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#32:24

RE-EXAMINATION OF RULES RELATING TO SHAREHOLDER COMMUNICATIONS, SHAREHOLDER PARTICIPATION IN THE CORPORATE ELECTORAL PROCESS AND CORPORATE GOVERNANCE GENERALLY

SUMMARY OF COMMENTS

THIS STAFF-PREPARED SUMMARY OF COMMENTS HAS BEEN MADE AVAILABLE TO FACILITATE FURTHER CONSIDERATION BY INTERESTED MEMBERS OF THE PUBLIC OF THE ISSUES RAISED IN THIS PROCEEDING. THE UNDERLYING LETTERS OF COMMENTS AND TESTIMONY ON WHICH IT IS BASED MAY BE INSPECTED (FILE NO. S7-693) AT THE COMMISSION'S PUBLIC REFERENCE ROOM, 1100 L. STREET, N. W., WASHINGTON, D. C. PORTIONS OF THE RECORD ARE ALSO AVAILABLE IN THE PUBLIC REFERENCE ROOMS OF THE COMMISSION'S NEW YORK, LOS ANGELES AND CHICAGO REGIONAL OFFICES.

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LIST OF COMMENTATORS

NAME	ORGANIZATION	CATEGORY
ABBCO DISTRIBUTORS		CORPORATION
ADAMS, THOMAS M.	TRANSAMERICA INVESTMENT MANAGEMENT COMPANY	INSTITUTION
ADLER, BENJAMIN M.		INDIVIDUAL
ADRIAN DOMINICAN PORTFOLIO ADVISORY BOARD		RELIGIOUS ORGANIZATION
AKESON, KENNETH W. and FAHY, JOHN F.	INDEPENDENT ELECTION CORPORATION OF AMERICA	CONSULTANT
AKZONA, INC.		CORPORATION
ALIBRANDI, JOSEPH	WHITAKER CORPORATION	CORPORATION
ALUMINUM COMPANY OF AMERICA		CORPORATION
AMENS, HAROLD		CONSULTANT
AMERICAN HOME PRODUCTS, INC.		CORPORATION
AMERICAN PETROFINA, INC.		CORPORATION
AMERICAN SOCIETY OF CORPORATE SECRETARIES ("ASCS")		BUSINESS ASSOCIATION
AMFAC, INC.		CORPORATION
AMSTED INDUSTRIES		CORPORATION
ANHEUSER-BUSCH, INC.		CORPORATION
ASH, RICHARD A., ESQ.		ATTORNEY
ASSOCIATED CATHOLIC CHARITIES, INC.		RELIGIOUS ORGANIZATION
BACHELDER, WILLIAM K.		INDIVIDUAL
BAILEY, GEORGE E., ESQ.		ATTORNEY
BAKER, THOMAS E., ESQ.		ATTORNEY

NAME	ORGANIZATION	CATEGORY
COPELAND, MARK G., ESQ.		ATTORNEY
CROMPTON, CHARLES S., JR.	GENERAL CORPORATION LAW COMMITTEE, DELAWARE STATE BAR ASSOCIATION	BAR
CROSS, JAMES E., ESQ.	O'MELVENY & MYERS	LAW FIRM
COURTENAY, JAMES C.		INDIVIDUAL
D'AMATO, FREDERIC, M.D.		INDIVIDUAL
DAHLY, EDWARD H.		INDIVIDUAL
DASH, EARL A.		INDIVIDUAL
DAVIS, EVELYN Y.		PUBLISHER
DAVIS, SIDNEY F.	DELTA AIRLINES	CORPORATION
DEL NOCE, ALDO		INDIVIDUAL
DEMMLER, RALPH H., ESQ.		ATTORNEY
DILLINGHAM CORP.		CORPORATION
DIXON, CARL		INDIVIDUAL
DIXON, JUNE STONER		INDIVIDUAL
DORNEAL, HARRY W.		INDIVIDUAL
DUNCAN, VIRGIL		INDIVIDUAL
DWIGHT, HERBERT M., JR.	SPECTRA-PHYSICS, INC.	CORPORATION
EAGLE, A.F.		INDIVIDUAL
EATON CORP.		CORPORATION
E.I. DUPONT DE NEMOURS & CO.		CORPORATION
EISENBERG, MELVIN A.		ACADEMIC
EL PASO CO.		CORPORATION
EPISCOPAL COMMUNITY SERVICES OF THE DIOCESE OF PENNSYLVANIA		RELIGIOUS CORPORATION

NAME	ORGANIZATION	CATEGORY
BANK OF NEW YORK COMPANY, INC.		BANK
BARNES, R. MARSHALL		BROKER
BARTELL, JEFFREY B.		STATE OFFICIAL
BAUGH, ATHA J.		RELIGIOUS ORGANIZATION
BEECH AIRCRAFT CORP.		CORPORATION
BELDEN CORP.		CORPORATION
BETHELEHEM STEEL CORP.		CORPORATION
BIALKIN, KENNETH J., ET AL (OF THE AMERICAN BAR ASSOCIATION, SUBCOMMITTEE ON PROXY SOLICITATIONS AND TENDER OFFERS OF THE FEDERAL REGULATION OF SECURITIES COMMITTEE, SECTION OF CORPORATION, BANKING AND BUSINESS LAW)		ATTORNEY
BISHOP TRUST CO., LTD.		BANK
BJURMAN, GEORGE D.		INVESTMENT ADVISOR
BLOUT, ELKAN R.		INDIVIDUAL
BOWER, BRUCE L., ESQ.		ATTORNEY
BOYCE, CHARLES A.	GULF OIL CO.	CORPORATION
BRANCH, PATTESON		INDIVIDUAL
BROWN, ASHLEY	DAYTON P&L SHAREHOLDERS FOR RESPONSIBLE CORPORATE CITIZENSHIP	SHAREHOLDER ORGANIZATION
BROWN, HARRY		INDIVIDUAL
BROWN, MEREDITH M. ESQ.		ATTORNEY
BROWNFIELD, KOSYDAR, BROWN, BALLY & STURZ		LAW FIRM
BRUSATI, LOUIS A.		INDIVIDUAL
BUTLER, JOHN W.		INDIVIDUAL
BUTTAFUOCO, JAMES P., M.D.		INDIVIDUAL

NAME	ORGANIZATION	CATEGORY
CARY, WILLIAM L.		ACADEMIC
CASHEL, WILLIAM S. and HUTSON, FRANK A. JR.	AT&T	CORPORATION
CASTLE & COOKE, INC.		CORPORATION
CATERPILLAR TRACTOR CO.		CORPORATION
CATHOLIC THEOLOGICAL UNION		RELIGIOUS ORGANIZATION
CHAFEE, JOHN J.		U.S. SENATOR
CHAMBER OF COMMERCE OF U.S.		BUSINESS ASSOCIATION
CHARLES, G.C.		INDIVIDUAL
CHEMICAL N.Y. CORP.		BANK
CINCINNATI MILACRON, INC.		CORPORATION
CITIES SERVICE CO.		CORPORATION
CLARK EQUIPMENT CO.		CORPORATION
CLEVELAND ELECTRIC ILLUMINATING CO.		CORPORATION
C.M. SMILLIE & COMPANY		CORPORATION
COLUMBIA GAS SYSTEM, INC.		CORPORATION
COLUMBUS & SOUTHERN OHIO ELECTRIC CO.		CORPORATION
COMMITTEE ON CORPORATIONS, BUSINESS LAW SECTION, STATE BAR OF CALIFORNIA		BAR
COOMBE, GEORGE W., JR.	BANK OF AMERICA	BANK
CONANT, ROGER R.	TIAA-CREF	INSTITUTION
CONARD, ALFRED F.		ACADEMIC
CONSUMERS POWER CO.		CORPORATION
CONVENT OF OUR LADY OF THE PRESENTATION		RELIGIOUS ORGANIZATION

NAME	ORGANIZATION	CATEGORY
ESKIN, JORDAN HARLAN		INDIVIDUAL
FARRINGTON, WILLIAM		INDIVIDUAL
FEIS, WILLIAM J., ESQ.		ATTORNEY
FINANCIAL LAND CORP.		CORPORATION
FINE, JERRY, ESQ.		ATTORNEY
FIRST HAWAIIAN INC.		CORPORATION
FIRST MANHATTAN CO.		BROKER
FLORIDA MINING & MATERIALS CORP.		CORPORATION
FLORIDA POWER CORP.		CORPORATION
FOSTER, ROGER S.	CENTER FOR LAW AND SOCIAL POLICY	PUBLIC INTEREST
FRANK, HARVEY		ACADEMIC
FRANKLAND, ERIC		INDIVIDUAL
FREUND, RON	CLERGY AND LAITY CONCERNED	SHAREHOLDER ORGANIZATION
FRIEDMAN, RONALD		INDIVIDUAL
FRITZ, ARTHUR A.	SECURITY PACIFIC NATIONAL BANK	BANK
FROOKS, EVERETT, ESQ.		ATTORNEY
GALE, HORACE	BOARD OF NATIONAL MINISTRIES, AMERICAN BAPTIST CHURCHES	RELIGIOUS ORGANIZATION
GALLAWAY, EDWARD A.	STOCKHOLDERS COMMITTEE FOR THE PRESERVATION OF CHRYSLER CORP.	SHAREHOLDER ORGANIZATION
GARRETT, RAY JR., ESQ.		ATTORNEY
GEER, JOHN F.	COMMITTEE ON CORPORATION LAW, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ("ABCNY-CORP. LAW")	BAR

NAME	ORGANIZATION	CATEGORY
GENERAL ELECTRIC CO.		CORPORATION
GENERAL MOTORS CORP.		CORPORATION
GENERAL TELEPHONE & ELECTRONICS CORP.		CORPORATION
GENUINE PARTS CO.		CORPORATION
GEORGESON, WILLIAM N.	HARRIS TRUST & SAVINGS BANK	BANK
GHRIST, M. WILLIAM		INDIVIDUAL
GILBERT, JOHN J.		INDIVIDUAL
GILBERT, MARK		INDIVIDUAL
GINTEL, ROBERT		INDIVIDUAL
GOULD, WILLIAM D., ESQ.	BUSINESS AND CORPORATION LAW SECTION, LA COUNTY BAR ASSOCIATION ("LACBA-BUS AND CORP.")	BAR
GRANT, STANLEY		CONSULTANT
GREELEY, ROBERT E.	FINANCIAL ANALYSTS	INVESTMENT ADVISOR
GREEN, MARK	PUBLIC CITIZENS CONGRESS WATCH	PUBLIC INTEREST
GUEDRY, JAMES W.	INTERNATIONAL PAPER CO.	CORPORATION
GUTTMAN, EGON		ACADEMIC
HALL, DICKLER, LAWLER, KENT & HOWLEY		LAW FIRM
HARVEST INDUSTRIES, INC.		CORPORATION
HAWAIIAN ELECTRIC CO., INC.		CORPORATION
HAWAIIAN TRUST COMPANY, LTD.		BANK
HAYDEN, TOM	CAMPAIGN FOR ECONOMIC DEMOCRACY	PUBLIC INTEREST

NAME	ORGANIZATION	CATEGORY
HEARD, JAMES		INDIVIDUAL
HERBERT, VICTOR A., ESQ.		ATTORNEY
HEIDRICK, GARDNER	HEIDRICK & STRUGGLES	CONSULTANT
HENNESSEY, ALICE E.	BOISE CASCADE CORP.	CORPORATION
HENRY, LILLIAN		INDIVIDUAL
HOLIDAY INNS, INC.		CORPORATION
HOLLAND, PEGGEE & WOODROW		INDIVIDUAL
HOMESTAKE MINING CO.		CORPORATION
HOUGHTON, ROBERT F.		INDIVIDUAL
HOY, JAMES B.		INDIVIDUAL
HYMAN, ALAN		ACADEMIC
ICE, RICHARD E.	BAY AREA COMMITTEE ON CORPORATE SOCIAL RESPONSIBILITY	RELIGIOUS ORGANIZATION
INTERFAITH CENTER ON CORPORATE RESPONSIBILITY		RELIGIOUS ORGANIZATION
INVESTORS HERITAGE LIFE INSURANCE CO.		CORPORATION
JACOBY, NEIL H.		ACADEMIC
JOHNSON & JOHNSON		CORPORATION
JONES, DAVID	UNITED CHURCH BOARDS FOR WORLD MINISTRIES	RELIGIOUS ORGANIZATION
JONES, MARY GARDINER	NATIONAL CONSUMERS LEAGUE	PUBLIC INTEREST
KAHEN, HAROLD I.		INDIVIDUAL
KAISER ALUMINUM & CHEMICAL CORP.		CORPORATION
KAYE, RICHARD S.		CONSULTANT

NAME	ORGANIZATION	CATEGORY
KEARNS, LEWIS G.		INDIVIDUAL
KELI[illegible], LEROY FRANCIS		INDIVIDUAL
KNOLL, MITCHELL A.	LYNCH, JONES & RYAN	BROKER
KOTZ, RICHARD, ESQ.	SECURITIES LAW COMMITTEE, CHICAGO BAR ASSOCIATION	BAR
KOVEN, VANCE R., ESQ.		ATTORNEY
LAZARUS, RALPH	BUSINESS ROUNDTABLE	BUSINESS ASSOCIATION
LEIMAN, LEONARD, ESQ.	COMMITTEE ON SECURITIES REGULATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ("ABCNY-SECURITIES REG")	BAR
LEMON, C. RICHARD, ESQ.		ATTORNEY
LEVI STRAUSS & CO.		CORPORATION
LIBERMAN, JAMES B., ESQ.	SEVEN ELECTRIC UTILITY SYSTEMS	CORPORATION
LIBERTY LOAN CORP.		CORPORATION
LIGGETT GROUP, INC.		CORPORATION
LLOYDS BANK CALIFORNIA		BANK
LOEB, RONALD M., ESQ.		ATTORNEY
LONG ISLAND LIGHTING CO.		CORPORATION
LOUDEN, J. KEITH		CONSULTANT
LOVETT, DONALD M.		INDIVIDUAL
MACE, MYLES L.		ACADEMIC
MACHINE & ALLIED PRODUCTS INSTITUTE		BUSINESS ASSOCIATION
MADISON BANK AND TRUST CO.		BANK
MANSFIELD, ALLEN, ESQ.		ATTORNEY

NAME	ORGANIZATION	CATEGORY
MARIANIST PROVINCIAL HOUSE		RELIGIOUS ORGANIZATION
MARTIN, JOHN E.		CONSULTANT
MARYKNOLL SISTERS		RELIGIOUS ORGANIZATION
MASLOW, WILL	AMERICAN JEWISH CONGRESS	RELIGIOUS ORGANIZATION
MASONITE CORP.		CORPORATION
MASSACHUSETTS FINANCIAL		INVESTMENT ADVISOR
MATHESON, DON P.		BROKER
MATHISON, ROBERT		INDIVIDUAL
MAUI LAND & PINEAPPLE CO.		CORPORATION
McCLENDON, DAN S.		INDIVIDUAL
McCREA, J.M.		INDIVIDUAL
McLEAN TRUCKING CO.		CORPORATION
MENDELSON, CHARLES		CPA
MERCHANDINI, D.N., M.D.		INDIVIDUAL
METZENBAUM, HOWARD M.		U.S. SENATOR
MEYER, PEARL	HANDY ASSOCIATES	CONSULTANT
MEYERS, PHILIP G., ESQ.		ATTORNEY
MICHIGAN GENERAL CORP.		CORPORATION
MILLS, ROY		CPA
MOLYNEAUX, WILLIAM		INDIVIDUAL
MOORE, PHILIP, ESQ.		ATTORNEY
MURPHY, CATHERINE		INDIVIDUAL
MURPHY, SISTER REGINA	COALITION FOR RESPONSIBLE INVESTMENT	RELIGIOUS ORGANIZATION

NAME	ORGANIZATION	CATEGORY
MUSGRAVE, R. KENTON, ESQ.	CORPORATION LAW DEPARTMENT SECTION, LOS ANGELES COUNTY BAR ASSOCIATION ("LACBA-CORP. LAW DEPT.")	BAR
NAD, ABRAHAM		PUBLISHER
NADER, RALPH		PUBLIC INTEREST
NATIONWIDE CORP.		CORPORATION
NEILSON WINTHROP C.	STOCKHOLDERS OF AMERICA	STOCKHOLDER ORGANIZATION
NEUHAUSER, PAUL M., ESQ.		ATTORNEY
NEWMAN, EDITH, ESQ.		ATTORNEY
NEWMAN, J. WILSON		INDIVIDUAL
NEW MEXICO & ARIZONA LAND CO.		CORPORATION
NEW YORK PROVINCE RELIGIOUS OF THE SACRED HEART		RELIGIOUS ORGANIZATION
NN CORP.		CORPORATION
NORBY, WILLIAM W.		FINANCIAL ANALYST
NORTRUST CORP.		CORPORATION
OFFICE OF SOCIAL MINISTRIES		RELIGIOUS ORGANIZATION
OLDHAM, THOMAS, ESQ.		ATTORNEY
OLIN CORP.		CORPORATION
OLSON, CARL	STOCKHOLDER SOVEREIGNTY SOCIETY	STOCKHOLDER ORGANIZATION
OSCAR MAYER & CO.		CORPORATION
OWEN, E. FORD		INDIVIDUAL
OWENS-ILLINOIS		CORPORATION

NAME	ORGANIZATION	CATEGORY
PACIFIC GAS AND ELECTRIC CO.		CORPORATION
PACIFIC RESOURCES, INC.		CORPORATION
PACKARD, RUSSELL		INDIVIDUAL
PAY LESS DRUG STORES NORTHWEST, INC.		CORPORATION
PENNSYLVANIA POWER & LIGHT CO.		CORPORATION
PERTSCHUK, MICHAEL		CHAIRMAN, FTC
PETRIE, DONALD A., ESQ.		ATTORNEY
PFIZER, INC.		CORPORATION
P.H. GLATFELTER		CORPORATION
PHILLIPS, JOHN R., ESQ.	CENTER FOR LAW IN THE PUBLIC INTEREST ("CLPI")	PUBLIC INTEREST
PHILLIPS, RICHARD M., ESQ.	ASSOCIATION OF PUBLICLY TRADED INVESTMENT FUNDS	BUSINESS ASSOCIATION
PITNEY BOWES		CORPORATION
POLLITTE, ROBERT		INDIVIDUAL
POPE, ALEXANDER H., ESQ.		ATTORNEY
POTLATCH CORP.		CORPORATION
PREAS, THOMAS W.		INDIVIDUAL
PROCTOR & GAMBLE CO.		CORPORATION
PUBLIC SERVICE ELECTRIC AND GAS CO.		CORPORATION
PUGET SOUND POWER & LIGHT CO.		CORPORATION
PULLEN, KEATS		INDIVIDUAL
RATNER, DAVID		ACADEMIC

NAME	ORGANIZATION	CATEGORY
RAYTHEON CO.		CORPORATION
REINISCH, HANS R.	NATIONAL SHARE-HOLDERS ASSOCIATION	SHAREHOLDER ORGANIZATION
RICKETTS, DONALD W., ESQ.		ATTORNEY
ROBINSON, J. WILLIAM and RICHARD NYE	GEORGESON & CO.	CONSULTANT
ROCKEFELLER FOUNDATION		INSTITUTION
ROSEN, LOUIS E., ESQ.		ATTORNEY
RUBBERMAID, INC.		CORPORATION
RUBICK, WADE D., ESQ.		ATTORNEY
RUBIN, MEL		INDIVIDUAL
RUDER, DAVID S.		ACADEMIC
RYDER, PAUL	OHIO PUBLIC INTEREST CAMPAIGN	PUBLIC INTEREST
SAFEGUARD INDUSTRIES, INC.		CORPORATION
SALHANICK, HILTON A., M.D.		INDIVIDUAL
SANTA FE INDUSTRIES, INC.		CORPORATION
SCHNEIDER, EMIL A.		INDIVIDUAL
SCHOMER, HOWARD		INDIVIDUAL
SCHWARTZ, CHARLES P.	CHAMPION PARTS	CORPORATION
SCHWARTZ, DONALD E.		ACADEMIC
SEIDLER, LEE J. and WEISEN, JEREMY, ESQ.	COMMISSION ON AUDITORS' RESPONSI-BILITIES ("COHEN COMMI-SSION")	CPA
SELAS CORPORATION OF AMERICA		CORPORATION
SELIGMAN, JOEL		ACADEMIC
SHALIT, SOL S.		ACADEMIC

NAME	ORGANIZATION	CATEGORY
SIGNAL CORPORATION		CORPORATION
SIGNODE CORP.		CORPORATION
SILBERMAN, JOSEPH		INDIVIDUAL
SILVEY COMPANIES		CORPORATION
SIMPSON, ALLEN J.		INVESTMENT ADVISOR
SISTERS OF MERCY		RELIGIOUS ORGANIZATION
SISTERS OF ST. DOMINIC		RELIGIOUS ORGANIZATION
SISTERS OF ST. JOSEPH OF PEACE		RELIGIOUS ORGANIZATION
SMITH, BRYAN F.		INDIVIDUAL
SMITH, FRANK J.		INDIVIDUAL
SMITH, RICHARD B., ESQ.		ATTORNEY
SOSIN, SIDNEY, ESQ.		ATTORNEY
SOSS, WILMA	FEDERATION OF WOMEN SHAREHOLDERS IN AMERICAN BUSINESS, INC.	SHAREHOLDER ORGANIZATION
SPORN, PHILIP		CONSULTANT
STAMM, ALAN, ESQ.		ATTORNEY
STIER, JAMES G.	NATIONAL INVESTOR RELATIONS INSTITUTE ("NIRI")	BUSINESS ASSOCIATION
STOCKHOLDER EMPLOYEES COMMITTEE, CHRYSLER CORP.		SHAREHOLDER ORGANIZATION
STROUD, ROBERT E., ESQ.	GENERAL ASSEMBLY MISSION BOARD OF THE PRESBYTERIAN CHURCH IN THE U.S.	RELIGIOUS ORGANIZATION
STROUGL, ROBERT I., ESQ.		ATTORNEY
SULLIVAN & CROMWELL		LAW FIRM
SUNAIR ELECTRONICS, INC.		CORPORATION

NAME	ORGANIZATION	CATEGORY
SQUILLER, JAMES		INDIVIDUAL
TAYLOR, TAMSIN		INDIVIDUAL
TERRALL, R.N.		INDIVIDUAL
TEXAS INSTRUMENTS, INC.		CORPORATION
TIMKEN CO.		CORPORATION
TRAVELERS INSURANCE COMPANIES		CORPORATION
UNION CARBIDE CORP.		CORPORATION
UNION SERVICE CORP.		CORPORATION
UNITED AIRCRAFT PRODUCTS, INC.		CORPORATION
UNITED CHURCH BOARD FOR WORLD MINISTRIES		RELIGIOUS ORGANIZATION
UNITED STATES GYPSUM CO.		CORPORATION
UNITED STATES STEEL CORP.		CORPORATION
VASSAR COLLEGE		INSTITUTION
WALSH, ANTHONY B.		CONSULTANT
WANDER, HERBERT S., ESQ.		ATTORNEY
WANLASS, LAWRENCE C.		INDIVIDUAL
WASHINGTON GAS & LIGHT CO.		CORPORATION
WEISS, ELLIOTT J.		ACADEMIC
WEISS, SAM B., ESQ.		ATTORNEY
WELSTAND, JOSEPH S.		INDIVIDUAL
WHEAT, FRANCIS M., ESQ.		ATTORNEY
WHIRLPOOL CORP.		CORPORATION
WHITE, SAMUEL K.	SUN COMPANY	CORPORATION

NAME	ORGANIZATION	CATEGORY
WHITE WELD ASSET MANAGEMENT		INVESTMENT ADVISOR
WINTHROP, STIMSON, PUTNAM & ROBERTS		LAW FIRM
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I. General Observations on Corporate Accountability

A. The Role of the Corporation in Society

In Securities Exchange Act Release Nos. 13482 and 13901 (April 28 and August 29, 1977), the Commission indicated that among the issues to be studied in the proxy rule re-examination was the fundamental question of "how corporations can best be made more responsive to their shareholders and the public at large." This broad inquiry prodded a number of commentators to offer their views on the role of corporations in society and the degree to which corporations are responsible for the social as well as the economic effects of their activities. Based on these comments, it is apparent that there is still a widely-held perception that the primary societal purpose of corporations is to provide products, services, jobs and income. (Union Carbide). Many commentators expressed the traditional view that corporations are profit-making enterprises whose primary responsibility is the maximization of investment return, and that the imposition of societal goals on these economic organizations would impact adversely on financial return and capital formation. It was asserted that the American corporation has proved to be an extremely powerful engine of economic and social progress, and that care must be exercised in tinkering with this mechanism (Yavitz). In this regard, Francis Wheat suggested that one of the major problems that the Commission must consider in its re-examination is whether corporate governance can be improved without impairing the efficiency of the corporate sector.

