, Assistant to the
16 General President of the United Brotherhood of Carpenters
17 and Joiners of America.

18 Mr. Durkin?

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1 STATEMENT OF EDWARD DURKIN, ASSISTANT TO THE GENERAL
2 PRESIDENT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
3 OF AMERICA

4 MR. DURKIN: Good morning. My name's Ed Durkin,
5 Assistant to the General President of the United Brotherhood
6 of Carpenters and Joiners of America.

7 The Carpenters Union represents 700,000 members
8 in the construction wood products and allied industries.
9 Our members are participants in Taft-Hartley pension funds
10 and welfare plans with assets of over \$7 billion, and as such
11 are major holders of corporate securities.

12 We appreciate the opportunity the Commission has
13 afforded us to participate in these hearings.

14 We feel it is imperative to voice our views on
15 the one share, one vote issue, as well as on the broader
16 issues which give rise to the discussions today. We strongly
17 urge the Commission to require the New York Stock Exchange
18 to retain its one share, one vote rule. It is clear that
19 the increasing pressure to modify the vote is a reaction to
20 hostile takeovers, but are hostile takeovers caused by
21 equal voting rights?

22 We suggest that if anything the increasing number
23 of takeovers is caused by unchecked mismanagement, a problem
24 that will only be worsened by leaving management less

1 shareholders would be the worst possible attempt to remedy
2 the takeover epidemic.

3 All too often, the loudest voices raised in these
4 debates are those of the competing sides in the intracorporate
5 struggle for control. On the one side of the debate are
6 the corporate raiders whose cause is championed by T. Boone
7 Pickens. His self-styled United Shareholders of America
8 which claims to be the "champion of 47 million small share
9 holders," is out to make the regulatory environment safer
10 for corporate raiding.

11 On the other side are corporate executives. The
12 self-appointed protectors of workers, communities, and other
13 corporate constituencies. While these chief executive officers
14 blast the greed of corporate raiders, they protect themselves
15 with lucrative parachutes, pay green mail, and adopt poison
16 pill provisions without seeking shareholder approval.

17 We are here to advocate a third and different view
18 of corporate voting rights, corporate accountability in take-
19 overs. This view represents the interests of millions of
20 working americans who have dual interests as employees whose
21 livelihoods are threatened by speculative and nonproductive
22 takeovers, and as shareholders whose rights and retirement
23 income are being eroded by entrenched and often inept manage-
24 ment.

25 We believe that our dual interests represents a

1 general public interest that justifiably demands regulatory
2 restrictions on certain takeover activities, and reforms to
3 enhance the accountability of corporate managements. The
4 first step to reinvigorating the corporate governance process
5 would be for Congress to take immediate action to curb a
6 variety of speculative and abusive devices, including junk
7 bond financing of takeovers and green mail payments.

8 The second step calls for a longer term preventive
9 approach to mismanagement and it would begin with the SEC
10 extending the rule of one share, one vote to all securities
11 exchanges. The SEC should not stop there. So-called share-
12 holder democracy has become a euphemism for a proxy voting
13 system that is a democratic as Soviet-styled elections.

14 The voters receive a ballot listing only one slate
15 of candidates. Short of buying the company, or at least
16 creating a credible threat to do so, the system provides
17 no way to monitor and correct mismanagement on a widespread
18 regular and continuing basis. In the absence of an effective
19 system of industrial democracy, raiding has become our only
20 industrial policy.

21 The SEC has the authority and the responsibility
22 to establish minimum standards for the corporate governance
23 process, designed to ensure that corporate boards are truly
24 independent overseers of management and represent the
25 pluralistic constituencies served by the

1 Shareholders should have an equal ability to
2 nominate directors. All eligible candidates should have
3 equal access to the issuers proxy statement. A secret proxy
4 ballot would reduce the voting pressures experienced by
5 institutional fund managers and employee shareholders opposin
6 incumbent management. Shareholders should also have easier
7 access to management's proxy solicitation documents, so as
8 to bring a wider range of important corporate policies to
9 a vote of the owners.

10 We believe that allowing any unequal voting rights
11 schemes would adversely affect the productivity and the
12 competitiveness of the American economy. While we do support
13 regulatory restrictions on speculative takeover activity,
14 defenses based on derogating shareholder rights are
15 the worst possible means to do so. In too many cases, the
16 effect would be to completely sever ownership from control,
17 leaving incumbent management permanently entrenched and
18 unaccountable to the majority of shareholders.

19 Thank you.

20 CHAIRMAN SHAD: Thank you, Mr. Durkin.

21 We'll now go around the table with the Commissioners
22 and might I suggest that we limit our questions to one or
23 two of the panelists rather than polling the entire panel,
24 unless that you'd like to do so through a show of hands.
25 But obviously, if we go through nine different participants,

1 on each question, we'll run out of time before all of us
2 have had an opportunity to raise questions.

3 I'd like to direct my question to Mr. Goldin and
4 or Mr. Monks, whichever would like to take it.

5 The arguments that we've heard over the past
6 yesterday and today, so far, have pointed out that management
7 controls the proxy machinery and that a majority vote,
8 they have the resources of the company itself to get a
9 majority to support, the majority of the public shareholders
10 to support recapitalization somewhat, not that that couldn't
11 and does, perhaps, disenfranchise the other 49 percent of
12 the shareholders that might oppose such a capitalization,
13 recapitalization.

14 Others have pointed out that those companies that
15 went public in the first place with an AB capitalization,
16 no one had to buy their shares, they offered non-voting
17 stock to the public, and if the public wanted to buy it,
18 they were privileged to. It wasn't coercive. They didn't
19 have to buy it. Some of you've gone further and said, well,
20 why shouldn't companies, right now, even though they went
21 public with a one share one vote capitalization, why shouldn't
22 they be permitted to do public offerings of non-voting
23 stocks. Nobody has to buy it.

24 It's not coercive. Others have gone even further
25 and said, well, then why they shouldn't be permitted to do

1 exchange offers to the company's shareholders, offering
2 them the opportunity to exchange their voting shares for
3 non-voting shares, which have other attractions and what-not.

4 You can see that the variations could go on and
5 in fact some of these variations would give an opportunity
6 to buy out or exchange out the vast majority of shareholders,
7 again, achieving the same problems that some are concerned
8 about.

9 Tossing one final piece on this overview scenarios
10 and that is the point that has been made by Mr. Macklin
11 of the NASD that they don't require one share, one vote.
12 All those companies are privileged to recapitalize but
13 only five percent of them have adopted a other than a one
14 share one vote capitalization, so they've had all this
15 time, years, to do so, but there hasn't been as some have
16 expressed the concern, an avalanche of companies going to
17 this A, B type capitalization.

18 Mr. Goldin or Mr. Monks, which of you, or both,
19 if you care to respond?

20 MR. GOLDIN: Mr. Chairman, I think there are
21 several answers to a complex and useful question. On the
22 last point, we live in a world of fashion that obtains
23 in corporate finance hardly less than it does in clothing
24 or in music. The fact that corporations have not today in
25 any sizeable number rushed to recapitalization to multiple

1 classes of common stock, should not blind us to the forces
2 which are now impelling resort to that approach increasingly.
3 And the likelihood is that if the last bulwark, which is
4 the New York Stock Exchange, were to be relieved of its
5 long-standing, its 60 year old commitment, to one share, one
6 vote, that we would in fact see a rush to multiple capitaliza-
7 tion or to multiple classes of stock.

8 Indeed, many companies, as all of us know, move
9 from one forum to another, with the ultimate listing being
10 on the New York Stock Exchange, and unquestionably although
11 I know of no empirical study which has established the fact,
12 companies have organized themselves and positioned them-
13 selves as they've grown and matured ultimately to be eligible
14 for listing on the New York Stock Exchange and no character-
15 istic of their structure is more fundamental than multiple
16 classes of stock and the right to vote.

17 Second, I regard the formulation that you offered
18 quoting others, as not dissimilar to Jean Valjean, the
19 rich and the poor alike can sleep under bridges, the
20 argument being made that shareholders are free to do as
21 they wish and if they don't want to participate in the kind
22 of capitalizations that it is now proposed to offer them as
23 a practical matter increasingly, they need not.

24 I represent, as I indicated in my prepared remarks,
25 a trust which invests in 1300 different American companies.

1 We are, as increasingly large institutions are, effectively
2 investors in the American economy. We require large
3 capitalization situations. It is no relief to us to tell us
4 that as those large capitalization situations increasingly
5 find attractive, issuance of multiple classes of stock,
6 that we can simply look elsewhere.

7 The fact of the matter is that we need to look
8 where the opportunities are that are commensurate with our
9 structure and organization. And that means that we have
10 relatively few options from a broad standpoint.

11 Third and lastly, I think it important to under-
12 stand that while the analogy to political structure is
13 unquestionably imperfect, it is in certain fundamental
14 respects, useful. Publicly owned corporations are a fundamen-
15 tal instrument of American society. They ought to be
16 recognized as vehicles that have an impact on the community
17 at large. We either accept that it is important and useful
18 as a fundamental value to require the corporations which
19 are publicly owned adhere to certain fundamental incidences
20 of democracy, or we do not.

21 And if we do, as I believe we should and as I think
22 the strong thrust of American corporate governance vindicates,
23 there is no incident which is more fundamental to corporate
24 democracy than a proportionate right to vote. If we abridge
25 that, or allow it to be abridged, if we abrogate commitment to

1 it, we will change something very fundamentally I think not
2 to the good. And to say that shareholders have the right
3 to surrender that value is akin as I've had occasion to
4 say to this Commission before, again to use an imperfect
5 analogy, to arguing that since we all control ourselves
6 and should have the right to do so in a free and democratic
7 society, why have a 13th amendment. Why not allow us to
8 sell ourselves into involuntary servitude.

9 The answer is that any generation of shareholders
10 any day of shareholders are not only holders for themselves,
11 but also in a sense are quasi-fiduciaries for the succeeding
12 generation of shareholders, and therefore it is respecting
13 the most fundamental of all incidences of corporate
14 democracy that even shareholders should be precluded from
15 compromising what is most basic, most fundamental to the
16 concept of corporate democracy.

17 CHAIRMAN SHAD: In view of that fulsome response,
18 I think I better give the other Commissioners the opportunity
19 to --

20 MR. GOLDIN: It was a fulsome question, Mr. Chairman.

21 CHAIRMAN SHAD: Yes, thank you.

22 MR. MONKS: Mr. Chairman, could I comment for one
23 minute?

24 CHAIRMAN SHAD: One minute? I can count that long.

25 MR. MONKS: I'd simply, in an effort to deal

1 with your very comprehensive question which was so ably done
2 on my right, it seems to me that the Commission has got to
3 be terribly allergic to the notion of solution by regulation,
4 because of the situation that the United States is only
5 one of a number of financing markets and the possibility of
6 unintended consequences.

7 It seems to me that all of the witnesses that you've
8 heard both yesterday and today, have in one form or another
9 told you that the free market, the efficient market in voting
10 does not exist. That shareholder voting is not indicative
11 of anything. Therefore, respectfully, I think the need is
12 to turn to how can the voting process be made to be meaningful.

13 CHAIRMAN SHAD: Thank you, Mr. Monks.

14 Commissioner Cox?

15 COMMISSIONER COX: My question really follows
16 directly on Mr. Monks' last statement. Because I've been
17 quite taken by the criticism that was offered yesterday
18 of the voting process in corporations, and then again this
19 morning, both Mr. Monks and Mr. Heard suggested that the
20 way shareholder voting works would not be useful for an
21 expression of shareholder will on altering voting rights
22 and in fact you were more critical and suggested that it
23 went much further than that, and suggested a broader range
24 examination of the problem.

25 But I wanted to ask both of you, Mr. Monks and Mr.

1 Heard, yesterday we heard the voting problems put in the term
2 of the well-known collective action problem, and so forth
3 which to the best of my recollection has been applied to
4 any kind of public choice-type of problem where there's
5 voting.

