THE BUSINESS LAWYER

Section of Business Law
American Bar Association

AUGUST 2008
Volume 63, Number 4

AMERICAN BAR ASSOCIATION
Business Law Section

AMERICAN BAR ASSOCIATION
Defending Liberty
Pursuing Justice

Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward

*By Leo E. Strine, Jr.**

In this lecture, I address a subject directly relevant to the topic of this conference: the status of two corporate governance initiatives being advanced by American institutional investors to the U.S. Securities and Exchange Commission ("SEC" or "Commission") and Congress. Those initiatives involve two buzzwords, "proxy access" and "say on pay." For all of the complexity that lies beneath these buzzwords, both initiatives have as their premise the idea of giving stockholders—a term that itself is far less descriptive than it has ever been[1]—greater influence over corporate affairs.

I will address these proposals for action by our national government from the perspective of a corporate law federalist, one who believes that the internal affairs of American corporations should continue to be regulated primarily by state law, with the national or "federal" government playing a vitally important, complementary role in ensuring that companies that issue publicly traded securities provide investors with reliable information and conduct their financial affairs in accordance with accepted accounting standards.[2] In fact, I believe that one key reason

* Vice Chancellor, Delaware Court of Chancery; Austin Wakeman Scott Lecturer in Law and Senior Fellow of the Corporate Governance Program, Harvard Law School; Adjunct Professor of Law, University of Pennsylvania Law School and Vanderbilt University School of Law; Henry Crown Fellow, Aspen Institute. This lecture was delivered in various forms in spring 2008 at the following forums: Programme on Shareholder Rights, Shareholder Voting and Corporate Performance, sponsored by the University of Amsterdam Center for Law and Economics, the Department of Ricerche aziendali: Business, Law and Communication of the University of Cagliari, and the Law and Business Program of the Vanderbilt University School of Law, on March 21, 2008; the Delaware General Corporation Law for the 21st Century Symposium, sponsored by the Widener University School of Law, on May 5, 2008; and the Directors' College, sponsored by the Terry College of Business of the University of Georgia and the National Association of Corporate Directors, on June 5, 2008. The author is grateful to Jeffrey Gorris, Thomas O'Brien, and Elane Boulden for their invaluable assistance and to Larry Hamermesh and Randall Thomas for helpful comments.

1. John Bogle, the person responsible for much of the success of the Vanguard mutual fund complex, an important champion of index investing, and a respected commentator on matters of corporate governance, estimates that approximately 74 percent of the stock of U.S. corporations is now held by financial intermediaries. John C. Bogle, *Reflections on "Toward Common Sense and Common Ground?,"* 33 J. Corp. L. 31, 31 (2007).

2. In earlier work with my colleague William B. Chandler III, I dwelled at greater length on the federal-state relationship in American corporate and securities law. *See* William B. Chandler III &

why the American model of corporate governance has served investors so well is the synergies that arise from the combination of a strong regulatory structure governing public disclosures and financial integrity, and a more nimble and enabling state law approach to the relations between corporate managers and stockholders.[3] I, for one, admit that the disclosure-forcing effect of federal law surfaces issues that inspire and strengthen the ability of stockholders to exercise effectively their state law rights, whether to bring a fight for control of the board or to seek redress in equity for publicly disclosed conduct suggestive of fiduciary impropriety.

In my view, the traditional federal-state law divide has also facilitated a more contractual approach to corporate law than might have otherwise existed. Because of that divide, Delaware emerged with a corporate law focusing on the relations between stockholders and managers, a corporate law that might be fairly characterized as a specialized contract law addressing the internal affairs of corporations.[4] And because there is free choice in the market for incorporation, corporations with operations all over our nation (and indeed the world) may have their internal affairs governed by Delaware corporate law. As a small state, Delaware is unlikely to be the corporate headquarters or principal place of business for corporations it charters. Delaware therefore lacks any incentive to freight its corporate law with concerns about other important policy issues. Aside from an irreducible requirement that corporations conduct only lawful business by lawful means, the Delaware approach to corporate law focuses intently on the relations between two corporate constituencies: managers and stockholders. This is not to say that Delaware, like other states, does not have laws that protect labor, the environment, and other important social interests affected by corporate conduct. We do, but those laws focus only on corporate operations within our borders and apply regardless of where a firm is chartered. Those regulatory statutes are not part of our company law, as Europeans might call it.

That a majority of American states have constituency statutes[5] and Delaware does not is no coincidence. For corporations chartered in states other than Delaware, they are overwhelmingly likely to have chartered their affairs in the state of their headquarters.[6]

Therefore, to other states, the protection of stockholders owning stock in their domestically chartered corporations—most of whom live somewhere else—is less

---

Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. Pa. L. Rev. 953 (2003) [hereinafter "Chandler & Strine, *Preliminary Reflections*"].

3. *See id.* at 1005.

4. In two earlier works, I commented more generally on the nature of Delaware's approach to corporate law. *See* Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673 (2005); Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 Cornell L. Rev. 1257 (2001).

5. *See, e.g.*, Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. Davis L. Rev. 407, 463 (2006) (noting that twenty-nine states have constituency statutes in effect).

6. *See* Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. Pa. L. Rev. 1795, 1817 (2002).

important than other interests—such as the concerns of communities where plants are operated—affected by those corporations. By contrast, in Delaware, corporate law is determined by the balance of interests between investors and corporate managers, a balance that results in a more investor-focused approach.

By taking a hands-off approach to corporate law, Congress has facilitated a contract-based approach to the governance of corporations that might not have otherwise existed. The broad support for constituency statutes and potent antitakeover statutes in states as diverse as Mississippi[7] and Massachusetts[8] illustrates the multi-constituency pressures Congress would face if it took on the task of enacting a federal law governing the internal affairs of corporations. By leaving that task to the states, Congress has implicitly encouraged advocates for tighter labor, workplace safety, and environmental standards to channel their energy into the pursuit of laws that codify those standards in statutes governing all corporations and has reduced pressure on itself to come up with a single national answer to that longstanding question, what is the purpose of the for-profit corporation in American society?

This is not to say that Congress has been immune from pressures to impose regulations on corporations for the benefit of investors. It has faced such pressures, and in some important instances, responded with legislation. Indeed, the capacious constitutional authority of Congress over interstate commerce is something that Delaware and other state corporate lawmakers have constantly had to take into account, as Professor Roe's scholarship has demonstrated.[9] When state law appeared to substantial elements of the investment community to be insufficient to protect investor interests, calls for congressional action arose, calls that influenced state lawmakers to reexamine the balance of interests between managers and stockholders. The proxy access and "say on pay" initiatives are only the most recent examples of this dynamic and come close on the heels of the Sarbanes-Oxley Act,[10] crisis-inspired legislation that made clear that if investor outrage was widespread enough, even a Republican-controlled Congress was prepared to enact federal laws affecting corporate governance without anguish about intruding into territory traditionally reserved to state law.

That members of Congress have continued to have an interest in corporate governance since the enactment of Sarbanes-Oxley should not be surprising. As things like bank accounts and defined benefit pension plans become quaint concepts fit for discussion on a financial version of the Antiques Roadshow, most Americans have become what I call forced capitalists, people who earn most of their wealth through their labor, but who are required to provide for their retirement by giving

7. Miss. Code Ann. § 79-4-8.30(f) (West 2001) (constituency statute); Miss. Code Ann. §§ 79-27-1 to 79-27-11 (West 2001) (control share acquisition statute).

8. Mass. Gen. Laws Ann. ch. 156D, § 8.30 (West 2005) (constituency statute); Mass. Gen. Laws Ann. ch. 156B, § 50A (West 2005) (staggered boards as a default provision).

9. *See, e.g.*, Mark J. Roe, *Delaware's Politics*, 118 Harv. L. Rev. 2491 (2005); Mark J. Roe, *Delaware's Competition*, 117 Harv. L. Rev. 588 (2003).

10. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (Supp. V 2005)).

substantial portions of their income to financial intermediaries for investment in the stock market.[11] As these forced capitalists face the insecurities and instability arising out of our nation's struggle to remain competitive in the face of globalized product and capital markets—think downsizings, more frequent job changes, and benefit cuts—it is unsurprising that they would give voice to concerns about CEO compensation, stock options fraud, and other hot button issues. Not only do these forced capitalists perceive a growing disparity between the interests of top managers and Wall Street and the interests of middle managers and other workers, their 401(k)[12] statements now tangibly reflect the profound effect negative market developments have on their net wealth. The investor class is now widespread and will only grow larger as the 401(k) money machine continues to churn.

With the rise of this investor class has come the solidification and prevalence of an important variation on the Berle and Means separation of ownership and control concept, which is what I call the separation of ownership from ownership.[13] Although a huge amount of the money in the markets is equitably invested on behalf of forced capitalists, the forced capitalists do not control how the shares bought on their behalf are traded or voted. Those decisions are instead made by financial intermediaries, who are subject to a host of potentially conflicting incentives.[14] The political science of how these intermediaries wield power remains far too little studied by corporate law academics, who, despite the admirable work of the participants in this conference, are still predominantly focused on the agency problems of those who manage operating companies. In very crude terms, however, this basic problem emerges.[15] Most individual investors are invested for the long term to accomplish two key objectives, having the funds necessary to pay for their children's college education and to provide for themselves in retirement. These investors have little interest in short-term gimmicks, quarterly earnings blips, financial plays, or corporate governance turmoil that does not create durable value for diversified investors.

The most rational of these investors give their money to mutual fund complexes that run index funds. That is sensible but creates its own problem. These

11. *See* Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. Corp. L. 1, 4 (2007) [hereinafter "Strine, *Toward Common Sense*"].

12. Section 401(k) is the provision in the U.S. Internal Revenue Code that provides favorable tax treatment for funds invested for retirement purposes. I.R.C. § 401(k) (West 2002 & Supp. 2008). As a general matter, American workers must invest their 401(k) funds in a choice of mutual funds selected by their employer. Workers generally cannot invest 401(k) funds in the stock of particular companies.

13. *See* Strine, *Toward Common Sense, supra* note 11, at 4, 6; Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 Harv. L. Rev. 1759, 1765 (2006) [hereinafter "Strine, *True Corporate Republic*"].

14. For a rich discussion of the conflicts of interest among various types of stockholders, see Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. Rev. 561 (2006).