Despite the prevalence of this view, there is growing recognition, particularly among public interest and religious organizations, that because corporations deal intimately with members of society and corporate practices have such a significant impact on the quality of life, corporations must be sensitive to societal trends. Concomitantly there is an increased awareness that "[t]he ability of corporations to attract capital and retain public confidence [is] deeply affected by the way in which corporate managements respond to public concerns about corporate activities..." (M. G. Jones), as well as a realization on the part of public interest groups and some corporate spokesmen that corporations must go beyond the letter of the law in assuring that their operations respond to public concerns. (e.g., Nader, Seligman, Cashel).

B. Nature and Scope of Corporate Abuses

In the releases announcing the proxy rule re-examination, the Commission noted that recent events, including disclosures by more than 400 corporations regarding questionable or illegal payments and practices, suggested that there has been an "apparent breakdown in corporate accountability." Although commentators were not specifically asked to address this point, many persons who discussed the broad question of how corporations can best be made more responsive to their shareholders and the public at large offered their views on the nature and scope of corporate abuses.

A number of commentators agreed with the proposition that in recent years, instances of illegal conduct and abuse of power by top management in major corporations have raised serious questions concerning the means by which corporations are governed (e.g. Wheat). Disclosure of improper payments and other misconduct, for example, have illustrated that passive, unknowing boards of directors have failed to properly supervise management. (Heard). These disclosures demonstrate, in the opinion of Professor Seligman, that directors nominated and controlled by inside executives do not function as an independent check on management and that the modern board of directors is "dangerous as well as incompetent." It was also noted that as a result of slush funds, illegal political contributions, foreign bribes, bank overdrafts and corporate perquisites, public confidence in corporations is declining (e.g., Senator Chafee, Geudry).

Among commentators who agreed that mechanisms of corporate accountability were inadequate, there was a difference of opinion as to the seriousness of the problem. According to Ralph Nader, for example, one of the most fundamental policy dilemmas facing this country is how to make private corporate power accountable to the public that it supposedly serves. He opined that there is in progress a "corporate crime epidemic" and that existing laws do not adequately deter such wrongdoing because of the absence of meaningful sanctions. Similarly, because there is no nexus between corporate property ownership and corporate property control, the normal accountability consequences of property ownership do not exist. His views were reiterated by Tom Hayden and Professor Seligman, among others.

With respect to the social implications of corporate conduct, Mary Gardner Jones expressed the view that "corporations have got to wake up to the fact that the impact of what they do in society

carries very severe consequences." She suggested that the question is how to sensitize corporate boards to this fact. Other commentators (e.g., Guedry) opined that the problem of corporate accountability, though serious, has been overstated.

On the other hand, an equal number of commentators challenged the assumption that corporate accountability problems exist and disagreed with the perception that recent illegal and improper payments disclosures are indicative of such problems. Thus Akzona, Inc., noted that thousands of companies are innocent of such conduct, and suggested that critics should differentiate between illegal and questionable practices, and situations involving differing degrees of senior management participation. Union Carbide pointed out that many questionable practices were legal in the countries where they occurred, were practiced by foreign competitors and were condoned or in some cases encouraged by the U. S. Government. Many of the cases involved small payments not reflecting adversely on the quality of management (Jacoby) and represented individual aberrations which should not give rise to whole scale remodeling of the system (Ruder). It was also noted that payments were made to increase corporate profits and not for personal gain.

Several commentators expressed the view that the need for reform is overstated (e.g. Musgrave; ASCS) and that corporations, by and large, are accountable and responsive to their shareholders and the public. To premise a radical transformation of a system that works reasonably well on certain imperfections in its operation, it was suggested, would not be in the best interest of shareholders or the public (Bower). Similarly, it was noted that many abuses were not originated by corporate directors or executives. Thus, sex and race discrimination in employment reflected patterns which pervaded society. Moreover, until recently, industrial pollution was considered acceptable by society (Union Carbide).

While many commentators stated that corporations deal fairly and responsively with shareholders, some pointed out abuses in connection with corporate treatment of public investors. Corporate managements were characterized as being arrogant and unresponsive (Hoy). Moreover, it was stated that corporate boards often are unable to provide any meaningful protection for shareholders' investments (Seligman) and do not represent the interests of the small investor. Abuses of trust, such as the adoption of charter amendments to perpetuate management's control, management opposition to favorable tender offers, dividend starvation, accounting improprieties, improper treatment of shareholders and improper diversions of corporate assets were noted (e.g., Sommer, Ash).

According to Senator Metzenbaum, the individual shareholder has been virtually ignored. Restrictive court decisions and new corporation laws have left him with no remedy or only an expensive appraisal remedy and his power and role have been reduced. Shareholders lack an electoral mechanism to replace incompetent, dishonest or self-dealing directors with more diligent, and honest legal representatives (Seligman) and, it was suggested, a continuing lack of opportunity for political input could lead the public to demand increased governmental control of corporations (Frank). The danger inherent in this system where the proxy machinery perpetuates the status of boards of directors and management is that the right of shareholder control tends to legitimize management decisions (Nader).

As a result of the lack of accountability to shareholders, it was observed that the small shareholders are abandoning the market. They express feelings of having been abused, manipulated and misled by insider self-dealing, going private, insider trading, an inability to get "inside" information and other mistreatment by corporations (Strough).

In contrast to the commentators cited above, Kenneth Bialkin *et al.*, opined that the separation of ownership from control results from the increased size of corporations and the growing liquidity of securities, both of which are conducive to stability. In their view the ultimate check on inefficient management comes from the marketplace - and this check is preferable to one executed by shareholders, exercising increased corporate suffrage.

C. Adequacy of Existing Accountability Mechanisms

In commenting on the need for new legislation or other means of improving corporate accountability, many commentators discussed existing checks on corporate decision makers and debated about their adequacy.

1. External Checks

A number of commentators stated that the existing system, characterized by the separation of political and economic power, has served us well and that large, publicly held corporations are subject to an adequate system of checks and balances. (Lazarus, Newman, Hennessey, Jacoby). Economic forces and substantive laws were thought to assure a high level of accountability.

a. The Wall Street Rule

A prime discipline on corporate managers, according to some commentators, is the fact that dissatisfied shareholders can sell their shares. Just as investment is a vote of confidence in management (Stroud), the sale of stock is a "no" vote, which, if it occurs on a large scale, will affect the price of the stock and have a significant impact on management (Barnes, Garrett). A decline in market values impacts upon the manager's personal finances, makes corporate fund-raising difficult and expensive, encourages shareholder proposals and leads to pressure on the board to take corrective action (AT&T, Garrett). At the point where dissatisfaction is clearly demonstrated, changes in management occur, either through board action or takeovers.

The effectiveness of the Wall Street Rule was disputed by a number of commentators, however. Several persons disagreed that sales by large numbers of shareholders have in fact resulted in changes in management (e.g., Eisenberg, Mansfield, Gintel). Additionally, it was noted that decreases in stock prices may be due to a number of factors and that management "may not get the message" (Knoll). In any event, since one shareholder replaces another, the exit of the selling shareholder gives a very ambiguous message to management (Schwartz). As a practical matter, the Wall Street Rule does not work in the case of a depressed market (Greeley) or in smaller corporations whose securities are not actively traded, because there is often no way for a shareholder to sell out (Matheson). Moreover, it was suggested that institutions tend to be healthier if people who are a part of them have a way of registering dissent other than quitting (Nader).

b. Takeovers

While some commentators (e.g., Bank of America, Cashel) suggested that the threat of a takeover is a discipline on corporate management, it was noted that there is a growing belief on Wall Street that a takeover is not a device to cast out bad management; rather, it is a means for large acquisition-minded companies to take over well-managed firms (Seligman, MAPI, Schwartz). In any event, some commentators suggested that a take-over bid is a heavy handed mechanism subject to enormous delays (Weiss) which is difficult to accomplish in the "current oppressive legal structure" (Eskin). According to these commentators, because a takeover is contingent on so much more than the competance or honesty of management, it cannot be used as a mechanism for corporate governance.

c. Federal Securities Laws

It was suggested by Ray Garrett, among others, that disclosures required under the federal securities laws have a prophylactic effect on corporate managers, particularly in light of the growing role of professional money managers who review such disclosures. The knowledge that a sophisticated professional will scrutinize disclosed management conduct, according to Mr. Garrett, causes management to consider its own actions in a more critical light. The anti-fraud provisions of the federal securities laws were also cited as a discipline on corporate managers, although of limited use for preventing and curing anti-social corporate behavior (Foster). Shareholder recourse to private litigation to obtain redress for securities laws violations, although a useful means of effecting structural changes in corporations (CLPI), was stated to be inadequate by a number of commentators, particularly in light of recent Supreme Court decisions restricting access to federal courts and construing narrowly the scope of Rule 10b-5 (e.g., Farrington, Kaye, Senator Metzenbaum).

2. Internal Checks

a. Board of Directors

The primary internal check on corporate managers is the board of directors, with whom ultimate responsibility and accountability must rest (Boyce). It is generally acknowledged that outside board members would tend to be less biased in reviewing management (Geudry), and it is clear that the number of publicly held companies with a majority of outsiders on the board is both large and growing. Peer pressure within the board tends to make directors accountable (B. Smith) and the high rate of removal of chief executive officers evidences the effectiveness of boards in serving as a check on management (ASCS).

Despite a high level of satisfaction among commentators with the manner in which boards now function and the way they are evolving (more outsiders, improved committee systems, etc.), some dissatisfaction with the level of accountability provided by corporate boards was expressed. Directors have limited time and information available, and rarely get regular reports on or ask questions about socially significant matters (M. G. Jones). Consideration of prospective nominees suggested by shareholders is not possible if a board is controlled by insiders (Pollitte). Moreover, the director selection process assures that directors are answerable to management, which does not necessarily have the long range interests of the corporation at heart, rather than to shareholders (Eisenberg). According to Professor Seligman, shareholder democracy has collapsed. Since 1956, management has run unopposed in 99% of Commission regulated proxy solicitations. Since 1967, incumbent managements have been re-elected 99.9% of the time. In the last five years not one management slate in any of the 500 largest industrial firms was even challenged. In the words of Tom Hayden, the present system, by which a self-perpetuating managerial elite maintains itself through control of the corporate proxy machinery, is "similar to the Soviet form of democracy".

While a number of commentators asserted that the corporate electoral process provides a means for expression of ownership rights and imposes a discipline on management (e.g., Cashel, Greeley), others opined that the proxy rules operate to entrench management and that most people have simply given up on proxy voting as an effective means of changing management (Lemon).

b. Proxy Contests

Although it was suggested that the possibility of a proxy contest exerts a constructive pressure on corporate managers, as indicated elsewhere, commentators with first hand experience in proxy contests described the difficulties entailed in mounting such contests and the slim chances for success (Gintel, Matheson, Lemon). While a successful contest can produce a new attitude on the board (Gintel), the costs and obstacles involved in contests make them an ineffective check in most situations.

c. Codes of Ethics

While several commentators suggested that corporate codes of ethics may be effective checks on management conduct, it was noted by some that codes are useless without explicit provisions for sanctions (e.g., Mace).

D. Responsiveness to Shareholder Concerns

Commentators' views on the degree of responsiveness exhibited by corporations to their shareholders seemed to be directly related to whether the commentators were shareholders or corporate representatives. Thus, the shareholders who addressed this question described deep dissatisfaction with the responsiveness of corporations with whom they had dealt. They described problems they had experienced in getting management to respond to letters and questions (Hoy), the difficulty of influencing management positions on certain questions (Gale), obstacles encountered in having proposals included in corporate proxy materials (Molineaux) and cavalier treatment of shareholders by management during annual meetings (Silberman). These commentators also noted that one factor precipitating the departure of millions of individual investors from the market is the deepening concern about the credibility and integrity of corporate management (Reinisch), and the apparent favoritism of corporations and brokers for institutional investors (Neilson).

Conversely, a number of corporate commentators and business associations suggested that shareholders with a genuine and legitimate interest in corporate governance currently have adequate opportunities to participate and to have their views considered (e.g., Washington Gas). American corporations, it was suggested, go to great lengths to respond to constructive criticisms and shareholder concerns (Maui Land & Pineapple Co., Wheat, ASCS). For example, in response to shareholder concerns and recommendations, the Gulf Oil Company appointed an audit committee in 1971, furnishes a proxy statement which contains biographies and pictures of directorial nominees, discloses all other directorships held by its nominees, and provides a proxy card which permits shareholders to withhold votes from individual nominees (Boyce). Similarly, Boise-Cascade has an active shareholder relations program and after careful research, responds fully to shareholder communications (Hennessey). AT&T noted that it received 465,000 communications from shareholders last year of which only .2% related to corporate governance; the vast majority of these communications dealt with matters of economic interest (Cashel).

Moreover, several corporate commentators took issue with the suggestion that investors have left the market because of the lack of corporate responsiveness. Rather, they interpreted this egress as the result of the economic climate, the erosion of investment returns because of inflation, double taxation of dividends, and other economic disincentives. (e.g., El Paso Co., Stier, B. Smith).

E. Shareholder Interest in Participating in Corporate Governance

Although the issue was hotly contested, the majority of commentators expressed the view that shareholders have little interest in participating in corporate governance. These persons stressed that shareholders are primarily interested in the economic performance of their corporations and concerned with making a profit on their investments (e.g., Robinson, Kotz El Paso Co., Texas Instruments). Investors are motivated by the "economics of a situation" and not by ideological issues (Newman) and they possess neither the time, talent nor inclination to act as a check on management (e.g., Wheat, ASCS). Several commentators noted that it is very expensive and difficult for shareholders to oppose management (e.g., A. Brown, Hyman) and for the most part they are uninterested in imposing additional costs on corporations (Schneider). Most commentators stated that shareholders rely on their ability to sell when they become dissatisfied (e.g., Gould, Hyman, Feis).

Similarly, a number of corporate commentators suggested that there is no evidence that their shareholders have any substantial interest in "direct change in the current mode of corporate governance". (Geudry, AT&T). Rather, the vast majority of shareholders are perceived as content to leave corporate leadership and policy-making to those willing to accept the responsibility (Union Carbide). This proposition has been borne out by the experience of Texas Instruments, where shareholders have indicated virtually no interest in an expanded corporate governance role (Garrett).

According to some commentators, even institutional investors normally have no interest in actively attempting to change management policies (e.g, Adams). Like other investors, institutions have concerns which are primarily economic (B. Smith). These commentators contended that, in fact, with the exception of certain politically motivated groups, investors do not buy securities with the intention of participating in corporate governance.

However, several commentators vehemently disagreed with the notion that shareholders are primarily concerned with economic performance and therefore have no interest in participating in corporate governance. They asserted that, on the contrary, shareholders and the public are concerned about financial collapses, consumer fraud and unethical conduct by corporations, all of which are symptomatic of deficiencies in governance mechanisms (e.g., Heard). They opined that shareholders are interested in making their participation in the electoral process more meaningful and would communicate their views if they believed they would have any effect (Akeson, Guttman). It was noted that individuals generally read their proxy materials, and in most cases, voting responsibilities are taken seriously (Neilson). According to James Heard of IRRC, the extent of shareholder interest in corporate governance was demonstrated by the results of a 1977 survey of voting on resolutions dealing with corporate responsibility and corporate governance

issues. The survey showed that 60 of 113 such resolutions which were presented to shareholders prior to June 30, 1977, received enough support in 1977 to permit their resubmission in 1978, although all but one was opposed by management.

Several commentators asserted that in recent years institutional investors have become more involved in corporate governance (e.g. Hoy). The predominant view held by institutions during the 1960's, that a vote for a shareholder proposal is a vote against management, is no longer true (Conant).

A number of commentators opined that shareholder apathy is a reflection of frustration with the powerlessness of the role of the investor (e.g., Stroud, Woelfel), and that it results from a proxy system heavily weighted in favor of management (Galloway). It was suggested that if shareholders had greater opportunities to participate and felt that their votes would have an impact on corporate policies or practices, they would become more active (Nader, Olson). Moreover, it was suggested that even if only a small number of shareholders were interested in participating in corporate governance, their activities would inure to the benefit of all, and that expanded opportunities for meaningful shareholder input in the corporate electoral process would be especially beneficial where a corporation was poorly managed since shareholders would then be afforded an effective means of "vot[ing] the rascals out" (Seligman).

F. Adequacy of State Law/Need for Legislation

In its releases, the Commission acknowledged that some of the issues raised by its re-examination transcend the proxy rules in significance and that several of the proposals under study could not be effectuated within the Commission's existing statutory authority. Commentators and witnesses therefore were invited to address the subject of the need for federal legislation and to comment on the desirability of the submission to Congress or support by the Commission for a federal minimum standards or federal chartering law.

The subject of federal legislation gave rise to heated debate. Not surprisingly, those commentators who viewed existing accountability mechanisms as adequate and corporate abuses as insignificant, saw no need for additional legislation. Similarly, commentators who perceived that there had been a breakdown in corporate accountability and that existing checks on corporate behavior are inadequate were strongly in favor of new legislation.

Part of the debate arose from the fact that the terms "federal minimum standards" and "federal chartering" have not been clearly defined and have different meanings to different people. Thus, persons who understood "federal minimum standards" to mean a codification of fiduciary standards for corporate officers, directors and control persons, and the creation of an express federal private right of action, were more likely to support such a bill than persons who defined the term to mean the creation of a new layer of regulation, controlling the internal structure and workings of corporations and enforced by a new or expanded federal bureaucracy.

Opponents of new legislation generally stated that legislation designed to increase corporate accountability is unnecessary because existing controls are adequate. As examples of existing constraints on corporate conduct, Bryan Smith, and other proponents of this point of view, pointed to governmental controls, such as securities, tax, and antitrust laws, and to specific bills regulating certain kinds of conduct, such as the Foreign Corrupt Practices Act. Mr. Smith noted that, in addition to governmental restrictions, companies are guided and controlled by private

organizations such as the FASB and the ABA. Furthermore, he cited the restrictions placed on companies whose securities are publicly traded by self-regulatory organizations and referred specifically to the New York Stock Exchange requirement that listed companies have independent audit committees. Mr. Smith further observed that the fact that a number of corporations, including Texas Instruments, have acted voluntarily to establish a strong independent board in order to guarantee that the corporation is being run in the best interests of shareholders within the context of its societal responsibilities, is further proof that the existing regulatory and legal structure is working.

This point of view was echoed by Dean Ruder, who added that individual aberrations and particular instances of unethical behavior should not give rise to full scale remodeling of the corporate system. Rather, the solution to specific problems is specific legislation, such as laws outlawing bribery. Similarly, Union Carbide, among others, opined that if corporate imperfections require correction, the most effective course is to address particular problems through specific laws.

Several commentators, including William Feis, noted that federalization is taking place even without federal minimum standards legislation, through case law developed under Rule 10b-5. Others, including General Motors Corp., expressed skepticism that the adoption of federal legislation would be likely to result in any improvement in corporate governance.