6 So is what we have here really different because
7 its in a corporation, than any kind of a voting problem whether
8 its a political decision or other types of decisions that
9 are made with voting, so is it peculiar to this and the
10 proposal suggested by the New York Stock Exchange, the
11 narrowest part of what we're considering today, or is it
12 really much broader whenever you have a voting decision as
13 compared to voluntary exchange and that kind of situation?

14 MR. MONKS: Commissioner Cox, I think there's a --
15 oh, excuse me, Jim.

16 MR. HEARD: No, go ahead.

17 MR. MONKS: I think there's a useful uniqueness
18 to the situation that we're now confronting. That uniqueness
19 is that many shareholders, increasing number of shareholders
20 are fiduciaries, and as trustees they have a legal obligation.
21 Because they have a legal obligation to a discrete group
22 of beneficiaries, their duty can be enforced to them
23 individually. And it is therefore a question of trying to
24 make more fiduciaries think the way Ned Johnson spoke earlier.

25 The difficulties are relatively pedestrian. Nobody

1 gets paid for voting; nobody's trained to vote. I've never
2 known a money manager in the history of money management
3 to get new business because they were good voters. And all
4 you get if you are a conscientious voter is a certain level
5 of notoriety which is very apt to get you put out of the club.

6 We thus have a set of negative incentives for
7 fiduciaries to do what they are legally obligated to do.
8 To my way of thinking, it is possible to deal with this
9 particular voting problem in terms of creating a structure
10 within which fiduciaries not only can do their duty, are
11 encouraged to do their duty. And the way in which to do this
12 I think with respect to the last speaker is my having public
13 disclosure of voting.

14 Because if a beneficiary does not know how his
15 trustee voted, he has no way of being able to know whether
16 his trustee was faithful to his trust. If a trustee in voting
17 faithfully can be competed against by less reputable fi-
18 duciaries who say, we don't feel we have to vote against
19 that antitakeover provision, he has a negative incentive.

20 It occurs to me, therefore, that in the area of
21 trying to remove market constraints from the fiduciary voting
22 process, that there is a way of dealing with this problem
23 helpfully.

24 COMMISSIONER COX: Go ahead, Mr. Heard.

25 MR. HEARD: Let me speak more to the problem

1 than the solution. One of the things that we do every year
2 and that we've been doing for about 4 or 5 years, is surveying
3 institutional investors, our own clients and other institu-
4 tions, about their voting policies and their voting practices
5 on corporate governance and shareholder rights questions.

6 We also interview people in connection with these
7 surveys and over the years within a number of institutions
8 we've built up a certain rapport and trust with people.

9 I have brought with me today our two most recent
10 surveys which some of you on the Commission may have seen.
11 I'd like to submit them for the record here today, if I could,
12 and be glad to furnish additional copies. What these surveys
13 say and what our testimony to two congressional committees
14 within the past year and a half, have said and what we have
15 learned in talking to people in financial institutions,
16 bank trust departments and insurance companies, particularly,
17 but also other financial institutions that are fiduciaries,
18 is that they do come under a considerable amount of pressure
19 from their own clients, from would-be clients to vote
20 for any takeover measures which many of the fiduciaries know
21 or certainly feel in their gut, are contrary to the interests
22 of those to whom they owe a fiduciary responsibility.

23 For the reasons that Bob Monks has given, some
24 institutions are approving proposals that they know are
25 not in the best interests of those to whom they owe a

1 fiduciary responsibility. Some have changed their policies
2 altogether to support proposals that they used to oppose,
3 and the only real reason for their having done so is because
4 they've gotten pressure from their own clients or expect
5 that they might lose business.

6 There's a sense here too, I should say, that nobody's
7 really watching. You go in and talk to people in financial
8 institutions about their voting policies, and they know,
9 particularly if they're managing ERISA money, which many of
10 them are, they know what their fiduciary responsibilities
11 are, but they also know that nobody has ever been prosecuted
12 by the labor Department or anybody else as far as we've been
13 able to tell, for violating those voting standards on the
14 hundreds and hundreds and hundreds of measures that have come
15 to a vote.

16 So there's a sense that nobody's watching, whatever
17 harm they may be doing is inchoate in the meantime, the
18 benefits of getting of retaining business are clear and
19 the pressures are here, and that's leading the people to
20 vote in a way that really calls into question I think whether
21 the integrity of the process as we now have it really is
22 there. And I think what we ought to be thinking about here
23 is how to strengthen the process, as many of us have said.

24 I can certainly tell you that if you approve this
25 New York Stock Exchange proposal and permit one share, one

1 vote, and then the American Exchange comes in with its proposed
2 change, and then others come in, the Pacific Exchange, you're
3 going to see a proliferation of these dual class plans and
4 proxy statements within the next year or so, and you're
5 going to see lots of them being approved, and you're going
6 to see financial institutions voting for things in some cases
7 that they know they really shouldn't be voting for.

8 COMMISSIONER COX: But if I could just ask for
9 a little clarification on that, how do you determine that
10 there will be a rush to put these plans into place when
11 there hasn't yet been a rush with the opportunities that
12 are available for NASDAQ companies and AMEX companies as
13 currently.

14 MR. HEARD: There are now 29 companies I believe,
15 as Mr. Phelan, on the New York Stock Exchange that have
16 gone through this process or are about to do so, I'd ask you
17 how many more do you think, Chairman Cox, really want it?
18 Why is the Exchange here asking for this rule proposal if
19 they thought it was only 20 companies they were going to
20 lose. In view of Mr. Phelan's very strong views on the
21 subject, it seems to me they'd be willing to lose 20 listings,
22 but I think they know and we should all realize that more
23 is at stake here than just those 20 listings or 29 listings.

24 COMMISSIONER COX: Thank you.

25 CHAIRMAN SHAD: We may be able to come back to this

1 area, or some of the other Commissioners may address it.

2 Commissioner Peters?

3 COMMISSIONER PETERS: Thank you, Mr. Chairman.

4 I'm really sorely tempted to pursue the questioning
5 initiated by you and Commissioner Cox, since the responses
6 are very articulate and eloquent. Mr. Goldin's literary
7 illusions and all, but I'm going to force myself to come
8 down back to mundane and direct my question to Mr. Waitzer
9 who made a point that apparently illustrates one repeated
10 continually yesterday by members of our panel, that if we
11 were to approve the New York Stock Exchange rule proposal,
12 the result would be a radical change in our economy and
13 the way corporate America operates.

14 And thus the fear was expressed that it would
15 invite and indeed provoke governmental intervention: trans-
16 late -- interference, in our capitalistic system as it now
17 exists. So I would ask you, Mr. Waitzer, with your
18 experience in Canada and what you describe as a proliferation
19 of A,B capitalization capital structures, to elaborate a
20 little bit on the rapidity with which that phenomena occurred
21 and identify for us some of the circumstances that in your
22 observance provoked the government to intervene and what
23 the ramifications were, for example, when the government
24 granted a vote where none had been available to the shareholder
25 either by corporate contract, or otherwise.

1 MR. WAITZER: In Canada, as you'll see in my
2 submission, there are a number of things that distinguish
3 the Canadian economy and the Canadian capital markets from
4 those here, and one of them is a level of concentration that
5 doesn't exist here. And because of that, the issues are
6 slightly different, but restricted shares have been a fixture
7 of the marketplace for various reasons, including regulatory
8 reasons for a long time.

9 There's no question that once the Securities
10 Commission and the Major Exchange reviewed the efficacy of
11 that situation and decided not to do anything about it, there
12 was a rapid proliferation of utilization. In effect, a
13 seal of approval had been put on the measures and they
14 were used for very different purposes and proliferated rapidly.

15 The kinds of and as I, just by way of background,
16 as I said as well, what you're doing or interfering with
17 or unilaterally amending a standard form contract that
18 corporation law is that is designed to facilitate the market
19 place. The kinds of situations that we've seen develop
20 in Canada with the proliferation of non-voting shares, are
21 let me give you two examples:

22 One is in numerous instances since 1980, the
23 Securities Commissions have as a matter of policy rather than
24 as a matter of law, imposed voting rights, often voting rights
25 as a class of majority or minority voting rights, in response

1 to transactions where there was either public outrage or
2 where it was clear that there was some element of related
3 party dealings, i.e, the interests of management or the
4 interests of the controlling shareholder were different than
5 those of the minority shareholders.

6 The difficulty with doing that of course is that
7 it makes it very difficult to plan, because you don't know
8 when the Commission is going to respond, or when a stock
9 exchange is going to respond by imposing these voting
10 requirements so it lends considerable uncertainty to the
11 marketplace.

12 A more recent example, in fact an example in respect
13 of which the Ontario Securities Commission is holding public
14 hearings tomorrow, is a situation where a company which adopted
15 so-called protective provisions as part of a capital reorganiza-
16 tion to introduce restricted shares, is now in the process
17 of having control passed from the original family ownership
18 group to an acquirer and the transaction has been structured
19 so as to avoid what everyone thought was the purpose and
20 effect of the protective provisions.

21 In other words, control is passing with the premium
22 being kept by the controlling shareholders, and not being
23 shared, and the voting structure being maintained intact.
24 In response to that again the Commission has called hearings;
25 has indicated that it might unilaterally cease trading in

1 the shares and thereby prevent the transaction from proceeding.
2 There's little question, given the response from the
3 institutional investors, including a full page ad in
4 yesterday's major newspaper in Canada, that if the Commission
5 doesn't intervene, it will become the subject of lengthy
6 and expensive litigation.

7 The removal of certainty and the ad hoc imposition
8 of substitute regulatory instruments without any overall
9 framework is in my view a very poor way to regulate, a very
10 costly way to regulate for the markets as a whole. Those
11 are two examples and I could give you many more that have
12 occurred within the last four years in Canada.

13 COMMISSIONER PETERS: I think we'll wait for the
14 many more.

15 CHAIRMAN SHAD: Thank you, Commissioner Peters.

16 COMMISSIONER PETERS: Thank you.

17 CHAIRMAN SHAD: Commissioner Grundfest?

18 COMMISSIONER GRUNDFEST: Thank you, Chairman.

19 I'd like to begin by calibrating my dollar meter over here.
20 Ms. Marshall, how many dollars have you got under management
21 in California?

22 MS. MARSHALL: Market value of approximately \$40
23 billion.

24 COMMISSIONER GRUNDFEST: \$40 billion.

25 Mr. Machold, you've got \$21 billion, is that right?

1 MR. MACHOLD: That's right.

2 COMMISSIONER GRUNDFEST: Mr. Goldin?

3 MR. GOLDIN: \$29 billion.

4 COMMISSIONER GRUNDFEST: \$29 billion. All right.
5 Mr. Johnson?

6 CHAIRMAN SHAD: I think you've used up your poll.

7 (Laughter)

8 COMMISSIONER GRUNDFEST: Mr. Johnson, you've got
9 \$65 billion. Mr. Waitzer, you've got \$37 billion U.S.
10 Mr. Codlin, you're at \$16 billion, and Mr. Durkin, you're
11 the lightweight at \$7 billion.

12 (Laughter)

13 MR. DURKIN: But Commissioner, our members are
14 represented in every one of the pension plans testifying
15 here today.

16 (Laughter)

17 COMMISSIONER GRUNDFEST: I agree. But your \$7
18 billion isn't included with the others, all right, so you're
19 the youngster at \$7 billion, okay?

20 Now, I'm just running down these numbers quickly
21 over here and I get \$215 billion is sitting at that table.

22 Have I left out anybody who directly manages
23 any funds, by the way?

24 CHAIRMAN SHAD: For roughly, that's good enough.

25 COMMISSIONER GRUNDFEST: Okay. I don't know about

1 anybody else at the Commission, but I don't think I've ever
2 looked at \$215 billion before. We have enough money repre-
3 sented at this table today roughly to fund the national
4 deficit for a year, all right.