15. For a provocative analysis that recognizes this problem, see Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights* 5 (Oct. 2007), http://ssrn.com/abstract=1066831 ("[W]e should shift our focus from empowerment of *shareholders* to the empowerment of the underlying equity *investors*." (emphasis in original)).

complexes wish to keep expenses as low as possible;[16] they are therefore the most inert of investors in the corporate governance debate, leaving the agenda-setting to others. These others often consist of investors with very short-term perspectives, such as hedge funds,[17] public pension funds, and other institutions that have built up staffs with a vested interest in promoting corporate governance changes, because the very continuation of strife justifies the existence of those staffs. This is not to say that these institutions do not genuinely believe that the ideas they advance are good for investors; it is only to acknowledge that there are now a large number of well-compensated people whose livelihoods are in large part dependent on corporate governance tumult. For these and many other reasons, one must acknowledge that there is reason to be skeptical that the corporate governance agenda advanced by the institutional investor community is one that advances well the interests of their clients, ordinary Americans who invest for the long term.[18] Indeed, there are forceful

16. Because index funds all target a return tracking their market index, they compete almost exclusively on cost. *See, e.g.*, Fidelity Investments, Advertisement, N.Y. Times, Apr. 27, 2008, at BU3 (full-page advertisement with this heading: "A better choice for indexing? Attention Vanguard Index Fund Owners: Fidelity has index funds with lower expenses. (Up to 58 percent lower)."). Moreover, index funds are not managed by investment experts focused on the quality of the portfolio companies but by persons expert in undertaking trading strategies that will allow the funds to produce results that track the market index as closely as possible. *See, e.g.*, Fidelity Investments, Prospectus, Spartan U.S. Equity Index Fund 7 (April 29, 2008) ("Statistical sampling techniques attempt to match the investment characteristics of the index and the fund by taking into account such factors as capitalization, industry exposures, dividend yield, price/earnings (P/E) ratio, price/book (P/B) ratio, and earnings growth."). That endgame has nothing to do with reading annual reports, analyst commentary, and considering whether portfolio corporations have strategies to make money from fundamentally sound economic transactions and disclose their affairs in a clear and understandable manner. *See* Robert C. Illig, *What Hedge Funds Can Teach Corporate America: A Roadmap for Achieving Institutional Investor Oversight*, 57 Am. U. L. Rev. 225, 266 (2007) ("Because they seek only to mirror market performance, [index] funds cannot be expected to engage in oversight activities or other activist trading strategies."); *id.* at 334 ("Public equity fund managers remain passive in their investment philosophy because they are paid not to monitor but to cut costs."). *See also* John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 Colum. L. Rev. 1277, 1352–53 (1991) (Coffee notes that "indexed investors are disinclined to be active monitors" because of their emphasis on cutting costs, but suggests that it would be rational for them to become active monitors because, given their long-term focus and large stakes in particular companies and "economies of scale [that they have] in reaching [economy-wide] voting decisions," they could justify expending substantial costs to improve corporate governance as that would result in better long-term financial performance. He reasons that "[i]f monitoring is . . . rational for the institution but does not occur, the most logical diagnosis is that an agency problem exists.").

17. *See* Robin Greenwood & Michael Schor, *Investor Activism and Takeovers* 2–9 (July 2007), http://ssrn.com/abstract=1003792 (arguing that hedge funds have been effective and primarily interested in pushing relatively small companies into a sale (even at less than a full price) for the sake of obtaining a one-time profit, and that hedge funds have comparatively little incentive or proven capacity to cause corporations to adopt corporate governance or business strategy changes that will produce better long-term results).

18. In a recent essay, I mused about some ideas that might ensure better alignment between the interest of end-user investors and financial intermediaries:

> [I]t might be useful to control this form of agency as well and to ensure that institutional investors' conduct is better aligned with the best interests of long-term investors. Given the mountains of 401(k) money that American workers, as a practical matter, will entrust to these firms for generations, the utility of considering measures to guarantee greater alignment seems self-evident to anyone who has listened to corporate law scholars beat the agency cost drum. Avenues for exploration could include requirements for institutional investors (in particular, index

arguments that support doing more to constrain the ability of institutional investors to exploit the separation of ownership from ownership for their own ends. But, as things stand, the institutional investor community has clout that is increasing daily, and it will continue to pursue corporate governance initiatives, all the while portraying itself as the champion of the ordinary American investor.

That reality has to influence how a corporate law federalist considers the proxy access and "say on pay" discussions in Washington. Demands for greater "stockholder voice" are unlikely to subside. Nor should such demands be seen as unprecedented or shocking by corporate lawyers or managers. American corporate law has traditionally used the stockholder franchise as a way to constrain managers from abusing their authority and to cleanse conflict transactions.[19] By this means, the pressure for prohibitory regulation is dampened, as disinterested stockholders are given the chance to protect themselves. Likewise, given the enormous discretion entrusted to corporate directors by state corporate laws, it should hardly be surprising that institutional investors would be interested in means by which the right to elect a new board might be invigorated.

To the federalist, the more legitimate concern ought to be where these demands for voice are made. Even then, one cannot press the point too much. No substantial argument can be made that Congress does not have the constitutional authority to enact a preemptive corporate law governing publicly traded corporations operating in interstate commerce. What is a serious policy argument is that Congress should not selectively intervene in the governance of the internal affairs of corporations when it has chosen to permit state law to do the hard work of creating a comprehensive approach to addressing that subject. Even then, the federalist must

---

> funds) to: focus on indicators of possible fraud or firm failure in making investment and voting decisions, align the compensation incentives of their management personnel with the investment horizons of long-term investors, and vote on mergers in a manner that takes into account whether the fund owns shares of both parties to the merger. In tandem with this could be the consideration of requirements prohibiting mutual and pension funds from utilizing proxy voting recommendations services unless those services publicly disclose: (1) the revenues they receive from public companies and institutional investors, and the nature of the work that generates those revenues; and (2) the process used by them to develop their corporate governance ratings for corporations and directors, including the specific criteria and weighting they use to calculate the specific ratings given to corporations and directors.
>
> . . . .
>
> . . . [A]dditional . . . strategy might well be considered. That would involve ideas to raise revenue by addressing short-term trading strategies. These could involve higher capital gains taxes on stock held for less than two years or a very small percentage tax on securities trades. By these means, the budget and social investment chasm that threatens our long-term economic vitality could be narrowed in a livable way that also has the utility of providing a comparative advantage to institutional investors who act like investors, rather than gamblers.

Strine, *Toward Common Sense, supra* note 11, at 17–18.

19. *See, e.g.*, DEL. CODE ANN. tit. 8, § 144 (2001) (insulating by stockholder vote a conflict transaction from being voidable solely because it was a conflict transaction); *id.* § 251 (2001 & Supp. 2006 & Supp. 2008) (requiring stockholder approval of mergers); *id.* § 271 (2001 & Supp. 2006) (requiring stockholders to approve a sale of substantially all assets); Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 895–902 (Del. Ch. 2003) (discussing the historical use of the ratification doctrine in Delaware corporate law).

admit of the reality that the federal securities law, as well as the SEC-approved stock exchange rules, have long contained mandates that, as a practical matter, constrain and channel the authority granted to corporate managers under state corporate laws.[20] That admission does not mean that there are not sound prudential arguments against further federal regulation, but it does counsel against suggesting that such regulation would be unprecedented. And precisely because such action is within Congress's authority and not unprecedented, arguments premised on the existence of a clear federal-state law divide, rather than on the policy merits, are unlikely to be influential in a floor debate. That is why the more successful, federalism-based argument has been that Congress should avoid selective corporate governance mandates when state corporate laws give stockholders considerable power to implement company-specific solutions to problems of concern to them.

If I'm lucky, like one of Pirlo's free kicks, I've now bent my way back to the debate on proxy access at the SEC. As you all know, that debate began over a proposal by institutional investors to require companies to turn the company's proxy card into a ballot open to director candidates nominated by stockholders.[21] If adopted in its original form, proxy access, as an essential matter, would have allowed institutional investors meeting certain criteria to nominate director candidates and

20. For example, federal law and the stock exchanges were the driving forces behind the requirements that public companies have an audit committee with outside directors, publish certified financial statements, and maintain certain controls regarding compliance with laws. *See, e.g.*, Melvin A. Eisenberg, *The Board of Directors and Internal Control*, 19 CARDOZO L. REV. 237, 242–43, 254–55 (1997) (observing that the Foreign Corrupt Practices Act § 102, 15 U.S.C. § 78m(b) (2000 & Supp. V 2005), made having reliable internal controls, including those governing compliance with laws, a requirement for companies whose stock is registered under the Securities Exchange Act of 1934); Paul G. Mahoney, *The Exchange as Regulator*, 83 VA. L. REV. 1453, 1466 (1997) (stating that the New York Stock Exchange ("NYSE") required audited annual financial statements for listed companies even before the Securities Exchange Act of 1934 was enacted); Joel Seligman, *The New Corporate Law*, 59 BROOK. L. REV. 1, 52 (1993) (noting that in 1977, the SEC, through a rule change in the NYSE listing requirements, mandated that listed companies have audit committees composed solely of independent directors).

21. *See* Letter from Richard L. Trumka, Sec'y-Treasurer, Am. Fed'n of Labor & Cong. of Indus. Orgs., to Jonathan G. Katz, Sec'y, U.S. Sec. & Exch. Comm'n (May 15, 2003), http://www.sec.gov/rules/petitions/petn4-491.htm ("Request for Rulemaking to Permit Shareholder-Nominated Director Candidates to Appear in Corporate Proxy Statements and Proxy Cards") [hereinafter "AFL-CIO, Rulemaking Petition"]. *See also* Chandler & Strine, *Preliminary Reflections, supra* note 2, at 999–1001 (article first circulated in late 2002—questioning whether the director election process was the "forgotten element to reform"); Phyllis Plitch, *Investors Seek Proxy Election Reform*, L.A. TIMES, Feb. 17, 2003, at C3 (discussing the proposed reforms and citing the article by Chancellor Chandler and me); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1072–74 (2002) (suggesting reform to the corporate election system); Citigroup, Inc., SEC No-Action Letter, 2003 WL 328268, at *3–8 (Jan. 31, 2003) (stating that the SEC Division of Corporation Finance would not recommend enforcement action against Citigroup for omitting the American Federation of State, County and Municipal Employees' Rule 14a-8 proposal to amend Citigroup's bylaws to allow a stockholder or stockholder group owning 3 percent or more of the company's common stock to have their director nominees included on the company's proxy statement); Press Release, U.S. Sec. & Exch. Comm'n, Commission to Review Current Proxy Rules and Regulations to Improve Corporate Democracy (Apr. 14, 2003), http://www.sec.gov/news/press/2003-46.htm (explaining that the SEC had decided not to review the SEC Division of Corporation Finance's Citigroup No-Action Letter and that it had instructed the Division to review the current proxy rules); *see generally* Damon A. Silvers & Michael I. Garland, *The Origins and Goals of the Fight for Proxy Access, in* SHAREHOLDER ACCESS TO THE CORPORATE BALLOT (Lucian Bebchuk ed., publication postponed indefinitely), http://www.sec.gov/spotlight/dir-nominations/silversgarland022004.pdf.

to have those candidates' names appear on the company's proxy card.[22] By that means, the cost of running a proxy contest would supposedly be reduced in a materially sufficient way to promote more competitive elections and therefore to create more accountable corporate boards.

As the original debate proceeded, the SEC's lack of any solid congressional authority to regulate corporate elections played a critical role. Although the SEC has well-established jurisdiction over the use of proxies to gather votes of stockholders at publicly listed corporations, it was considering the use of that jurisdiction in a very untraditional and strained way. The SEC's window into the issue of corporate elections was small, and gave it no authority to consider rational questions such as (on the institutional investor side of the argument) whether an invigoration of the election system required a scheme for reimbursement of the costs of dissidents when they make a sufficiently credible showing of success, or (on the managerial side of the debate) whether it made sense to create an incentive for annual competitive elections in corporations, when our society does not even mandate that for our own Congress or Presidency. Even goofier, to use the technical term, was the idea that the SEC would establish its own triggers for access to the company's proxy card based on some measure of corporate economic success or unresponsiveness to supposedly precatory, non-binding stockholder resolutions.[23] This idea would have put a federal regulatory agency without a supporting congressional mandate in the awkward and, to me, illegitimate, self-anointed position of determining when corporate boards had supposedly been either so poor in actual business performance or in responsiveness to stockholder wishes that they should face greater electoral risk. Other aspects of the debate were equally strained, such as the question of whether proxy access would be allowed if the dissidents were actually seeking to elect a governing board majority rather than only a so-called "short slate."[24] Likewise, the original proxy access idea would not have been triggered by any company-specific decision by stockholders to opt-in—it was to be an invariable federal mandate.