Proponents of federal legislation stated, on the other hand, that existing checks and balances affecting corporate conduct are inadequate. Professor Ratner pointed out that the potency of the federal securities laws has been diminished by recent Supreme Court decisions which restrict the ability of private litigants to seek redress in federal courts. Professor Cary noted that one factor which may be influencing the Court is the view that the burgeoning caseload of the federal courts threatens to over-burden the federal court system. He expressed concern that the trend in Supreme Court decisions may give rise to direct federal regulation, a prospect he does not favor. Senator Metzenbaum suggested that the individual shareholder has been virtually ignored by corporations, and that restrictive court decisions have left him with no remedy or only an expensive and unsatisfactory appraisal remedy. He agreed that the Supreme Court's attitude toward shareholder rights could make legislation even more necessary.

Professor Cary pointed out that a standard of "inherent fairness" which imposes a high level of fiduciary obligations,

cannot be developed by the Commission; rather it must come from legislation and judicial decisions. Similarly, Professor Schwartz opined that the Commission cannot remake the governing structure of corporations, nor can it remove the worst inequities which subvert the goal of fair corporate suffrage.

Ralph Nader expressed the view that in recent years there has been a virtual "corporate crime wave" and emphasized that there is a vast difference between internal reform designed to prevent future misconduct, and external after-the-fact regulation. He asserted that there is a great need for legislation which will achieve the former. He also suggested that improvements in corporate democracy, while desirable, will not in themselves be sufficient. His views were reiterated by Professor Joel Seligman and Tom Hayden, among others.

Much of the debate about the need for federal legislation centered around the adequacy of existing state law, and particularly, the law of the State of Delaware. On the one hand, opponents of federal legislation expressed the view that the states have taken a balanced approach to the operational needs of corporations by requiring directors to meet certain fiduciary standards but refraining from penalizing them for good faith errors of judgment (Ruder). One commentator even suggested that the competition between the states raises standards because "[a] state whose laws favor management to the detriment of shareholders will attract fewer and fewer new corporations... Promoters of new corporations will be drawn to those states whose laws are most favorable to shareholders and whose securities will thus be attractive to investors" (Union Carbide). In this regard, one analyst reported that, according to his studies, prices of securities tend to rise when corporations reincorporate in Delaware, thus reflecting a perception that shareholders are benefited by such a move (Hyman). On the other hand, proponents of change asserted that states have waged a "race for the bottom" and offered "law for sale". These commentators, particularly Professor Cary, suggested that those who assert that existing fiduciary standards are adequate are disingenuous. Thus, while a number of persons referred to recent Delaware court decisions, such as Singer v. Magnavox Company, Del. Supr., 380 A. 2d 969 (1977), as evidence of the sufficiency of shareholder protections under state law, others suggested that these decisions were an aberration.

Proponents of continued state regulation of corporate conduct suggested that the newly enacted California corporations law is an excellent example of what can be achieved through state regulation and noted that it places on directors a duty of reasonable inquiry in addition to the duty of care they owe to shareholders (Feis, Jacoby). They also expressed concern that federal legislation would be an unwarranted incursion by the federal government which would be apt to lead to more and more federal interference, impede innovation and constructive advances, and concentrate too much power in the federal government (Sosin, Crompton, B. Smith). Moreover, some commentators opined that federal standards are not likely to be any more exacting than state standards (ASCS, Dupont), and noted that

states have standard procedures and many years of jurisprudential experience in applying them to the benefit of companies and shareholders alike.

On the other hand, supporters of new legislation suggested that it makes no sense for multinational corporations to be chartered on a state by-state basis, and that absent federal involvement, Delaware becomes a "Liberia" for corporations (Hayden). It was noted that state legislatures have responded to management concerns about takeovers by, for example, adopting anti-takeover statutes which allow corporate managements to frustrate legitimate tender offers to keep themselves in office, permitting corporations to dispense with annual meetings and otherwise reducing the role of shareholders in de facto mergers (Senator Metzenbaum). Additionally, it was noted that certain desirable changes in corporate governance, such as requiring public companies to have independent boards, could only be achieved through legislative mandate (Seligman).

II. Adequacy of Available Means for Shareholder Communications

A. General

The majority of commentators addressing the question of facilitating communication between shareholders generally stated that they believed the existing rules afford sufficient opportunities for communication, and opposed rule changes to create communication mechanisms to supplement the present system. These commentators, primarily corporations, expressed concern over the high cost of what they believed would necessarily be a cumbersome and unworkable procedure. In addition, a number of commentators, including Castle and Cooke, pointed out that any expansion of opportunities for shareholder communication would, because few shareholders are sufficiently interested to avail themselves of present means, involve the misuse of shareholder equity, for the benefit of a few. In this regard, Proctor & Gamble stated that none of its 98,000 shareholders had ever requested increased opportunities for communication, and pointed out that, according to the IRRC, there are only sixteen principle shareholder-proponents. 1/ In addition, it was noted that the present system, which places the cost of soliciting proxies or mailing communications on the shareholder-proponent, may have a salutary effect because it provides a practical means of limiting such mailings to shareholders who have a genuine concern and interest in the matters involved.

William J. Feis, Esq., expressed the opinion, espoused by a number of other commentators, that because there are already many avenues of persuasion available to a shareholder such as Rule 14a-8, the media, proxy contests, comments at the annual meeting, and letters to management, to fundamentally change the proxy rules in an effort to enhance shareholder communications would grant to stockholders what may be merely a "spurious right." Levi-Strauss generally opposed as costly and unnecessary proposals which would make the proxy statement or reports available to shareholders to communicate any viewpoint not directly relating to the company's business. However, it suggested that the Commission might wish to consider an amendment to the shareholder proposal rule to permit shareholder proposals requiring management to discuss certain areas of general interest to shareholders. Similarly, AT&T, while indicating that it believed current communication measures were in general adequate, stated that, if further measures were desirable, it would recommend requiring summaries of shareholder communications and company responses in the company's annual report, provided management retained the discretion to select the comments to be included and to determine the content of the summaries.

Commentators who favored amendments to the proxy rules to facilitate communication between shareholders generally represented shareholder organizations and public interest groups. Some specific recommendations were also made by representatives of the corporate and legal community. The Committee on Securities Regulation of the Association of the Bar of the City of New York suggested that the classes of "solicitations"

1/ *See* New York Times, May 16, 1977.

to which the proxy rules do not apply, pursuant to Rule 14a-2(a), be expanded to include communications between shareholders concerning socially significant matters. Other commentators suggested that shareholders be able to express their views in the corporate newsletter, in the proxy statement via space provided for pro and con arguments, or in the annual report. Other suggestions included establishing a more effective means of transmitting proponents' materials to beneficial owners and requiring that the shareholders lists be made more readily available to shareholders. One commentator opined that requiring self-regulatory organizations to mandate such communication mechanisms as a prerequisite to listing, would be the most workable approach.

Commentators noted that any system to facilitate shareholder communications also must incorporate mechanisms for increased disclosure if that system is to provide a meaningful opportunity for shareholder communication. As a corollary to that observation, it was noted that, although some commentators have stated that shareholders are not interested in shareholder proposals relating to socially significant matters, many shareholders are concerned about these issues, and improved shareholder communication mechanisms are necessary to determine how much support there is for a particular proposal.

Numerous commentators, representing a broad spectrum of affiliations, supported the notion of maintenance by the corporation of a shareholder communications file. Both Sun Company and Raytheon Company stated that the Commission should accomplish this change by promulgating guidelines encouraging the establishment of communication files and providing advice concerning the mechanics of instituting such a program.

B. Rule 14a-8

1. Impact and Effectiveness of Existing Rule 14a-8

a. Impact

A broad mix of commentators, including many corporations, indicated that in their experience shareholder proposals exert pressure on management to defend its present policies, and have often resulted in significant revisions of these policies. Generally, these commentators pointed out that even though a proposal may not receive sufficient votes to compel management actions, factors external to the voting process, such as unfavorable publicity from the revelation of facts and views brought out in the proposal, as well as management's concern for its reputation and image with its shareholders and with the public at large, appear in many instances to have deterred management from continuing certain practices or to have influenced the adoption of certain policies. In this regard, Union Carbide stated:

> "... Rule 14a-8 now provides an effective device by which shareholders can compel management to discuss matters of shareholder interest that are reasonably related to corporate activity. The machinery has had a substantial impact on corporate action even though the number of votes cast in favor of 14a-8 proposals has been small."
> (citation omitted.)

In addition, General Electric Co., citing affirmative company action in connection with proposals concerning equal opportunity employment, South Africa and nuclear energy, stated that shareholder proposals have provided guidance to the board concerning issues to which it should give particular attention. Frank Hutson of AT&T stated that AT&T had voluntarily adopted several shareholder proposals, and that he believes many proposals relating to socially significant matters have generated meaningful discussions and positive actions by the management of other corporations. Further, Roger R. Conant of TIAA - CREF, a teacher's retirement fund, opined that in the case of General Motors, institutional support of shareholder proposals helped to induce General Motors to take steps to improve the structure of its board and to act favorably on certain social and environmental issues.

Will J. Maslow, describing the request for disclosure of Arab Boycott related activities submitted by the American Jewish Congress in 1977 to a large number of industrial corporations, stated that many companies agreed to furnish the requested disclosure, obviating the need to go forward with the proposal. Sixty companies included the resolution and after the vote, which in a majority of corporations exceeded three percent, many were willing to discuss the matter with the AJC. In this regard, Mr. Maslow opined that not only did the campaign bring the issue to the attention of top management and shareholders, but it also

contributed to a public as well as Congressional awareness and understanding of the issues. On the other hand, Sister Regina Murphy indicated that although some shareholder proposals she has submitted have been resolved in discussions with management prior to inclusion in the proxy materials, her experience has been that once the proposal is included in the proxy materials, in the absence of a majority vote, management will not adopt it even if the proposal receives a significant percentage of favorable votes.

b. <u>Viability of Present Rules</u>

A number of commentators believe that the Commission staff, in its "no-action" positions concerning shareholder proposals, has construed Rule 14a-8 too narrowly. These commentators emphasized the importance of this means of communication to express dissatisfaction with management policies, and noted that disposing of one's holdings is not a viable alternative for a shareholder whose stock has greatly declined in value or who is a retired company employee.

A number of commentators also expressed the view that the present system is heavily biased in management's favor (e.g. Gallaway, Mansfield). It was noted that the current rules afford the shareholder very little opportunity or time to promote his proposal, and do not provide an opportunity to rebut management's statement in opposition. Finally, it was suggested that such weaknesses in the current system interfere with the opportunity for a shareholder-proponent's views to be fully formulated and considered on their merits; thus shareholder apathy and lack of participation result.

A significant number of commentators, including corporations, attorneys, and the ASCS, believed that the present rules should be maintained intact. William N. Georgeson of Harris Trust & Savings Bank, for example, opined that the growing number of shareholder proposals is evidence that the present system is adequate. In addition, he stated that the bank's proxy review committee comments to management regarding some shareholder resolutions, and that generally he believes corporations now give these proposals more careful consideration than in the past. Another commentator suggested that amendments to Rule 14a-8 would be premature, stating the recent revisions of that rule should be tested in operation for several years before further changes are promulgated.

Several commentators argued that liberalizing amendments to Rule 14a-8 are not warranted because they believe the vast majority of shareholders are not interested in opposing management's recommendations, particularly when additional expenses or complex corporate transactions are involved (<u>e.g</u>., Ruder, Hennessey). In their view, liberalizing

Rule 14a-8 would allow a small minority to harrass management; the majority of shareholders dispose of their holdings if they are dissatisfied with management's performance. General Electric Company pointed out that in the last five years only one shareholder proposal out of the twenty-two such proposals included in its proxy materials received more than three percent of the vote. However, one commentator suggested that the small favorable vote may be a function of management's recommendation against the proposals and in support of this argument cited the secret ballot proposal included in AT&T's proxy materials. When management opposed the proposal the first year, it received three percent of the vote. However, the following year management recommended the proposal, and in that year ninety-seven percent of the votes were cast in favor of the resolution.

A small number of commentators suggested tightening the present rules to eliminate many of the proposals submitted by minority shareholders. These commentators were of the view that to require that corporate funds be expended to include such proposals is grossly unfair to the majority of shareholders.

Finally, a few commentators were concerned that the proliferation of shareholder proposals would, by diffusing responsibility for significant corporate decision-making, have an adverse impact on management's ability to manage the corporation in an effective and efficient manner. In addition, a number of commentators were of the view that the proper forum for regulation of corporate social behavior is through the political processes, not the corporate annual meeting. In this regard, William N. Georgeson of Harris Bank & Trust Company stated:

> "Proposals on matters of social concern are carefully reviewed. As a representative of many shareholders with widely different points of view, we seek to judge these proposals on their merits.
>
> Frequently, these items have a wide scope that extends far beyond the company in question to society in general. These situations are often better addressed directly through political processes, rather than indirectly through a few scattered corporations."

2. Standing Requirements

Commentators addressing this issue were about evenly split. Of those who believed additional limitations on the availability of Rule 14a-8 are warranted, most proposed a requirement that shareholders own a minimum percentage or dollar amount of securities to be eligible to submit a proposal for inclusion in management's proxy soliciting materials. These commentators suggested percentage thresholds that ranged from 1 percent to 5 percent of a company's outstanding shares.

Commentators cited a number of arguments for additional standing criteria. Union Carbide and Masonite opined that the proxy solicitation process should not be a forum to discuss issues of social import unless a shareholder or shareholder group with significant stockholdings desires consideration of such issues. In their view, a minimum percentage limitation on standing to use Rule 14a-8 would deter abuse of the rule by special interest groups seeking a low-cost means of popularizing their individual causes. One commentator cited the substantial expense incurred by corporations, and by the Commission in administering the shareholder proposal rule, as justification for conditioning the use of the rule on some minimum ownership of shares. Finally, General Motors noted that if the Commission were to amend its rules to require that a discussion of the availability of Rule 14a-8 be set forth in a periodic report, or that a broader range of proposals be includible, then additional standing criteria as well as an increase in the minimum vote requirements for resubmission of proposals the following year would be necessary in order to avoid a sharp increase in the number of proposals and the attendant expense and practical difficulties that would ensue from such a profusion of shareholders resolutions.

Don Matheson, a broker, suggested as an alternative standing criterion that shareholder proponents be required to present a petition with a significant number of shareholder signatures. In this regard, he contemplates that shareholder lists be made available to proponents for purposes of gathering the supporting signatures, and that a proponent be reimbursed for expenses incurred in connection with gathering the signatures if a certain percentage of the vote is cast in favor of his proposal. Finally, one commentator,

although opposed to any requirement that a proponent own a minimum percentage of company shares to be eligible to use Rule 14a-8, indicated that a requirement that a proponent own a certain number of shares, such as ten to twenty, would be acceptable.

A handful of commentators favored expanding Rule 14a-8 standing criteria to include a minimum holding requirement. These commentators pointed out that a holding period requirement would provide an accurate and tangible indication of a proponent's bona fide interest in the affairs of a particular corporation (e.g., ASCS, R. Smith, Neilson).

Commentators opposing further limitations on the availability of Rule 14a-8 cited a number of policy arguments. Primarily, these commentators questioned the need for additional restrictions because in their view, the current limitations, such as existing criteria for resubmission of shareholder resolutions, are sufficient to prevent abuse of Rule 14a-8 (e.g., Maslow). In addition, the Committee on Corporations of the California State Bar pointed out that additional standing criteria would not be beneficial because such restrictions could foreclose the submission of a proposal otherwise permitted by state law, and, moreover, there is no significant evidence that satisfaction of a holding period, or stock ownership requirement would be indicative of the legitimacy of a shareholder proponent's motives or objectives. Sister Woefel, whose coalition of religious organizations often sponsors shareholder proposals concerning matters of social concern, indicated that the coalition holds stock in more than 300 corporations and that for the most part, this stock has been held for a number of years. However, she added that in the past the coalition has purchased securities solely for purposes of submitting a shareholder proposal to a certain corporation. A few commentators expressed the opinion that such a requirement, by making it more difficult for small stockholders, who in the aggregate may own a majority of a company's outstanding shares, to submit resolutions for consideration at the annual meeting, would further erode what little interest presently exists in the annual meeting (e.g., PP&L). In addition, one commentator opined that a holding period requirement would in practice be so difficult to police as to be ineffective.

3. Procedural Requirements

a. Limitation on the Number of Proposals

Only a few commentators directly addressed the issue of whether current Rule 14a-8(a)(4) is appropriate. Richard S. Kaye indicated that in his view, the present rule, which limits to two the number of proposals a shareholder may submit for inclusion in a company's proxy soliciting material, is not justified by the very small number of abuses which he believes would result if the limitation is removed.

b. Required Appearance at the Annual Meeting

About half of the commentators addressing the issue favored retention of the requirement in Rule 14a-8(a)(2) that a shareholder or his representative appear at the annual meeting to present a proposal included in the proxy materials, or forfeit the right to compel inclusion of the proposal for the following two years. Generally, these commentators, who represent a broad cross-section of the various types of commentators who have submitted their views to the Commission, argued that the provision serves to inhibit submission of frivolous proposals, and also assures that an informed, interested individual will be present to introduce the proposal and to participate in any ensuing debate (e.g., Gilbert, Maslow, AT&T, Professor Jacoby). In addition, a few commentators expressed the view that the attendant expense of required appearance is not an unfair burden; other shareholders, they contended, must eventually bear the cost of including the proponent's resolution and, moreover, permitting a representative to appear at the meeting on behalf of a shareholder eliminates or reduces any potential economic hardship to the proponent. A number of commentators, while generally favoring the current provision, suggested amending Rule 14a-8(a)(2) to clarify that any person qualified under state law to present a proposal, whether or not he is also a company shareholder, may represent the proponent at the annual meeting (e.g., Maslow).

The other half of the commentators, who also represented a broad mix of backgrounds and affiliations, generally favored a change in Rule 14a-8(a)(2) to eliminate the requirement that the proponent or his representative be present at the annual meeting. In addition, Evelyn Y. Davis contended that the requirement is discriminatory because it favors those who are wealthy enough to hire representatives. In addition, she pointed out that increasingly corporations hold their annual meetings on or around the same day. Another commentator, Sidney Sosin, Esq., argued that if a proposal is a proper subject for shareholder action, it is unnecessary and burdensome to further require that the proponent attend the annual meeting to present the proposal. He pointed out that presentation by the proponent or his representative is not essential for a fair consideration of the proposal because as a general rule there are

relatively few shareholders present at the meeting, and by that time the outcome of the vote has already been determined by proxy. A few commentators, in particular, Professor Egon Guttman, suggested that, as an alternative to current practice, the rule be revised to provide that the corporate secretary or some other corporate officer present shareholder resolutions on behalf of proponents who are unable to attend the meetings. In this regard, Professor Guttman also opined that such a provision would not be inconsistent with existing state law. Professor Melvin Eisenberg, however, recommended that the question be resolved under state law.

c. Disclosure of the Proponent's Identity, Address and Shareholdings

All commentators addressing this issue favored disclosure in proxy materials of the names and addresses of shareholder proponents and a number of these commentators also favored disclosure of the proponent's shareholdings. Generally, the commentators indicated that such information would, by enabling shareholders to better appraise the objectives of the proponent, and to communicate with the proponent for clarification or additional information, promote an informed consideration of the proposal. A few commentators suggested that proponents' telephone numbers also be included in the proxy soliciting materials. Mr. Charles A. Boyce of Gulf Oil Co., pointed out that Gulf Oil currently includes proponents' names and addresses in its proxy soliciting materials, and recommended such disclosure together with a statement encouraging shareholders to communicate their views concerning the proposal to management and to the proponent.

d. Length of Shareholder Supporting Statements and Management Opposing Statements

Very few commentators addressed this issue. However, those commentators who did generally favored either eliminating the restriction in Rule 14a-8(b), which limits a proponent's supporting statement to 200 words, or placing some limit on the length of management's comments concerning a shareholder proposal, perhaps the same number of words allotted to the shareholder proponent. Professor William L. Cary, for example, stated that in view of the 200-word limitation on shareholder supporting statements, it is reasonable that there also be some word limitation on management's comments concerning shareholder proposals; he suggested a 400-word limit.

e. Requirements for Resubmission of a Proposal

A few commentators addressed the need for revision of Rule 14a-8(c)(12) which governs re-inclusion of shareholder proposals in proxy soliciting materials the following year. Currently, if substantially

the same shareholder proposal has been included in a company's proxy statement for a meeting held within the preceding five calendar years, it may be omitted for three years thereafter if it receives less than three percent of the vote the first time it is considered, less than six percent the second time, or less than ten percent thereafter.

The commentators generally believed the rule should be modified. Charles P. Schwartz of Champion Parts Corp., suggested that if the percentage of the vote necessary to reintroduce a resolution were to vary according to the size of a particular company, the threshold test would be more accurate as a measure of shareholder interest. Professor Paul M. Neuhauser, who represents a number of shareholder proponents, suggested that the first year's threshold be dropped to 2 percent, as he believes that figure is more reasonable, particularly in the case of large, multi-national corporations. In addition, he suggests that the ceiling for subsequent years be set in the range of 5 to 7 percent because it has been his experience that management will tend to alter its policies in response to a proposal that receives 5 to 7 percent of the vote.

Roger S. Foster of the Center for Law and Social Policy indicated that he believes a new formula governing proposal resubmissions is warranted. He stated that the present rule, which is apparently aimed at reducing the number of frivolous proposals, is not well suited to this task. A proposal on behalf of a shareholder with a small interest in the corporation and regarding a matter with which the company shareholders are not concerned, would be included the first year it is submitted as long as it is a proper subject for shareholder action, while a proposal previously supported by thousands of shareholders will be excluded if that support represented less than three percent of the vote. In addition, Mr. Foster noted the present rule does not effectively bar resubmission by a mere publicity seeker because even if management may exclude a proposal from company proxy material, the proponent may simply submit it to a different corporation.

f. Other Suggestions

Commentators also suggested the following procedural changes:

(1) Requiring corporations to print in their proxy materials the date by which proposals must be received for inclusion the following year. They opine that such disclosure would be useful because Rule 14a-8(a)(3) is not easily understood by shareholders, and that the requirement would not be burdensome as many corporations meet at approximately the same time each year (e.g., Heard); and

(2) Requiring a second vote if less than 90 percent of the votes are cast in favor of a management proposal.