5 Now, --

6 MR. GOLDIN: Don't say it too loud, Commissioner,
7 or there'll be people who'll try to take it away for that
8 purpose.

9 COMMISSIONER GRUNDFEST: They're sitting right
10 over there. Let's face it, Boone Pickens is a piker compared
11 to you guys. All right, at \$215 billion, you could, without
12 raising any junk bond financing or anything, finance 21 take-
13 overs, hostile, at \$10 billion apiece. It's curious from
14 my perspective I think to say the least that a group of
15 managers that has \$215 billion of assets under control appears
16 to be before us almost as a group of supplicants beseeching
17 protection from someone else.

18 I find it quite fascinating to see so much money
19 asking for so much protection, particularly in our system.
20 Now, that raises two questions in my mind. One, to what
21 extent does the situation that we see here before us today
22 to what extent is that situation at least partially a result
23 of your own actions, or a result of your own inactions in
24 the sense that you haven't actively taken the steps that
25 perhaps you should have for many years to protect the value

1 of your own franchise?

2 And in part I suspect that the system may also
3 be to blame, creating the kind of situation where the managers
4 of \$215 billion of assets feel a real need to seek government
5 protection from the companies in which they are investing
6 and aren't able to use some other mechanisms of self-help
7 and the like.

8 Lord knows, if there was a group of corporate
9 raiders out there that had \$215 billion under control, I
10 suspect that we would see lots of people up in arms over the
11 implications of that kind of an aggregation of capital
12 in the hands of a small group of investors.

13 That's by way of an introduction. Now, let me
14 get down to a little bit of the nitty and the gritty over
15 here.

16 By show of hands, how many of you own bonds?
17 How many of those of you with, with -- is there anybody
18 who controls investments that doesn't have bonds? The
19 last I looked the majority of bond investments in the United
20 States are non-voting. Why do any of you own bonds?

21 Mr. Machold?

22 MR. MACHOLD: A bond is a contract and it's a very
23 complicated contract and the form of the contract is sanctioned.
24 There's uniform protection in there for trustees and others.
25 There's a promise to pay; there is a promise to make maturity.

1 COMMISSIONER GRUNDFEST: Oh, yes, that's right.

2 MR. MACHOLD: The owner of that bond receives
3 a contract which is far more explicit than is the case with
4 common stock.

5 COMMISSIONER GRUNDFEST: That's right.

6 MR. MACHOLD: Now, we have a contract with common
7 stock as well and that contract is very simply stated and
8 it's uniform which is one share, one vote. Together with
9 certain rights of liquidation and so forth that are provided
10 by law. If one were to eliminate the one share, one vote,
11 we are now in a situation where owners like ourselves would
12 demand another contract. We are not going to sit without
13 a contract.

14 Because that's simply waiting there for a few crumbs
15 to come off the table. That contract is going to be every bit
16 as complex, of necessity, to assure some form of repayment,
17 as is the case with bond contracts. And my neighbor next to
18 me was describing what happens. We've seen it in these
19 markets here. The General Motors E is a very complex contract;
20 very few normal shareholders would understand how that works
21 with the put features in it, you see.

22 And what will happen if we abandon this rule is
23 that there will be a proliferation of contracts, oddly worded,
24 curiously stated, ambiguous in their terms, all designed to
25 protect the people who are the authors of those contracts.

1 And as my Canadian friend has observed, that will end up in
2 a great deal of litigation. Right after this meeting, a
3 group of us are going to meet with some of the people from
4 General Motors, and that will be the subject of the discussion.

5 I think to think of a stock as something which is
6 comparable to a bond, yes, it is, but that's because there
7 is the most solid of all contracts, there is accountability.
8 In the absence of that accountability, those of us who are
9 going to be involved in this are going to ask for a much more
10 complex contract.

11 COMMISSIONER GRUNDFEST: Is there anyone else
12 who wants to follow up? Ms. Marshall?

13 MS. MARSHALL: Yes. I would like to say that
14 \$215 billion or so, probably only \$100 billion or something
15 is in equity holdings which is what we're discussing today.
16 The equity capital markets are well over a trillion dollars,
17 and in fact, corporate managements who are most interested
18 in entrenching themselves through their pension funds control
19 more than the public funds control in terms of equity owner-
20 ship in the United States.

21 So that if we get into a simple confrontation over
22 this, we will lose on the numbers. I would suggest that the
23 \$200 billion is a misleading statistic.

24 COMMISSIONER GRUNDFEST: But it still suggests that
25 there's a certain amount of muscle at the table.

1 MR. MACHOLD: But we don't have the ability to use
2 that muscle. We can't hire a PAC. We are public funds that
3 are supposed to be devoid of political interference. There
4 are hundreds of conflicts that we could subject ourselves
5 to, and this is one the very nature of fiduciary law require
6 that we cannot involve ourselves with.

7 Now, I would bet that all of the people at these
8 tables have consistently voted against antitakeover type
9 repellents. If we had a show of hands here, I would suspect
10 every hand would go up. But we don't have the relative
11 power on account of the very large amounts of holdings that
12 are elsewhere.

13 MR. MONKS: Commissioner, I think it might be
14 interesting to consider the testimony that we submitted
15 by your former employee, John Pound. That what John, in
16 analyzing 100 proxy contests in the last five years,
17 ascertained was that institutional investors are approximately
18 one-half as likely to oppose management as individuals.
19 And without any perjorative connotation, I think that that
20 phenomena is something worth observing.

21 I would suggest to you that my experience in the
22 area while not comprehensive is extensive. And that I would
23 suggest to you that maybe the \$210 million you're looking
24 at is all the institutional investors who vote conscientiously
25 and in favor of their beneficiaries interests.

1 CHAIRMAN SHAD: Commissioner Grundfest, can we
2 move on and come back around if there is time?

3 COMMISSIONER GRUNDFEST: Certainly.

4 CHAIRMAN SHAD: Thank you.

5 All right, Commissioner Fleischman?

6 COMMISSIONER FLEISCHMAN: Actually, I'm going to
7 give each of you who had his hand or her hand raised just
8 then the opportunity to give your answer, because I'm going
9 to follow directly on Commissioner Grundfest's question.

10 In the material that Mr. Monks was kind enough to
11 submit, there's a lengthy discussion of the new shareholder,
12 and I would venture to say that everyone represented at this
13 table who actually does vote and the advisors who are repre-
14 sented at the table actually fall into that category.

15 In the summation of the particular portion of
16 the material, Mr. Monks concludes that these new shareholders
17 have the necessary financial and legal expertise to understand
18 the costs, benefits and means of voting; they face significant
19 costs if they chose to sell, rather than vote, and reinvest,
20 and they have a clear legal liability if they fail to act
21 in their beneficiaries' best interests.

22 The ultimate conclusion is that these funds will
23 act rationally and in their own interests and will be acting
24 in precisely the energetic and informed way that has been
25 anticipated heretofore.

1 That's perhaps just another way of saying what
2. Mr. Goldin said earlier in his oral presentation, that the
3 funds, at least those represented at this table, can and
4 will protect themselves if given the opportunity. The
5 particular rule submission that is before us gives share-
6 holders and the institutional shareholders, the opportunity
7 to protect themselves.

8 Why, if any of you will answer, do not the new
9 shareholders as represented here have exactly the opportunity
10 that Mr. Goldin and Mr. Monks say is necessary?

11 MR. GOLDIN: Commissioner, if I may be permitted
12 to venture a brief attempt at an answer. As all of us
13 recognize, new shareholders or old, the pressures that exist
14 in this area are not unidimensional. The tides don't all
15 flow in one direction.

16 Even institutional shareholders may have a short
17 term incentive in given situations and we could flush out
18 what those situations might be if you chose, to surrender their
19 longer term perspective as to what was in the best interests
20 of the economy and the best interests of a particular situation
21 even ultimately in their best interests as institutional
22 shareholders, in exchange for the short term advantage that
23 management skillfully offers in order to induce shareholders
24 at any given point in time to surrender for what I would
25 disparagingly dismiss as a small portion of porridge, something

1 very fundamental in corporate democracy.

2 So the fact that we represent institutions which
3 are able to protect themselves, which have a broader perspec-
4 tive, which are more enlightened, which are better calculated
5 to participate in the franchise that companies offer, which
6 may willingly step forward and surrender the birth right
7 that one share, one vote represents, should not induce
8 this Commission to go along with the proposal that the barrier
9 that would inhibit that surrender be removed.

10 I said to you in my prepared remarks that we don't
11 wish to be protected from ourselves, but we want to have the
12 right to act. But I also said that there are certain
13 fundamental basic characteristics of the corporate landscape
14 that inure to the concept of corporate democracy which are
15 so fundamental they shouldn't be permitted to be abridged
16 even by one generation of shareholders; that we should consider
17 the shareholder of today as a custodian, in addition to being
18 someone that acts in his or her own self interest.

19 And so the short answer is that even though we
20 can protect ourselves, because the pressures are complex
21 and mixed, we should be required to retain certain fundamental
22 values and not to compromise them.

END T2

23 COMMISSIONER FLEISCHMAN: Ms. Marshall?

24 MS. MARSHALL: I feel that we are at a serious
25 disadvantage in protecting ourselves. I personally have

1 been involved in several proxy solicitations where we came
2 very close to defeating management proposals on antitakeover
3 measures where management succeeded in 51 percent. Management
4 was able to use corporate resources which I considered partly
5 mine, the part that didn't vote from the 49 percent, to solicit
6 shareholders. They had the lists of shareholders; they could
7 see the proxy votes.

8 When I asked the company what the outcome of the
9 vote was, they said we won. And I said, well what does that
10 mean, and I said, can you tell me what percentage of the
11 votes were. And they said, well, we don't have to file it
12 until we file our next SEC filing. It took them a week to
13 figure out whether they could even disclose their vote to me.

14 Now, I don't consider that responsible corporate
15 response to shareholders and I think we're seriously dis-
16 advantaged. I'm very much in favor of having the voting
17 process streamlined and clarified and made more equitable
18 for all the participants.

19 MR. DURKIN: Commissioner? What's interesting
20 is \$215 billion here at this table, but whose not here?
21 The corporate pension funds aren't here; okay. You talk
22 about \$215 billion, that's not 215 billion dollars of power.
23 The power is the voting rights, and I am speaking as a private
24 pension fund. The other pension funds here are public
25 pension funds. The workers, the new shareholder is the

1 workers, the sanitation workers, the city teacher, it's
2 the carpenter. They are not exercising the power that goes
3 with that \$215 billion. Who is exercising it?

4 It's the Merrill Lynch, it's the Shearson Lehman
5 who are voting, okay, voting in contests which quite frankly
6 often times they feel coerced in, are they going to lose
7 underwriting business, are they going to lose credit business.
8 We conducted a proxy solicitation on corporate governance
9 issues with the Fortune 500 company.

10 We asked for an expansion of the board of directors
11 to include independents. We asked for management directors
12 off the compensation committee, okay. We got 12 percent
13 of the vote; a union got 12 percent of the vote in a proxy
14 contest.

15 In talking orally with the trust -- not the trustees
16 but with the funds that voted that stock in favor of us,
17 I will submit that two-thirds of them, and that was the
18 institutional vote, had no idea whatsoever what they were
19 voting. And I think who voted was the Secretary who happened
20 to have the stamp in her hand at that time when the proxy
21 came through the door.

22 It's an amazing system out there. The power has
23 been stripped from the ownership interests, and it's been
24 stripped, and all we're asking for is not rules to protect
25 ourselves, just minimal standards. We have, we're part

1 of the problem here. As Mr. Monks indicated, we haven't
2 told our trustees, we haven't monitored their voting per-
3 formance. We need to do that. But there needs to be some
4 minimal standards, like a private or a secret ballot.

5 No funds going to go out there when they think
6 they're going to jeopardize investment business, underwriting
7 business, credit business, and take a stand against corporate
8 management, and unfortunately, there hasn't been any checks
9 and balances there from our end of it, quite frankly.