During the course of that furious debate, several of us from Delaware, including my distinguished colleague Stephen P. Lamb and me, made an observation that contributed to a helpful evolution of the debate.[25] We noted that the Delaware

22. AFL-CIO, Rulemaking Petition, *supra* note 21.

23. *See, e.g.*, Letter from Sean Harrigan, President, Cal. Pub. Employees' Ret. Sys., to Jonathan Katz, Sec'y, U.S. Sec. & Exch. Comm'n (Dec. 5, 2003), http://www.sec.gov/rules/proposed/s71903/calpers120503.htm (File No. S7-19-03) (suggesting that the SEC would establish triggers for access to companies' proxy cards); *see generally* Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, Summary of Comments: In Response to the Commission's Proposed Rules Relating to Security Holder Director Nominations (Mar. 5, 2004), http://www.sec.gov/rules/extra/s71903summary.htm (providing a detailed list of the suggested specific event triggers at the text of the summary accompanying notes 163–72).

24. *See* Security Holder Director Nominations, Exchange Act Release No. 34-48626, 68 Fed. Reg. 60784, 60787 (proposed Oct. 23, 2003) (to be codified at 17 C.F.R. pts. 240, 249 & 274) (trial balloon of then-Chairman Donaldson) [hereinafter "Security Holder Director Nominations"]. *See also* Strine, *True Corporate Republic, supra* note 13, at 1776–77.

25. In 2003 and 2004, key institutional investor organizations, corporate representatives, the SEC, and members of the Delaware bench and bar participated in important public discussions about director election reform at, among other forums, the Harvard Law School, the University of Delaware, and

General Corporation Law gave stockholders the authority to adopt bylaws,[26] and that many scholars thought that bylaws addressing the process by which the corporation conducts director elections would be valid.[27] But, we also observed, the use by stockholders of their state law rights had been stymied by the SEC itself, which had permitted issuers to exclude bylaw proposals addressing issues that had not been definitively resolved by the Delaware Supreme Court simply because the issuer got an opinion from its lawyer taking the debatable position that the bylaw would be invalid under state law.[28] This gagged the discussion about

the International Corporate Governance Network. During these conferences, the potential and legally untested utility of election reform bylaws were discussed by, among many others, Vice Chancellor Lamb and me. In that context, the barriers to presenting election related bylaws using Rule 14a-8 were a frequent part of the discussion. *See* Symposium on Corporate Elections at Harvard Law School 96–104, 110–11 (Oct. 3, 2003) (transcript available at http://ssrn.com/abstract=471640) [hereinafter "Harvard Symposium"]; Roundtable at the University of Delaware on Shareholder Access to the Company Proxy: Accountability Creator or Boardroom Bomb? 37–45 (Nov. 18, 2003) (transcript on file with *The Business Lawyer*) [hereinafter "Delaware Roundtable"]; Stephen Davis, *Global Eye: Retiring the Rubber Stamp*, FIN. TIMES, Dec. 13, 2004, at 6; STEPHEN DEANE, ISS INST. FOR CORPORATE GOVERNANCE, MAJORITY VOTING IN DIRECTOR ELECTIONS: FROM THE SYMBOLIC TO THE DEMOCRATIC 6–15, 18 (2005), *available at* http://issproxy.com/pdf/MVwhitepaper.pdf. Throughout the long debate, there were also discussions of American Bar Association corporate law committees among key constituents, during which Delawareans observed that the use of bylaws to effectuate election reform had yet to be tested. Indeed, this course of discussions is likely what led to the SEC inviting both Vice Chancellor Lamb and me to participate in the 2007 Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law. *See infra* note 28.

26. *See* DEL. CODE ANN. tit. 8, § 109(a) (2001) ("After a corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote, or, in the case of a nonstock corporation, in its members entitled to vote; provided, however, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body by whatever name designated. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.").

27. *See, e.g.*, Harvard Symposium, *supra* note 25, at 103–04 (Jack Coffee) (suggesting that the Delaware courts would likely uphold the use of bylaw amendments to set procedures for shareholder voting); Delaware Roundtable, *supra* note 25, at 38 (A. Gilchrist Sparks) (stating that a bylaw that would proportionally reimburse management and insurgents for their proxy solicitation costs could be adopted without stating who, the shareholders or the board, could adopt it). *See also infra* note 28 (citing several scholarly articles that discuss what shareholders could likely achieve via bylaw amendments).

28. The SEC's exclusion of bylaw proposals that issuers' counsel, rather than the highest court of a state, had concluded were invalid had the practical effect of preventing any resolution by state courts of the validity of those bylaws because institutional investors have generally been unwilling to push bylaws outside the Rule 14a-8 process. *See, e.g.*, Harvard Symposium, *supra* note 25, at 110; Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law 82–83 (May 7, 2007) (unofficial transcript available at http://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf) [hereinafter "First Roundtable Transcript"]. Of course, there is a rich body of work by distinguished scholars on the extent to which stockholders of Delaware corporations can use bylaws to address subjects like takeover defenses, the electoral process, and executive compensation. That debate centers on the relationship between section 109(b) of the Delaware General Corporation Law ("DGCL"), which states that "bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees," and section 141(a), which states that the corporation shall be managed by or under the direction of the board, except insofar as the DGCL or the corporation's certificate provides to the contrary. DEL. CODE ANN. tit. 8, §§ 109(b), 141(a) (2001). Readers interested in these questions can usefully consult the

real, binding stockholder proposals. Why, we and others asked, was there a need for a federal mandate? Shouldn't we see whether stockholders, using their rights on a company-specific basis, could forge solutions that worked for themselves?

In this regard, we also noted the reality that the SEC had long ago created a pretend polity under Rule 14a-8[29] that had no reference to principles of state law.[30] Within this pretend polity, stockholders are free to include in the company's proxy any "recommendation or requirement that the company and/or its board of directors take action."[31] The corporation has to put those proposals up for a vote unless the stockholder fails to meet the rule's procedural requirements or the proposal falls within the thirteen substantive bases for exclusion, including that a proposal is improper under state law.[32]

Strangely, precisely because state corporation laws do not contemplate non-binding stockholder votes on anything, the SEC has permitted non-binding or "precatory" proposals on virtually everything, including takeover defenses and executive compensation.[33] As a result, stockholders had, by federal mandate, the

---

following articles: Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*, 73 TUL. L. REV. 409 (1998); John C. Coates IV & Bradley C. Faris, *Second-Generation Shareholder Bylaws: Post-*Quickturn *Alternatives*, 56 BUS. LAW. 1323, 1368 (2001); John C. Coffee, Jr., *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests?*, 51 U. MIAMI L. REV. 605 (1997); Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205 (2005).

29. Exchange Act Rule 14a-8, 17 C.F.R. § 240.14a-8 (2008).

30. Professor Roberta Romano eloquently explained this idea at the 2007 Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law. She stated:

> I think in some sense, the view of this by corporations as democracy is inept, because in democracy, we think of things as one person/one vote, and it is people's visions of the good.
>
> Whereas, corporations are not really a polity, and they are there to serve as engines of efficiency in terms of the allocation of resources and the production of goods and services, and the concept of that is one share/one vote and not one person/one vote, because we think the more financial interest you have in the firm, the more likely your voting will be for increasing the value of the firm and with the other investors.
>
> The thresholds of 14a-8 is really like an one person/one vote, because you can have a trivial investment and you have the same equal access to using everyone else's resources in the proxy statement as those who have a large block.

First Roundtable Transcript, *supra* note 28, at 50.

31. Rule 14a-8(a), 17 C.F.R. § 240.14a-8(a) (2008). Although stockholders are allowed to make mandatory proposals, "[a]fter more than four [now six] decades of experience and modification, the consensus understanding of the typical rule 14a-8 proposal is that it is advisory or precatory in nature." *See* Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 101 (1988). *See also* RISKMETRICS GROUP, 2007 POSTSEASON REPORT: A CLOSER LOOK AT ACCOUNTABILITY AND ENGAGEMENT 5 (Oct. 2007), *available at* http://www.riskmetrics.com/pdf/2007PostSeasonReportFINAL.pdf (observing that only 2 percent of the shareholder proposals that appeared on proxy statements during the 2007 proxy season were binding).

32. *See* Rule 14a-8(i), 17 C.F.R. § 240.14a-8(i) (2008). The full list of the thirteen substantive bases for exclusion is: (1) improper under state law; (2) violation of law; (3) violation of proxy rules; (4) personal grievance; special interest; (5) relevance; (6) absence of power/authority; (7) management functions; (8) relates to election; (9) conflicts with company's proposal; (10) substantially implemented; (11) duplication; (12) resubmissions; and (13) specific amount of dividends. *Id.*

33. In section 211 of the DGCL, the statute says that "an annual meeting of stockholders shall be held for the election of directors" and that stockholders may transact "[a]ny other proper business" at the annual meeting. DEL. CODE ANN. tit. 8, § 211(b) (2001). The annual meeting undoubtedly provides stockholders an annual chance to ask questions and make statements of reasonable length, but the

option to require a stockholder referendum on a non-binding resolution when state law gives stockholders no right to demand such a show of hands. But, when a stockholder put up something that state law clearly contemplates—a binding bylaw—the SEC took a far more exclusionary approach. That approach often involved excluding a binding proposal so long as the issuer got an opinion of counsel claiming that the bylaw was clearly invalid under state law, even if the issuer could not cite state law authority addressing the specific subject at issue.[34] That stifled any consideration by courts of the validity of these bylaws, as they never got put before the stockholders in the first place.[35]

As to the question of bylaws addressing the election process in particular, another problem existed that was of federal, not state, making. For many years, the SEC had also excluded proposals that were attempts at "'conducting campaigns or effecting reforms in elections of that nature.'"[36] That exclusion prevented someone from running a slate and then making a proposal to have stockholders vote that the management slate was corrupt or some other proposal that clearly was an echo of the underlying debate about which slate should be seated in a specific, contested election. But along the way, the exclusion got interpreted more broadly to exclude proposals that "*might* result in contested elections, even if the proposal only

term "proper business" would seem to stop far short of giving a stockholder a right to demand a vote on a non-binding resolution when such resolutions are never mentioned in the statute or most corporate charters or bylaws. Rather, what would clearly be a proper exercise of that stockholders' right is the timely proposal of a bylaw addressing a subject that section 109 identifies. *See id.* § 109. But the SEC has used the lack of any state law on non-binding stockholder plebiscites to justify its own creation of such a device. In fact, the SEC encourages the submission of non-binding proposals by including the following note after the subsection of Rule 14a-8 stating that a shareholder bylaw may be excluded if it is improper under state law:

> Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

Rule 14a-8(i)(1), 17 C.F.R. § 240.14a-8(i)(1) (2008).

34. Rule 14a-8(J)(2)(iii), 17 C.F.R. § 240.14a-8(J)(2)(iii) (2008) (requiring that a company file a "supporting opinion of counsel" with the SEC if it seeks to exclude a shareholder proposal via a reason "based on matters of state or foreign law"); SEC Staff Legal Bulletin No. 14B (CF) (Sept. 15, 2004), http://www.sec.gov/interps/legal/cfslb14b.htm ("In submitting such an opinion of counsel, the company and its counsel should consider whether the law underlying the opinion of counsel is unsettled or unresolved and, *whenever possible*, the opinion of counsel should cite relevant legislative authority or judicial precedents regarding the opinion of counsel." (emphasis added)).

35. Through cooperation, Delaware and the SEC have recently provided a new option to address future questions like this. Last year, a Delaware constitutional amendment became effective when the second leg passed the legislature. *See* 76 Del. Laws ch. 37 (S.B. 62) (May 3, 2007). That amendment authorizes the Delaware Supreme Court to answer questions from the SEC regarding issues of state law. DEL. CONST. art. IV, § 11. This expression of public policy might be thought to ripen disputes between issuers and stockholders about the validity of *proposed* bylaws, given that the Delaware Constitution now reflects the public policy determination that answering such questions in a timely fashion is in the public interest.