4. Shareholder Views on Management Proposals

About two thirds of the commentators who discussed the desirability of establishing procedures to permit shareholders views concerning management proposals to be included in the corporate proxy statement were opposed to the development of such a rule. These commentators, for the most part corporations, opposed the idea primarily because they believed any such proposal would not be feasible as it would necessarily involve insuperable mechanical and practical difficulties. The difficulties cited included the following:

(1) The additional round of mailing of proxy materials that would be necessary to provide shareholders with an opportunity to comment on management proposals would be costly and require preparation of proposals an unreasonable time in advance of the meeting. Such a long lead time would virtually eliminate management's flexibility to prepare proposals to deal with problems that arise in the interim (e.g., Olin, GE);

(2) It is unreasonable to require management to print what may be a voluminous record of shareholder views, or to impose on management the responsibility for compiling a fair summary (e.g., AT&T);

(3) The compiling and printing of shareholder views and review by the Commission or by management for relevancy and accuracy would result in substantial delays. In the case of many proposals, such as mergers, timing may be crucial to implementation of the contemplated corporate action (e.g., Rosen, Gulf);

(4) Inclusion of numerous or lengthy shareholder views would render the proxy material virtually unintelligible (e.g., PP&L, Potlach);

(5) There are no workable mechanisms for limiting the number of comments, or providing management the opportunity to rebut such comments (e.g., Pacific Gas and Electric, Akzona, Inc.).

Moreover, some commentators stated that shareholders presently have the power to adopt such a mechanism, but apparently have not chosen to so do, and they argued that shareholders should be permitted to retain that discretion (e.g., Washington Gas).

With respect to the possibility of providing shareholders access to management proposals prior to mailing of the proxy materials, by requiring that such proposals be filed with the Commission and available for public inspection, several commentators argued that such a procedure would be unworkable. It would be difficult for the Commission to

determine when the proposals were in final form and available for inspection by shareholders, and would be unfair because it would give an advantage to shareholders who can afford the cost of obtaining materials from the Commission's files (e.g., Professor Schwartz).

A substantial number of commentators opposed permitting shareholder comments on management proposals because in their view the expense of such a program would be astronomical without a countervailing benefit (e.g., Pfizer, MAPI, Gould). Other commentators stated that no change was necessary because under the proxy rules, management already has an obligation to present its proposals in a fair manner, including disclosure of all material advantages and disadvantages of the contemplated action (e.g., Castle & Cook, Gulf). In addition, these commentators pointed out that adequate and more suitable channels for shareholder comments on management proposals currently exist, as shareholders may correspond directly with management, may express their views at the annual meeting, may express dissatisfaction by voting against a management proposal, or may communicate with other shareholders via the procedures provided by Rule 14a-7.

Finally, the following alternatives were suggested:

(1) Provision of a shareholder communication file available for inspection by all shareholders (Bank of America);

(2) Inclusion in a post meeting report of a summary of shareholder views regarding management proposals (e.g., Hennessey); and

(3) Implementation of the Advisory Committee on Corporate Disclosure recommendation that the Commission, in its review of proxy materials, emphasize disclosure of the advantages and and disadvantages of management proposals. (Kenneth Bialkin et al.).

Commentators who supported establishing procedures to afford shareholders the opportunity to comment on management proposals generally favored either publishing the proposals in a letter to shareholders, or in the third or fourth quarter report, (e.g., Kelly, Kaye, Leiman) or placing such proposals in the Commission's public records a reasonable time in advance of the annual meeting (Professor Guttman). Sun Corporation suggested that management be required to release to the financial press not less than 60 days or more than 90 days prior to the mailing the proxy statement, all management

proposals together with the proposed mailing date so that shareholders could comment on them. Management would be permitted, but not required, to release for comment proposals which have not yet been finally approved by the Board for submission to shareholders. Finally, under this proposal, management would be required to include a brief summary of all written shareholder comments relating to such proposals which are received at least 45 days prior to the proposed mailing date. No management proposal which had not been released for comment would be permitted in the proxy materials unless the company could establish to the satisfaction of the Commission's staff, reasonable grounds for failure to previously release the proposals.

Professor David Ratner suggested as a means of providing shareholders an opportunity to comment on management proposals that management be required to mail its proposals to requesting shareholders a specified number of days before the meeting. Professor Mel Eisenberg opined that amending Rule 14a-8 to permit shareholders to submit counter-proposals would provide shareholders with an effective avenue of expressing their opinions on management proposals. Finally, a small number of commentators expressed the view that shareholders be permitted to comment on management proposals, but that the opportunity to comment be limited to those who represent a specified minimum percentage of the outstanding company shares (e.g., Kaiser Aluminum).

5. <u>Shareholder Response to Management's Statement in Opposition to a Shareholder Proposal</u>

The vast majority of commentators addressing this issue, primarily individuals and religious organizations, favored giving shareholder-proponents the opportunity to comment on management's statement in opposition. Commentators pointed out that the present system, which forces the proponent to rely totally on Commission review of the proxy materials and on lawsuits, is not well suited to the task of ensuring the veracity of management's opposing statement because many questions of fact, and severe time exigencies are necessarily involved (e.g., Professor Neuhauser, Sr. Murphy). In this regard, they point out that the Commission has limited resources available for review, and also may not be in the best position to detect misstatements. In addition, citing Sisters of the Precious Blood v. Bristol-Myers, 431 F. Supp. 385 (S.D.N.Y. 1977), commentators opined that adequate judicial relief may not be available, at least in the case of precatory shareholder proposals. Moreover, the deliberate pace of a court action often places a heavy burden on both the plaintiff and the court, because the court may have to determine whether to delay a stockholders' meeting at a time well after proxies have already been mailed or even returned to the company.

Some commentators specifically suggested that shareholder proponents be given at least ten days in which to review management's statement and to notify the Commission and/or management of any comments they may have. In this regard, Sister Regina Murphy cited the settlement in Lemon v. Texaco Oil Co., as an example of such a procedure that has apparently worked in practice. Texaco has agreed to submit its preliminary proxy material to the proponent at least ten days prior to filing the materials with the Commission, and to give careful consideration to any comments the proponent may have concerning Texaco's discussion of the proposal. Another commentator noted that a number of corporations, including Union Carbide and New Mexico & Arizona Land Co., presently provide management's opposing statement to proponents.

A number of commentators also expressed the view that to allow management the opportunity to comment on the proponent's submission without affording the proponent an opportunity to respond is not only grossly unfair, but also does not promote the full and accurate disclosure necessary for a fair consideration of the proposal. In this regard, one commentator suggested that the Commission might want to consider, in the alternative, simply prohibiting management comments on shareholder proposals.

The ASCS stated that although it believes Commission staff review of management's comments has been efficient, it would not oppose amendments to the proxy rules if the Commission were aware of problems or abuses involving management's comments on shareholder proposals. In this regard, another commentator pointed out that management already has a fiduciary duty to include in its recommendations a complete and detailed discussion of the proposal (Robinson). Professor William L. Cary also would not object to a mechanism to provide for shareholder comment on management's statements, but he expressed concern that timing problems might create serious practical difficulties.

A few commentators recommended no change in current practices. Pennsylvania Power and Light Company expressed the concern that any additional restrictions on management's prerogatives in connection with its discussion of and recommendation regarding a shareholder proposal could prevent full disclosure.

6. Criteria for Excludibility of Shareholder Proposals

The majority of commentators believe that the present limitations on the subject matter of shareholder proposals should be retained.

A number of these commentators opposed expansion of the types of proposals includible in management proxy materials because solicitations with respect to proposals that are not proper under state law would, in their view, be an exercise in futility. Bar associations point out that requiring inclusion of matters which are not proper subjects for action by shareholders under state law would go beyond the authority granted to the Commission under Section 14(a) of the Securities Exchange Act to protect fair corporate suffrage. In addition, a number of commentators noted that the present rule, which permits inclusion of certain shareholder proposals otherwise not proper under state law if the proposals are phrased as a request rather than a mandate ("precatory" proposals), is unnecessary because the effect under state law, whether or not the proposal is a directive, would be purely advisory. (e.g., ASCS, Professor Eisenberg, AT&T). However, commentators believed that the present mechanism is advantageous because it puts shareholders on notice with respect to the nature and effect of such proposals.

A second group of commentators who favored retaining the current restrictions cited the already large volume of shareholder proposals and stated that broadening the availability of the rule would result in confusing, costly, and unintelligible proxy materials. In particular, these commentators expressed concern that the requirement that a proposal be "significantly related" to the company's business be retained. (e.g., Jacoby, Dwight, MAPI). In this regard, several commentators opined that shareholders are not interested in issues which do not have a significant economic impact. (e.g., PP&L).

Finally, the ASCS and two bar associations suggested that although they are opposed to amendments to Rule 14a-8 which expand the classes of permissible subject matters, the Commission might wish to consider instead the possibility of more flexible interpretations of the current rules, giving more weight to non-economic considerations.

A substantial minority of the commentators favored expanding the classes of proposals permitted under Rule 14a-8. Commentators advocated the following changes with respect to permissible subjects for shareholder proposals:

(1) Rule 14a-8 should be amended to clarify that shareholders may propose amendments to the Articles of Incorporation or by-laws which would permit them to make nominations for directors (Gould, Union Carbide);

(2) Amendments to Rule 14a-8 should permit shareholders to submit proposals regarding the qualifications of directors (Rosen);

(3) Proposals counter to management proposals should be permitted at least within specified limits, because the current prohibition is unnecessarily broad and in practice often works to needlessly restrict shareholder opportunities to submit proposals (Silberman, Professor Eisenberg);

(4) The 1%-test used by the Commission staff to select matters "significantly related to the issuer's business" in accordance with Rule 14a-8(c)(5) should be eliminated, particularly in cases involving a proposal requesting disclosure. These commentators generally were of the view that such a percentage test is not an effective or appropriate means of determining significance because the significance of a proposal to a particular company depends on a myriad of factors which may have a significant impact on the corporation, including legal, political, ethical and economic factors (e.g., Maslow, Heard);

(5) Proposals regarding executive compensation and employee retirement plans should be permissible under Rule 14a-8 (Gilbert);

(6) Proposals regarding moral integrity of management should be permitted under Rule 14a-8 (Matheson);

(7) Proposals requiring management to discuss specific socially significant issues should be allowed. In this regard, Levi-Strauss Company opined that they would favor such proposals in lieu of permitting shareholder communications concerning such matters in management's proxy soliciting materials.

Professor Melvin Eisenberg recommended several amendments to Rule 14a-8 which he believed would greatly simplify and improve the rule. Specifically, he suggested that Rule 14a-8 simply state that it is available only to the extent a proposal is valid under state law. Thus, he would eliminate virtually all but subsection (c)(1) of the rule. However, he would retain certain of the present subsections, (2) through (6) and (10) through (12), to serve as an explanation of the Commission's views regarding the current ambit of state law. In the alternative, he would at least eliminate paragraphs (7), (8), (9), and (13) from Rule 14a-8. In this regard, Professor Eisenberg opined that in particular, proposals not "significantly related" to the company's business would not be proper under state law. However, he was of the view that shareholders could, under state law, make advisory proposals regarding matters related to the company's ordinary business, including dividend matters, and he recommended amending Rule 14a-8(c)(7) to clarify that precatory proposals regarding such matters are proper subjects for action by the shareholders. In this regard, he suggested rephrasing 14a-8(c)(7) to exclude only proposals that are directives or mandates.

III. Disclosure of Socially Significant Information

A. General

About two thirds of the commentators addressing this question, primarily corporations and members of the bar, were of the view that shareholders, for the most part, are interested in a return on their investment. They do not believe there is substantial evidence that shareholders desire greater disclosure concerning matters relating to corporate social responsibility (e.g., Garrett, Liberman, Proctor & Gamble, Gulf). In their view, shareholders are interested in socially significant matters only in the rare instances when such matters also have an economic impact on the company. Further encumbering the proxy statement with information desired by few shareholders, they argued, is not warranted, particularly because additional, and perhaps lengthy, disclosures may obstruct communication with the majority of shareholders.

In this regard, James Liberman discussed a survey conducted by Edison Electric Institute. The data, which was compiled from responses from fifty-five electric utilities to a questionaire distributed by the Institute to all members, indicated that the number of company shareholders who submitted inquiries regarding socially significant matters was a fraction of 1%, and less than 1% indicated a desire for additional information on items such as the environment or equal opportunity. Similarly, a study conducted for Boise Cascade Co. revealed that only 20 of the company's 58,000 shareholders have communicated with the company on matters relating to social concerns. Their survey also indicated that 75 percent of the shareholders had invested in Boise Cascade Co. primarily because they are interested in a high rate of return on their investment and the potential for profit via long-term corporate growth. Commentators opined that the vocal minority should dispose of their holdings if they disagree with management's social responsibility policies rather than impose significant burdens and expense on the majority.

A number of these commentators argued that shareholder meetings are not a suitable or legimate forum for deciding questions of social concern, as distinct from matters traditionally considered relevant to the financial interests of the shareholders (e.g., Koven, Leiman). They pointed out that constituencies other than management and a small number of shareholders are not represented at the annual meeting. Leonard Leiman, Esq., of the Committee on Securities Regulation, Association of the Bar of the City of New York, cogently summarized the additional concerns raised by commentators relating to obtaining shareholder views on socially significant matters:

> "The question raised by the Commission's proposals is, we believe, whether a statutory system directed to the honest,

> efficient and informed functioning of capital markets should be converted to a forum in which shareholders qua shareholders may debate current social issues. There are, we believe, equally legitimate competing social interests which may be prejudiced by the Commission's proposal, including the following: the interest of individuals in personal privacy; the interest in preserving a Federal system in which state law is accorded traditional respect; and the interest in not imposing excessive and unfair costs upon shareholders who have invested in an issuer for economic rather than for social reasons."

A number of commentators argued that an amendment to require management to discuss matters of social interest is unnecessary because Rule 14a-8 already allows shareholders to obtain such information. In addition, they pointed out that because matters such as environmental and employment practices as well as political contributions are already discussed in filings with government agencies and in some corporate annual reports, disclosure in proxy materials relating to such matters would be duplicitous and wasteful.

Generally, religious organizations, shareholder organizations, public interest groups and individuals were of the view that those shareholders interested in matters of social significance should have a means for expressing their concerns to management and to the shareholders (e.g., Maslow, R. Murphy, Frankland, M. G. Jones). The religious organizations stressed that although they, of course, are concerned about the economic aspects of their investment 2/ they are also interested in and concerned about the social responsibility of corporations in which they invest. Robert E. Stroud of the Presbyterian Church, for example, stated that:

> "[the Presbyterian Church's] investment policy requires it to consider both investment productivity criteria and social factor criteria... The Presbyterian Church has taken the position that it must make a responsible use of its wealth, and not just maximize its economic return on its investment...The Presbyterian Investment Policy recognizes that once it makes an investment in a particular company, the Presbyterian Church becomes an owner of the company and

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2/ Religious organizations addressing this issue also pointed out that a large portion of their annual budget (between 15 and 35 percent) is derived from portfolios of securities.

> not solely an investor. Ownership of a business carries with it a responsibility for what that business does... It is a responsiblity that is amplified and increased by virtue of the profound effect a large or publicly-held business has in American society today."

In this regard, a number of religious organizations pointed out that they do monitor the conduct of the corporations in their portfolios on a broad range of socially significant issues, and that sufficient disclosure regarding such issues is necessary to effectively implement church investment policies. It should be noted, in this connection, that Alice E. Hennessy of Boise Cascade Corp. stated that Boise Cascade includes in its quarterly report information concerning corporate policies and plans relating to equal employment opportunity compliance, compliance with environmental standards, and other similar matters. Ms. Hennessey pointed out that the company discloses this information not because it is material in an economic sense, but because they believe it may be of interest to shareholders.

A significant number of commentators also argued that social responsibility and profitability are not mutually exclusive. They pointed out that public image and the goodwill of shareholders, customers, and employers has a substantive impact upon the long term economic well-being of the corporation. Charles P. Schwartz of Champion Parts Co. summarized this point of view:

> "A company that is aware of the problem in South Africa is probably a company that will survive better in the politicized atmosphere that permeates much of our lives."

These commentators were of the view that because corporations have an impact on society broader than simply an economic effect, it is reasonable that they be required to consider social implications in their decision-making. In addition, these commentators pointed out that since the actions of corporations often have substantial political and social effects, it is necessary that shareholders immediately be provided adequate means to express their views on these very important issues (e.g., Freund).

A number of commentators expressed the view that any apparent lack of shareholder concern may actually be due to the confusing array of issues and the necessity to make economic as well as legal judgements on these issues. Gulf Oil Co., however, pointed out that shareholder proposals provide an effective mechanism for determining over time what issues are of general interest to shareholders. In this regard, Mary Gardner Jones recommended that if a proposal receives a certain percentage of the vote, management be required to hold a public hearing on the issue involved. In her view, the hearing would not only give management the opportunity to evaluate the support for the proposal, but would also give the proponents an opportunity to consider management's views on the matter.

B. Materiality of Socially Significant Information

Most commentators opined that regardless of any distinctions one might attempt to draw between information necessary to an informed voting decision and information necessary to an informed investment decision, whether socially significant information is deemed material should depend on whether the matter has a significant financial impact on the operations of the corporation (e.g., ASCS, DuPont, Union Carbide, Masonite). These commentators, primarily corporations, stated that although voluntary disclosure might be encouraged, disclosure beyond that traditionally considered to be material should not be required because it would be virtually impossible to develop workable standards and criteria (e.g., PP&L), and the vast majority of shareholders are satisfied with the information they already receive (e.g., Hennessey, Wheat, PP&L). In addition, commentators argued that a different standard would result in costly disclosure of trivial information, burdening the majority of shareholders for the benefit of a few. In this regard, one commentator, (Cleveland Electric) indicated that unless information is materially related to a corporation's business, the use of corporate funds to disseminate such data to shareholders constitutes a waste of corporate assets. Finally, a small number of commentators argued that because matters of social concern are already highly regulated by Federal and state governments, which consider the interests of all constituencies, corporations are not the appropriate context in which to raise such matters.

Religious organizations, academics, individuals and a few corporate commentators indicated that the social impact of certain kinds of corporate conduct is material because it reflects on the quality and integrity of management, and therefore, may have a significant long-run financial impact on a corporation. (e.g., Boyce, Professor Ratner, Conant). Charles A. Boyce of Gulf Oil Co., summarized this view, stating that:

> "disclosure about the governance of the corporation in which [a shareholder] invests is equally important [as financial disclosure] since the character and quality of management affect the economic results. . . . Changes in disclosure requirements which will increase investor confidence are beneficial to everyone."

In addition, commentators pointed out that such matters may have a substantial effect on the shareholder in his role as a citizen and, accordingly, merit disclosure. They contend that management should be required to disclose these matters to enable shareholders to re-evaluate their investment decision or to exert pressure on management to defend or change its present policies (e.g., Vassar College).

In this regard, Tamsin Taylor stated that corporations that take "environmental and equal employment 'shortcuts'" may be more profitable in the short run, but this profitability will be at the expense of both social and corporate health.

C. Need For Disclosure of Socially Significant Information Even if Not Material

Commentators were about evenly split on the question of whether disclosure of certain socially significant information is necessary even if such information is not considered material. Commentators opposing disclosure argued that historically few shareholders have expressed an interest in socially significant matters, while in contrast many have expressed an interest in company financial operations, and that socially significant matters should therefore be disclosed only if there is an impact on a corporation's financial prospects (e.g., PP&L, Kotz, NN). In addition, commentators expressed concern that requiring disclosure of matters other than those meeting the materiality standard articulated in TSC Industries, Inc. v. Northway, Inc. 3/ would make the proxy statement confusing and would unfairly require the majority of shareholders to bear substantial additional expenses for the benefit of a few. (e.g., Professor Cary, Gould, Kotz). A few commentators indicated that stretching the concept of materiality would encourage shareholder suits, discourage competent persons from serving as directors and generally harm the competitive position of United States corporations internationally (e.g., Jacoby). The ASCS questioned the Commission's authority to require disclose of immaterial matters, and suggested that the Commission encourage, rather than require, disclosure of such matters, leaving the form and content of the disclosure to management's discretion. Finally, several commentators opined that disclosure of socially significant information is no more necessary for voting decisions than for investment decisions because shareholders are interested almost entirely in financial information; whether they are making a voting decision or an investment decision is irrelevant (e.g., Liberman).

Commentators who supported requiring such disclosure were primarily academicians, shareholder organizations, and religious organizations. Generally, they were of the view that because such information often has long term financial repercussions and also promotes honest corporate management, disclosure is necessary to both informed investment and informed voting decisions (e.g., Woelfel, Conant, Stroud). In this regard, Roger Conant of TIAA-CREP stated:

> "When management of a corporation is innovative, progressive, and when it demonstrates socially responsible attitudes towards its business activities, that corporation more likely than not will be a good long-term investment. And it is far more likely to keep out of various government entanglements that can slow it down."

3/ 426 U.S. 438 (1976)

A number of commentators also opined that disclosure concerning areas of corporate performance which could have a substantial impact upon shareholders in their role as citizens also is necessary for informed voting decisions. Sister Arlene Woelfel, for example, stated:

> "As companies increasingly demand that corporate losses be socialized, the environmental impact of corporate activity increases. Shareholders, who are also citizens, should have the right to indicate how much they are willing to pay in social costs by having some voice in determining how corporations use their monies."

A few commentators argued that more "soft" information is necessary for voting decisions, particularly in the context of proxy contests, where the shareholder is choosing between two opposing points of view on management matters. (e.g., Lemon) In this regard, Joseph Alibrandi of Whittaker Corp. pointed out that although shareholders and management do not want corporate resources expended on behalf of a few shareholders interested in promoting personal goals, shareholders should be furnished with information concerning the principles by which management proposes to guide the corporation. Finally, a handful of commentators mentioned specific areas which they believed merited disclosure (e.g., Ryder - advance notice of plant closings; Stroud-matters relating to discrimination, the environment and practices of multinational corporations abroad).