10 So the money's here but the power's not here;
11 the power is out in the hands of institutions who quite
12 frankly have self-interests involved in the voting process.

13 COMMISSIONER FLEISCHMAN: Thank you, Mr. Chairman.

14 CHAIRMAN SHAD: Thank you, Commissioner Fleischman.

15 We'll go to the senior staff, and by a show
16 of hands or eyelids, who would like to direct the Commission
17 comment or question?

18 Director Ketchum?

19 MR. KETCHUM: Mr. Waitzer, I'd like again to go
20 back to your experience in the Canadian developments that
21 Ms. Peters asked a little bit about. One of our basic
22 findings has been over time the companies that have moved
23 to do capitalization tend to have a very high concentration
24 of controlled stock already, primarily in the vein of
25 40 percent or more, though not in all cases.

1 In talking about a proliferation of dual class
2 capitalization, I think one of the concerns is whether
3 that moves to other types of corporations which "disenfranchise
4 were before there wasn't control and over a time period,
5 control will develop.

6 Have you seen that in Canada? Have you seen companies
7 with a lesser percentage of voting control using dual
8 capitalization to develop that control?

9 MR. WAITZER: I don't want to overstate the position
10 so just by way of the backdrop, you should understand that
11 the vast majority of major Canadian companies -- when I
12 say major, the benchmark that I use for purposes of this
13 discussion, is those companies that are eligible investments
14 for institutions -- are already controlled. But one of the
15 classes of recent users of restricted shares have been
16 companies that are already controlled but in order to raise
17 additional equity that they feel necessary for their business
18 would in ordinary circumstances have to dilute or surrender
19 that control.

20 And they have adopted dual capitalization in order
21 to separate equity ownership from control, and that has been
22 very common in the last four years.

23 MS. QUINN: Let me ask whether any of you would
24 invest in non-voting common stock. Is there a discipline
25 that the market will bring to bear essentially on the

1 inability to raise equity capital if indeed companies
2 go to a non-voting common?

3 MR. MACHOLD: Directed towards any individual?

4 MS. QUINN: To whomever.

5 MR. MACHOLD. Okay, I'll take a crack at it.

6 A non-voting stock is a security like any other
7 so it has a value so to say that there isn't going to be
8 an investor, would be wrong. There will be investors, but
9 certainly it's a different kind of security and you would
10 require a higher return for it in the marketplace.

11 Some how or another. Now, as a matter of policy
12 in our case, we did not invest in the General Motors E stock,
13 because we immediately foresaw some of the conflicts that
14 you're reading about in the paper today; the difficulty
15 of intercompany transfer and two corporate cultures coming
16 into conflict.

17 And I think if you were to look at the chart on
18 the E stock and compared it with other companies in that
19 industry, you would see that that was a stock which has not
20 done well, relative to where it could have or should have done.
21 Now, we don't have perfect ability to foresee things. There
22 are companies that we have invested in on one or two occasions,
23 we have three or four of them in our portfolio now, which
24 we think the value of the company is still good,

25 We have some Wang stock; we've taken a terrible

1 licking on it. We have some stock in some of the smaller
2 retail type operations. These tend to be strongly controlled.
3 One of the trade-offs in buying a non-voting type stock is
4 that you rarely if you were to buy the voting stock wouldn't
5 get much either because the inside management already controls
6 it.

7 So, in a sense, you're not giving up very much
8 by participating in that sort of a situation. I might add
9 that our counsel of Institutional Investors has tried to
10 take into account the so-called, small company situation, and
11 we have put a proviso in that we would accept two-tier type
12 stocks where companies have strong inside entrepreneurial
13 management and we've tried to do that in a very simplistic
14 formula way, by saying that its companies with 500 shareholders
15 or less.

16 But that would cover the great majority of the
17 type of companies when we talked about only five percent of
18 the NASD. The fact is I don't know what the percentage would
19 be but a very substantial percentage I'm sure would in effect
20 be non-voting stock anyway. Because of the strong inside
21 control typical of smaller type companies.

22 MS. FEINBERG: I had a question for Mr. Monks.
23 I was fascinated by your APA argument. I'm not at all clear
24 that the APA would apply to the New York Stock Exchange rule
25 proposal in this circumstance as opposed to arguably

1 an enforcement type action, but even if it did, you suggest
2 that we could, as a matter of law based on the APA, reject
3 the New York Stock Exchange proposal.

4 I'm not sure how that would go with our obligations
5 under Section 19(b). As I read it, we would have to find
6 the proposal inconsistent with part of the statute. I was
7 wondering if you could expand on that a bit.

8 MR. MONKS: Ms. Fienberg, with great deference,
9 I'll address myself to the question. I would like first to
10 refer you to our written submission which, if you haven't got,
11 and secondly, I'd like to refer you to my general counsel,
12 Ms. Minow, who is in fact a great deal more knowledgeable
13 than I am.

14 I would simply say that in a general sense, when
15 the New York Stock Exchange files a proposal and as part
16 of that proposal they contain analysis of their sub-
17 committee's report, the subcommittee report prepared by
18 such distinguished people as former Commissioner Sommer,
19 whose here, and Mr. Sigler and a group of Manhattan lawyers,
20 and that --

21 (laughter)

22 -- and that proposal raises a number of questions.

23 And that becomes part of the record. And in their
24 final conclusion, Ms. Fienberg, the New York Stock Exchange
25 makes no reference to any of the contentions or policy

1 assertions that their subcommittee raise. And so they've
2 submitted to you a record that raises questions but doesn't
3 even hazard the remotest response to them. So, just as an
4 opening matter, we don't have the foggiest idea why the
5 New York Stock Exchange rejected its own subcommittee proposal.

6 Now, in a general way, it is that kind of deficiency
7 that encouraged me to make the rather broad conclusion that
8 you must reject their proposal.

9 MS. FIENBERG: Thank you.

10 CHAIRMAN SHAD: Any others of the staff care to
11 raise questions?

12 Mr. Davis.

13 MR. DAVIS: Several of you seem to be saying that
14 the current corporate voting system just doesn't work, even
15 with one share, one vote. And yet you're all quite fearful
16 of losing some form of accountability,

17 I'm wondering if perhaps that accountability that
18 you fear losing is provided by some other source, perhaps
19 through competition both in the product market and the market
20 for capital.

21 Mr. Machold indicated that he does invest in non-
22 voting stock. Perhaps he believes that there is some other
23 mechanism for accountability, even provided for non-voting
24 stock.

25 Mr. Machold?

1 MR. MACHOLD: I said in my remarks that there are
2 really only three people that a company can be accountable
3 to; and I think it's inherent in the value, and I tried to
4 illustrate that by some specific examples, that the value of
5 the stock directly is affected by the lack of accountability.

6 I could go on and give a list of some of the things
7 that corporations do in the absence of accountability. A
8 gentleman from Revlon taking a \$36 million finders fee for
9 selling a company to a willing buyer; or a gentleman who
10 takes \$12 million a year in income out of a company that
11 only makes \$5 million, and so forth.

12 And these go on and on and on. I don't know how
13 to respond, other than to say that we would, these people
14 don't seem to be accountable. I read an article in Barron's
15 the other --

16 MR. DAVIS: What is the accountability you fear
17 losing if you say right now the corporate voting system does
18 not work?

19 MR. MACHOLD: Well, this is, this, the only shred
20 we have is what exists today. In the absence of that, there's
21 nothing. I agree it doesn't work, but it should be improved
22 rather than eliminated.

23 MR. GOLDIN: It's potential should not be under-
24 estimated. Fewer and fewer Americans, lamentably, are voting
25 in elections. That would not be an argument that elections

1 are unimportant or that we should look for a substitute for
2 the exercise of the franchise.

3 Hopefully, more and more institutions in an in-
4 creasingly competitive and active environment, will become
5 alerted to the need to vote, and to the importance of voting.
6 They will begin to use more aggressively this instrument of
7 accountability. And there are it seems to me forces which
8 would suggest analytically that that is likely to happen.
9 The fact that it has not happened sufficiently, the fact
10 that the culture of institutional investment has tended to
11 inhibit institutional investors from using the franchise
12 widely should not become an excuse for now reinforcing
13 institutionalizing the environment in which accountability
14 is denied.

15 MR. HEARD: Mr. Chairman, can I briefly say some-
16 thing?

17 It can be made to work. I think the people who
18 are up here today, while they may not be representative share-
19 holders at large, and even if they were, there wouldn't be
20 the problem that we're suggesting exists, but it can be
21 made to work. But it won't be made to work if we approve
22 the New York Exchange proposal, and then if the American
23 Exchange comes in here and wants the same thing, what you're
24 doing is further disadvantaging people who already are
25 struggling against heavy odds to try and make the system work.

1 And this is just another disadvantage that you're going to
2 create.

3 CHAIRMAN SHAD: Any other questions or comments
4 from the staff?

5 MR. JOHNSON: Could I respond?

6 CHAIRMAN SHAD: Please.

7 MR. JOHNSON: I was just going to say, also, I think
8 we're dealing with a problem here which may be a worse problem
9 in the next several years. I hate to predict futures, because
10 we know how wrong all of us can be, especially in the stock
11 market business.

12 But remember we changed the tax law in this country.
13 The differentiation between capital and income is almost,
14 looking several years out, the tax rate will be exactly the
15 same. I think the conflict between how much money management
16 is going to take out of individual corporations is going to
17 be much more of a problem in the future.

18 And one of the ways of protecting oneself, ones
19 individual investment is through the voting process and
20 if through the voting process, management can vote all of
21 the profits to themselves, there may not be anything to share.

22 You say to me, well, maybe that isn't important;
23 who gives a damn. But we damn well give a damn because
24 the whole business is built on this. It's an exceedingly
25 important issue, and if we're disenfranchised from our vote,

1 you know, we may just have to sit there and enjoy it, and
2 watch our business go down, as we say, down the tubes.

3 COMMISSIONER FLEISCHMAN: May I follow up on that?

4 CHAIRMAN SHAD: Yes, please.

5 COMMISSIONER FLEISCHMAN: Mr. Johnson, do you
6 represent an institution or you do lead an institution which
7 has a viz a viz other colleagues on the panel, a different
8 kind of role. You advise, you sometimes provide directors;
9 you see the voting process from a whole variety of facets.

10 Do you have the same feeling, going back to
11 Commissioner Cox's question, that the process itself is
12 deficient?

13 MR. JOHNSON: I think the process can work a whole
14 lot better, and I think it will work a lot better. Again,
15 looking in the perspective of history, I think things are
16 going to change. I think shareholders will be a lot more
17 active in the future because they're going to clearly see
18 that it is in their best interests to be active. That hasn't
19 maybe happened, yet. But I think clearly it is going to happen
20 and with all of the what I would say with various corporations
21 misuse of corporate cash to which you might say personal
22 benefit of officers of the corporation with questionable
23 benefit to shareholders, I think eventually that's going to
24 change. Now, you can say granted, we can vote with our feet,
25 which I guess is the weakness of the system.

1 We can sell the stock if we don't like the manage-
2 ment, but I guess those of us again who have large pools of
3 capital realize that we have a limited number of investments.
4 Then we go one stage further; we say, also, let's look at
5 it from a public policy viewpoint. How are your corporations
6 going to be best managed. I would say to you that that is
7 the most important issue of all, and if you have corporate
8 managements who basically are responsible to their own
9 consciences and to God, I would question as is to how
10 responsible they will be.

11 COMMISSIONER FLEISCHMAN: Thank you, Mr. Chairman.
12 I owe you one question.

13 CHAIRMAN SHAD: Thank you. I would like to poll
14 the panel.

15 I gather from your comments that you're unanimously
16 opposed to the Commission approving the New York Stock
17 Exchange's request. I also gather that if not every one of
18 you, certainly a vast majority of you would favor requiring
19 the NASD and the American Stock Exchange to come up to
20 the New York Stock Exchange's present one share, one vote
21 requirement.