36. Am. Fed'n of State, County & Mun. Employees ("AFSCME") v. Am. Int'l Group, Inc., 462 F.3d 121, 126 (2d Cir. 2006) (quoting Proposed Amendments to Rule 14a-8 Relating to Proposals to Security Holders, Exchange Act Release No. 34-12598, 41 Fed. Reg. 29982, 29984 (proposed July 7, 1976) (to be codified at 17 C.F.R. § 240.14a-8)).

purports to alter general procedures for nominating and electing directors."[37] Thus, a bylaw proposal that would have had the effect of making the corporate election system more cost-effective for dissidents could have been excluded because by making a proxy contest more affordable, the proposal made it more likely that a contested election would be held.

This exclusion therefore had the effect of making it impossible to use Rule 14a-8 to advance company-specific election-related bylaw proposals. Frustrated by this, the American Federation of State, County & Municipal Employees went to court in 2005 and obtained a ruling in 2006 overturning the exclusion.[38] The U.S. Court of Appeals for the Second Circuit held that "a shareholder proposal that seeks to amend the corporate bylaws to establish a procedure by which shareholder-nominated candidates may be included on the corporate ballot . . . cannot be excluded from corporate proxy materials under [Rule 14a-8(i)(8)]."[39] For the sake of simplicity, I will refer to the position that the SEC cannot exclude election reform bylaws under Rule 14a-8 as the *AFSCME* Rule.

As a formal matter, the problem for institutional investors was that the *AFSCME* decision was only from one circuit and did not preclude the SEC from using its rulemaking authority more specifically to amend Rule 14a-8 to exclude proposals regarding the process of corporate elections. Faced with the *AFSCME* decision, SEC Chairman Cox began a process that, both from the perspective of corporate law federalists and institutional investors, had the promise for a principled resolution of the proxy access debate. He did so by convening a series of public hearings to permit the SEC to hear from commentators about how the SEC could facilitate stockholders' exercise of their state law rights.[40] The Commission, to its credit, invested a great deal of time listening to a diverse array of commentators, and I was honored to have had the opportunity to discuss this question with the commissioners on two occasions.

From those hearings, it was clear that the five commissioners then sitting were split over a number of important issues about which rational minds could differ. Without ascribing positions to any particular commissioners, it is fair to say that one school of thought was that it was high time that stockholders had a more affordable option to run a dissident slate and that at the very least the SEC should permit stockholders to present bylaw proposals requiring corporations to include

37. *Id.* at 123 (emphasis in original).

38. *Id.* at 129–30 ("We therefore interpret the election exclusion as applying to shareholder proposals that relate to a particular election and not to proposals that, like AFSCME's, would establish the procedural rules governing elections generally.").

39. *Id.* at 123. The Second Circuit explained, "We agree with the SEC that, based on the 1976 Statement, shareholder proposals can be excluded under the election exclusion if they would result in an immediate election contest. . . . By contrast, a proxy solicitation seeking to add a proxy access amendment to the corporate bylaws does not involve opposing solicitations dealing with 'the election or removal of directors' . . . ." *Id.* at 127.

40. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Roundtable Discussions Regarding Proxy Process (Apr. 24, 2007), http://www.sec.gov/news/press/2007/2007-71.htm (announcing that the SEC would host a series of three roundtables on shareholder rights and the federal proxy rules during May 2007).

dissident nominees on the company's proxy card or otherwise to reform the director election process. Another school of thought questioned whether most end-user investors actually supported the use of their corporation's funds to address the thousands of proposals now generated as a result of Rule 14a-8. Those in this school thought that institutional investors who wished to put up a rival slate should be willing to fund their own costs, particularly given that the Internet was reducing the barriers to cost-effective communication. Moreover, if the SEC was going to require corporations to open their proxy statements to even more proposals, this school thought investors should know more about the motivations and financial interests of a proposal's proponents. Recognizing that institutional investors who regularly seek to change the corporate governance system of publicly listed corporations are, as a general matter, not subject to fiduciary duty claims if the impact of their proposals is adverse, these commissioners believed that these non-passive investors should at the very least have to inform the other stockholders more fully about their economic interests and motivations.

Out of this dialectic came an unusual result. Two sharply conflicting proposals were advanced, with Chairman Cox supporting both proposals in order to facilitate progress toward a principled compromise among the commissioners. One proposal, supported by Commissioners Campos and Nazareth, and signed onto by the Chairman, essentially would have embraced the Second Circuit's *AFSCME* Rule.[41] But, to address the concerns expressed by issuers and other commissioners that the electorate should have more information about the interests of stockholders seeking to alter the corporate election process, the proposal also would have required proponents to meet much more stringent criteria than are typically applicable to proponents using Rule 14a-8. To propose a bylaw reforming the corporate election process, a stockholder or group of stockholders would have had to own "5% of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the shareholder submits the proposal" and have to be eligible to file on Schedule 13G, rather than Schedule 13D.[42] In addition, the proponent would have to file not only the information required by Schedule 13G but make the same disclosures required of a person actually running a proxy contest to elect new directors.[43]

The other proposal, supported by Commissioners Atkins and Casey, as well as the Chairman, would simply have formally amended Rule 14a-8 to exclude proposals that related to a "nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such

41. Shareholder Proposals, Exchange Act Release No. 34-56160, 72 Fed. Reg. 43466 (proposed Aug. 3, 2007) (to be codified at 17 C.F.R. pt. 240) [hereinafter "Nazareth Proposal"].

42. *See id.* at 43470; *see also* Securities Exchange Act of 1934 § 13(d), 15 U.S.C. § 78m(d) (2000); Exchange Act Rule 13d-1, 17 C.F.R. § 240.13d-1 (2008) (providing the rule for who must file Schedules 13D and 13G); Exchange Act Schedules 13D & 13G, 17 C.F.R. § 240.13d-101, -102 (2008).

43. *See* Nazareth Proposal, *supra* note 41, at 43474 ("[W]e are proposing a new Rule 14a-17 that would provide that the existing disclosure requirements for solicitations in opposition (either for a short slate or for a majority of board seats) would apply to nominating shareholders and their nominees under any shareholder nomination procedure."). *See also* Exchange Act Regulation 14A, 17 C.F.R. §§ 240.14a-1 to 240.14a-17 (2008) (regulation for proxy contestants).

nomination or election."[44] That is, these commissioners wanted to restore the status quo existing before the Second Circuit ruling and make clear that Rule 14a-8 was not an avenue to electoral reform.

Only a few weeks after the competing proposals were put forth, Commissioner Campos announced that he would be resigning imminently, leaving the SEC with only four commissioners.[45] As a result, the proposal to have the SEC embrace the *AFSCME* Rule was left with one less vote. Three months later, Commissioner Nazareth, the *AFSCME* Rule's other primary proponent, announced her intention to leave the SEC.[46] Chairman Cox, who had voted both for and against the *AFSCME* Rule as a way of moving forward toward a middle ground, was thus faced with the reality that the two proponents of the pro-*AFSCME* position were not going to be around to implement their proposal.

Down one commissioner and knowing that another of their number would be leaving in the very near future, the SEC voted three-one on November 28, 2007, in favor of the proposal that restored the status quo as it existed before the *AFSCME* decision, making it clear that at least during proxy season 2008, Rule 14a-8 would not be a vehicle for electoral reform.[47] Chairman Cox explained that the Commission's decision was designed to create certainty in advance of the 2008 proxy season.[48] He noted that the *AFSCME* decision had created uncertainty, which was intensified by the fact that the decision applied "only in one of the 12 judicial circuits in America."[49] Chairman Cox was concerned that the lack of a "clear and authoritative interpretation of [the SEC's] rules" would create "an easy end run around the Commission's required disclosures and our antifraud rules in proxy contests."[50] After observing that the return to the status quo before the *AFSCME* decision created certainty for the upcoming proxy season and thus achieved the Commission's investor protection objectives, Chairmen Cox

44. Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 34-56161, 72 Fed. Reg. 43488, 43493 (proposed Aug. 3, 2007) (to be codified at 17 C.F.R. § 240.14a-8) [hereinafter "Atkins Proposal"].

45. Press Release, U.S. Sec. & Exch. Comm'n, Commissioner Campos to Leave SEC (Aug. 9, 2007), http://www.sec.gov/news/press/2007/2007-163.htm.

46. Press Release, U.S. Sec. & Exch. Comm'n, Commissioner Nazareth Announces Intention to Leave SEC (Oct. 2, 2007), http://www.sec.gov/news/press/2007/2007-210.htm.

47. Press Release, U.S. Sec. & Exch. Comm'n, SEC Votes to Codify Longstanding Policy on Shareholder Proposals on Election Procedures (Nov. 28, 2007), http://www.sec.gov/news/press/2007/2007-246.htm [hereinafter "SEC Votes to Codify Longstanding Policy Press Release"].

48. *Id.* ("If the Commission did nothing, then there would be no clear and authoritative interpretation of our rules."); Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n, Statement Concerning Bylaw Proposals to Establish Director Nomination Procedures (Nov. 14, 2007), http://www.sec.gov/news/testimony/2007/ts111407cc.htm ("[W]e are committed to having a clear rule in place for the coming proxy season.") [hereinafter "Statement Concerning Bylaw Proposals"].

49. Statement Concerning Bylaw Proposals, *supra* note 48. Further increasing the uncertainty, according to Chairman Cox, was the recent U.S. Supreme Court decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007), in which the Court addressed the standard for reviewing an agency's interpretation of its own regulations. *See* Statement Concerning Bylaw Proposals, *supra* note 48. He believed that the Court in *Long Island Care* cast doubt on the Second Circuit's decision in *AFSCME. See id.* ("As a result of [*Long Island Care*], it is more likely today that even a Second Circuit court would uphold the agency's longstanding interpretation of our proxy access rule.").

50. SEC Votes to Codify Longstanding Policy Press Release, *supra* note 47.

expressed his belief that the Commission could "move forward and re-open this discussion in 2008 to consider how to strengthen the proxy rules to better vindicate the fundamental state law rights of shareholders to elect directors."[51]

Commissioner Nazareth, the lone commissioner to vote against the proposal, gave a speech articulating her disappointment with the Commission's decision. She dubbed the new rule "the non-access release" and expressed her belief that there was no "state of great uncertainty."[52] She suggested that "the SEC's role in adopting the proxy rules stems from Congress's belief that 'fair corporate suffrage is an important right,' and the federal proxy authority is intended to reinforce, not supplant, state law rights."[53] In light of her view of the SEC's role, Commissioner Nazareth argued that "the more principled way to eliminate any uncertainty is to clearly allow director nomination bylaw proposals, thereby affirming rather than denying shareholder state law rights."[54] She pointed out that the Committee on Capital Markets Regulation had noted that "'shareholders of U.S. companies have far fewer rights in a number of important areas than do their foreign competitors,' and that this difference 'creates an important potential competitiveness problem for U.S. companies.'"[55] Commissioner Nazareth concluded her comments by noting that "all 40 of the largest markets outside the U.S. give investors in public companies the ability to nominate and remove directors" and urging the Commission to "move forward with proxy access in the near future."[56]

Unsurprisingly, the SEC's action dismayed institutional investors, who had been given reason to hope that the proxy access debate was going to be resolved by an elegant move by the SEC to adopt the *AFSCME* Rule and to allow investors to use Rule 14a-8 to propose bylaws to reform the corporate election system. As predictable, some advocates for proxy access voiced a desire to have Congress itself get involved in the policy discussion given the SEC's decision to restore the pre-*AFSCME* status quo, a status quo that prevented investors from using Rule 14a-8 as a means to propose electoral reform.[57]

---

51. *Id.*

52. Annette L. Nazareth, Comm'r, U.S. Sec. & Exch. Comm'n, Speech by SEC Commissioner: Opening Statement—Shareholder Proposals Relating to the Election of Directors (Nov. 28, 2007), http://www.sec.gov/news/speech/2007/spch112807aln.htm [hereinafter "Nazareth Speech"].