D. Identification of Socially Significant Issues

Most commentators, including Professor Cary, expressed the view that it would be inappropriate for the Commission, an agency charged with the responsibility of ensuring disclosure of sufficient financial and other material information concerning the operations of a company to permit informed investment decisions, to also assume the responsibility for identifying those socially significant issues that merit disclosure. Generally, the commentators felt that the Commission would be ill-equipped to make such determinations. Moreover, they believed it would not be possible in practice to compile a list because the significance of such issues will vary for different companies, and the list would have to be updated continuously to reflect changing economic and social conditions. (e.g., ABCNY, Loeb, NN). However, a few commentators suggested in this regard that the Commission could specify material socially significant issues based on periodic rule-making proceedings. The list, they argued, would then contain any matters recognized as significant by a reasonable consensus among representative interests in the society. (e.g., Stroud).

Corporate commentators generally opposed formal guidelines, and suggested that disclosures regarding socially significant matters be left to management on a voluntary basis.

A few commentators proposed that if a shareholder proposal requesting disclosure regarding matters of social concern receives a certain minimum percentage of the vote, the corporation be required to disclose the requested information in its next report to shareholders. (e.g., Maslow, Alibrandi, Rosen). Will Maslow argued that such a requirement would not involve unreasonable expense or burdens, particularly if the Commission promulgated rules governing length, cost, and confidentiality of information. He stated that the disclosure should continue for one additional year without additional shareholder requests. Thereafter, it would be necessary for the shareholder resolution to receive a higher percentage of the vote to require continued disclosure.

Finally, various commentators also suggested the following additional means of identifying socially significant information of interest to a company's shareholders:

(1) Shareholder proposals regarding issues of social concern could be screened by an independent body, such as the FASB or a social responsibility committee, that would generally be responsible for the conduct of corporate management in matters of social concern. These commentators noted that this independent body could ensure that the views of all the various interested constituencies are considered in any determinations concerning matters of social significance (e.g., Koven); and

(2) Standards regarding socially significant issues should be established by law (e.g., Madison Bank).

E. Institutional Voting on Socially Significant Issues

Institutions and other commentators expressing views concerning institutional voting on issues of social significance, generally indicated that institutional investors do consider such issues on an individual basis, perhaps in part because they recognize that their substantial block of votes will have an impact on management. James Heard cited an IRRC study which indicated that many institutional investors have abandoned the "Wall Street Rule." In this regard, Roger Conant of TIAA-CREF, pointed out that although TIAA-CREF generally does not simply sell their stock if they disagree with management policies because they believe their votes do affect management action, the large volume of their holdings would not prevent them from disposing of their interest in a particular company.

Mitchell A. Knoll, of the brokerage firm of Lynch, Jones and Ryan, described a survey conducted for that firm involving over 250 financial institutions and which examined several issues relating to the role of the institutions in the proxy voting process. Mr. Knoll indicated that based on an analysis of the survey data, the firm had reached the following conclusions:

(1) "A substantial minority of the fiduciaries who responded to our survey do not feel that it is appropriate for them to interfere with the prerogatives of management, and consider the appropriate response for expressing their dissatisfction with management policies to be a sale of the security in question... On the other hand, a slight majority of the fiduciaries responding to our questionnaire separate the questions of investment merit and corporate accountability and address them separately."

(2) "[T]hose fiduciaries who accept the responsibility for proxy voting reach their voting decisions through a relatively formalized procedure, and that decision making is normally done through committee and usually involves the senior investment officer or officers."

(3) "[T]he central sources of information and guidance most often used by fiduciaries in deciding proxy issues, namely, the company itself or the company's officers and Wall Street brokerage firms tend to be quite pro-management biased".

(4) "[E]xcept in cases where there's an immediate impact on investment merit, that is, in the cases of mergers, acquisitions, control fights, fiduciaries rarely vote against incumbent management."

Thomas M. Adams, of Transamerica Investment Management Company confined his remarks specifically to investment companies. Emphasizing the unique nature of investment companies, he stated that investment companies "represent the pooled assets of small investors which are invested in the securities of many issuers. Many of the social problems of operating companies regarding minority employment, environmental concerns, questionable corporate pay-offs and similar matters are second-tier issues for investment companies". In addition, he pointed out that as investment companies are presently regulated under the Investment Company Act of 1940, any changes in investment company regulation should occur in the context of that Act rather than as "an accidental side effect flowing from changes that were meant primarily for operating companies."

F. Cost/Benefits of Socially Significant Information

Many commentators expressed concern that the disclosure of socially significant information would require substantial direct expenditures. In this regard, James B. Liberman, representing seven electric utility systems, estimated that one additional page in the annual report of all reporting companies would cost $13 million. These commentators also argued that significant intangible costs would result because disclosure documents would contain excessive and confusing detail and also, that persons may refrain from purchasing the stock of a corporation making such disclosure because they do not believe social concerns are proper for profit-making enterprises.

Professor Guttman, however, opined that to be meaningful, any estimate of incremental cost must be viewed in the context of a particular corporation's ability to bear such costs. Clark Equipment Corp. recommended the development of guidelines to weigh the benefits of advocacy in the proxy statement of socially significant issues against the increased costs to shareholders and the corporation as a first step in implementation of any Commission's proposals.

IV. Other Means to Facilitate Shareholder Communications

A. Access to Shareholder Lists

Approximately 40 commentators responded on the issue of whether the Commission should amend its proxy rules to require issuers to provide shareholders with shareholder lists upon request. Generally, the corporate commentators opposed, and individuals, particularly those who have participated in solicitations as proxy contestants or as proponents of shareholder resolutions, favored such an amendment. Representatives of the legal community were split on the issue.

All of the non-corporate commentators appeared to favor the provision of shareholder lists, under certain circumstances, to requesting shareholders. Some commentators who favored greater opportunities for communication among shareholders believed that furnishing shareholder lists will encourage such communication (e.g., Hoy). A number of shareholders who have initiated or supported shareholder proposals pointed out that it is necessary that shareholder proponents be able to identify other shareholders, particularly those with large shareholdings (e.g., Sr. Murphy, D. Jones). Joel Seligman pointed out that if the Commission adopts a shareholder nomination rule which includes standing requirements relating to the size or amount of shareholdings, access to a shareholder list will be essential in order to put together a group of shareholders with sufficient holdings to meet such requirements.

Concern with uncontrolled access to a shareholder list was expressed by a number of the commentators. These commentators were concerned that access might infringe on the rights of privacy of corporate shareholders (e.g., ABCNY-SR, R. Smith, Sosin). AT&T referred to the July, 1977 recommendation of the Privacy Study Commission that confidentiality of recordkeeping in the private sector be strengthened. These commentators expressed concern about the possible misuse of shareholder lists for commercial solicitations (e.g., Leiman, Alibrandi) or other improper purposes. Professor Schwartz, however, stated that it does not appear that shareholders who have obtained access to lists, pursuant to provisions of state law, have in fact misused that information.

The ASCS indicated that corporate management has a duty to prevent the improper use of shareholder lists. Howard Schomer, on the other hand, questioned whether there is any constitutional or legal basis for management's position that the identity of the corporation's owners is private.

Virtually, all of the corporate commentators indicated that state law adequately balances the interests of providing for shareholder communications and preventing potential abuse of shareholder list information by requiring that the list be made available to a shareholder only "for a proper purpose." For example, according to AT&T, New York law requires that the requesting shareholder file an affidavit stating that inspection is not "for a purpose which is in the interest of a business or object other than the business of the corporation."

According to proponents of a federally-granted right to a shareholders list, however, state law provisions relating to access are often used to frustrate the requesting shareholders. These commentators indicate that regardless of the merits of the controversy, corporations virtually always resist requests for lists, and often sue in state court, thereby creating substantial delays (e.g., M. Eisenberg). One witness who attempted to obtain a shareholder list characterized the corporation's use of the legal process against him as "harassment and intimidation," and stated that it took him eight months to obtain the list (R. Kaye). According to Professor Schwartz, state courts have 4/ often taken a narrow view of what constitutes a "proper purpose." Professor Cary believes that the primary abuse in this area results from the extended hearing process required under state law to determine whether a proper purpose exists.

Opponents of a federal right believe that the "proper purpose" test is not difficult to meet (e.g., Bank of America). Also, Charles Crompton of the Delaware State Bar Association points out that under Delaware law there is a summary complaint filing and hearing procedure with respect to requests for access and that Delaware penalizes corporations which frivolously reject such requests by barring the directors from seeking re-election. However, the corporation will suffer no such penalty unless the list is not provided within ten days of the shareholders meeting, which he characterized as "too short a time for a real proxy battle." Mr. Crompton also believes that corporations would be discouraged from frivolously rejecting a request for access out of fear of receiving an adverse court ruling on other, more important, aspects of a litigated dispute with a shareholder.

4/ Professor Schwartz believes that state courts have often narrowly construed "proper purpose", as illustrated by Pillsbury v. Honeywell, supra, 91 N. W. 2d 406 where the Court held that a stockholder who purchased securities solely for the purpose of communicating his social and political concerns to shareholders in the hope of altering the company's board of directors and thereby changing certain of its policies, cannot compel the company to produce the shareholders list for his inspection, finding that the shareholder's objectives do not constitute a "proper purpose" for inspecting the shareholders list because they are not germane to the financial well-being of the corporation. Professor Schwartz concludes that "[t]he solicitation of stockholders support for a resolution that is proper under the federal proxy rules might not always afford a basis for obtaining a list under state law."

Proponents of a federal right indicated that even where shareholders are successful in gaining access to a shareholders list pursuant to the provisions of state law, they may be frustrated in their attempts to communicate with other shareholders because so many shares are held in the name of a depository. For example, Robert Gintel, a proxy contestant, indicated that he obtained access to a shareholders list only to discover that out of 2.3 million shares outstanding, 900,000 were held by a depository. Neither the corporation nor the depository provided him with a further breakdown and he was forced to call brokerage houses, at random, to determine whether their customers owned stock in the corporation. Corporate management is generally provided with a participant breakdown by the depository (Gintel, Akeson), but the requesting shareholder may be required to sue in order to obtain this information (Robinson).

Certain proponents of a federal right of access favored or did not object to, making lists available to any shareholder (e.g., Professor Eisenberg). Most proponents, however, would limit access to shareholders whose purposes for obtaining the list is not "improper." Commentators have suggested that access be limited to shareholders who are proxy contestants and have filed Schedules 14B with the Commission (Ice), shareholders whose resolutions will be included in the corporate proxy material pursuant to the requirements of Rule 14a-8, (D. Jones), and shareholders who represent that the list will not be used for commercial or other purposes unrelated to their status as shareholders (Rosen).

Proponents of a federal right to access indicated that it is necessary to assure that the list includes depository participants (e.g. Gintel). Professor Eisenberg believed that the lists should contain the number of shares held by each holder. While he favored retention of the issuer option in Rule 14a-7, Richard Nye of Georgeson and Co., recommended amendment of the rule to require issuers who choose the option of providing a list to give a breakdown of depository holders.

Only a couple of commentators specifically addressed the question of whether a Commission rule providing for a shareholder right of access would conflict with state law. Ray Garrett believes that a Commission rule would create "confusion" between the federal securities laws and state law. Professor Eisenberg opined that the Commission, pursuant to Section 14(a). has the authority to provide a right of shareholder access by rule. He stated that "it is necessary for the investors' protection to ensure that all persons with an interest in communicating with them on a given issue have access to their names." Professor Eisenberg and Herbert Wander recommended an amendment to Rule 14a-7 which would give a shareholder the option of obtaining a list or having management mail his material. Professor Conard stated that minority shareholders must be able to deal directly with majority shareholders and therefore, should have the option of obtaining a list.

Most of the commentators did not focus on the distinction between providing access to a list and providing shareholders a copy of the list. A few of the commentators recommended that shareholder lists be filed with the Commission in order to afford easier access (e.g., Eskin). One proxy contestant testified that because his group did not have sufficient funds to pay for the cost of reproducing a list, it was forced to sit in the corporation's offices over a period of several days copying by hand, 56,000 names and addresses (A. Brown). AT&T indicated that a computer printout of its list of 3 million shareholders costs approximately $35,000. According to Akzona, Inc., however, the costs of merely copying an existing printout would be nominal. Most of the commentators who commented on the matter of cost recommended that the cost of providing a list be borne by the requesting shareholder (e.g., Akzona, Inc., PP&L, Louden). PP&L opined that requiring the shareholder to pay the costs would discourage frivolous requests and protect the other shareholders from unnecessary expenses.

B. Transmittal of Non-Issuer Communications to Beneficial Owners

All of the commentators who addressed this issue believe the Commission should amend its rules to require brokers and intermediaries who hold stock in street or nominee name to forward non-management proxy materials to the beneficial owners upon payment of reasonable costs. (e.g., AT&T, Akzona, Cary, Gould, Nader, Neuhauser, Rosen Wheat). Richard Smith added that brokers should be able to obtain assurances that the material complies with the proxy rules prior to transmitting it to shareholders. Professor Neuhauser suggested that any new requirement in this area should be extended to banks as well as to brokers. While few commentators were aware of any refusal on the part of brokers to forward non-management material, and one stated that transmittal is required by the rules of the NYSE and AMEX (Robinson), it was noted that brokers do not always forward the material with alacrity. (e.g., Pollitte, Sosin).

With reference to the costs of forwarding such material, Professor Cary believes the costs should be borne by the issuer up to some reasonable amount. The ASCS, on the other hand, argued that the persons making the solicitation should pay the entire costs.

C. Conduct of Shareholder Meetings

1. Location and Timing

Several shareholders suggested ways in which their attendance at corporations' annual meetings might be made more convenient by changing the location and timing of such meetings (e.g., D. Jones, Neilson, Sr. Woelfel). Suggestions included locating such meetings in a readily accessible place, holding meetings at the company's home office and holding meetings in parts of the country where shareholders are concentrated. One corporation, Michigan General Corp., reported improved shareholder attendance when they began to hold regional meetings at different locations. Suggestions for scheduling meetings at more convenient times included holding annual meetings at a reasonable time of day (D. Jones) and holding such meetings on Saturdays or during the evening (Neilson).

2. Allocation of Time to Shareholders

A few shareholders expressed concern that the meeting is conducted in a manner which limits the time available for shareholder proponents to present and discuss their proposals (e.g., Freund, D. Jones, Sr. Woelfel). Senator Metzenbaum suggested that a ten or fifteen minute limitation be placed upon a shareholder's initial presentation, and that the shareholder be provided an opportunity to speak further when others had been heard from. He suggested that such procedures would "open up" the annual meeting, while also sufficiently limiting a shareholder's presentation to assure that others present would also have an opportunity to participate.

3. Voting Procedures

A small number of commentators addressed the question of the secret ballot. While there was general support for this procedure, it was noted that in certain situations it may be necessary to maintain the shareholder's ability to prove that he voted in a certain way; for example, to protect appraisal rights (e.g., R. B. Smith). In support of the secret ballot, commentators pointed out that such a procedure would encourage employees and others who have an economic affiliation with the corporation to vote on the merits of a proposal by reducing any pressure they may feel to vote in support of management's recommendations (e.g., Soss). One commentator suggested that, while most corporations do not attempt to influence the votes of their employees, in order to give shareholders more confidence in the integrity of the voting procedure, ballot secrecy is necessary to avoid the appearance of coercion (Akeson).

A few commentators pointed out the potential for abuse of the proxy process if the proxies are received and tallied by management (e.g., Soss, Hoy). According to Kenneth Akeson, 60 to 70 percent of all corporations have affiliated persons, such as transfer agents, performing the tallying function. Independent election inspectors were proposed by Professor Neuhauser and others. It was also proposed that shareholders have equal access to executed proxies (Neuhauser), and that executed proxies be retained for a year in case a dispute should arise (Gale).

4. Directors' Attendance at Annual Meetings

Several commentators suggested that directors be required to attend annual meetings and respond to shareholders questions (e.g., Gilbert). Taking the opposite view, J. Wilson Newman, Chairman of the Special Review Committee of Lockheed Aircraft Corporation, speaking on his own behalf, stated that directors should not be put in the position of speaking for the corporation, since their proper function is to monitor management and determine whether its performance is satisfactory. One person expressed the view that, unless there was a "significant segment of shareholders present who can vote as a group and translate the questions into some sort of action.", questions of directors would result in an "academic exercise." (Lemon).

5. Interim Meetings

A few commentators suggested that interim meetings be held in addition to the annual meeting of shareholders, for the purpose of providing information to shareholders and answering their questions. Abraham Nad suggested that meetings be held on a quarterly basis, and that the fourth quarter's meeting include a discussion of resolutions to be presented at the annual meeting. Louis E. Rosen and Bryan Smith also supported the notion of interim informational meetings, and suggested that they be held in varying regions of the country.

V. Increased Opportunities for Shareholder Participation in the Corporate Electoral Process

A. Election Contests

Commentators addressing the issue of costs of election contests undertaken pursuant to Rule 14a-11, particularly those commentators who have been or who have represented participants, expressed dismay at the high cost of waging such contests. Robert Mathison indicated that in his 1977 proxy contest with respect to Rowe Furniture Corp. he spent $250,000 and the corporation spent $567,000 (Rowe Furniture had net earnings of $572,000 for 1977). Robert Gintel stated that his unreimbursed expenses in one election contest were $40,000 and $100,000 in another. According to Mr. Gintel, even though it is necessary for a contestant to engage the services of a professional proxy soliciting firm, the costs of soliciting are not unreasonable. However, he believes that soliciting costs are sufficiently high to limit contestants to persons who are "financially responsible". Mr. Gintel concluded that the bulk of a contestant's expenses are legal costs, particularly if the corporation initiates litigation. In this regard, he related that in connection with one contest, he was required to expend large sums to successfully litigate the legality of amendments to the corporation's by-laws, adopted by the board of directors in response to his candidacy, and which had the effect of disqualifying him from service as a director. Only one commentator, Richard Smith, directly addressed the issue of the cost of compliance with the provisions of Rule 14a-11. He indicated that compliance probably does not impose substantial costs.

Most of the commentators who expressed an opinion on the propriety of corporate reimbursement of management's solicitation expenses in connection with a contest favored such reimbursement. According to AT&T, management's costs are a proper corporate expense because management has a duty to provide for annual meetings at which a quorum will be present in order to ensure continuity of management. J. W. Robinson, a principal of Georgeson & Co., believes that management has a responsiblity, as a fiduciary, to try to defeat an opposition slate if to do so is in the best interest of shareholders.

A number of commentators were troubled by management's seemingly unlimited access to the corporate treasury to reimburse its election contest expenses. As discussed elsewhere herein, these commentators believe such access gives management a virtually insurmountable advantage. Also, they expressed concern that access may encourage the wasteful expenditure of corporate funds. Robert Gintel stated in this regard that one corporation refused his request for a directorship, thereby resulting

in an expensive proxy contest, despite the fact that he owned and represented sufficient shares to assure his election. Commenting upon the typical state law principle which permits corporate reimbursement of management's expenses "where directors act in good faith in any contest over a policy," Professor Cary indicated that, as a practical matter, these standards can always be met. With respect to whether there should be any limit on the amounts which may be expended by management in an election contest, Richard Smith indicated that there is no practicable way to establish a standard of maximum expenditure beyond state law corporate waste standards. Professor Eisenberg, however, suggested that the amount of corporate funds spent by management be limited to the amount spent by the contestants.

A small number of commentators suggested that incumbent directors pay the costs of soliciting their election. Richard Lemon suggested that corporate management be required to undertake to reimburse the corporation if its slate loses a contest. He believes that, on balance, such an undertaking would discourage management spending. J. W. Robinson, however, pointed out that if management nominees are required to fund election costs, only the wealthy could afford to seek nomination.

Several commentators addressing the issue of whether corporate funds should be used to reimburse the expenses of those challenging management, indicated they are opposed or would approve such reimbursement only if the opposition wins the contest. These commentators believe that reimbursement would increase corporate costs, encourage non-productive election contests (e.g., Professor Ruder) and could encourage irresponsible activity by corporate "raiders" (e.g., Wheat).

A number of commentators expressed concern about the inability of proxy contestants to obtain reimbursement. Richard Lemon believes that the reason so few contests are undertaken is that there is a small likelihood of success and, unless they are successful, contestants will not receive reimbursement from the corporate treasury. Donald Petrie stated that to impose costs on one slate and subsidize the other mocks the notion of "corporate democracy." Ralph Nader believes that there is a benefit to the corporation in having a contest and favored subsidization of all condidates based upon the percentage of support received. Richard Lemon favored reimbursement only if the contestant

receives a significant vote. A few commentators agreed with Donald Petrie who stated that if both management and the opposition are to receive a subsidy, the opposition should be required to represent a specified minimum percentage or dollar amount of the outstanding stock (e.g., Gintel, Eskin, Mathison).

Few commentators specifically addressed the issue of the Commission's authority to equalize the costs and burdens in election contests. Ralph Nader believes the Commission has such authority, but Professor Cary expressed doubt. Professor Ratner also questioned the Commission's authority to limit spending by management, but opined that under Section 14(a) the Commission may require that corporate funds be expended, for a non-management solicitation. A number of commentators who criticized the present system, while not expressing any opinion on the Commission's authority, recommended legislative solutions. The legislative approach recommended by Professor Cary would empower the courts to permit payments out of corporate funds to non-management contestants, even if they were not successful, if these contestants have performed a salutory function in changing corporate policy.

A few commentators who had participated in proxy contests were critical of the Commission staff's administration of the proxy rules. Generally, these commentators complained about what they perceive as a reluctance by the staff to commence enforcement proceedings when violations of the proxy rules are alleged (e.g., Mathison, Lemon, A. Brown).

Only a handful of commentators discussed the question of whether further disclosure costs of settling proxy contests should be required. The ASCS believes that costs should be disclosed, if material. PP&L opined that because shareholders are not interested in this information, such information is not material. Both J. W. Robinson and Don Matheson favor disclosure of all costs of solicitation including settlement costs.