22 I would ask if that were done, and its a hypothetical
23 question, would you support three exceptions to the one share,
24 one vote rule. Now, those companies that when they first
25 went public, went public with a dual capitalization so that

1 they did a public offering of non-voting stock and no one
2 was coerced to buy it. But that they be permitted to be
3 publicly traded on the Exchange or in any other market;
4 that those companies with subject to the one share, one vote
5 requirement nevertheless be permitted to do public offerings
6 of non-voting stock where they again, if they wish to offer
7 additional shares to raise money, there's an enormous spectrum
8 of rights and privileges that you can accord the investors
9 through preferred or common stocks with various futures.

10 And if the company that has the one share, one
11 vote capitalization initially, but wishes to raise additional
12 equity capital at the very bottom of its capitalization to
13 be able to build its credit system on top of it, now would
14 you permit that exception to the one share, one vote rule,

15 And also in acquisitions. If a company wishes to
16 acquire another company and not in effect be taken over
17 by the target company by giving them voting stock, would you
18 permit companies to issue non-voting stock for the purpose
19 of acquisitions.

20 Those are the three exceptions I would ask whether
21 or not you would go along with, in return, if you will,
22 for the possibility of bringing all the market places up to
23 the one share, one vote standard. By a show of hands, how
24 many would support a one share, one vote requirement across
25 the board, but with those three exceptions?

1 Any?

2 MR. MACHOLD: I -- I'm, speaking for myself --

3 CHAIRMAN SHAD: I just want a show of hands. We
4 don't have the time to go through a speaking for yourself --

5 MR. GOLDIN: Only if you forced us Mr. Chairman.

6 CHAIRMAN SHAD: Okay, well, therf you unanimously
7 would not support any -- all right, go the other way.
8 Would you support, by a show of hands, any exceptions to
9 the one share, one vote requirement.

10 We have one candidate, 2, 3, 4, 5, 6. Well,
11 certainly two-thirds of the panel would support some exceptions
12 to the one share, one vote across the board requirement.

13 And if you would, in about two words apiece, I'd
14 like to hear what those exceptions would be, starting with
15 Mr. Johnson.

16 MR. JOHNSON: The third case that you made, it seems
17 to me if you were going to have another company come in with
18 non-voting shares, if the small company had both, you, you
19 I think you would want to say that you would have a right
20 to vote on the issue of whether the additional shares to
21 be issued were to be voting or non-voting. Subject to that,
22 I would think it would be all right to issue non-voting
23 shares, and the rest I --

24 CHAIRMAN SHAD: Subject to the shareholders of the
25 acquiring company approving the issuance of non-voting shares

1 to acquire another company would be your exception.

2 MR. JOHNSON: Yes.

3 CHAIRMAN SHAD: Any other exceptions? Mr. Waitz:

4 MR. WAITZER: Let me just describe one exception
5 that appears to be emerging in the Canadian marketplace
6 on new offerings, where as a result of negotiations between
7 institutional investors and underwriters in smaller company
8 medium sized company situations where management controls
9 the company, the use of restricted shares is being allowed
10 subject uniformly to sunset provisions and also subject,
11 in many instances, to transfer restrictions on those super-
12 voting shares. That is, when they pass from the hands of
13 the existing management group, they lose their voting
14 privilege.

15 CHAIRMAN SHAD: And you would support those exceptions?

16 MR. WAITZER: Yes.

17 MS. MARSHALL: I think I could also say that --

18 CHAIRMAN SHAD: Well, let me just go down the
19 table. Is there anyone else that has a comment on the
20 exceptions that they would approve, or support.

21 MR. MACHOLD: Well, the council has I mentioned
22 cited those companies that have less than 500 shareholders.

23 CHAIRMAN SHAD: Yes, Mr. Heard?

24 MR. HEARD: I wouldn't allow any exceptions for
25 companies traded on an exchange or traded through the national

1 market system. Smaller companies or companies not traded
2 through the national market system, or an exchange I might
3 make an exception.

4 CHAIRMAN SHAD: Well, let's get companies that
5 are non-reporting companies to the SEC are not included
6 in that.

7 MR. HEARD: That, and also, Mr. Chairman, you
8 might be able to justify a grandfather clause just for
9 expediency's sake.

10 CHAIRMAN SHAD: Those that already have dual
11 capitalization through a grandfather, they could be traded
12 or whatever.

13 MR. HEARD: Maybe, maybe.

14 CHAIRMAN SHAD: Yes?

15 MR. DURKIN: We wouldn't agree with any exceptions
16 and the grandfathering potentially causes problems because
17 we know specific instances where the dual capitalization right
18 now is the result of --

19 CHAIRMAN SHAD: No, I want your exceptions you'd
20 go along with; not that you'd not go along with.

21 MR. DURKIN: We wouldn't go along with any. It's
22 a slippery slope and what would --

23 CHAIRMAN SHAD: So you would deny any public
24 market in all those companies that presently have an A/B
25 capitalization, is that correct?

1 MR. DURKIN: Right.

2 CHAIRMAN SHAD: Thank you.

3 MS. MARSHALL: Well, now I have to speak for myself
4 because I can't represent the Board that I report to, but
5 I would support some sort of dual classes with very stringent
6 sunset and transfer provisions as mentioned earlier.

7 CHAIRMAN SHAD: Thank you.

8 MR. MONKS: I would want to know more about the
9 voting market and how to make it a real efficient market
10 before coming to a conclusion on this subject.

11 MR. GOLDIN: Only small, essentially start-up type
12 situations of the kind contemplated by the Council of
13 Institutional Investors exceptions.

14 CHAIRMAN SHAD: Well, again, I'd like to ask
15 therefore you would deny any public market to those companies
16 that presently have A/B capitalization?

17 MR. GOLDIN: Yes, I would not grandfather. I would
18 allow some orderly process by which the existing multiple
19 classifications would be eliminated over time.

20 CHAIRMAN SHAD: I find that tough to swallow inas-
21 much as nobody was compelled to buy that non-voting stock
22 when they did their initial public offering.

23 MR. GOLDIN: By the same token, Mr. Chairman, the
24 slippery slope will lead you to exactly where the New York
25 Stock Exchange is asking you to go.

1 ~~Stock Exchange is asking you to go.~~

2 CHAIRMAN SHAD: No, --

3 MR. GOLDIN: On the ground that nobody compels
4 anybody to do anything.

5 CHAIRMAN SHAD: Contrary to that, Mr. Goldin, I'm
6 suggesting that we, I'm raising the possibility of the
7 Commission voting against the New York Stock Exchange's
8 requirement and going even further and saying what if there
9 was an effort to bring all of them up to the one share, one
10 vote requirement, but with certain reasonable exceptions,
11 and it's evident that by in large, this panel is opposed to
12 any significant exceptions, even grandfathering those
13 companies that hundreds of thousands of shareholders already
14 that voluntarily bought the non-voting stock on the initial
15 public offerings.

16 That slippery part of the slope is behind us;
17 not in front of us.

18 There's only five minutes left. If there's anyone
19 that wishes to make a final statement?

20 Or can we take a brief break and go into our
21 11:30 session. Gentlemen and Ladies, thank you very much.
22 This is an exceptionally provocative discussion. Appreciate
23 it. Thank you.

24 We'll reconvene in five minutes.

25 (Brief recess is taken)

1 CHAIRMAN SHAD: Ladies and gentlemen, if you'd
2 please take your seats.

3 We're now proceeding into the Public Company Panel.
4 And as in the past, we'll due it in alphabetical order
5 according to the organizations represented at the table,
6 starting with Mr. Sommer, former Commissioner Sommer,
7 representing the Alliance for Corporate Growth.

8 I'd remind you that we'd like you to loudly and
9 clearly state your name and affiliation. Any amplifications
10 that you wish. You have five minutes for an opening state-
11 ment. I can assure you there'll be more than adequate time
12 to get around with questions, if you don't get a chance to
13 give your full statement.

14 When you see the green light, you have three
15 minutes remaining, the yellow light, one minute remaining
16 and suggest that when you see the yellow light, you begin
17 your summation, and the red light means that your time
18 has expired.

19 Then we'll go on to Q&A after each of you have
20 had an opportunity to make your opening statements, starting
21 with Mr. Sommer.

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1 STATEMENT OF A. A. SOMMER, JR., ALLIANCE FOR CORPORATE
2 GROWTH

3 MR. SOMMER: Thank you, Mr. Chairman.

4 Mr. Chairman, Commissioners, my name is A.A. Sommer,
5 Jr. I'm a partner in the law firm of Morgan, Lewis and
6 Bockius. I am representing here this morning The Alliance
7 for Corporate Growth, consisting of some 14 corporations
8 having an interest in this issue.

9 While I represent them, I also wish to state that
10 I am also expressing personal views. I would like to make
11 clear at the outset that even though I was co-chairman of
12 the New York Stock Exchange Committee on Shareholder
13 Participation and Qualitative Listing Standards that made
14 the initial recommendation to the Public Policy Committee
15 with regard to this matter, I am not speaking on behalf
16 of the Exchange in any degree or way whatsoever.

17 While there's been a lot of discussion about the
18 pros and cons of classes of common stock, the simple fact
19 is the Commission is confronted with the question, should it
20 or can it approve or disapprove the proposal of the New York
21 Stock Exchange under the powers that it has. I leave to
22 others the technical discussion of whether the language is
23 broad enough to permit the Commission to approve or dis-
24 approve this particular proposal. However, I would like to
25 reflect a little bit upon my own experience and recollections.

1 The power that the Commission is being called
2 upon to exercise in this case was granted to it by the
3 Amendments to the Securities Act in 1975. At that time,
4 I was a member of this distinguished body. The hearings
5 that preceded that and all of the discussions with regard
6 to those amendments related to the manner in which the
7 exchange was governing the affairs of itself and its members,
8 the rules it was adopting with regard to their affairs,
9 how it was enforcing its rules.

10 At no time can I recall in the legislative history,
11 in the hearings, in the discussions of the Commission, the
12 Staff, with the people on the Hill, or anyone else, a sug-
13 gession that this was a means by which the Commission could
14 go through the back door and do something that it has
15 assiduously avoided in the past, namely, substantively
16 take action with regard to corporate governance.

17 Now, the Commission has been circumspect with
18 regard to matters of corporate governance. True, it has
19 done studies, Commissioners have made speeches -- I made a
20 few myself -- and done other things, but it has always
21 carefully avoided a substantive approach to corporate
22 governance because it has very wisely concluded that it
23 is not a super state legislature, it is not a super
24 Commissioner of Corporations, it is a Federal agency with
25 a well-defined function, one that does not embrace directly

1 or indirectly through the exchanges, becoming the arbiter
2 of corporate governance issues.

3 If the Commission were to refuse approval of the
4 Exchange's rule, it would obviously place the Exchange in
5 a very unsatisfactory competitive position. The only way
6 the Commission could remedy that would be for it to compel
7 the other exchanges through the power that it has under
8 Section 19(c) of the '34 Act, compel them to adopt similar
9 requirements. If the Commission does that, where is it going
10 to stop the process of involving itself in corporate
11 governance?

12 Is it then going to require all of the markets to
13 have two directors, outside directors, as the New York Stock
14 Exchange does? Is it going to require all of the markets
15 to have audit committees of independent directors as the
16 Exchange does? Is it going to require that all of the
17 exchanges adopt the New York Stock Exchange requirements
18 with regard to shareholder votes on a variety of proposals?

19 It seems to me the Commission should long pause
20 before it embarks upon a course that may have consequences
21 from which it will have a great difficulty disassociating
22 itself. One of the fundamental matters to be borne in mind
23 here is that historically the relationship between equity
24 and vote has been a matter of state law. That goes back
25 to the very beginnings of this republic.