53. *Id.*

54. *Id.*

55. *Id.* (citing COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 93 (Nov. 30, 2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf [hereinafter "COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT"]). The Committee on Capital Markets Regulation is a blue-ribbon committee whose stated "purpose is to explore a range of issues related to maintaining and improving the competitiveness of the U.S. capital markets." COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT, at vii. Specifically, its "objective is to recommend policy changes that should be made, or areas of research that should be pursued, to preserve and enhance the balance between efficient and competitive capital markets and shareholder protection." *Id.*

56. Nazareth Speech, *supra* note 52.

57. *See, e.g.*, Press Release, Cal. Pub. Employees' Ret. Sys., CalPERS Urges U.S. Senate Committee to Protect Shareowner Access to Corporate Election Ballots; Seeks Strong Message to SEC About Proposed Rule Change (Nov. 14, 2007), http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2007/nov/calpers-urges-us-senate.xml (asking the U.S. Senate Banking Committee to urge the SEC to leave

Just as unsurprisingly, some advocates for corporate managers have celebrated the SEC's wisdom by running to the corner flag and taking their shirts off in exultation.[58] But the match isn't nearly over and I'm not sure the reprieve of another proxy season without the *AFSCME* Rule amounts to much more than winning a disputed call on a mid-pitch throw-in. In fact, what worries me from a corporate law federalist's perspective is that a debate that had started as one about a nationally mandated system of subsidized electoral competition and had evolved constructively into a conversation about whether the election exclusion under Rule 14a-8 stymied the exercise of core state law rights would degenerate back into its original form. That is, with institutional investors prevented from advancing company-specific bylaw proposals by way of Rule 14a-8, it seems conceivable that many of them may return to their prior advocacy of an across-the-board federal mandate requiring that corporations put out—in the form of a proxy—the equivalent of a corporate ballot with two slates of candidates. And if that is on the table, other ideas for federal regulation, such as mandated reimbursement of slates meeting a certain level of success, might be as well.

In saying this, I admit that there are reasoned arguments that the overall effects of Rule 14a-8 on corporations and their stockholders are negative, with the costs

the *AFSCME* Rule in place after it became clear that the SEC was likely to adopt the Atkins Proposal); Press Release, AFL-CIO, Statement of AFL-CIO President John Sweeney on SEC Attack on Investor Rights (Nov. 28, 2007), http://www.aflcio.org/mediacenter/prsptm/pr11282007a.cfm ("The SEC should be responding by moving aggressively to protect investors, rather than taking away our rights. . . . Investors have every reason to fear after today that they face a Commission that will ignore their views and act against their interests."); Press Release, Cal. Pub. Employees' Ret. Sys., CalPERS Assails SEC Rollback of Investor Rights—Denounces Action to Deny Shareowner Access to Corporate Ballots (Nov. 28, 2007), http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2007/nov/calpers-assails-rollback.xml ("In effect, the Commission has turned back the clock on corporate democracy by withdrawing a shareowner right that is taken for granted in other developed countries."); Posting of Lynn E. Turner to Harvard Law School Corporate Governance Blog, http://blogs.law.harvard.edu/corpgov/2007/12/17/heroes-and-villains/ (Dec. 17, 2007, 19:51 EST) ("Heroes and Villains") ("By passing the non-access rule, three of the four current Commissioners have only served to increase the likelihood of open warfare, and perhaps litigation, between shareholders and management."). *See also* Press Release, Chris Dodd, U.S. Sen. for Conn., Statement of Senator Dodd, Chairman of Senate Banking Committee, on SEC Vote on Proxy Access (Nov. 28, 2007), http://dodd.senate.gov/index.php?q=node/4149 (expressing his concern about the effect of the SEC's adoption of the Atkins Proposal on shareholder rights and stating that he would hold Chairman Cox to his promise to revisit the issue in 2008); Press Release, Congressman Barney Frank, Chairman, H. Comm. on. Fin. Servs., Frank Statement on SEC Action to Restrict Proxy Access (Nov. 28, 2007), http://www.house.gov/apps/list/press/financialsvcs_dem/press112807.shtml ("The amendments to the Commission's proxy rules will leave shareholders with inadequate recourse to influence insular boards that are unresponsive to shareholder concerns, by effectively precluding shareholders from proposing changes to director election procedures. I believe the Commission should have waited until it was at full membership and was able to deal comprehensively with the issue of proxy access.").

58. *E.g.*, Press Release, U.S. Chamber of Commerce, Chamber Supports SEC Action to Curb Abuse of Proxy Process (Nov. 28, 2007), http://www.uschamber.com/press/releases/2007/november/07-200.htm ("The United States Chamber of Commerce today applauded action by the U.S. Securities and Exchange Commission (SEC) that clarifies its longstanding interpretation of proxy access rules and prevents special interest groups from abusing the proxy process."); Posting of John Carney to Dealbreaker Blog, http://www.dealbreaker.com/2007/11/sec_nixes_proxy_access_proposa.php (Nov. 28, 2007, 16:12 EST) ("SEC Nixes Proxy Access Proposal") ("Ordinary shareholders can breath[e] a little easier that this attempted power grab has failed.").

of subsidized, largely non-binding referenda outweighing the benefits.[59] But, let's also be realistic. The representatives of corporate managers, such as the Business Roundtable, have not invested any substantial capital in seeking a wholesale reversal of Rule 14a-8. Although they gripe about the Rule, they've lived with it for a long time without strong complaint.

By ceding that much ground, opponents to the *AFSCME* Rule leave themselves in a place that makes little federalist sense. The opponents accept the idea that the federal government mandates that public companies include precatory proposals relating to a wide variety of subjects, even though state law contemplates no rule for non-binding plebiscites. Yet, those opponents believe it would be a shocking and unprincipled act for the SEC to require issuers to include bylaw proposals seeking corporate election reform on their proxy card, even though bylaw proposals are contemplated by state law and there are no definitive state law decisions holding that the most common types of such proposals are invalid.

Indisputably, there are rational reasons to oppose a federal requirement that public companies include proposals by stockholders on the company's own proxy card. If investors seeking to change corporate governance really care about their proposals, why can't they pay all of their own solicitation costs? Especially now that it is becoming both cheaper and easier to run an effective proxy contest because of the increase in institutional holdings and the ease of sending information electronically?[60] I get these arguments.

Those simply happen not to be ones that the business community has spent any capital pressing in Washington, D.C. Nor, in this regard, can it be credibly argued that the business community has only stayed silent because Rule 14a-8 has been used largely as a forum for stockholders to express their views about social issues, such as Darfur, climate change, child labor, and so forth, and not about managerial issues hitting corporate managers where they live.[61] A host of precatory proposals on issues like classified boards, poison pills, executive compensation, and even the voting system have had a powerful admonitory effect on corporate boards, with corporate boards often voluntarily assenting to non-binding proposals rather than

59. *See, e.g.*, Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 Yale J. on Reg. 174, 181 n.18 (2001) (citing earlier scholarship concluding that Rule 14a-8 was not advantageous from a cost-benefit perspective and suggesting that "the introduction of institutional investors with higher levels of ownership and whose proposals attain higher support levels does not alter the cost-benefit conclusion, that subsidizing the proposal process is inefficacious").

60. Even commentators who support invigorating the corporate election process have raised questions about the need for proxy access. For example, Professor Gordon has argued that the emergence of both the ability to solicit proxies through e-mail and the concentration of votes in most corporations among a relatively discrete number of institutional holders has rendered the issue of getting direct access to the company's own proxy card trivial. Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 Vand. L. Rev. 475, 487–91 (2008).

61. *See* RiskMetrics Group, *supra* note 31 at 6, 31 (noting that there were 174 social proposals that went to vote during the first half of 2007 but also thirty-seven for majority vote in director elections, forty-one for advisory vote on executive pay, thirty-four for board declassification, thirty-eight for pay for performance, and forty for an independent board chairperson).

risking wrath at the next director election.[62] Not only that, Rule 14a-8 has long required corporations to include bylaw proposals unless those proposals are clearly invalid under state law.

Given that corporate managers have largely accepted the use of Rule 14a-8 to: i) mandate non-binding stockholder votes on proposals when state law provides no basis for such votes; and ii) place on the corporate proxy card bylaw proposals on non-election subjects that are not clearly invalid under state law, how strong is the argument that Rule 14a-8 should not be usable by an investor seeking to present a bylaw regarding the corporate election process? After all, a bylaw is precisely the type of proposal that state law actually gives stockholders the statutory power to adopt. As any litigator in Chancery will tell you, I am more than a little familiar with Emerson's famous maxim about the non-foolishness of some inconsistencies.[63] But the notion that there is somehow a principled federalist argument for having the national government single out, by subject matter, a specific class of bylaw proposals for exclusion does not obviously fall within that category. Such

62. *See* Randall S. Thomas & James F. Cotter, *Shareholder Proposals in the New Millennium: Shareholder Support, Board Response, and Market Reaction*, 13 J. Corp. Fin. 368, 378–82 (2007) (surveying shareholder proposals during the 2002–2004 proxy seasons and noting that the percentage of majority supported shareholder proposals that received a positive response from the board increased from 15 percent in 2002 to 50 percent in 2004); Yonca Ertimur, Fabrizio Ferri, & Stephen R. Stubben, *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals* 2 (Harvard Business School Working Paper Series, Mar. 2008), http://ssrn.com/abstract=816264 ("The emergence of MV shareholder proposals as an important driver of governance change calls for a better understanding of the frequency, determinants and consequences of boards' decisions to implement these proposals. To address this question, we analyze a sample of 620 governance-related, non-binding MV shareholder proposals between 1997 and 2004. In terms of frequency, we find that 193 of these proposals (i.e., 31.1%) were implemented within one year from the majority vote. The rate of implementation has increased dramatically after 2002, doubling to more than 40%."). *See also* Posting of L. Reed Walton to Risk & Governance Blog, http://blog.riskmetrics.com/2008/02/investors_push_for_proposal_ad.html (Feb. 26, 2008) ("Investors Push for Proposal Adoption") ("According to RiskMetrics Group data, more than 40 companies have made changes in response to majority-supported resolutions last year. At least 115 proposals won 50 percent shareholder support or greater in 2007, but that number may grow as companies with fourth-quarter meetings continue to report voting results."); Posting of L. Reed Walton to Risk & Governance Blog, http://blog.riskmetrics.com/2007/10/nonbinding_proposals_defeateds.html (Oct. 12, 2007) ("Non-Binding Proposals Defended") (citing data on the number of shareholder proposals withdrawn and the votes received for the remaining shareholder proposals to support its conclusion that "companies have become more willing to engage with resolution proponents" while "[a]t the same time, investors have continued to give strong support to shareholder proposals that go to a vote").

The activist shareholder pressure to remove takeover defense mechanisms has had a material effect in the last five years. "In the S&P 500, for example, poison pills currently are in effect at only 29% of companies, as compared to 60% in 2002, while classified boards currently exist at only 36% of companies, as opposed to 61% in 2002." David A. Katz & Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, Corporate Governance Update: Do Corporate Governance Ratings Fail to Make the Grade? 3 & n.8 (Jan. 24, 2008), http://www.realcorporatelawyer.com/pdfs/Corporate%20Governance%20Update%20-%20Do%20Corporate%20Governance%20Ratings%20Fail%20to%20Make%20the%20Grade.pdf (citing statistics from www.sharkrepellant.net). One recent empirical analysis suggests that precatory shareholder proposals have played a material role in the voluntary dismantling of classified boards. Mira Ganor, *Why Do Managers Dismantle Staggered Boards?*, 33 Del. J. Corp. L. 149, 185, 187 (2008) (finding "a statistically significant connection between precatory resolutions and the management decision to destagger").