Commentators also made the following recommendations:

a) Disclosure in Schedule 14B of information concerning the conduct of the shareholders meeting, including the counting of proxies, the appointment of inspectors and the opening and closing of the polls (Lemon);

b) Disclosure in Schedule 14B of any advertising program undertaken to influence shareholders (Lemon);

c) Preparation and filing with the Commission of questions and answers to be used in any oral solicitation. Presently, Rule 14a-6(d) requires filing only when written instruction are prepared (R. Lemon);

d) Requiring that any communication used in oral solicitation which deviates from the proxy material be filed with the Commission (Lemon);

e) Adoption of a Commission rule requiring management to maintain records reflecting a bona fide allocation of expenses incurred in a proxy contest (Lemon); and

f) Abolition of the $500 filing fee for proxy materials filed in connection with a proxy context (Brown).

B. Shareholder Nominations

1. Existing Opportunities

Some commentators, including some who were opposed to the notion of shareholders having direct access to the corporate proxy statement for the purpose of making nominations, indicated that existing opportunities for shareholders to make nominations are not meaningful. Under state law, shareholders are entitled to make nominations from the floor at the annual meeting of shareholders (S. Sosin). However, by the time of the meeting proxies have already been solicited, and nominations from the floor therefore have no real chance of succeeding (Stier). According to Ray Garrett, the right to make nominations has real meaning only if it can be exercised in connection with a solicitation of proxies. As indicated elsewhere herein, a number of commentators believe that because of the high costs involved and the probability that such costs will not be reimbursed by the corporation, the conduct of an election contest is not feasible except for a small number of wealthy shareholders. No commentator related information indicating that any public corporation permits direct shareholder access to the corporate proxy material. Some of the corporate commentators did indicate however, that shareholders may submit suggested nominees to the corporation's nominating committee (e.g. GM). Other commentators indicated, however, that such opportunities are not meaningful because shareholders are not aware that they may submit nominations and that, in any event, such nominations will be rejected because corporate management ultimately decides who will be nominated (e.g., M.G. Jones). According, to some, the present system, which in their view does not permit shareholders to make nominations and vote on nominees who are not selected by management, makes a mockery of "corporate democracy" by appearing to give shareholders the right to elect directors (e.g., Heard).

2. Efficacy of a Shareholder Nomination Rule

As indicated in greater detail elsewhere, a large number of commentators, particularly corporate representatives, proposed little or no direct role for shareholders in the governance of corporations. Substantial opposition to a shareholder nomination rule is based on a conclusion that increased participation by shareholders in the nominating process will not have any or sufficient practical effect to warrant the effort necessary to develop and implement such a rule. For instance, George Coombe of Bank of America asserts:

> "Now, I don't perceive that two directors on the board representing stockholders as a whole through direct mandate of stockholder access to the nominating process will make a hill of beans of difference from the standpoint of off-book transfers of payment in the average corporation. If the regular directors who are trying to do their job can't get this job done, two extra directors sitting there at the table allegedly representing the ubiquitous stockholder quote, quote, in large, will not make any difference"

Ray Garrett believes however that

> ". . . it is among the smaller companies that abuses or neglect of shareholder interests are more likely to occur and that some increased shareholder participation in management decisions might actually do some good."

The opposition of certain commentators to affording shareholders direct access to the corporate proxy statement appears based, in part, on their conclusion that such opportunity will not enhance the role of the shareholder

in corporate governance. While conceding that a shareholder nomination procedure may provide a means of communicating shareholder concerns to management, William Cashel believes that other means of communication are available and utilized presently. A few commentators suggested that access would be utilized only by proxy contestants, in addition to their other soliciting activities (e.g. Wander, Michigan General). Ray Garrett believes that if the Commission were to adopt a shareholder access rule which includes a standing requirement that a nomination be supported by some reasonable minimum percentage of the outstanding stock, that level of support would probably assure representation on the board even in the absence of such a rule. Other commentators expressed doubt that direct shareholder nominations will have any effect on who gets elected (e.g., Professor Ruder). As discussed elsewhere, some commentators asserted that individual shareholders are normally apathetic about matters of corporate governance and that shareholders would not take a greater interest in elections, even if permitted to make nominations (e.g., Wheat). Al Sommer opined that if shareholders are sufficiently dissatisfied with management to vote for a competing slate they very likely have already sold their stock. J. W. Robinson of Georgeson & Co. stated that direct shareholder access to the proxy statement would not replace the proxy contest Rather, he believes, in order to gain representation, it would be necessary to engage in a full-blown solicitation in order to convince many investors, particularly recent investors, that the board is not doing a good job.

A number of commentators stated that institutions could, under the present rules, have a substantial impact on who gets elected to the board (e.g., S. White). However, they noted that institutions are sufficiently concerned that public reaction to their involvement in corporate governance will be adverse to refrain from utilizing a shareholder nomination rule or from promoting the candidacy of shareholder nominees (e.g., Heard).

Other commentators, however, believe that independent shareholder nominees could be elected (e.g., Sr. Murphy), and that direct access will improve the opportunity for shareholder representation on the board, particularly for the significant minority shareholder who has a large financial stake in the corporation (e.g. Lemon). Most of these commentators agreed with Professor Frank's view that in order to be an effective means for shareholder representation, shareholder nomination procedures must be linked with mandatory cumulative voting (e.g., Professor Weiss, Nader, Heard, Sr. Woelfel). Some of these commentators also believe that classified boards must be prohibited. Wilma Soss stated that it would be necessary to require secret ballots to assure that shareholder nominees receive the proxies to which they are entitled. Finally, a number of commentators including, Ralph Nader and Professor Schwartz emphasized that corporate funding of solicitation expenses for shareholder nominees would be necessary, particularly if management actively solicits for its nominees.

Several commentators expressed concern that the election of shareholder nominees would be disadvantageous to the corporation. Richard Smith and Francis Wheat believe that shareholders are not in a position to realistically

evaluate the qualifications of nominees. As a result, irresponsible or inadequate persons may be elected (e.g., ASCSI, R. Smith). Others fear the election of directors that favor special interests (e.g., Columbia Gas, Swarthmore). Richard Smith believes that there is some risk that the election of such directors may reduce the feelings of mutual respect and willingness to work together among board members and also affect the assurance which management must have about the character and integrity of board members in order to work effectively with the board.

Proponents of direct shareholder access believe that the election of shareholder nominees would have no greater potential for harm to the corporation than does the election of management sponsored nominees, and that it may well be of some benefit. In this regard, Professor Schwartz indicated that unqualified persons are often nominated by management. He believes that shareholders should be trusted to make the right choice between qualified and unqualified nominees. Professor Eisenberg pointed out that it is under the present system that special interests, such as large creditors of the corporation, are likely to be nominated by management and elected. Sidney Sosin stated that even if a shareholder nominee represented a special interest, management would have the opportunity to advise shareholders of this fact. Professor Schwartz opined that election of shareholder nominees would not, in his view, actually factionalize the board, but might reduce some of the "chuminess" and introduce more independence into the boardroom. Professor Weiss pointed out that other organizations such as pension funds and universities have had elections of petitioning nominees apparently without undue dissension.

Commentators opposed to direct access by shareholders to the corporate proxy statement were concerned with the potential negative effects on the corporation of such a procedure, even if shareholders' nominees are not elected. Such a procedure, they fear, could threaten the smooth functioning of the election process and lead to disruption or chaos (e.g., BONY, A. Hennessey. Professor Ruder). Some were concerned that making corporate elections "political" may discourage qualified persons who have no desire to "run for office" from becoming nominees (e.g., Feis, Fine). Some corporate commentators indicated that the costs of soliciting proxies would increase substantially. AT&T stated in this regard, that the printing and postage costs of including in its proxy statement information relating to 38 independent nominees (twice the number of vacancies) would be $130,000. Union Carbide indicated that a larger proxy card would require additional data processing expenditures. In its example, AT&T estimated extra processing costs of $100,000. Corporations would also incur other costs for additional time spent by management and legal counsel (e.g., Kotz, Sosin).

Commentators who favored shareholder access believe that such nomination procedures would be beneficial to the corporation even if shareholder nominees are not elected. These commentators agreed with James Heard's view that the process would focus attention on the way the board is performing and on basic policy questions. The fact that management would be required to describe its credentials and to justify its position on certain issues could, over time, have a positive impact on management (e.g., Taylor, Freund). Sidney Sosin believes that, as is the case with shareholder proposals, shareholder nominations which gain a fairly healthy vote might cause management to change its policies. Hans Reinisch

stated that the impact of media coverage of shareholder nominations would enhance this effect. These commentators also believe that a shareholder nomination procedure would bring to the attention of the corporation's nominating committee a diverse group of qualified persons willing to serve and would encourage such committee's acceptance of these persons as part of management's slate (e.g., Heard, Kaye). According to Elkan Blout, only persons with large egos would be dissuaded from serving by the element of contest inherent in the shareholder access proposal. In this regard, he indicated that contested elections in other institutions e.g., university trustee elections, does not prevent well qualified people from running.

3. Commission Authority to Adopt a Shareholder Nomination Rule

The commentators, including John Geer of the ABCNY-(Corp. Law.) and the ASCS, generally agreed that shareholders, as a corollary to their right under state law to elect directors, have the right to make nominations. A majority of the commentators, including virtually all of the commentators from the legal community, believe that a procedure to permit the inclusion of shareholder nominees in the corporate proxy material would not violate state law. While Richard Smith expressed doubt that granting shareholder access would conflict with state law because state law is virtually silent about the nomination process, PP&L pointed out that Pennsylvania law provides that if the corporate articles or by-laws provide a fair and reasonable procedure for the nomination of candidates, only candidates nominated in accordance with such procedure shall be eligible for election. PP&L concluded that a Commission rule which mandates a particular nominating procedure may result in the inclusion of candidates who cannot be elected.

With respect to whether Section 14(a) provides the Commission with the authority to adopt a shareholder proposal rule, the majority of commentators from the legal community either expressed the opinion that such role is consistent with Congressional intent in enacting Section 14(a) (e.g. ABCNY-Corp Law, Professors Cary, Conard, Eisenberg, Neuhauser, Ratner, Schwartz and Weiss, Sidney Sosin) or by their comments did not appear to question that the Commission has authority. According to Professors Neuhauser and Ratner the rationale used to support the Commission's authority to promulgate the shareholder proposal rule may be equally applicable to a shareholder nomination rule, i.e. that the corporate proxy statement omits to state material facts in omitting information concerning nominations which management is aware will be presented at the meeting.

Richard Smith believes that a Commission rule mandating a shareholder nomination procedure pursuant to §14(a) would constitute an unprecedented expansion of its role in the governance process, and that before adopting such a rule it should obtain confirmation of its authority from Congress.

A small minority of the legal commentators opined that the Commission does not have authority to promulgate such a rule. Kenneth Bialkin, et al. stated:

> "We think that under Santa Fe and the relevant legislative history, so drastic a change in the relationships among shareholders, directors and management was not contemplated by Congress in its grant of rule-making authority to the Commission."

Professor Eisenberg specifically disputed this conclusion:

> "How could it be a drastic change among shareholders, directors and management to allow shareholders to nominate directors? . . to say that you have got a legal right [under state law] to nominate directors, but P.S., not in the proxy statement, I just can't follow that reasoning and to say that reallocates or that is a drastic change, or that it falls under <u>Santa Fe</u> . . . no."

Francis Wheat also believes that the Commission lacks authority to require the inclusion of shareholder nominees in the corporate proxy statement:

> ... I don't see anything in Section 14(a) which gives the Commission power to require the management or the corporation to print up proxy materials which would solicit the vote of the shareholders for nominees which it has not made."

4. <u>Adoption by Corporation of Shareholder Nomination Procedures</u>

Consistent with their view that the Commission should not mandate changes in corporate governance procedures and that an expression of shareholder interest in greater participation should be a precondition to providing more opportunities for such participation, a number of representatives of the corporate community favored permitting each corporation separately, to determine the question of shareholder access to the corporate proxy material. Members of the Business Roundtable and others suggested that this matter could be the subject of shareholder proposals submitted to corporations pursuant to Rule 14a-8. The shareholder body of each corporation could decide, based on its perception of the costs and benefits involved, whether to recommend changes in the corporate governing instruments to permit shareholder access and, if so, the appropriate circumstances and limitations. These commentators referred to the inclusion of such shareholder proposals in the proxy material of several corporations, including GM and Levi Strauss, and noted that the shareholder proposal contained in GM's 1971 proxy statement, which was opposed by GM's management, received 1.4% of the shares voting. These commentators also recommended that Rule 14a-8 be amended to clarify that shareholder proposals relating to access may not be omitted pursuant to paragraph (c)(8) of Rule 14a-8, which permits the omissions of any proposal which "relates to an election to office."

Other commentators, however, questioned the appropriateness of having each corporation decide the question of access through the use of shareholder proposals. Shareholders will normally cast their vote as recommended by management, and if management opposes such shareholder proposals the proposals generally will be defeated (R. Kaye, R. Lemon). In this regard, William Gould suggested that an independent board would not automatically oppose such a resolution. Professor Frank, however, stated that if there is a demonstrated need for shareholder access, the Commission should mandate such access for all public corporations; to cede this decision to shareholders is no more appropriate than giving them the opportunity to decide whether the proxy rules should apply to their corporation.

Both Professor Ratner and Professor Eisenberg suggested that while the Commission should mandate shareholder access, it should, at least initially permit corporations, individually, to develop their own procedural requirements. They pointed out that should the requirements developed appear unfair to shareholders, the Commission could then adopt more specific rules.

5. Proposed Shareholder Nomination Rule

a. Standing Requirements/Limitation on Number of Nominees

Assuming that a shareholder nomination rule is adopted, a couple of commentators (e.g., Kaye) appeared to favor unlimited shareholder access. The vast majority of commentators, however, favor some restriction on access and a limit on the total number of shareholder nominees which the corporation must include in its proxy statement. Such limitations would assure that shareholder nominations have a minimum level of credibility (Raytheon), would protect against abuse by the frivolous-minded (Heard) and would avoid the substantial corporate costs and shareholder confusion resulting from inclusion of a proliferation of nominees (AT&T, PP&L). Union Carbide suggested that a limit on the number of nominees proposed by any group of shareholders would guard against a disguised takeover. John Gilbert believes that a standing requirement is justified because, unlike other kinds of shareholder proposals, election to the board involves a continuing relationship with the company.

Most commentators favored a requirement for standing to obtain access framed in terms of a minimum percentage of the outstanding shares. Many contemplated the formation of groups of shareholders whose combined ownership could exceed the minimum. Suggested levels of support ranged from .1% (Hayden, Seligman, Sosin) to 10% (Raytheon) of the outstanding securities. Some commentators also propose that the minimum required support be expressed in terms of a dollar value of outstanding shares or a percentage of total stockholders (Seligman, Sosin (1% or $50,000)). According to Kenneth Bialkin et al., the level of support should vary with the size and stock distribution of the corporation. Evidence of support would be reflected in nominating petitions filed with the corporation not later than a specified period prior to the filing of preliminary proxy material. Signatures could be guaranteed (Sosin) and forgers could be subject to the antifraud provisions (PP&L).

Professor Schwartz and Sidney Sosin suggested that no person be permitted to sign more than one nominating petition. Commentators also recommended that there be a limitation on the number of nominees proposed by any one group of shareholders (e.g., AT&T).

With respect to the total number of shareholder nominees required to be included in the proxy statement, recommendations ranged from no more than three (AT&T) to two times the number of vacancies (Seligman). Commentators generally agreed that if there are more nominees than the number required to be included, includability should be determined according to the amount of support for each nominee. William Feis recommended consideration of election of an "at-large" candidate to the board from among shareholder nominees. These nominees would compete only for this slot.

b. Screening by Nominating Committees

A few commentators suggested that the Commission consider requiring that shareholder nominees be screened by a nominating committee of the board (e.g., ASCS, Chamber of Commerce). According to John Geer, however, unless such committee is composed of outside directors, screening may not be appropriate. Keith Louden and J.W. Robinson were concerned that such a procedure would expose the nominating committee to litigation brought by an unsuccessful nominee and his supporters. John Geer and others believe that the imposition of standing requirements might render screening by a nominating committee unnecessary.

c. Disclosure and Procedural Requirements

Specific disclosure and other requirements relating to the operation of a shareholder nomination rule proposed for Commission consideration included the following:

a) That the nominating petition be accompanied by a written statement from the nominee that if elected he will serve (e.g., Sr. Murphy);

b) That the corporation be permitted to exclude nominees receiving less than a minimum prescribed vote in past elections, similar to the provisions of Rule 14a-8(c)(12) (e.g., Heard);

c) That information of the type presently required to be disclosed under Item 6 of Schedule 14A with respect to management nominees be disclosed with respect to shareholder nominees (e.g., Leiman);

d) That information of the type presently required to be disclosed if there is an election contest, under Items 3(b) and 4(b) of Schedule 14A, be disclosed (e.g., Professors Frank and Eisenberg);

e) That the proxy statement include a brief supporting statement on behalf of a shareholder nominee (e.g., Olson);

f) That management have no duty to verify the information furnished with respect to shareholder nominations (e.g., J. Geer) and that the nominators incur liability for false and misleading statements (Gulf);

g) That management be given the opportunity to comment briefly upon shareholders' nominees and state its preference (J. Heard) or make a recommendation respecting the vote by shareholders (Gulf); and

h) That shareholder nominees and their supporters who utilize access to the corporate proxy statement be prohibited from engaging in any further proxy soliciting activities with respect to that election (Robinson). Professor Frank agreed and recommended that management suffer the same prohibition. In this regard some commentators indicated that if the rule contemplated additional soliciting activities, as discussed elsewhere, they would favor equal access to the corporate treasury in order to fund such activities undertaken on behalf of shareholder nominees.

6. Distinction Between Obtaining Representation and Control

Approximately twenty commentators dealt with the issue of whether any distinction can or should be drawn between shareholder nominations made for the purpose of obtaining representation and those made for the purpose of gaining control of the board. Union Carbide and Olin indicated that such a distinction cannot be made and that since shareholders will be reluctant to permit use of the corporate proxy material to facilitate bids for control, the Commission should not adopt a shareholder nomination rule. Other commentators, who also believe that the distinction would be difficult to make, recommended that nominating shareholders be required to fully comply with Rule 14a-11 (e.g., R. Smith). As indicated above, a number of commentators suggested that shareholder nominations be treated like proxy contests, at least for purposes of proxy statement disclosure. An equal number of commentators believe that Commission requirements should differentiate between shareholder nominations seeking representation and those seeking control. Sidney Sosin recommended that the nomination of a single director in opposition to management not be subject to Rule 14a-11. John Geer suggested that "aggressive" nominations which are designed to displace management or institute substantially different corporate policies be treated as contests. He opposed permitting proxy contestants one free round by giving them access to the corporate proxy material. Generally, all the commentators agree that if there is a contest for control, Rule 14a-11 should apply.

7. Rule 14a-2(a)

As noted above, most commentators recommended that, if adopted, a shareholder nomination rule include a requirement that a shareholder nomination have some minimum level of support in terms of shareholdings or numbers of shareholders. Generally, these commentators contemplated that individual shareholders would be able to band together for the purpose of making nominations. With the exception of a few corporate representatives (e.g., PP&L), the commentators agree that it may be appropriate to exempt from regulation under the proxy rules activities to permit exploration of whether minimum support for a nominee exists (R. Smith, GM) or to organize a nominating group (e.g., Professor Cary). Most commentators suggested that the exemption from application of the proxy rules provided by Rule 14a-2(a) (i.e., non-issuer solicitations made to 10 persons or less) be amended to increase the number of persons solicited. Some suggested increasing the number to 25 (e.g., Gould, Sosin). Others suggested not including institutional investors in the count (e.g., Professor Neuhauser), or permitting exempt solicitations of shareholders holding more than 10% of the total outstanding stock (Feis). Professor Frank was concerned that there is greater risk that activities not subject to the proxy rules would involve fraud, and suggested that any written materials used in connection with these activities be filed with the Commisssion and furnished to the corporation.

8. Alternatives to Shareholder Access

Most commentators who opposed a requirement that shareholder nominees be included in the corporate proxy material recommended, as an alternative, that nominations from shareholders be considered by a nominating committee of the board of directors. Some of these commentators (e.g., California State Bar) discussed the composition of the nominating committee and proposed that outside directors constitute all or a majority of its membership. These commentators also suggested that shareholders be advised of the existence and purpose of such committee (ASCS) and its standards for director qualifications (e.g., Wheat). Shareholders would be encouraged to suggest nominees to the committee (Gould, D. Jones) and if a suggested nominee were not accepted, the nominating shareholder would be informed in sufficient time to undertake an election contest (Sun). CLPI suggests that the nominating committee issue a report to shareholders concerning its decisions. Commentators who favored the use of nominating committees as an alternative to providing for shareholder access to the proxy statement emphasized the following benefits: the use of a nominating committee would eliminate adversariness; the committee could insure the inclusion of a limited number of shareholder nominees in the proxy statement; and the committee could do a better job than shareholders of selecting qualified candidates since shareholders, in general, lack adequate sources of information to make such selection (AT&T).

Several commentators addressed another alternative, the inclusion in the corporate proxy materials of a greater number of nominees, selected by the corporation, than vacancies. Commentators indicated that this approach may help restore shareholder confidence in the electoral process by giving shareholders a choice and would help sensitize corporate management to the kinds of qualifications which shareholders wish to have represented on the board (M. G. Jones). A greater number of commentators believe that permitting a choice among more nominees will not result in an improvement in corporate governance, particularly if all the nominees are proposed by management (e.g., Heard). In addition, some commentators believe, as indicated above, that the element of contest would discourage some able persons from running.