1 And all of the states have allowed a great degree
2 of flexibility in how the entrepreneurs, the shareholders,
3 and others involved with corporations relate equity to
4 shareholder votes. This flexibility has been important because
5 time change, companies are different, none of them are cast
6 in the same mold and the mold with regard to voting that
7 suits in one time, may not be suitable in another time.

8 The emotional dedication that a lot of people have
9 with this issue, I think, stems from the fact that they make
10 a political analogy I think that's totally inappropriate, to
11 use one simple example, the fact of the matter is that when
12 you are outvoted in the political election you live with what
13 the majority has decided. If you don't like what a majority
14 of shareholders do, you sell your stock.

15 The people who are most vehement in advocating that
16 this proposal of the New York Stock Exchange should be denied
17 and of the Commission should take action to compel one share,
18 one voting, basically in my estimation are less concerned
19 with the rights of shareholders than they are with their
20 own rights to make incursions on management and tear up
21 companies in the fashion that we have witnesses in the very
22 recent past.

23 It is important to remember that they are proposing
24 in the interests of the shareholders to take away from the
25 shareholders, an important right that shareholders have,

1 namely, the right to vote their own voting structures in
2 their corporation. No corporation, no publicly held corpora=
3 tion has adopted a two-tier voting structure without the
4 vote of the shareholders, and the New York Stock Exchange
5 clearly provides that those not associated with management,
6 a majority of those not associated with management will
7 make that decision.

8 I think it is good the Commission has had
9 these hearings. There is going to be a great deal of
10 discussion in the coming Congress with regard to these
11 issues and many others related to takeovers. I think it's
12 well that discussion's begun in this body.

13 Thank you, Mr. Chairman and Commissioners.

14 CHAIRMAN SHAD: Thank you, Mr. Sommers.

15 The American Society of Corporate Secretaries,
16 represented by Mr. Richard H. Troy. Mr. Troy?

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1 STATEMENT OF RICHARD H. TROY, AMERICAN SOCIETY FOR
2 CORPORATE SECRETARIES, INC.

3 MR. TROY: Good morning, Commissioner Shad.

4 Is my microphone on?

5 CHAIRMAN SHAD: Yes.

6 MR. TROY: My name is Richard Troy. I am
7 representing this morning the American Society of Corporate
8 Secretaries of which I am a Vice President and also Chairman
9 of its Securities Law Committee.

10 At the outset, I'd like to point out that the
11 members of the several committees of the Society which have
12 focused on this issue have not achieved consensus on all
13 issues. But I'd like to point out this morning is the
14 degree to which we have achieved consensus, to identify the
15 reasons although not within five minutes elaborate upon all
16 the reasons.

17 First of all, focusing on the narrow question,
18 namely, should the Commission affirm the proposal of the
19 New York Stock Exchange as proposed; answer, yes. Reasons
20 therefore: first, competitive concerns, we value the
21 exchange; we don't want to see it jeopardized by competition
22 in the voting rights issue. Secondly, the lack of a legal
23 basis to require the New York Stock Exchange to maintain
24 a rule which is not required of other exchanges, and thirdly
25 utility to pursue one share, one vote, you simply do not

1 achieve it by imposing it on one exchange and not on others.

2 Getting beyond this degree of consensus, we come
3 to some divergence, namely the reasons that bring us to
4 this consensus on the narrow question may lead to different
5 conclusions when the question is changed. Moreover, there's
6 some divergence as to whether or not the Stock exchange rule
7 should be approved as proposed with its several conditions,
8 or whether on the other hand, the several conditions themselves
9 should not be in the rule.

10 In favor of the several conditions would be such
11 reasons as that facially, they are reasonable and equitable
12 conditions; they would tend to quiet concerns about management
13 entrenchment; and shareholder disenfranchisement; and thirdly,
14 they would foster the underlying values of the one share,
15 one vote philosophy without having to resort to a rigid rule.

16 Opposing the inclusion of those conditions were
17 several reasons, one, the desire to eliminate competition
18 among exchanges on the voting rights issue; to equalize that
19 issue, not have it as a matter of competition between exchanges.
20 Secondly, a series of business reasons with which I'm sure
21 you're familiar, the General Motors example, Hershey, BDM,
22 that sort of example, the debt equity concerns of corporations
23 which may want to raise capital but not increase debt, but
24 also not simultaneously dilute the voting power of existing
25 equity holders, tax considerations which may motivate the

1 issuance of equity on debt, and yet not extend voting rights
2 at the expense of present holders.

3 Further the environmental changes since 1926 when
4 the stock exchange rule was first put into effect. Fourthly,
5 in the takeover area itself, an area which is certainly
6 relevant but I don't think is controlling, as many of the
7 comments in this room would lead us to believe, the imposition
8 of a market regulation rule in the takeover area would, I think,
9 prove illusory in the sense that it would not override
10 the obligation of boards of directors under State law to take
11 those actions which their fiduciary obligations under state
12 laws might require them to take to protect the shareholders.

13 And fifthly, in the area of corporate governance
14 and capital structure, the viewpoint that state law should
15 govern. Now, some years ago, one might have spoken of the
16 rule of state law and the state courts with somewhat less
17 conviction than today. But the developments in both federal
18 and state court decisions of state law in the last few years
19 leaves no doubt that boards of directors are now being subjected
20 to a scrutiny they have never experienced before.

21 By way of example, the poison pill somewhat
22 ironically has produced its own antidote, namely, the
23 scrutiny of the courts, both as to the motivation for which
24 the pill was put in, and more particularly, the decision of
25 the board of directors as to whether or not to redeem that

1 pill.

2. Similarly, in the lock-up area, you don't hear
3 lock-up anymore. It is leg-up. The courts are telling
4 the boards as they have never told boards before, their
5 obligation is to the shareholders; not to the management.
6 When the company is up for auction, they must seek the highest
7 price; they may not favor one bidder over another.

8 If anything, the courts are telling boards they
9 must be more active and more zealous in safeguarding the
10 rights of their stockholders. And I'm waiting for the
11 decision which will tell them in effect they must go even
12 further and perhaps start to "usurp" some of those rights
13 because they may be the only persons who are in a position
14 to protect the rights of stockholders.

15 Finally, in the last minute, on the broader issue,
16 should there be a national mandatory policy, no exception,
17 mandating one share, one vote on all markets? No. For the
18 reasons recited of the various business reasons for capital
19 structure, the change in environmental considerations,
20 the infringements on the rights of stockholders to chose
21 the capital structure they want; the stifling of creativity
22 and experimentation.

23 The fact that it would get into merit regulation
24 of securities, not market regulation. The fact that
25 ironically it may produce the ultimate antitakeover weapon,

1 the doomsday machine of antitakeover devices in that if you
2 impose all market places under your jurisdiction to one share,
3 one vote, what does the target do? It issues the offending
4 security. What is the result? A halt to all trading or
5 chaos, whichever you will.

6 And you cannot achieve it through a market regulation
7 vote, you'd have to go to substantive regulation, making
8 the offending security illegal, which in turn gets you to
9 merit regulation or federal regulation of corporations with
10 the evil that it does.

11 Thank you.

12 CHAIRMAN SHAD: Thank you, Mr. Troy. Your point
13 on the target defense was interesting. It hasn't been raised
14 before.

15 We now go to the General DataComm Industries
16 Incorporated, represented by the chairman of the board of
17 that company, Charles Johnson.

18 Mr. Johnson?

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1 STATEMENT OF CHARLES R. JOHNSON, CHAIRMAN OF THE BOARD,
2 GENERAL DATACOMM INDUSTRIES, INC.

3 MR. JOHNSON: Yes. Good morning, Chairman Shad,
4 and members of the Commission.

5 On two occasions, companies in which I held top
6 management positions were acquired by corporations interested
7 only in short term results. In 1969, I founded and have
8 since built a computer communications company, now well
9 established in domestic and international markets which employ
10 2600 people in a previously depressed area.

11 Within the past year, the public shareholders of
12 this listed company overwhelming voted to create dual classes
13 of equity stock. I believe that this background uniquely
14 qualifies me to testify before this Commission. The
15 information equipment industry consists of computer, semi-
16 conductor and telecommunications equipment manufacturers.
17 It is a dynamic industry with rapidly changing technology
18 whose success depends on creativity and productivity.

19 Exceptionally high long term R&D investments are
20 required in times of both strong and weak market conditions
21 to maintain or increase market shares. Success also requires
22 recognition that technological competition is a worldwide
23 challenge that many foreign companies and that many foreign
24 countries subsidize their high tech industries as part of
25 their national priorities.

1 In late 1984, and early 1985, it became apparent
2 that a number of major changes were underway that would
3 alter the characteristics of the information industry.
4 The computer industry entered a period of slow growth; the
5 break-up of AT&T would alter the industry's competitive
6 structure. The decline of the U.S. dollar. And depressed
7 information industry stock prices that make acquisition of
8 U.S. companies more attractive to foreign interests.

9 These four factors occurring simultaneously had
10 never been experienced in this industry. This brought the
11 need for stockholder protection against non-negotiated
12 acquisitions into focus. By mid-1985, the computer market
13 was soft. At this time, the divestiture of AT&T created
14 new regional Bell operating companies who began to buy
15 market shares.

16 Their ability to sell equipment at low prices
17 resulted from the opportunity to absorb losses under regulated
18 monopoly business where profits are guaranteed. These practices
19 inversely impacted the earnings of competing companies against
20 the R-box.

21 Concurrently, the 30 percent decline in the value
22 of the U.S. dollar since 1985, and the depressed stock prices
23 of many information industry companies that made them
24 attractive takeover targets to foreign investors. In fact,
25 if a German competitor were able to buy my company today,

1 the relative cost would only be one-quarter of the early
2 1985 costs. Japanese corporations have also targeted this
3 industry, as evidenced by the propopsed acquisition of the
4 Fairchild Semiconductor unit. Semiconductors represent
5 30 to 35 percent of the value of information equipment.

6 By dominating worldwide semiconductor sources,
7 the Japanese can compete unfairly with U.S. manufacturers
8 by controlling the price of these key components and the
9 information equipment in which they are used. Acquisitions
10 of U.S. companies by subsidized foreign corporations are now
11 rising to a level that should concern those of us interested
12 in maintaining and investing in U.S. technological leadership

13 This very concern was the major reason why the
14 proposal for dual classes of equity stock was presented to
15 our shareholders in January, 1986. The approval of our
16 shareholders was overwhelming. Of the total public, non-
17 insider stockholders eligible to vote, the favorable vote
18 was 59 percent.

19 Of the total public shareholders actually voting,
20 73 percent voted in favor of the proposal. Of interest was
21 the fact that 69 percent of the institutional votes were
22 favorable. Securing the necessary majority of public
23 shareholders with the proposed rule is difficult. The
24 rule as proposed is tough. For example, about 19 percent
25 of our stock was held by insiders. In addition, 19 percent

1 of the public shareholders did not vote, primarily because
2 of the difficulty in obtaining proxies for shares held in
3 street names. In reality, a favorable vote of about 65
4 percent of the public shareholders voting was required
5 to meet the majority rule proposed by the Exchange.

6 We've attached some exhibits with the voting
7 results to the Secretary.

8 The apprehensive attitude of institutional and
9 stockholder representative groups appearing before this
10 panel is in itself an additional insurance that dual classes
11 of stock will be approved only under compelling circumstances.
12 High tech, high growth companies need a high degree of
13 flexibility.

14 The Exchange's proposal allows long term stock-
15 holders to provide management the ability to make and
16 execute long range strategic decisions and/or sell the
17 company on a negotiated basis. It also negates the
18 negative influence that speculative investors with short
19 objectives might otherwise affect. Certainly, it is improper
20 to deny public shareholders the right to decide who will
21 represent their long term interests.