63. Ralph Waldo Emerson, *Self-Reliance, reprinted in* 2 The Complete Works of Ralph Waldo Emerson 43, 57 (Edward W. Emerson ed., 1903) ("A foolish consistency is the hobgoblin of little minds . . . .").

an exclusion does not buttress state law; rather, it constitutes a federal decision to discriminate against a particular type of bylaw on federal policy grounds, even if the type of bylaw might well be valid under the relevant state law at issue.

Because such a policy determination in my view must turn on prudential factors about the substance of the excluded bylaws, rather than on federalism, arguments against the *AFSCME* Rule based on federalism are likely to be seen as strained. At best, they have a modest "this far, but no further" appeal. But when the "this far" is so substantial, and the remaining territory to be covered is so slight and so categorically indistinguishable from that already covered by Rule 14a-8, the case that annexation of the remainder would be unprincipled is far from overwhelming and unlikely to be convincing to any who accept that the federal government has a legitimate role in regulating public corporations.

Indeed, resistance to the *AFSCME* Rule can rationally be viewed as inconsistent with federalist principles because a federal, not state, policy decision drives the exclusion. More pragmatically, one can also view an obstinate objection to the *AFSCME* Rule as, in the long term, increasing the risk that federal action will be taken to mandate that all public companies adopt certain election practices favored by institutional investors. Although there is a colorable argument that institutional investors should pay for their own proxy card when presenting a bylaw, the reality is that they have become accustomed to Rule 14a-8 and that Rule has cut their transaction costs.[64] If corporate managers are going to require institutional investors to incur higher costs just to present company-specific election proposals, those investors and their political advisors might conclude that it is better simply to seek an invariable federal right of proxy access for director candidates and perhaps other electoral rights. If the costs of fighting many small battles are rendered too high, institutional investors may just seek to win the big one.

That is the risk that the principled corporate law federalist ought to take seriously. If one believes that state corporate laws should govern the internal affairs of corporations, one must also accept that state governments must be accountable to the constituencies affected by those laws. If institutional investors are unhappy with the content of those laws, it is legitimate for them to lobby for change, to seek to have corporations domicile in jurisdictions more favorable to their concerns, and to go to Congress if states are not meeting their needs. The United States is a

64. The so-called "endowment effect" would likely come into play if the SEC sought to take away a tool that institutional investors have so long enjoyed. *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625 (1998) (describing the endowment effect as the fact that "individuals will often place a higher value on an entitlement if they own it than if they do not"); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401 (1981) (exploring the same effect but referring to it as the "offer-asking" problem). One might suspect that the endowment effect would be particularly strong because "'the [SEC], *since 1942*, has provided security holders of public companies subject to its proxy regulations a right to have their proposals presented to the issuer's security holders at large and to have proxies with respect to such proposals solicited at little or no expense to the security holder.'" Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 422 (D.C. Cir. 1992) (emphasis added) (quoting Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-19135, 47 Fed. Reg. 47420, 47421 (proposed Oct. 26, 1982) (to be codified at 17 C.F.R. pt. 240) (footnote omitted)).

republic, after all.[65] Any belief that resisting the *AFSCME* Rule will somehow relieve pressure on state lawmakers does not rest on federalist grounds; it is simply a tactical notion, and one that is of doubtful wisdom. Gagging institutional investors from attempting to exercise their state law rights will, in the long run, just generate frustration and fuel appeals for more federal "solutions."

Indeed, the advantage of the *AFSCME* Rule as a solution to the proxy access debate is precisely that it allows the conversation about corporate election systems to occur where it should. Instead of Congress or the SEC making a selective intrusion into the corporate election process by fashioning a one-size-fits-all reform to increase the competitiveness of corporate elections, stockholders will propose company-specific bylaws. These may take many forms and their validity will be tested in the state courts. By being experimental, livable practices will have a chance to emerge and awkward ones to be discarded. Important issues like how frequently any system of increased competitiveness should operate and the thresholds for eligibility to use such a system can be debated in a company-specific context.[66] And the vitality of the conversation may require state statute writers to consider the adoption of specific provisions addressing the content and prerequisites of bylaw proposals related to the corporate election process.[67] However things turn out, the result will come from a process entirely consistent with the traditional federalism of American corporate law.

Stockholders, exercising their state law rights, will present bylaws about the important subject of election reform. Corporate managers will react to those company-specific proposals, and if either the stockholders or managers are dissatisfied by the judiciary's treatment of those proposals, pressure will be put on state statute writers to address their concerns. That is corporate law apple pie and motherhood, with the kind of private ordering that is central to the American form of corporate lawmaking being preeminent in the outcome. That is, the market, rather than the Delaware General Assembly, the California State Legislature, or Congress for that matter, will have the most important role in establishing the

---

65. Many of the advocates for having the states make corporate law justify this position in large measure because of the regulatory competition among the various states that allows for more private ordering and experimentalism in the Brandeisian sense. *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 14–31 (1993); Ralph K. Winter, Jr., *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 273–76 (1977). *See also* Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1742–44 (2006).

66. *See* Strine, *True Corporate Republic, supra* note 13, at 1775–83.

67. Already, Delaware has taken substantial action to address the desire of institutional investors to move away from plurality voting. *See* DEL. CODE ANN. tit. 8, § 216 (2001 & Supp. 2006) ("A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors."). *See also id.* § 141(b) ("A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable."). If the *AFSCME* Rule were embraced by the SEC, one can imagine further consideration of state law changes and important bylaw drafting questions, such as the threshold and durability of support particular bylaws should receive, whether enhanced ownership requirements should be required of proponents, and whether new disclosure requirements should be imposed on proponents.

norms, with flexibility for particular corporations to deviate from those norms in ways that work for them.

That said, I think it important to recognize the legitimacy of the concerns harbored by SEC commissioners about ensuring appropriate disclosure regarding the motives of institutional investors seeking electoral reform. Counterintuitively, it was the commissioners embracing the *AFSCME* Rule, Nazareth and Campos, who took this issue head-on, no doubt hoping that by doing so, a pro-*AFSCME* Rule Commission majority might coalesce. The Nazareth Proposal addressed this subject by requiring that any stockholder proposing an election reform bylaw be eligible to file on Schedule 13G and make the same disclosures as if it were running a proxy contest. This aspect of their proposal drew considerable fire from institutional investors, both for legitimate reasons and for reasons that display a stunning lack of self-awareness.

The legitimate reasons are basically two in number. The first is that the Nazareth Proposal inadvertently fell into the same lapse in federalist logic as those who oppose the *AFSCME* Rule. Instead of calling for the SEC to reexamine the ownership requirements and disclosure requirements that should apply to any proposal under Rule 14a-8, the Nazareth Proposal endorsed subjecting election reform bylaws to a special set of disclosure rules. Therefore, instead of being neutral as to the substance of a bylaw proposal, the SEC would have selected out by subject matter a specific class of bylaws for special treatment.

The other legitimate reason is the less than obvious conclusion that any proponent of electoral reform should be subject to the same disclosure requirements as someone who has nominated a slate of directors for election.[68] As will soon be clear, I believe there is a credible argument that stockholders who seek to change the corporate governance of a public corporation are categorically different from other investors, are engaged in conduct that has a considerable effect on other investors, and that the corporate electorate should know more about their economic motives. But the mere proposal of electoral reform is far different from sponsoring a governing slate and is hard to distinguish in effect from other proposals—such as calls for the repeal of a classified board structure—that institutional investors now make without onerous disclosure obligations.

That said, the legitimate objection to the Nazareth Proposal's solution to the rational concern many harbor over institutional investor motivations does not obscure the illegitimate desire certain activist institutional investors have to avoid any greater public scrutiny and accountability then they now face. Stockholders who seek to change the governance structure of public corporations are not passive investors entitled to privacy. They are seeking to effect long-lasting reforms

68. For a scholarly argument that this aspect of the Nazareth Proposal was overbroad, see Gordon, *supra* note 60, at 479–80 (contending that most shareholder proposals, such as proposals on social issues or precatory corporate governance resolutions, would not be made without the subsidy provided by Rule 14a-8 because the cost of distributing a separate proxy for such proposals would not be cost-effective for the proposing investors). As Gordon notes, the SEC could require any person who actually nominates a slate using a proxy access mechanism adopted by bylaw to meet the proxy contestant disclosure requirements at that time. *Id.* at 490–91.

that will have a material and durationally significant impact on public corporations, their investors, and other constituencies. Unlike corporate managers, these activists are not subject to the constraints of equity because they do not owe, as a general matter, other investors fiduciary duties.[69] At the very least, other investors should be afforded key information about the economic interests of such proponents. How much stock do they own and in what forms? Are they long or short the company, and by how much? That is particularly true as to proponents seeking an economic subsidy—through use of Rule 14a-8—from other stockholders to advance their agendas.

Not only that, but there is a strong argument that the economic stake required for eligibility for the Rule 14a-8 subsidy should be raised considerably. Presently, to be eligible to use Rule 14a-8, all a stockholder has to own is a position worth $2,000, or 1 percent of the company's securities entitled to vote on the proposal, for at least one year by the date of the proposal submission.[70] One can rationally doubt whether Rule 14a-8 was or should be intended to give investors with a trifling economic stake in a particular corporation access to a subsidized bully pulpit, with the costs borne by others who are actually investing as investors.[71] Rather, it seems more plausible to view Rule 14a-8 as having the purpose of giving genuine investors a chance to influence the governance of corporations in which they have a bona fide, long-term, and meaningful economic investment.[72] Precisely because most ordinary investors are rationally passive and do not make 14a-8 proposals, it is important those investors not be exploited by others who impose costs on them by using federally mandated subsidies to pursue idiosyncratic corporate governance and political objectives.

Given that we are now in an era when investor activism is commonplace and when most of the active investors are subject to conflicts of interests with

---

69. The increased activism of certain investors, and the conflicts of interest among various kinds of investors, have inspired two scholars to call for an expansion of traditional fiduciary duty law to subject activist investors to potential liability when their activism unfairly benefits themselves to the detriment of the corporation and its other investors. *See* Iman Anabtawi & Lynn A. Stout, *Fiduciary Duties for Activist Shareholders*, 60 Stan. L. Rev. 1255, 1293–1303 (2008).

70. Rule 14a-8(b)(1), 17 C.F.R. § 240.14a-8(b)(1) (2008).

71. By comparison, the obstacles to gaining access to the ballot in the political arena are far more substantial. To place an initiative on the ballot in California, 433,971 signatures must be collected. California Secretary of State, Elections, How to Qualify an Initiative, http://www.sos.ca.gov/elections/elections_h.htm (last visited June 11, 2008). In Pennsylvania, a fee of $200 and 24,666 signatures are required to run for statewide office. Commonwealth of Pennsylvania Department of State, Elections, Instructions for Filing as a Political Body Candidate; 2008 General Election, http://www.dos.state.pa.us/elections/lib/elections/010_running_for_office/2008/2008_instructions_for_filing_as_a_political_body_candidate.pdf (last visited June 11, 2008). In Delaware, the fees for candidates running for statewide office shall not exceed 1 percent of "the total salary for the entire term in office for which the candidate is filing," *see* Del. Code Ann. tit. 15, § 3103 (1999 & Supp. 2006), and typically have been as much as 1 percent.