C. Street Name Stock - Operation of the Ten-Day Rule

Over thirty commentators expressed support of current exchange procedures for voting of "street name" stock, and, specifically the "ten-day rule" of the New York Stock Exchange. These commentators gave the following reasons for their position:

(1) The Commission's "Street Name Study" concluded that shareholders are not dissatisfied with the operation of the ten-day rule (e.g., ASCS);

(2) Brokers have discretion to vote shares only in the case of routine, uncontested proposals (e.g., Washington Gas);

(3) Discretionary voting may not have a significant impact on corporate governance. AT&T pointed out that in 1977, for example, 72.2% of its outstanding shares were voted on matters where discretionary voting by brokers wasn't permitted and only a marginally greater percentage of shares - 73.8 to 74.1% - was voted on matters where discretionary voting was permitted;

(4) Street name stock is held primarily by people who aren't interested in long-term investment, and who have no interest in voting, at least not in opposition to management (J. William Robinson, J. Keith Louden);

(5) The beneficial owner of street name stock puts his stock into street name voluntarily and therefore may be considered to have decided that he wants that stock voted as street name stock may currently be voted. In any event beneficial holders have the opportunity to vote under the "10-day rule", and if a beneficial owner does not respond when his instructions are sought, it may be presumed that he wishes to have his broker vote (GM);

(6) Brokers will attempt to act in the best interests of shareholders in exercising voting discretion. Shareholders are protected by the law governing fiduciaries' conduct. (e.g., G.M., Kotz);

(7) Since corporations currently have no means of communicating directly with the beneficial holders of street name stock (e.g., PP&L, GM), abolition of the "10-day rule" would make it difficult for some companies to obtain a quorum (e.g., Potlatch); and

(8) Any change in existing practices would increase the costs of soliciting proxies and contribute to the disinclination of brokers to participate in the electoral process (Leiman).

Two commentators suggested extending brokers' discretion. Sidney Sosin suggested that an election of directors should not be considered contested, if no more than half the number of seats on the board of directors were contested. Similarly, Richard Lemon, Esq., stated that the 10-day rule should apply in contest situations so that brokers would have the opportunity to act as shareholder representatives and use their blocks of votes to influence the election of directors.

Kenneth Bialkin et al., supported current street name voting practices but stated that the self-regulatory organizations should work with their members to correct operational deficiencies and to ensure that brokerage clients are informed of the effects of street name registration.

An equal number of commentators opposed current street name practices. Reasons given for such opposition included the following:

1) The beneficial owner of street name stock registers his securities in this manner for reasons unrelated to voting and such registration should not entitle brokers to vote (e.g., Fahy, Reinisch).

2) Shareholders are not aware that brokers may vote their shares under certain circumstances (e.g., Politte, Professor Eisenberg). Mr. Fahy suggests that the instructional letters which the NYSE requires that brokers send to beneficial owners are archaic and hard to understand;

3) The accuracy of brokers' tallies of instructions is questionable. (Branch);

4) The tally which the corporation receives from brokers does not contain a breakdown of instructed and uninstructed votes. (e.g., Branch);

5) The ten-day rule provides too short a time for receiving instructions from the beneficial holder (e.g., Sr. Woelfel);

6) The possibility that the voting broker may have a conflict of interest (e.g., Fahy)

Don Matheson, who indicated that his brokerage firm does not keep stock in street name and seeks to ensure that its customers have the opportunity to vote the stock themselves, contended that there is a very real potential for conflicts of interest if brokerage firms are permitted to vote the stock of corporations which may be in a position to give them substantial business.

These commentators suggested that street name stock be voted by the brokers only if they have received specific authorization to do so (Professor Eisenberg), only in the same proportion as shares for which instructions have been received (Gilbert) or only for the purpose of obtaining a quorum (Professor Eisenberg, Branch). Patteson Branch recommends that the "omnibus method" of voting, used by some brokers, be required of all. Under this method, the broker sends to the beneficial owners signed proxies for the number of shares owned by the beneficial holder which the beneficial owner can then mark and send directly to the corporation.

D. Neutralization of Vote

A substantial number of commentators addressed the issue of whether there are situations involving conflicts of interests where the votes of affiliates or other persons should be neutralized in matters affecting the substantive rights of shareholders. Substantially all of the commentators, particularly the legal commentators, opined that the Commission does not possess the statutory authority to promulgate rules in this area (e.g., AT&T, California State Bar, Leiman, Ratner, R. Smith, Union Carbide, Wheat).

These commentators cited the following additional reasons why neutralization of votes of affiliates or other persons in conflict of interest situations would not be appropriate:

1) Common law and state statutes adequately protect shareholders against potential abuses arising from conflicts of interest (e.g., AT&T, Feis, Geer, GE, Leiman, Olin). In this regard, commentators pointed out that officers, directors and controlling shareholders are subject to state fiduciary standards which impose obligations of fair dealing with respect to minority shareholders (e.g., ASCS; Geer, Union Carbide);

On the other hand, a few commentators disagreed with the notion that state law adequately protects minority shareholders in conflict situations. Some saw a need for legislation to redress abuses which have occurred (e.g., Ratner). Others opined that this is an area peculiarly susceptible to judicial treatment (Professor Cary, R. Smith);

2) Restricting the ability of affiliates to vote their shares would disenfranchise persons who have a major economic interest in the corporation. A corporation's ability to raise capital might also be adversely affected by such a practice because investors might be reluctant to make substantial investments in corporations if there is the possibility that they may not be entitled to vote their shares on certain matters (e.g., Hall, Dickler; R. Phillips). Many commentators stated that it is not appropriate to impose any restrictions on a shareholder's right to vote his shares (e.g., Castle & Cooke, NN);

3) Neutralizing the votes of certain persons would be undemocratic, and might leave corporate decisions in the hands of a minority of shareholders (e.g., ASCS, Cleveland Electric, Kotz, R. Smith);

4) Neutralization of votes might make proxy solicitations more difficult and costly because state corporation laws require specified percentages of outstanding shares for approval of corporate actions. (R. Phillips);

5) It would be difficult, if not impossible, to solve the problems arising from conflicts of interest through rulemaking. In this regard, Professor Jacoby opined that the Commission could not formulate a rule that would be appropriate in all circumstances and Washington Gas questioned whether the phrase "conflict of interest" could be adequately defined;

6) Depriving affiliates of their right to vote may constitute an unconstitutional deprivation of property without due process (Akzona, Inc.); and

7) Problems arising from conflict situations are being handled adequately on a voluntary basis (BONY).

In contrast to the majority view, Vance Koven believes that the Commission does have the authority to force abstentions on particular matters.

E. Institutional Voting

A number of commentators expressed concern about the concentration of voting power which institutions possess. It was estimated that institutions hold more than 50 percent of United States securities. Nonetheless, virtually all of the commentators believed that institutions should not be required, prior to exercising their voting power, to obtain the views of persons having an economic interest in the securities being voted (e.g., California State Bar, Fritz, Professor Jacoby, Rosen, R. Smith, Wheat). The commentators argued that the enormous costs of such an undertaking, which might not even be feasible in certain situations because identification of the beneficial owners is not always possible, would not be justified because such persons have no direct interest in the matters affecting the portfolio company and no desire to vote on them (e.g., California State Bar, Professor Eisenberg, Nad, Professor Ratner, Wheat). In addition, some commentators questioned the Commission's authority to take steps to regulate institutional voting. In this regard the ASCS asserted that the Commission does not have the authority to vary the terms of private contractual arrangements which govern the relationship between institutions and institutional investors. Arthur Fritz of Security Pacific National Bank opined that requiring pass-through voting might, in the case of employee benefit trusts, violate the provisions of ERISA.

Commentators indicated that pass-through voting or polling of those who hold an economic interest would be particularly inappropriate for large institutional investors. They stated that the persons holding economic interests may be too numerous and in some instances may not be specifically identifiable (e.g., AT&T, Fritz).

Commentators who favored establishing pass-through voting requirements pointed out that such a requirement would not involve an unduly burdensome procedure because in practice it would not be necessary to conduct separate solicitations of beneficial holders for each portfolio company. Institutions could instead lump issues common to more than one portfolio company and simply mail to beneficial holders one questionnaire dealing with these issues (e.g., Reinisch). In addition, a few commentators opined that pass-through voting requirements might be most workable if the number of beneficial holders is small, if the institution has a small portfolio, or the institution owns more than 10 percent of the voting securities of the portfolio company (Bank of America, Professor Frank). Additionally, it was suggested that, where action by the beneficial holders is impracticable, the voting decision should be made by a group selected by those holding an economic interest (e.g., Gale, Koven, Sr. Woefel). Roger Conant, speaking on behalf of TIAA-CREF, indicated that trustees selected by policyholders constitute a majority of the committee that makes the voting decisions for that fund.

Commentators were split on the question of whether institutions, as fiduciaries, are required to vote, particularly on shareholder proposals which may not clearly relate to the portfolio company's short-term economic interest. Professor Schwartz believes there is a legal requirement that institutions consider and vote on all proposals. Professor Frank, however, indicated that in his view pension fund trustees are not required under the present law to obtain the views of those holding an economic interest nor to vote except perhaps on important economic issues such as mergers. John Geer of ABCNY-Corp. Law opined that institutions have a responsibility to vote on matters relating to the economic return to portfolio companies, to vote in favor of proposals which will further the economic return and to vote against proposals which would cause the corporation economic loss.

A number of commentators indicated that while institutions almost always vote for management, many institutions no longer do so automatically. (e.g., Fritz, Geer, Hoy, Knoll). Based on a survey of financial institutions, Mitchell Knoll stated that except in cases where there may be an immediate economic impact on an investment, such as a merger, institutions rarely vote against incumbent management. Mr. Knoll observed that some institutions simply don't consider the issues and merely sign and return the proxy. Others feel that corporate policies regarding social or environmental questions are the prerogatives of management and shouldn't be interfered with, or prefer direct methods of communicating with management. He noted, however, that the sources of information and guidelines used by institutions tend to have a pro-management bias. Mr. Knoll pointed out, however, that institutions are increasingly aware of their responsibilities and that there is a trend by institutions to use the proxy mechanism to accomplish social goals.

Commentators noted that some institutions have adopted formal voting procedures and may seek information from outside sources, such as the IRRC, in order to assure that proposals, including shareholder proposals, receive careful consideration. In this regard, a few commentators indicated that proxy voting, at least on non-routine or contested matters, is done through a formal committee arrangement (e.g., Adams, Fritz, Knoll). Professor Frank opined that larger institutions should have a separate committee, elected by those having an economic interest or by outside members of the board. The committee would be required to vote the shares in the same proportion with the vote of the committee members on a given issue. Professor Conard suggested that Congress should amend the Investment Company Act and ERISA to define the duties of investment managers to include the responsible exercise of voting power.

Finally, a number of commentators suggested that in the absence of pass-through voting requirements it would be useful to require institutions to report on their voting procedures and their actual vote on certain issues, particularly shareholder proposals, contested issues, mergers and acquisitions. (e.g., Neuhauser, Ratner, Reinisch, Sisters of Mercy). Thomas Adams of Transamerica Investment Management Co., however, opined that such disclosure is not warranted because shareholders and policyholders are not interested in this information.

VI. Changes Relating to Matters to be Disclosed in Proxy Statements

A. General Views on Disclosure

In the releases announcing the proxy rule re-examination, comments were solicited as to whether the Commission should amend Schedule 14A to require additional disclosure in proxy statements. The contemplated disclosure items were directed primarily at providing shareholders with improved information about the quality and integrity of management and encouraging corporations subject to the proxy rules to consider adopting certain new governance models and structural reforms which would improve accountability.

While reaction to the various disclosure proposals was mixed, the vast majority of commentators who addressed these issues supported the development of improved disclosure requirements. These persons suggested that additional disclosure requirements would not only provide shareholders with better information but also would deter management misconduct and stimulate structural changes (e.g., BA, Lazarus, D. Schwartz, Sommer). Substantial support was expressed for the development of disclosure requirements which would promote the independence of boards (e.g., D. Schwartz), strengthen their ability to monitor management conduct and assist investors in understanding the role and the organization of the board (e.g., Sommer). In this regard, however, several witnesses cautioned against requiring disclosure which would elicit boilerplate responses, intrude into board operations or destroy the confidentiality of board deliberations (e.g., Heard, D. Schwartz, Weiss).

On the other hand, a number of commentators were opposed to the promulgation of disclosure requirements designed to regulate corporate conduct. These persons argued that problems in existing models of corporate governance, if they exist, should be remedied directly, rather than indirectly through disclosure (e.g., Koven), and that disclosure should not be used as a regulatory mechanism in areas where the Commission lacks authority (e.g., Liberman).

B. Disclosures Relating to Committees

A number of commentators expressed the view that the development of strong committee systems would increase the effectiveness of corporate boards and indicated their support for increased disclosure regarding board committees, their memberships and their functions. Although some general suggestions were offered and some support was expressed for disclosure relating to all standing committees (e.g., Greely), the discussion focused primarily on the need for disclosure relating to nominating committees and, to a lesser extent, the advisability of requiring more information than is currently available about audit committees and compensation committees. As a general matter, Professor Donald Schwartz recommended that issuers be required to describe briefly the authority and responsibilities of each standing committee, the procedures by which these committees report to the full board and the methods used to select committee members. In the same vein, the Center for Law in the Public Interest advocated a requirement that each committee provide shareholders with a statement of its activities on an annual basis.

1. Disclosure of the Existence of a Nominating Committee

Strong support was expressed for the notion that the establishment of nominating committees would improve the director selection process by increasing the range of candidates under consideration and intensifying the scrutiny given to their qualifications (e.g., Sommer). As a result, virtually all of the commentators who addressed this issue expressed support for a requirement that issuers disclose whether or not they have a nominating committee and, if so, the identity of its members. (e.g., Bialkin, Proctor-Gamble, ASCS, Wander, Sun Co., Herbert, Jacoby, BONY, Columbia Gas). It was suggested that such disclosure would encourage public companies to establish nominating committees (e.g., Bialkin) and that disclosure of the composition of such committees would induce corporations to appoint outside directors to serve on them (e.g., Jacoby). Several commentators ass[illegible]ted that disclosure of the existence and composition of these committees w[illegible]ld enable shareholders to contact committee members to suggest nominees and thus would facilitate greater shareholder participation in the corporate electoral process (e.g., Bower, Rosen).

In addition to general expressions of support for a requirement that nominating committees and their activities be disclosed (e.g., Wander), a number of commentators advocated more comprehensive and detailed disclosure. Harold Amens, for example, suggested that issuers be required to disclose whether shareholder

nominations were solicited by the committee and to identify committee members present and voting during the meeting at which nominees were selected. Similarly, Louis Rosen supported a requirement that issuers disclose whether or not the selections of the nominating committee were unanimous.

While commentators generally questioned the Commission's authority to mandate nominating committees (e.g., Eisenberg), it was suggested that steps be taken in addition to the promulgation of disclosure requirements, such as the issuance of policy statements, to encourage companies to establish such committees (e.g., Feis).

Despite strong support for nominating committee disclosure, some opposition was expressed. AT&T, for example, suggested that disclosure of the absence of a nominating committee would result in added verbiage without serving any proper purpose. In this regard, Sidney Sosin pointed out that most small companies do not have nominating committees and that he would not favor negative disclosure. Professor Ratner questioned the importance of nominating committee disclosure unless shareholders are able to submit nominations to the committee. Additionally, it was suggested that disclosure of the existence and membership of a nominating committee without any explanation of its role could be misleading (e.g., PP&L), where, for example, the nominating committee does not select nominees but merely makes nonbinding recommendations to the full board.

Despite the widespread support expressed for a requirement that issuers disclose the existence and membership of nominating committees, commentators reacted less favorably to proposals to require disclosure of the nominee selection process (whether or not a nominating committee exists), the criteria used to select nominees, or the qualifications nominees must possess. While shareholder organizations, religious orders, academics and some corporations generally favored such disclosure (e.g., Gallaway, Convent of Our Lady of the Presentation, New York Province, D. Schwartz, Sommer, Eisenberg), at least if the form and substance of the discussion is left to the discretion of management (e.g., Gulf, Sun Co., PG&E), approximately one half of the corporate commentators who addressed this question expressed some opposition.

Supporters of such requirements suggested that expanded disclosure of the process by which directors are selected would have a prophylactic effect by discouraging bad nominations from being made (e.g., Gould). On the other hand, opponents of such disclosure argued that it would result in general, self-serving "boilerplate", and that it would not assist shareholders in making informed voting decisions (e.g., Bialkin, AT&T, Olin, PP&L). Concern was also expressed that it would be

difficult or impossible for issuers to describe their selection process or the criteria utilized in making selections which necessarily entail numerous subjective factors (Leiman, Proctor & Gamble, R. Smith). Some commentators asserted that it is directors' qualifications rather than the selection process which is important to shareholders (e.g., Castle & Cooke, MAPI, Union Carbide).

2. Disclosure Relating to Audit and Compensation Committees

While many commentators discussed the need for audit committees and offered their views concerning the composition and role of such committees, few persons addressed the question of whether disclosure requirements relating to audit committees should be expanded. In this regard, one commentator suggested that issuers be required to disclose the number of meetings between the audit committee and the independent auditors and indicate whether management representatives were present at those meetings, as a means of strengthening the role of the audit committee (Sommer). Another commentator advocated disclosure of whether services performed by the independent auditors were limited to those generally accepted as relating to the audit process and whether all other services were reviewed and approved in advance by the audit committee (Amens).

Although independent compensation committees generally were advocated to assure arms-length negotiation of management remuneration (e.g., Meyer), few commentators addressed the desirability of requiring disclosure relating to such committees. While some support was expressed for requiring disclosure of the existence of a compensation committee, its authority and responsibilities, and the criteria used to set compensation for senior management (e.g., Heard), it was also suggested that such a requirement would lead to "boilerplate" disclosure (e.g., Meyer).

C. Disclosure of the Existence of Business or Personal Relationships Between Any Nominee or his Affiliates and the Issuer or its Officers or Directors.

Virtually all of the corporations which responded to this issue, as well as some of the other commentators, were opposed to expanded disclosure of nominees' relationships (e.g., ASCS, AT&T, Jacoby, Kotz, Masonite, PP&L, Sosin). Most of these commentators opined that Item 7 of Schedule 14A presently requires adequate disclosure of material relationships and that no need for an expansion of disclosure in this area has been demonstrated. In this regard, PP&L stated:

> "The Company does not object to the disclosure of the existence of any material business or personal relationship between any nominee or his affiliates and the issuer or its officers. However, the Company submits that disclosure of such relationships is already required under the current provisions of Item 7 of Schedule 14A. In this regard, Item 7(e) requires the disclosure of material indebtedness of a nominee to the issuer. Item 7(f) requires the disclosure of a direct or indirect material interest of a nominee, or his affiliates, in any transaction with the issuer. Accordingly, the Company is of the opinion that no amendment to the proxy rules is necessary to require the disclosure of material business or personal relationships between any nominee or his affiliates and the issuer or its officers and directors. The disclosure of immaterial relationships would be of no value to shareholders in making voting decisions and therefore would serve no purpose." (emphasis in original)

Richard Kotz, speaking on behalf of the Chicago Bar Association, claimed that additional disclosure requirements would have a number of undesirable results. He stated:

> "[W]e believe that dealings between nominees and the issuer are adequately covered by Items 7(e) and 7(f) of Schedule 14A. Additional or more detailed disclosure of business or personal relationships between nominees and the issuer or its officers and directors appears unnecessary and would unduly clutter the proxy statement with immaterial information. Furthermore, such disclosures might imply that a nominee should be considered a less worthy candidate because of such relationship. Just the reverse may be the fact; the relationship or affiliation may have been what brought the competence or ability of the nominee to the committee's attention in the first place."

Some of the commentators appeared to be uncertain about what disclosures were contemplated by the Commission's release. Thus, Louis Rosen stated:

> "substantial relationships, such as debtor-creditor, supplier-customer, investment banking, legal counseling, etc., between any nominee or his affiliates and the issuer should be disclosed. To a large extent, however, these relationships are already required to be disclosed under Item 7 of Schedule 14A."

AT&T claimed that, in view of Item 7(f), which already requires disclosure of material transactions between the issuer and nominees or their affiliates, it was not clear what additional disclosures were suggested by the release. A few commentators believed that the language used in the release was unduly broad and vague, and expressed particular concern over disclosure of "personal relationships." In this regard, R. Smith commented:

> "The suggestion for disclosure of the 'existence of any business or person relationship' between a nominee director 'or his affiliates' and the issuer 'or its officers and directors' is far too broad to be meaningful or relevant. Any relationship that is required to be disclosed should rise to a level of materiality. Transactions in the ordinary course of business in aggregate amounts that are not material to either party should not be required to be disclosed. Moreover, as stated, disclosure would be required if a bank of which a non-officer director is also simply a director made a normal home mortgage loan to a non-director officer of the issuer. The examples of immaterial, irrelevant relationships, and unnecessary invasion of ordinary personal financial arrangements could be multiplied.
>
> If by personal relationships is meant a marital or family relationship, it should be so stated. Most directors would feel they have a 'personal' relationship with other directors after several meetings of the board. 'Personal' is too vague a term to be meaningful."

Sidney Sosin added:

> "I don't know what is meant by personal relationships. Would we have to disclose that Messrs. X and Y have been friends for ten years and have gone on three fishing trips together? The term is too vague."

Professor Ratner, while believing that directors' relationships may be material, doubted that a disclosure requirement would elicit meaningful information. Thomas Adams remarked that dislosure of business and personal relationships for companies subject to the Investment Company Act is adequate.

Although corporate commentators generally opposed expanded disclosure of the business and personal relationships of nominees, most individuals and attorneys favored additional disclosure requirements on the ground that information regarding directors' relationships is essential in evaluating conflicts of interest and should be furnished to shareholders (California State Bar, Feis, Eisenberg, Levi-Strauss, D'Amato, Pullen, Blout). Some of these commentators expressed general support for expanded disclosure of the types of director relationships mentioned in the Commission's release (e.g., Comm. on Corps, California State Bar, Eisenberg). Keats Pullen suggested that the Commission require disclosure of interlocking directorates. William Feis recommended that Instruction 3 to Item 7(f) of the proxy rules be amended so that

> "any material relationship between the company and the candidate's employer should be disclosed, since it may suggest potential conflicts of interest. While the interest of the candidate himself in such relationships may be slight, and thus come within an exception to the present disclosure pattern, the shareholders might be better informed about why he was nominated if they are told about the material connection between the company and the candidate's employer."

Professor Mace asserted with regard to commercial bank boards that all transactions between the bank and the director's company should be disclosed in proxy statements.