22 I urge this Commission to approve the New York
23 Stock Exchange proposal.

24 CHAIRMAN SHAD: Thank you, Mr. Johnson.

25 Now, the Mesa Partnership represented by T. Boone

1 Pickens.

2. Mr. Pickens.

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1 STATEMENT OF T. BOONE PICKENS, MESA LIMITED PARTNERSHIP
2 UNITED SHAREHOLDERS ASSOCIATION

3 MR. PICKENS: Good morning, Chairman Shad and
4 members of the Commission. I appreciate the opportunity
5 to address you on this important issue.

6 I'm Boone Pickens, general partner, MESA Limited
7 Partnership, and Chairman of the United Shareholders
8 Association.

9 I'll summarize my formal testimony that I filed
10 with the Commission.

11 Mesa went public in 1964, and was listed on the
12 New York Stock Exchange in 1969. Since then, I have listed
13 four additional securities on the New York Stock Exchange.
14 The United Shareholders Association is a non-profit advocacy
15 group dedicated to advancing the rights of America's
16 47 million shareholders.

17 And as a head of a large public company and an
18 advocate of shareholders rights, I am here without conflict.
19 I'm here to ask the Commission to reject the New York Stock
20 Exchange's request to drop its one share, one vote standard.
21 And even more important, I want to encourage you to implement
22 an across the board one share, one vote standard that will
23 apply to all exchanges.

24 When Mesa went public in 1964, we did not consider
25 the possibility of adopting anything other than one share,

1 one vote. It wasn't even discussed. When Mesa Limited
2 Partnership issued 90 million new preferred units, this
3 year, 1986, in an acquisition, all of the units received
4 one share, one vote status. We did that even though the
5 new units had different financial characteristics and more
6 than double the number of MLP units outstanding.

7 In other words, we support one share, one vote not
8 only in principle, but also in practice.

9 The issue before the Commission today has profound
10 consequences for American shareholders. Approval of the
11 New York Stock Exchange's request would enable corporate
12 executives as a matter of public policy to secure absolute
13 autonomy from the owners of the companies they manage.
14 Those that portray this issue strictly as a matter of
15 contract law, disregard the vital role of equal voting rights
16 incorporate in America's system of checks and balances.

17 There's nobody more free-market oriented than I
18 am. Taking to its extreme, we could justify dropping almost
19 any standard with the shareholder democracy argument, but
20 it would be just as absurd as saying we should drop all of
21 our criminal laws to preserve individual liberty.

22 Some standards are fundamental to the orderly working
23 of the system. One share, one vote is one of those standards.
24 It is no coincidence that the one share, one vote issue
25 has arisen at this point in time. Ever since World War II,

1 the gap between ownership and control in corporate America
2 has grown wider. And for the most part, shareholders stood
3 idly by and watched management take total control of their
4 assets.

5 I believe stockholders own companies and managements
6 are employees. I'm an employee of Mesa Petroleum. If I
7 wanted to be an owner, I shouldn't have gone public in
8 1964. Finally, in the last year or so, shareholders began
9 to challenge management autonomy, exert pressure to improve
10 performance.

11 This growing shareholder movement is increasing
12 corporate competitiveness and providing significant benefits
13 to the American economy. If the Commission sanctions
14 unequal voting rights, the separation of ownership and control
15 will become complete. The potential cost of unequal voting
16 rights is enormous. The total value of the assets controlled
17 by the more than 6,000 publicly owned corporations in America
18 easily exceeds \$10 trillion, and this represents the majority
19 of the nation's wealth.

20 If those that control this wealth are allowed to
21 insulate themselves from those who own it, the cost to share-
22 holders and the economy will be measured in hundreds of
23 billions of dollars. It's clear that managers, not share-
24 holders, want unequal voting rights. There's absolutely
25 no demand by shareholders for stock with inferior voting

1 rights. All unequal voting rights plans adopted to date
2 have been proposed by incumbent managers, not by shareholders.

3 One of the worst aspects of unequal voting rights
4 is that they disenfranchise shareholders for all time. Once
5 in place, dual classes of common stock make it virtually
6 impossible for shareholders to exert pressure on management
7 no matter how poor the performance. The New York Stock
8 Exchange request is based on its belief that it will lose
9 business to other exchanges unless it abandons one share,
10 one vote.

11 As a result of the Exchange proposal, the American
12 Stock Exchange has voted to remove its voting standard
13 entirely to remain competitive. Clearly, the so-called
14 race to the bottom is on. If the Commission approves the
15 Exchange's proposal, it will begin an endless regression
16 towards standardless securities markets. The way to create
17 a level playing field for all exchanges is to apply a uniform
18 standard across the board.

19 It appears that both the New York and American
20 Exchanges are willing to maintain one share, one vote, as
21 long as it applies to all securities markets. The future
22 of our capital markets and America's economy will depend on
23 your leadership on this issue.

24 In conclusion as a veteran who has fought in
25 the trenches of our free market system for over 30 years,

1 and as an advocate of the rights of all shareholders, I
2 urge the Commission to take the high road and implement a
3 universal one share, one vote standard.

4 Thank you.

5 CHAIRMAN SHAD: Thank you, Mr. Pickens.

6 And how the National Association of Over the Counter
7 Companies, represented by the Chairman Elect, Raymond A.
8 Mueller.

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1 STATEMENT OF RAYMOND A. MUELLER, CHAIRMAN-ELECT, NATIONAL
2 ASSOCIATION OF OVER THE COUNTER COMPANIES

3 MR. MUELLER: Thank you very much, Mr. Chairman,
4 Commissioners, ladies and gentlemen.

5 My name is Ray Mueller, chairman elect, chairman
6 of Conair Incorporated, a commuter airline operating out
7 of Cincinnati, Ohio. I'm serving this year as Chairman
8 Elect of the National Association of Over the Counter Companies.

9 National Association of Over the Counter membership
10 is made up of approximately 550 companies whose securities
11 are traded in the over-the-counter markets. About 95 percent
12 of those companies are traded in NASDAQ, and nearly 80 percent
13 in the National Market System. We therefore believe our
14 membership is fairly representative of the universe of
15 NASDAQ companies. And represents the mainstream of medium-
16 sized companies which lead businesses in this country in
17 job growth, production, and service innovation.

18 Under existing NASD regulations, no restrictions
19 are placed on the voting rights of the securities of these
20 companies. And NAOTC is strongly opposed to restrictions
21 which would impair the ability of a company to raise capital.
22 It is essential to a company's financial wellbeing that it
23 be able to have a flexibility to customize new issues to meet
24 its objectives and fit the needs of various investment markets.

25 There are numerous legitimate business reasons for

1 a company to have dual classes of common stock.

2 For example, firms controlled by founding families
3 or entrepreneurs may wish to retain control, and still have
4 the flexibility to employ equity financing when needed.
5 Often investors wish to participate with founders or
6 entrepreneurs in the financial growth of their business,
7 unrelated to their respective voting authority. Many
8 investors want higher current income, especially in light
9 of the new tax act.

10 While owners and entrepreneurs are willing to
11 take less current income in order to maintain voting power,
12 and thereby direct the long term growth of the company.
13 In addition to providing a corporation with capital for
14 continued growth, securities with less than equal voting
15 rights, will also meet the objectives of many investors.

16 The investors should be allowed to select the type
17 of security he wants to purchase, rather than having the
18 choice made for him by regulatory restrictions. Today's
19 investors have adequate sophistication and access to the
20 information that they need to be able to make an intelligent
21 decision whether or not to purchase shares with different
22 voting rights.

23 Of course, it is imperative and NAOTC strongly
24 believes that full disclosure of any voting differences be
25 made by the issuing corporation. The securities marketplace

1 in the United States, should be allowed to operate with
2 minimal governmental interference. While regulation of
3 those who trade securities is essential for the benefit
4 of the public as well as the company, the right to determine
5 how best to govern a company should be left to its management,
6 not to regulation or law.

7 NAOTC believes that it is the responsibility of
8 Congress and the regulators to assure full disclosure of
9 the terms and conditions of any securities offered to the
10 public, but not to determine the voting rights of the
11 company's securities.

12 In addition, we question whether an exchange in
13 general or the NASD in particular should be able to dictate
14 the voting rights which a company may attach to a given
15 classification of stock. Management with advice and consent
16 of the board of directors, should be permitted to determine
17 what types of securities and voting rights best satisfy a
18 company's need for capital. The determination as to the
19 types of security a company issues and the voting rights
20 associated with those securities are best controlled by
21 the marketplace. If there is no market for shares with
22 disparate voting rights, then they will quickly cease to
23 exist.

24 We believe that there are potential costs associated
25 with the prohibition of dual class common stock. According

1 to a recent study on dual class of common stock by Dr. Dan
2 Fitzgerald, it is unlikely that prohibiting dual class common
3 stock would result in a reduction in the extent of public
4 ownership of corporations. Owners of family held businesses
5 and other entrepreneurs may be excluded from the capital
6 markets if their ability to retain control over the company
7 is threatened by the elimination of stock with other than
8 full voting rights.

9 This would have the effect of increasing the cost
10 of capital for those firms, thereby reducing market efficiency
11 and slowing the growth of the fastest growing business market
12 in terms of job creation and product innovation in the United
13 States.

14 In conclusion, let me say that NAOTC believes that
15 the existence of dual classes of common stock serves an
16 important role in the American free enterprise system and
17 urges that no action be taken which would restrict the right
18 of the company to seek the financing it needs through capital
19 markets.

20 Thank you.

21 CHAIRMAN SHAD: Thank you, Mr. Mueller.

22 Now, let's go in reverse order at this point,
23 starting with Commissioner Fleischman.

24 COMMISSIONER FLEISCHMAN: Thank you, Mr. Chairman.

25 Mr. Sommer, I am particularly challenged by your

1 submission on the intentions of the Congress in bestowing
2 powers on this Commission.

3 In testimony heard and presented yesterday, there
4 were arguments to the contrary from Professor Neuhauser,
5 Professor Seligman, and former Commissioner Karmel.
6 With respect to the original 1934 Act, a very strong argument
7 was presented to the Commission out of the Committee reports
8 in '34, that fair corporate suffrage is an important right
9 which should attach to every equity security bought on a
10 public exchange. Managements of properties owned by the
11 investing public should not be permitted to perpetuate them-
12 selves by the misuse of corporate proxies.

13 Out of the '75 Amendments Act, the provisions of
14 Section 11A not only empowering but directing the Commission
15 to designate the securities of classes qualified for trading
16 in the national market system.

17 Could you respond to those arguments presented
18 yesterday in furtherance of your assertions on the limitations
19 of the Commission's power in the corporate governance area?

20 MR. SOMMER: Well, in regard to the first statement,
21 Commissioner Fleischman, I think that the 1934, the text that
22 attended the 1934 enactment obviously was in the context
23 of the enactment of Section 14A, which gave the Commission
24 power over the regulation of proxies. I think it was clearly
25 intended to relate to that particular grant of power.

1 I don't think it was intended or in the context --
2 it could not have been in the context as a matter of fact,
3 because of the temporal difference, of the amendments that
4 were adopted in 1975. In 1975, the statements that you have
5 read do not in my estimation provide compelling evidence
6 that Congress was intending that the Commission should exercise
7 its power over the rules of exchanges to accomplish those
8 purposes.

9 The Congress established in 1975 a much broader
10 mandate to the Commission with regard to the manner in which
11 it would deal with the rules of exchanges. Those amendments,
12 as I said more fully in the statement I submitted, grew
13 out of a number of -- I wouldn't call them scandals, but
14 certainly misconduct on the part of the exchanges with regard
15 to how they managed their affairs and managed the affairs
16 of their members or governed the affairs of their members.

17 With regard to the National Market System, it seems
18 to me again that the purpose there was to provide a market
19 in which there would be competitive opportunities with regard
20 to securities and I think that largely those exist. I don't
21 think that that language was in the context of or intended
22 to apply to competition with regard to listing standards.

23 COMMISSIONER FLEISCHMAN: Now, before you leave
24 the 14A subject, just to give you an opportunity to expand
25 just a little bit further, the temporal context as you say

1 was '34 after the one share, one vote rule by some eight
2 years, against the background of the one share, one vote
3 assumption by the Congress.