72. The parent company of ISS Governance Services, RiskMetrics Group, has bylaws, for example, that give its investors the opportunity to influence its governance through the inclusion of stockholder nominated directors on the company's proxy, but only if the stockholder or group of stockholders has owned at least 4 percent of the company's common stock for at least two years. RiskMetrics Group, Inc., Registration Statement (Form S-1/A), at 114 (Jan. 24, 2008).

long-term individual investors, a serious congressional and SEC examination of the following topics would be worthwhile:

- Should the eligibility criteria for using Rule 14a-8 be increased to require that the proponent have held a net long position of either 1 percent or $2,000,000 for a year?;
- Should there be a reasonable filing fee, say the old $2,000 ownership rule, for proposals?;
- Should the existing less stringent criteria be maintained in place for 14a-8 proposals that focus on social issues, such as environmental, labor, and human rights, and not business or corporate governance structure?;[73]
- Should section 13 of the Securities Exchange Act be amended to reduce the general reporting threshold to 3 percent? This would conform section 13 more closely to the prevailing approach in England. By that means, the SEC would have the authority to require earlier, all-in, long and short, and constantly updated reporting at a lower 3 percent threshold.[74] But

73. The idea of social proposals has become complicated by the increasing dominance of institutional investors among the stockholder base of public operating companies. How money managers trained at Harvard Business School, the Wharton School, or the Owen Graduate School of Management are supposed to bring to bear their "conscience" on controversial social questions is a subject for an article unto itself. A recent debate between Fidelity Investments and its stockholders is suggestive of both the problem and a theoretical solution. Last year, Fidelity sold a significant portion of its holdings in PetroChina, a company targeted by human-rights activists for its ties to Sudan's rulers and thus the crisis in Darfur. Fidelity was vocal in declaring that its decision to sell shares of PetroChina was not a response to the criticism of human-rights activists. Anne Crowley, Fidelity's spokesperson, explained:

> Our funds have a fiduciary responsibility to act in the financial interests of their investors, in keeping with the investment policies for each fund. This is not Fidelity investing its own money, this is Fidelity investing the money of millions of people.
>
> . . . .
>
> [The situation in Darfur] is a matter to be properly resolved by the governments of the world and the United Nations. And we truly hope they will do what is right.

Ross Kerber, *Fidelity Says It Did Not Divest for Darfur—Firm Insists Decisions Based on Financials, Not Activist Pressure*, BOSTON GLOBE, May 17, 2007, at D1. The response of Fidelity stockholders was to submit shareholder proposals on the issue. The SEC denied Fidelity's no-action request on excluding those proposals. Sue Asci, *Activists Push 'Genocide-Free Investing' Resolution—SEC Gives the Group Thumbs-up on Proxies*, INV. NEWS, Feb. 18, 2008, at 20. In spring 2008, shareholders of several Fidelity funds were able to vote on a shareholder proposal to establish "oversight procedures to screen out investments in companies that, in the judgment of the Board, substantially contribute to genocide, patterns of extraordinary and egregious violations of human rights, or crimes against humanity." Fidelity Contrafund, Definitive Proxy Statement (Form 14A) (Feb. 29, 2008). The funds' directors recommended against the adoption of that proposal. *Id.*

74. In 2007, the United Kingdom's Financial Services Authority implemented a thorough going regulatory scheme requiring a stockholder controlling 3 percent or more of a listed company's total voting rights to make substantial disclosures of all direct and indirect investments in that company within two trading days of reaching that threshold. Financial Services Authority, The Full Handbook, Disclosure Rules and Transparency Rules §§ 5.1.2, 5.8.3 (U.K.), http://fsahandbook.info/FSA//handbook/DTR/5.pdf (last visited June 11, 2008) (requiring disclosure within "four trading days in the case of a non-U.K. issuer and two trading days in all other cases"). Moreover, whenever the stockholder changes its ownership by 1 percent in either direction, the stockholder must update its disclosures no later than two trading days thereafter. *Id*. Arguably, the U.K. requires fuller and more prompt disclosure than is required in the United States under Exchange Act Rule 13, when Rule 13 is considered as a whole.

a tradeoff might be made by eliminating the ineffable "purpose" distinction between 13G and 13D filers. This would give the market earlier and fuller information about the holdings of large institutional holders in exchange for dropping a purpose test of questionable utility;

- Should frequent users of Rule 14a-8 be subject to Schedule 13D disclosure requirements? When stockholders regularly seek subsidized access, a stronger argument exists that the market should have the information to assess the economic motivations—or lack thereof—of these frequent filers. This could be achieved by requiring such filers—once they meet the definition of a frequent filer—to file a Schedule 13D for any company at which they seek to make further proposals.

From the perspective of those worried about the accountability of activist investors, including members of the SEC itself, prompt adoption of the *AFSCME* Rule could have the benefit of clearing the decks for this long-overdue examination. By cleansing the agenda of the proxy access issue, the Congress and SEC would have time to focus on the important new issues arising from the separation of ownership from ownership. These issues do not only have relevance to election

At a recent program at Harvard Law School, two prominent activist investors suggested that they could live with the U.K. approach, particularly if that were accompanied by an end to the "purpose"-driven distinction that now separates filers under Rule 13g from those who file under Rule 13d. Posting of Robert Jackson to Harvard Law School Corporate Governance Blog, http://blogs.law.harvard.edu/corpgov/2008/01/02/hedge-fund-activism/ (Jan. 2, 2008, 18:51 EST) ("Hedge Fund Activism") (providing a summary and link to a video of the program). In that regard, these investors also noted that the antitrust statute has now become a tripwire for activist investors even in situations that raise no genuine antitrust concerns because it requires a filing when an investor buys a stake of $63.1 million. *See* 15 U.S.C. § 18a (2000); Federal Trade Commission, Bureau of Competition, Filing Fee Information, http://www.ftc.gov/bc/hsr/filing2.shtm (last visited June 11, 2008) (listing the current transactional thresholds).

Interestingly, the hedge fund industry in England has welcomed consideration of even greater disclosure and transparency requirements for large investors. HEDGE FUND WORKING GROUP, HEDGE FUND STANDARDS: FINAL REPORT 96–98 (Jan. 2008). The greater disclosure that the industry acknowledged was a legitimate subject for consideration included disclosure of derivative positions and disclosure in response to the concerns about activist investors borrowing stock to vote at shareholder meetings, an issue that has generated recent attention from corporate law scholars and practitioners. *See* Henry T. C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions,* 156 U. PA. L. REV. 625, 640–42 (2008); Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership,* 79 S. CAL. L. REV. 811, 814–22 (2006); Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775, 777–80 (2005); Memorandum from Theodore N. Mirvis, Adam O. Emmerich & Adam M. Gogolak, Wachtell, Lipton, Rosen & Katz, Beneficial Ownership of Equity Derivatives and Short Positions—A Modest Proposal to Bring the 13D Reporting System into the 21st Century 1 (Mar. 3, 2008).

Two current events have heightened the focus on disclosure and transparency requirements related to derivative positions. The June 2008 decision in *CSX Corp. v. Children's Investment Fund Management (UK) LLP* elided an answer to whether Rule 13d's beneficial ownership definition covers the long side of cash-settled total return equity swaps, but nevertheless illustrates the utility of a deep examination of those issues in light of evolving market practices. *See* No. 08 Civ. 2764 (LAK), slip op. at 77–81 (S.D.N.Y. June 11, 2008). In July 2008, the United Kingdom's Financial Services Authority examined those issues and determined that it would "require disclosure of cash-settled and other derivative contracts, on an aggregated basis with ownership of actual common stock, at the 3% level." Memorandum from Theodore N. Mirvis, Adam O. Emmerich, William Savitt & David E. Shapiro, Wachtell, Lipton, Rosen & Katz, De-Coupling of Ownership, Economic and Voting Power in Public Companies—The UK's Financial Services Authority (FSA) Moves Decisively to Close the Gap 1 (July 3, 2008).

reform proposals but are important to all shareholder proposals and to merger and acquisition transactions. I think it is difficult to argue that election reform proposals threaten more substantial change than precatory proposals placing enormous pressure on boards to declassify their board structure or subject poison pills to stockholder plebiscites. Experience has shown that supposedly precatory proposals have a real world influence.[75] Rather than obsessing over whether election proposals should receive special treatment, the SEC could address in a comprehensive way the well-founded concerns over issues like empty voting and the agency costs of institutional investors. Having given institutional investors the green light on the *AFSCME* Rule, those investors would be in a graceless position to resist reasoned and balanced SEC consideration of what obligations they owe to public investors and regulators. That consideration is arguably long overdue.

Undifferentiated use of the term stockholder is naïve. The history of our Republic illustrates the need to hold those who wield economic power accountable for their actions, when those actions affect others.

Ordinary investors are more likely to own shares in mutual funds and interests in pension funds than in operating companies. The fiduciaries in the middle are an increasingly potent societal force. Many of them do not behave like traditional individual investors and do not have identical interests. These activist institutions seek to act on, not just invest in, public companies. These institutional investors have often called for public companies to provide the market with greater disclosure to increase what they call transparency. Having established themselves as makers of corporate governance policies affecting public companies, investors, workers, and communities, these activist investors can hardly deny the legitimacy of a good faith consideration of means to ensure that their clout is exercised consistent with the public interest and their duties to their own stockholders.

Even without the SEC's adoption of the *AFSCME* Rule, the toolkit of institutional investors is filled with powerful instruments. While turmoil over proxy access continues, institutional investors get to use those tools without the greater disclosure or larger and longer stakeholds that might be required after a serious examination by the SEC of the responsibilities that should be owed by activist investors.

Progress on the proxy access front has relevance to another issue pending in Washington, D.C., which is the so-called "say on pay" legislation. That legislation passed the House of Representatives with bipartisan support.[76] In essence, the bill requires that public company annual meetings include a non-binding shareholder vote on the corporation's executive compensation policies, and that proxies soliciting a vote on a merger, acquisition, or sale of substantially all the assets of an issuer contain a non-binding vote on golden parachute compensation.[77] The

75. *See supra* note 62.

76. Office of the Clerk, U.S. House of Representatives, Final Vote Results for Roll Call 244 (Apr. 20, 2007), http://clerk.house.gov/evs/2007/roll244.xml (indicating that H.R. 1257, the Shareholder Vote on Executive Compensation Act, passed with a vote of 269-134).

77. Shareholder Vote on Executive Compensation Act, H.R. 1257, 110th Cong. § 2 (2007). The "say on pay" bill requires "a separate shareholder vote to approve the compensation of executives as disclosed pursuant to the [SEC's] compensation disclosure rules." *Id.* This shareholder vote addresses the broad disclosure of executive compensation in annual proxy statements, including the

bill has gone nowhere in the Senate, but its Senate sponsor, an obscure first-term Senator from Illinois named Obama, might be gaining in clout.[78] Not only that, Senator McCain has expressed support for "say on pay."[79] Thus, the two presidential candidates support the concept.

Most corporate law federalists and representatives of corporate managers oppose the federal "say on pay" bill. Their argument against that bill, however, is weakened by the lack of progress on proxy access for election reform proposals. Why? Because institutional investors argue that they lack a cost-effective means to influence the composition of boards of directors. As a result, these institutional investors say they should be given a direct voice over issues of executive compensation.

If the *AFSCME* Rule were adopted, opposition to "say on pay" could be more strongly grounded in principles of republican democracy. Because stockholders would have the tools to create a more competitive election process, their call for federally mandated referenda on specific corporate issues would become weaker.[80] Instead of carping about particular decisions, the argument would go, investors should carefully choose directors and replace them if they do a poor job.[81]

In fact, absent movement on corporate election reform, federalists have little to offer on the "say on pay" front. Although the issue has not been resolved in Delaware, distinguished scholars have suggested that a bylaw requiring stockholder approval of executive compensation contracts would be at greater risk of invalidation than a bylaw governing the conduct of director elections.[82] Setting

---

Compensation Discussion and Analysis section that the SEC mandated via new rules adopted before the start of the 2007 proxy season. *See* Executive Compensation and Related Person Disclosure, Securities Act Release No. 33-8732A, 71 Fed. Reg. 53158, 53160 (Sept. 8, 2006); Executive Compensation Disclosure, Securities Act Release No. 33-8765, 71 Fed. Reg. 78338, 78340–41 & n.25 (Dec. 29, 2006) (to be codified at 17 C.F.R. pts. 228 & 229).