4 Is that not so?

5 MR. SOMMERS: Except that at that time there were
6 I think 20 or 25 exchanges in this country, and the New
7 York Stock Exchange was the only one that had that provision.
8 And as a matter of fact, that provision was less stringent
9 than the one that presently exists.

10 COMMISSIONER FLEISCHMAN: Thank you, Mr. Chairman.

11 CHAIRMAN SHAD: Thank you, Commissioner Fleischman.
12 Commissioner Grundfest?

13 COMMISSIONER GRUNDFEST: Thank you, Chairman.

14 We've heard a lot about averages and statistics over the last
15 couple of days, and I think it helps sometimes to look at
16 individual case studies. And what I'd like to do with the
17 assistance of Mr. Sommer, is go through one case study of
18 a corporate recapitalization and examine some of the potential
19 consequences and dangers, if any, involved in that transaction.

20 The case study that I'd like to focus on is that
21 of Figgie International Corporation. Am I right, Mr. Sommer,
22 that you were counsel to that corporation and were somewhat
23 involved in that recapitalization?

24 MR. SOMMER: That's correct. That's right.

25 COMMISSIONER GRUNDFEST: The insiders in that case,

1 the family, I'm informed, owned approximately 7.3 percent of
2 the corporation shares?

3 MR. SOMMER: I think that's approximately correct,
4 yes.

5 COMMISSIONER GRUNDFEST: And by my rough calculation
6 that would be less than half of the amount, for example, that
7 Carl Icahn owned in TWA during the course of his takeover?

8 MR. SOMMER: I don't know the amount that he owned.

9 COMMISSIONER GRUNDFEST: The plan that was involved
10 as I take it, had three components. The first component
11 of the plan would be to reduce the voting power of any
12 shareholder with more than 10 percent of the shares, so if
13 you had more than 10 percent of the shares, you'd only
14 have 100th of a vote for any share above 10 percent.

15 Is that correct?

16 MR. SOMMER: That was correct. That was explicitly
17 provided for in a Delaware Supreme Court case.

18 COMMISSIONER GRUNDFEST: I understand. But this
19 was part of the recapitalization plan.

20 The maximum vote that anybody could cast regardless
21 of the number of shares they owned would be capped at 15
22 percent?

23 MR. SOMMER: That's correct.

24 COMMISSIONER GRUNDFEST: And a new class of common
25 was created. Each share of this new class would have 1/20th

1 of a vote, but a preferential dividend.

2 MR. SOMMER: That's correct.

3 COMMISSIONER GRUNDFEST: What was the preferential
4 dividend?

5 MR. SOMMER: Commissioner Grundfest, I think it
6 was originally 8 cents a share, and subsequently raised to
7 I believe 12 cents, but I'm not certain of those figures.
8 None of that stock was issued, I might add, until about
9 a year ago. At which time it was issued initially as a
10 dividend.

11 COMMISSIONER GRUNDFEST: Right. But this was
12 lesser voting shares, 1/20th of a vote per share?

13 MR. SOMMER: That's correct.

14 COMMISSIONER GRUNDFEST: Plus there would be a limit
15 on the total number of votes that anybody could ever cast,
16 plus reduced voting for anything above ten percent, --

17 MR. SOMMER: Yes.

18 COMMISSIONER GRUNDFEST: -- with the family holding
19 7.3 percent.

20 MR. SOMMER: That's right.

21 COMMISSIONER GRUNDFEST: Now, before this plan,
22 this corporation already had in place an 80 percent super-
23 majority and a staggered board, is that correct?

24 MR. SOMMER: That's right.

25 COMMISSIONER GRUNDFEST: So in a sense, they had

1 certain contraceptives and they were adding a chastity belt,
2 to the extent they were concerned about the possibility
3 of a takeover.

4 (Laughter)

5 MR. SOMMER: You might describe it that way, yes.

6 (Laughter)

7 COMMISSIONER GRUNDFEST: The stock price did a
8 very interesting thing in this one particular case. The
9 public announcement of this transaction which occurred on
10 April 25, 1983, was accompanied by a decline of roughly
11 3-3/8ths dollars per share, that's 15 percent of the value
12 of the company shares on that date. And on that day, that
13 company's shares were the largest loser on the New York
14 Stock Exchange.

15 MR. SOMMER: Did you note the price of it a week
16 later, Commissioner Grundfest?

17 COMMISSIONER GRUNDFEST: No, I didn't. What was
18 the price a week later.

19 MR. SOMMER: Within a week, I believe, I'm not sure
20 of the exact time, the stock had recovered its value entirely.
21 The drop in the price of the stock was very short-lived.

22 COMMISSIONER GRUNDFEST: Any explanation for why
23 there would have been a drop in the price at all?

24 MR. SOMMER: I have beliefs that I would rather
25 not express in public.

1 COMMISSIONER GRUNDFEST: I can appreciate that
2 given current events.

3 MR. SOMMER: It had nothing to do with Iran.

4 COMMISSIONER GRUNDFEST: And I appreciate you
5 haven't so far taken the Fifth.

6 Mr. Troy?

7 MR. TROY: Commissioner Grundfest, while we're
8 on this subject of Figgie, I should add that quite by
9 coincidence, I used to be a preferred stockholder of Figgie
10 I received a very stable dividend. It was convertible. My
11 recollection is not only did I get my stable dividend, but
12 when I converted into the common and sold out, I more than
13 doubled my money.

14 COMMISSIONER GRUNDFEST: I'm sure you appreciate
15 that.

16 MR. SOMMER: Why didn't you stay --

17 MR. TROY: Hell, I'd be better off now.

18 COMMISSIONER GRUNDFEST: The question that I'd
19 like to leave you with is why did the management owning
20 7.3 percent of this corporation, having an 80 percent
21 supermajority, so they in effect almost had a veto over
22 the transaction already, twenty percent would be a killer
23 in any kind of transaction, why did this management determine
24 to proceed with this type of a recapitalization that had
25 negative stock price effect, albeit transitory, when they

1 had other alternatives available. If they wanted control,
2 they could have done an LBO.

3 If they wanted to increase their percentage, they
4 could have bought the shares with the associated rights
5 from the other stockholders. What was the benefit to this
6 transaction in this case?

7 MR. SOMMER: The benefit of this transaction was
8 to assure that there would be continuity of control. The
9 management had had for many years a very well developed
10 and a very well conceived program of diversification and
11 development of the divisions that they acquired during
12 the diversification phase of its business. They had grave
13 concern because of the tendencies that seem to exist in
14 America today, for people bent upon takeovers to take over
15 companies, break them up without any concern about the
16 planning that had gone into it, the future of the businesses
17 individually, they had great concern that that fate might
18 be in store for them unless they took further measures to
19 assure that control was not wrested from them.

20 Now, we could debate endlessly as to whether this
21 was a case of suspenders and pants and all that, maybe it
22 was an excess of caution, but it was a course that the
23 management regarded as prudent. I would not suggest that
24 stock price is the only measure of the prudence of the course,
25 but I would point out that the stock is selling today at

1 230 percent more than it was at the time the actions you
2 describe were taken.

3 COMMISSIONER GRUNDFEST: But no reason for any
4 decision not to pursue any type of recapitalization
5 in which dollars would change hands?

6 MR. SOMMERS: Well, we believed this was the most
7 feasible way to do it. The Company did not want to do an
8 LBO, because that would have burdened the Company with
9 excessive financing. The Chief Executive Officer of that
10 company happens to believe that it is a very imprudent course
11 to excessively burden companies with debt and he did not
12 want to follow that course.

13 COMMISSIONER GRUNDFEST: I think I've used up my
14 time.

15 MR. TROY: Commissioner Grundfest, in response
16 to your question, I'd like to make one additional observation.
17 And that is that problems of this nature might be more
18 fruitfully visited under the rubric of going private rules,
19 i.e., rules that govern the tendency of a company to become
20 less public and more private than being reviewed under the
21 aegis of a one share, one vote rule of a stock exchange.

22 CHAIRMAN SHAD: Thank you, Commissioner Grundfest
23 Commissioner Peters?

24 COMMISSIONER PETERS: Well, lest we appear to
25 be picking on former Commissioner Sommer, let me address

1 MR. SOMMER: It's not the first time I've been
2 picked on, Commissioner.

3 COMMISSIONER PETERS: I know Al. Let me address
4 my question to Mr. Pickens and Mr. Mueller who seem to
5 represent the prototypical polls of opinion on this
6 particular issue; one arguing for maintenance of the one
7 share, one vote, and therefore denial of the New York Stock
8 Exchange proposal; and the other arguing, rather eloquently,
9 I thought, for the maintenance of flexibility for certain
10 companies to have in arranging their capital structure.

11 And I wonder if there is a point between the
12 two of you at which you could have a meeting of the minds,
13 and it occurs to me as it has for the past day and a half
14 listening to other panelists that most of those who had
15 differing viewpoints were able to agree that what distressed
16 them most about the New York Stock Exchange proposal was that
17 it would result in a disenfranchisement of shareholders.

18 So I wonder if one focused on that issue, could
19 you agree that should the Commission decide to grant the
20 New York Stock Exchange request, what conditions could be
21 put on it to ensure that shareholders would not be damaged
22 from the disenfranchisement aspect of the proposal.

23 Should we for example require a company to compensate
24 shareholders for their vote that they are giving up, or at
25 the very minimum require a company to compensate those minority

1 shareholders who vote against the relinquishment of their
2 vote and I'm assuming of course that one could assign a value
3 to that particular property right.

4 Mr. Mueller?

5 MR. MUELLER: I think that really market conditions
6 would dictate values or restrictions or considerations for
7 additional types of stock, and I think that it should rest
8 right there. In terms of other kinds of things that I would
9 suggest to modify our position, I don't know that unless,
10 I don't know that we could come up specifically with something
11 like that at this moment.

12 COMMISSIONER PETERS: Well, what about assuming
13 that less than the vote for turning over your voting power
14 to management is less than unanimous, do you not, are you
15 not at all concerned about the loss of the property rights
16 to that minority who voted against changing the capital
17 structure.

18 MR. MUELLER: I think we are concerned with that.

19 COMMISSIONER PETERS: But you wouldn't compensate
20 them for it?

21 MR. MUELLER: I don't think so. I think we'd prefer
22 I think to allow market conditions to take care of that.

23 COMMISSIONER PETERS: Mr. Pickens?

24 MR. PICKENS: Well, I'm disturbed that a stockholder
25 group today could disenfranchise stockholders of the future.

1 So, and I think that the proxy process needs to be looked
 2 at also, and I think this came up yesterday in I can't recall
 3 whether it was in John Phelan's testimony, and I believe
 4 a question from Commissioner Cox, I believe that exchange,
 5 something took place as to the proxy process and disenfran-
 6 chising future stockholders.

7 I don't see why we want to complicate the situation.
 8 I would not pay anybody for their vote, anymore than I would
 9 pay somebody for the vote if I was running for United States
 10 Senate. That won't work there, either. So I believe, you
 11 know, and if you look back over any comments that Mr. Mueller
 12 had that said that you had to have different classes of
 13 stock to raise money. I don't know who all's in this room,
 14 but I'll put my record against anybody in the room as far
 15 as having to raise money.

16 I started off with \$2500 in Mesa Petroleum in 1956,
 17 and at one point, we raised \$3.5 billion, and so I've never
 18 had any problem raising money, because I had -- and so that
 19 as far as I'm concerned, that's a myth, for anybody to tell
 20 me they have to have different classes of stock to raise money.

21 COMMISSIONER PETERS: But would it be that we all
 22 had your talent, Mr. Pickens.

23 MR. PICKENS: Commissioner Peters, you're kind to
 24 say that, but there are others that I can give you names --

25 COMMISSIONER PETERS: That's envy, not kindness, sir.