78. Shareholder Vote on Executive Compensation Act, S. 1811, 110th Cong. (2007).

79. Avi Salzman, *McCain Seeks Shareholders' Say on Pay*, Bus. Wk., June 10, 2008, http://www.businessweek.com/bwdaily/dnflash/content/jun2008/db20080610_480485.htm; *Say on Pay in America: Fair or Foul?*, Economist.com, June 12, 2008, http://www.economist.com/business/displaystory.cfm?story_id=11543754.

80. At a recent debate over "say on pay," Professor and former SEC Commissioner Harvey Goldschmid acknowledged that the case for issue-specific votes becomes weaker if stockholders have a greater ability to elect a new board. Program at the Institute for Law and Economics at the University of Pennsylvania on Say on Pay: A Positive Contribution to Corporate Effectiveness and Accountability or an Unprincipled and Costly Incursion into Director Authority? (Mar. 4, 2008) (webcast available at http://www.law.upenn.edu/academics/institutes/ile/calendararchive07-08.html).

81. *See American Corporate Governance: Hail, Shareholder!*, Economist, June 2, 2007, at 65, 65 ("[H]arried managers may conclude that the best approach is to adopt corporate-governance reforms that increase shareholder democracy and so give them a stronger mandate. If shareholders are able to elect directors and hold them properly accountable for their performance, then they should be more willing to let them get on with the job.").

82. *See* Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. Davis L. Rev. 605, 662, 664 (2007) (suggesting that, "[c]onsistent with their right to elect directors, shareholders should be permitted to nominate director candidates" but that shareholder "say on pay" is not a proper subject for shareholder action because "[u]nder state corporate law, directors have responsibility for setting officers' salaries, and shareholders do not have any say on the matter"). *See also* Robert B. Thompson, *Shareholders as Grown-ups: Voting, Selling, and Limits on the Board's Power to "Just Say No,"* 67 U. Cin. L. Rev. 999, 1018 (1999) (placing "the right to propose and pass mandatory bylaws that will control executive compensation" at the very far end of the shareholder primacy and direct democracy spectrum); *see generally* Coates & Faris, *supra* note 28, at 1352–53 (putting forth a

the compensation for top executives has long been considered a core managerial function of a board of directors.

The combination of the *AFSCME* Rule, the decreasing prevalence of classified boards, and the emerging prevalence of so-called majority voting would, in combination, make credible the argument that the federal government should not tamper with state laws entrusting executive compensation solely to the board, without stockholder involvement.

Absent progress on the election front, more, not less, pressure will be placed on state lawmakers over the executive compensation issue. In the absence of any reasonable prospect that state lawmakers will empower investors to adopt bylaws requiring stockholder approval—in some form, binding or not—of executive compensation, one should expect that institutional investors will continue to seek a federal solution.[83] In that advocacy, institutional investors will be able to argue accurately that national institutions have required stockholder votes on certain types of compensation.[84] These prior national mandates, they will say, had little effect on the core prerogatives of directors under state corporate laws. Instead, they simply gave investors in publicity-troubled American corporations more voice on a subject, executive compensation, that the traditional accountability tool used by the American corporate law system to address the broad flexibility granted to corporate directors—fiduciary duty review—has had great difficulty addressing in a reliable and efficient manner.[85] Given that American corporation statutes

guide for determining whether a particular shareholder-adopted bylaw would be permissible under Delaware law).

83. Notably, the U.K. mandate for an annual non-binding vote on executive compensation was inspired, at least in part, by a desire to relieve the political pressure on Parliament to address the issue of executive compensation. *See* Stephen Davis, *Does 'Say on Pay' Work? Lessons on Making CEO Compensation Accountable* 9–14 (Yale School of Management, The Millstein Center for Corporate Governance and Performance, Policy Briefing No. 1 [Draft], 2007), http://millstein.som.yale.edu/Davis_Say_on_Pay_Policy_Briefing.pdf. Undoubtedly, the U.K. mandate also plays into the American discussion of this issue.

84. For example, in 1994, section 162(m) of the U.S. Internal Revenue Code was adopted, and it requires that executive compensation in excess of $1,000,000 per year be performance based, approved by the board compensation committee, and approved by a majority stockholder vote in order for it to be deductible by the company. I.R.C. § 162(m) (2000 & Supp. V 2005). Moreover, the SEC approved stock exchange rules adopted in 2003 requiring stockholder votes on stock option plans. *See* Self-Regulatory Organizations, Exchange Act Release No. 34-48108, 68 Fed. Reg. 39995 (July 3, 2003). Even earlier, the NYSE had required stockholder votes on certain transactions, such as transactions involving the issuance of a certain percentage of the corporation's outstanding shares, when state law did not require such a vote. *See* NYSE, Inc., NYSE Listed Company Manual § 312.03(c) (2008) (requiring shareholder approval if an issuance of securities constitutes either 20 percent of the number of shares or 20 percent of the voting power of all shares); Norris Darrell, *The Use of Reorganization Techniques in Corporate Acquisitions*, 70 Harv. L. Rev. 1183, 1193 n.44 (1957) (noting that this rule was in the 1956 *NYSE Listed Company Manual*). The controversial Time-Warner merger dynamics were influenced in no small measure by this NYSE requirement. *See* Paramount Commc'ns Inc. v. Time Inc., C.A. Nos. 10866, 16070, 10935, 1989 WL 79880, at *14 (Del. Ch. 1989), *aff'd,* 571 A.2d 1140, 1146 (Del. 1990).

85. *See* Robert B. Thompson & Paul H. Edelman, *Corporate Voting* 19 (working paper, 2008) (on file with *The Business Lawyer*) ("There are times when voting will work better than judging in addressing decision-making within the corporation. One example is executive compensation, an area in which judges seemingly have never been comfortable reviewing and have not developed any understandable principles to guide judicial review.").

have often mandated stockholder voting in areas of great importance where there is the potential for exploitation of conflicts of interest, there is a colorable, traditionalist argument for giving stockholders a voice on executive compensation arrangements.[86] Pretending that this is not a question about which rational minds can differ is therefore not likely to be a successful argument tactic. Moreover, by proposing only a non-binding vote, "say on pay" stops well short of where it logically could, which would be to use the venerable means of stockholder ratification to provide mandatory assurance that a conflicted transaction is considered fair by the stockholders. Importantly, the debate on pay now has a global competitiveness flavor, with institutional investors and even the Committee on Capital Markets noting that non-binding votes on executive compensation are now mandated in England and Australia.[87]

Although a corporate law federalist has the high ground, in my view, in arguing that the debate about stockholder voice over executive pay should be held at the state level, an argument that there is no logical basis to have the debate at all lacks credibility. Of course not all aspects of the debate have a credible basis. For example, as a student of political science and a fan of Franklin Roosevelt, I find it ludicrous to believe that capital—largely in the form of professional money managers—will constrain executive compensation to benefit workers or society as a whole.[88] Voting capital will protect itself, not others. But that reality still leaves

86. *See* Strine, *Toward Common Sense, supra* note 11, at 13 ("In the context of a larger reform to create a rationally balanced system of corporate accountability, it might be worth considering the admittedly large step of permitting stockholders to adopt non-repealable bylaws requiring that employment contracts of top executives be subject to stockholder approval.").

87. *See* Comm. on Capital Mkts. Regulation, Interim Report, supra note 55, at 93, 107, 109 (commenting on the U.K. system but declining to make any recommendation). *See also* Companies Act, 2006, cc. 6 & 9, §§ 420–22, 439–40 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf (requiring a non-binding shareholder vote on a listed company's remuneration report at its annual general meeting); Directors' Remuneration Report Regulations, 2002, S.I. 2002/1986, §§ 234B, 241A, Schedule 7A (U.K.), *available at* http://www.opsi.gov.uk/si/si2002/uksi_20021986_en.pdf (statutory instrument first mandating the rule); Corporations Act, 2001, § 250R (Austl.), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D5087CD577B2B403CA2570C200011F96/$file/Corps2001Vol1WD02.pdf (requiring a non-binding shareholder vote on a listed company's remuneration report at its annual general meeting); Corporations Act, 2001, § 250R (Austl.), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/C13C582617A31FB4CA2573B70003109D/$file/Corps2001Vol02_283AA601DJ_WD02.pdf (stating the requirements for the remuneration report). In addition to the 2001 Corporations Act requirement for a non-binding vote on the remuneration report, companies listed on the Australian Securities Exchange must obtain shareholder approval before issuing securities under an employee incentive scheme. *See* ASX Listing Rules § 10.14 (Oct. 24, 2005), *available at* www.asx.com.au/ListingRules/chapters/Chapter10.pdf. There is reason to be cautious about making too much of the fact that the U.K. experience with "say on pay" has not been disruptive. In contrast to U.S. investors, U.K. institutional investors are far more likely to hold their shares for a meaningful time period and to have a longstanding relationship with the corporations in which they invest. Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 Cornell Int'l L.J. 493, 499, 537 (2005).

88. *See* Strine, *Toward Common Sense, supra* note 11, at 13 n.2; *see also* Robert B. Reich, Editorial, *Don't Count on Shareholders*, Am. Prospect, Apr. 2007, at 52 (expressing the same skepticism). If Congress's intention is to goad corporations toward policies that promote income equality, good working conditions, and domestic employment, a more rational approach would be to require issuers to disclose information relevant to those concerns. For example, one could imagine a requirement that

room for a perfectly rational discussion about whether better corporate performance will result if executive compensation arrangements are shaped by a process permitting stockholders to express their viewpoint.

Further progress on the election reform front will provide evidence that a vibrant and productive discussion about that topic can be had at the state level. Relatedly, such progress will demonstrate that there is a more flexible, more market-based context within which to move forward. Just as state corporate law points toward company-specific, diverse approaches to corporate elections, because state corporate laws stress private ordering, so too would a vigorous state law discussion of executive compensation be less likely to yield rigid and costly one-size-fits-all mandates and more likely to enable flexible, company-specific solutions acceptable to investors and managers.

For all these reasons, it therefore seems to me that corporate law federalists—whether they are serving on the SEC or living, as some are wont to say, "outside the Beltway"—should think more than twice before concluding that adoption of the *AFSCME* Rule by the SEC would be counterproductive. It might just be that the SEC's embrace of the *AFSCME* Rule would channel debate over the corporate election process and executive compensation into the forums contemplated by state corporation laws, allowing for flexible private ordering among market participants. And an end to the tired proxy access debate would free up Congress and the SEC to address an array of legitimate concerns about the power wielded by activist investors. For end-user investors, breaking the current logjam in this balanced manner might provide hope that both sets of agents they must rely upon—the managers who run actual operating companies and the money managers who are in fact the direct fiduciaries for most American investors—will become more effective and accountable.

issuers disclose information about the growth in remuneration and benefits to top executives over time in comparison to the median wage and benefit package paid to the corporation's employees, along with information disclosing the size of the corporation's workforce, the percentage of the workforce that is employed full-time, the percentage of employees provided with health insurance, and the percentage of the workforce located in the United States. Although it is doubtful that voting capital would care about those metrics, information of that kind would be of interest to citizens wanting to know the impact that particular corporations have on their employee constituencies. In fact, in Europe, some nations are now requiring issuers to make disclosures about the effect their policies have on the nation, such as by requiring that corporations disclose information about the environmental impact of their operations. *See* Williams & Conley, *supra* note 88, at 503–10 (describing the social reporting mandates of various nations); Companies Act, 2006, c. 46, § 417(5)(b) (Eng.) (requiring that a quoted company disclose, to the extent necessary to understand the company's business, information about environmental matters, the company's employees, and social and community issues).