A number of commentators emphasized the importance of the monitoring function performed by boards of directors, and stressed the importance of the inclusion of independent outsiders on the board to perform this function (e.g., D. Schwartz, Wheat). In this regard, several commentators suggested that it would be appropriate for the Commission to require disclosure in proxy statements regarding the independence or management affiliations of directors and nominees (e.g., D. Schwartz, Sommer, Yavitz). Professor Weiss, for example, stated:

> "There should be identification of each nominee for the election of director and each other person whose term of office as a director would continue after the meeting as a management, affiliated non-management, or unaffiliated non-management director. And for each affiliated non-management director, a statement of the significant relationship with management that has caused them to be classified as an affiliate."

In his opinion, such disclosure would

> "have the benefit of promoting independent boards and providing information to investors that will be important for purposes of both voting decisions and investment decisions."

D. Time Devoted to Corporate Affairs by Incumbents in Previous Fiscal Year.

Approximately 60 commentators commented on the desirability of requiring disclosure of the time incumbent directors devoted to the affairs of the issuer during the previous fiscal year, and the aspects of the issuer's activities with which they have dealt during that year. The overwhelming majority of the commentators expressed opposition to amendment of the proxy rules to require such disclosure.

1. Time Spent

Only a handful of commentators favored disclosure of the time devoted by directors to corporate activities (e.g., Maryknoll Sisters, Gallaway, Sun, Grant). The Sun Company indicated that such disclosure should be included in an interim or annual report, not in the proxy materials which Sun believes are already too detailed. Stanley Grant recommended in this regard that disclosure requirements include both the time spent on affairs of the issuer as well as an estimate of the number of days or hours devoted to other corporate directorships and public service work; he believes that a comparison of the time spent for the issuer and time spent elsewhere would be useful to shareholders as it would be an indication of a director's committment to the company.

Corporate, legal and academic commentators almost unanimously object to disclosure of the time an incumbent director has devoted to the issuer for the following principal reasons:

1) The quantity of time spent is not a meaningful measure of a director's value to a corporation; the quality of performance, based on business experience, judgment, and skill, is a far more reliable measure of a director's value and effectiveness (e.g., Hawaiian Electric, Ruder, Potlatch Corp., Castle & Cooke, CC, ASCS, R. Smith, Olin, California State Bar);

2) Disclosure of the time spent by directors may be misleading to shareholders since it involves so many variables and since it is a poor measure of a director's value to the corporation (e.g., Wheat, Chemical NY, CLPI, BONY, Gould, Leiman). In this regard, PP&L asserted that devotion of less time to the issuer does not necessarily indicate the exercise of less diligence; the time devoted may depend on the number of committees in which a director is involved and the complexity of matters with which he deals;

3) Time spent on corporate affairs is difficult to calculate with a sufficient degree of precision (e.g., Yavitz, Columbia Gas, Olin, AT&T), particularly for inside directors who would have to distinguish between time spent on board matters as opposed to other business of the issuer (ASCS);

4) Disclosure of time spent would result in meaningless boilerplate (Adams, Rosen);

5) Disclosure of time spent cannot be presented in a meaningful way without a great deal of detailed explanation (Hill, Christopher & Phillips);

6) Qualified persons may not wish to serve as directors if their performance is judged by hours devoted to the issuer (Guedry, Professor Jacoby);

7) Disclosure of time spent may stimulate litigation (Wheat); and

8) Existing mechanisms such as peer pressure from other members of the board should already provide an effective deterrent against abuses (Yavitz).

Many commentators suggested, as an alternative to requiring disclosure of the total time a director has devoted to the affairs of a company, that disclosure of the number of board and committee meetings held and a director's attendance record be required instead (e.g., Gould, Rosen, Garrett, Professor Weiss, Sommer). Such disclosure would provide more meaningful information to shareholders and would not require cumbersome recordkeeping. Al Sommer noted that disclosure of attendance records might also encourage greater involvement and participation by directors. General Motors indicated that it presently discloses directors' average attendance records.

2. Aspects of the Issuer's Activities Incumbents Have Dealt With

Commentators were virtually unanimous in their opposition to disclosure regarding aspects of the issuer's activities incumbent directors have dealt with. These commentators believe that such disclosure would not provide useful information to shareholders (e.g., GM, AT&T, R. Smith, Hawaiian Electric, Kotz, ASCS). They also suggest that such disclosure would be meaningless because boards act on matters collectively and directors typically are involved in all aspects of the issuer's activities. Further, PP&L opined that such disclosure might be misleading because it would make directors appear personally responsible for certain matters when in fact only the board acting collectively has the power to make decisions. A few commentators stated that identifying matters which

directors have dealt with could reveal sensitive or confidential information helpful to competitors and detrimental to the interests of shareholders (e.g., Chemical NY). In addition, several commentators were concerned that such disclosures could not be presented to shareholders in a meaningful way without being supplemented by a great deal of detailed explanation.

As an alternative to disclosing the areas of corporate activities which directors have dealt with, a number of commentators suggested that the Commission require disclosure of the committees on which an incumbent director serves (e.g., Amens, ASCS, Union Carbide, Garrett). General Motors and Harold Amens indicated that it would be desirable to also require a brief description of the functions and activities of each committee.

E. Director Resignations

There was general support among all categories of commentators for disclosure pertaining to resignation of directors or decisions not to stand for reelection (e.g., ASCS, AT&T, BONY, Boyce, Professor Jacoby, Professor Weiss). . Commentators indicated that such disclosure would give management an incentive to seriously consider opposing viewpoints and would encourage management to satisfy meritorious concerns raised by outside directors.

However, a number of the commentators who addressed the issue believe it would not be advisable to require disclosure of the reasons for resignations (e.g., Rosen, Professor Ruder, PP&L, Louden, Florida Power, Kotz). In this regard, commentators pointed out that directors often resign for personal or confidential reasons which are of no interest to shareholders (e.g., PP&L, Rosen, Ruder) and which might prove embarrassing if revealed (Hebert). Chemical NY Corp. stated that personality conflicts or other factors leading to resignations may easily be misconstrued or exaggerated, and that disclosure may produce a series of charges and countercharges which prolong and distort the disagreement. In this regard, Alice Hennessey of Boise Cascade Co. stated that if disclosure of reasons for director resignations is required, management should have the opportunity to express its views on the matter as well. Louis Rosen opined that disclosure of the reasons for resignations would most likely result in boilerplate and also would raise complex questions regarding a director's liability for failing to disclose and whether management has the right to respond to any disclosures. Proctor & Gamble believes that such a disclosure requirement would not be advantageous because it would inhibit honest discussions on the board at a time when candor is in the best interests of the corporation.

Finally, Richard Kotz argued that if the Commission believes some reasons for resignations involve material matters, the Commission should identify these matters and require disclosure regardless of whether or not a director actually resigns. Similarly, a few commentators indicated that because a corporation would, under existing rules, already be required to disclose material facts underlying a resignation, additional disclosure requirements are unnecessary.

Some commentators suggested that disclosure of a director's reasons for resigning should be on a voluntary basis only (e.g., Gould).

F. Other Directorships

The Commission's release requested comments on the extent to which disclosure of certain other board memberships and outside activities of incumbents would reflect potential conflicts of interest or give any indication of the time available for services to the issuer. Approximately two-thirds of the commentators who addressed this issue believe it would be desirable to require disclosure of other board memberships or outside activities of directors.

Opponents of this disclosure, primarily corporations and business associations, asserted that furnishing shareholders with information concerning other board memberships and outside activities of directors would not be sufficient to show actual or potential conflicts of interest (e.g., ASCS, AT&T, GM, Kotz, PP&L, R. Smith). These commentators believe that adequate disclosure of material conflicts of interest are already required under Item 7(f) of Schedule 14A (e.g., PP&L, AT&T, GM). PP&L for example, stated that merely being a director of another corporation does not create a material conflict of interest unless there are material transactions between the corporations, and the individual has some material interest beyond merely being a director of both corporations; in such cases, Item 7(f) already requires disclosure.

Commentators also argued that unless a director has an inordinate number of other directorships, disclosure of other positions held would not be a meaningful indication of time available for the affairs of the company (e.g., ASCS, AT&T, Kotz). In addition, commentators contended that disclosure could discourage qualified individuals from serving on boards because they will view it as infringement of their privacy (e.g., Kotz). Similarly, others cautioned that required disclosure could create an undue emphasis on other board memberships as a qualification for director nominees and thereby may eliminate from consideration persons who are not directors of other prestigious corporations, but who nevertheless are qualified to serve.

Although opposed to a disclosure requirement, AT&T stated that it voluntarily discloses the board memberships of its directors.

Individuals, academics, religious orders and shareholder organizations generally favored disclosure of other board memberships because they believe that such disclosure would provide an indication of the time available for services to the issuer and, to some extent, the qualifications of nominees (e.g., Greely, Ice, Rosen). William Feis opined that disclosure may suggest conflicts of interest, but expressed concern that it could distort the accomplishments of directors. Another commentator suggested that any rule should protect the issuer from liability arising from a director's or nominee's failure to fully disclose his outside activities (Rosen).

A number of commentators made specific suggestions regarding the content of any required disclosure. Some favored disclosure of other board memberships only (e.g., Jacoby, Professor Weiss), while others favored disclosure of "outside activities" in general (e.g., Cary, Rosen, Soss). Other specific disclosure recommendations included:

1) The board memberships of all officers (Bjurman);

2) Management's interests in other corporations (Duncan);

3) Interlocking boards (Soss); and

4) All present occupations (Guedry).

G. Directors Fees

A number of commentators recommended disclosure of the compensation received by all directors including annual fees, meeting attendance fees, committee membership fees and committee meeting fees (e.g., Senator Chafee, Ghrist, Pacific Gas & Electric, Weiss, Sommer, Wheat). These commentators opined that in light of the greater expectations which shareholders have for directors, this information would help shareholders assess the likelihood that directors will perform their expanded role.

H. Disclosure of Management Compensation

1. General

A number of commentators, including most corporate commentators, stated that the Commission's existing requirements for disclosure of management remuneration are comprehensive and adequate (e.g., BONY, Castle & Cooke, Proctor & Gamble). A few of these commentators feel that additional disclosure would make proxy statements more cluttered and less readable (e.g., AT&T, GM, Kotz). A small number of commentators recommended that disclosure requirements be narrowed by raising the current disclosure "floor" on compensation from $40,000 to a higher figure (e.g., Hebert).

Other commentators, however, mostly non-corporate, expressed an interest in having more detailed and comprehensive disclosure of management renumeration (e.g., Fine, Gallaway, Heard). David Jones suggested that the Commission define and require disclosure of the total renumeration package to enable shareholders to compare compensation levels of different corporations. In support of more comprehensive disclosure of remuneration, Roger Foster, speaking for the Center for Law and Social Policy, asserted that management incentive plans often cause management to focus on short range objectives and can indicate the future direction of the company. Robert Greely, speaking on behalf of the FAF, stated:

> "Professional investors would . . . find it extremely useful to have additional information [concerning management and director compensation]. Information as to the management incentive programs, namely whether bonuses are tied to sale, profits or return on equity can be very indicative of the future direction of that company."

In a similar vein, Senator Chafee stated that remuneration disclosures reflect on directors' performance of their fiduciary duties. He referred to surveys conducted by the Commission's Advisory Committee on Corporate Disclosure to support the proposition that investors consider information about management important in deciding whether to buy, sell or hold securities.

2. Disaggregation

The Commission's releases requested comments on whether Item 7(a) of Schedule 14A should be amended to require a breakdown of aggregate direct remuneration paid to each person as to whom individual disclosuris required into its various components, such as salary, bonuses and personal benefits, including "perquisites."

An overwhelming majority of the corporate commentators objected to any proposal which would require separate reporting of the various components of management compensation (e.g., AT&T, Dwight; GM; PP&L). These commentators agreed that while disclosure should be sufficiently comprehensive to assure that shareholders are informed of total compensation, disclosure of the forms in which remuneration is paid is not necessary to achieve this purpose (e.g., ASCS, Blout, Feis). In the opinion of these commentators disclosures presently required provide an adequate basis on which to compare compensation levels of different corporations (e.g., PP&L).

Some commentators expressed concern that disaggregation would involve difficult and sometimes impracticable valuations of perquisites, particularly those purchased on a group basis (GM). Louis Rosen opposed a breakdown of perquisites because of the difficulties of valuation, but nonetheless believes it may be meaningful to disclose the nature of perquisites. Similarly, AT&T feels that corporations should be permitted to disclose aggregate remuneration figures and only where aggregation is not possible should they be required to explain the forms of remuneration.

Pearl Meyer asserted that disclosure of all the details of remuneration will lead to standardization of executive compensation plans. Corporations, she believes, are inclined to follow other corporations and will design compensation packages to contain the same components in the same amounts. She concluded that the form of compensation is not important to shareholders, but that the cost of management remuneration to the company is.

Most individuals, however, stated that they are interested in the forms of remuneration (e.g., Holland, D'Asmato, J. Gilbert, E. Davis). Senator Chafee and a number of academic and legal commentators also believe that reporting of aggregate remuneration is not sufficient to adequately inform shareholders and favor disclosure of compensation both in the aggregate and disaggregated (e.g., Cal. State Bar).

3. Disclosure of Perquisites

Many of the commentators favoring disaggregation also desire more comprehensive disclosure of perquisites. Senator Chafee asserted that shareholders have the right to know, as owners of the corporation, what perquisites are being received and their value. He believes that if the perquisite also benefited the corporation, this too could be disclosed. He stated that information concerning perquisites is material to shareholders and investors for the following reasons: (1) it may indicate waste and misappropriation of corporate assets; (2) perquisites may represent material amounts of corporate expenses; (3) unfavorable publicity about perquisites may engender adverse market and consumer reaction or legal actions; and (4) disclosure may reflect on the quality of management, its attitude and sensitivity to its fiduciary duty. He believes more detailed disclosure standards will have a deterrent effect on abuses.

With regard to the valuation of perquisites, Senator Chafee suggested that they be valued at the higher of fair market value to the recipient or cost to the company. On the other hand, Pearl Meyer, a specialist in developing executive compensation plans for corporations, feels that reference should be made instead to the accounting charges reflected in the company's books for purposes of valuing benefits.

James Heard, testifying on behalf of IRRC, suggested disclosure by boards of directors of the reasons why perquisites are considered ordinary and necessary business expenses. Similarly, Professor Ratner recommended disclosure of the issuer's policy concerning reimbursement of travel and entertainment expenses and the amount of reimbursement received by individual officers and directors if in excess of a specified minimum.

A number of commentators argued that perquisites should not be disclosed as a separate item. These commentators emphasized that the shareholders' legitimate interest in comparing bonus and other incentive payments with the financial results achieved by the issuer would not be served by separate disclosure of perquisites (Rosen). Concern was also expressed that since perquisites are a useful element of executive compensation plans, disclosure could force their elimination, resulting in the payment of the dollar value of these benefits in cash (Meyer). Gardner Heidrick, however, stated that disclosure of the components of remuneration will not make it more difficult for issuers to attract talented, qualified people.

Only a few commentators responded to a question contained in the Commission's release concerning separate disclosure of all personal benefits which exceed a specified dollar value. PP&L opposed such disclosure because it believes that disclosure of aggregate direct remuneration, including all personal benefits, is adequate. The Sun Company favored separate disclosure of perquisites in excess of $5,000 if the perquisites are primarily for the benefit of the recipient rather than for the convenience of the company. Sidney Sosin recommends a disclosure threshold of the lesser of 10 percent of total remuneration or $25,000.

4. Disclosure of the Total Costs of All Personal Benefits

The Commission's releases requested public comment on whether the total costs to the issuer of all personal benefits received by officers, directors and employees should be disclosed in the aggregate and broken down by category.

A total of five persons commented on this issue. Three of the commentators expressed opposition to such disclosure (Bank of America, Kotz, Rosen). They pointed out that to the extent personal benefits constitute determinable remuneration to the company's directors or its three highest paid officers, the value of such benefits would be included in aggregate remuneration figures presently required to be disclosed. They did not believe that any further disclosure of personal benefits would provide information relevant to shareholders in making informed voting decisions.

On the other hand, both Senator Chafee and Professor Ratner favored disclosure of the aggregate cost to the issuer of non-cash remuneration. Senator Chafee stated that issuers should disclose the full cost of obtaining and maintaining

> "all corporate assets which either: (1) at one time or another are committed for the personal use of directors and high-ranking officers; or (2) are used by this select group for business entertainment purposes. Excluded by this definition would be those items which are available on a fairly equal basis to all employees or to a broad class of employees."

The Senator cited company-owned vacation condominiums, fishing and hunting lodges, executive limousines, executive dining rooms, aircraft and high-rise penthouses that are of limited business use to the corporation as matters of particular concern. In the Senator's view, shareholders, by comparing the business value of such an asset to its cost, can better judge management in the context of making voting decisions. By requiring that

> "the total cost of the facility be disclosed, not just the cost of any personal benefit derived from the facility, and . . . that the facility be included only if its use is limited to directors and high-ranking officiers,"

the Senator believed it possible to provide relevant information to investors without imposing an undue burden on the issuers. The Senator concluded:

> "if the issuer feels that such a requirement results in the full business value of the facility not being fairly portrayed, the company would be free to state the cost of the facility allocable to bona fide business purposes, and the cost allocable to the personal use of its executives."

5. Class of Persons Whose Compensation Must Be Disclosed

The Commission's releases asked whether the disclosure requirements of Item 7 should be made applicable to all officers and employees whose aggregate remuneration exceeds a specified dollar amount. Several commentators, including all the corporations and business associations which responded to this question, opposed this expansion of Item 7 (e.g., ASCS, AT&T, GM, PP&L). They argued that such disclosure would clutter proxy statements with pages of meaningless details and perhaps hinder voting decisions. Concern was also expressed that such disclosure, particularly of employee compensation, may constitute an unwarranted invasion of privacy (AT&T, Sosin). These commentators also opined that such disclosure will not be informative because the remuneration of non-director officers and employees merely reflects competitive conditions (Rosen) and such information is not necessary in order to compare pay scales of different corporations (PP&L).

A few non-corporate commentators recommend expanded disclosure of the remuneration of officers and directors (e.g., Eisenberg). In this regard, Senator Chafee recommended disclosure of the remuneration of all directors and the 10 highest paid officers.

A small number of commentators favored or did not object to expanding Item 7 to cover all officers and employees earning more than a specified amount, providing a sensible threshold amount is chosen (e.g., Kotz, Meyer). Sidney Sosin, however, stated that disclosure should be limited to officers and directors, except that where shareholders are voting on employee benefits, the aggregate cost of all benefits to employees for the past year should be disclosed.

6. Remuneration Information for Prior Years

The Commission's release requested comments on whether Item 7 of Schedule 14A should be amended to require disclosure of remuneration for fiscal years in addition to the most recent year. Approximately two-thirds of the commentators who addressed this issue favored such an amendment (e.g., J. Gilbert, Kotz, Rosen, Sosin). In general, these commentators indicated that such disclosure would enable shareholders to compare changes in management remuneration with changes in the issuer's profitability. Of the commentators who suggested a specific period of time, most recommended disclosure for one year in addition to the most recent year (e.g., Gilbert, Sosin, Soss).

opposing remuneration disclosure for additional
hareholders are not interested in such additional
PP&L). General Motors argued that the reason-
ation is most appropriately determined by the
e during the period over which the compensation
mmentator stated that such disclosure is unnecessary
s who are interested in remuneration figures for
er to their old proxy statements (Meyer). John
sserted that shareholders should not be expected
tements from prior years.

Outside Directors in Annual Report

mmentators responded on the issue of whether the
end Rule 14a-3(b) to require issuers to make the
reholders available to outside or independent
o communicate their views on the performance of
er matters to shareholders.

the commentators including approximately thirty
expressed strong opposition to such amendment.
tators objected to providing a public forum for
ews of outside directors. They argued that such
riously inhibit the candid exchange of ideas
utside directors as well as between management
hat such disclosure would destroy the cooperative
environment necessary for effective corporate
Castle & Cooke, Chemical NY Corp, GM, Jacoby,
Illinois). These commentators pointed out that
satisfied with management's performance it is
ective action and communicate his dissatisfaction
the board rather than to shareholders (e.g.,
Stier of the National Investors Relations
at disclosure to shareholders would encourage the
of shareholders into the deliberative process
hareholders have elected the board, the board
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re not in a position to resolve differences
ctors. Several persons expressed the view
result in meaningless generalities (e.g.,
ry (R. Smith) rather than constructive

Those commentators who believe it desirable for outside directors to have a forum for expression of their views asserted that such a procedure would bring important information concerning corporate activities to the attention of shareholders (Gintel) and may provide a means for outside directors to influence management decisions (Hebert). A small number of commentators recommended that the Commission adopt rules to provide a forum in the annual report to shareholders for such communication (e.g., Gintel, Gallaway, Sr. Murphy). Professor Cary believes that it is within the Commission's authority to do so. Most of these commentators, however, favor permitting corporations to adopt mechanisms for director comminication voluntarily (e.g., Cary, Rosen, Sun Co.). Some commentators recommended that any Commission amendment limit opportunities for such communication to subjects which are of significant interest to shareholders (PP&L) or which require a vote of directors prior to shareholder action (Columbia Gas). PP&L suggested that any amendment to the Commission's rules incorporate the following concepts:

(1) that such communications are voluntary;

(2) that management have the option of responding in the annual report; and

(3) that management not be held responsible for the views expressed by directors electing to communicate with shareholders.

J. Availability of Post Meeting Reports and Transcripts

1. Post Meeting Reports

While commentators representing diverse interests generally agreed that post meeting reports would be useful to investors (e.g., Duncan, Freund, Gallaway, Jacoby, Neilson), conflicting views were expressed with regard to the appropriateness of a Commission rule requiring such reports.

Some commentators, including a number of corporate spokesmen, indicated that they would support, or not object to a requirement that post meeting reports be disseminated to shareholders. These persons noted that many publicly held companies already provide such reports in their annual or quarterly reports (e.g., AT&T, GM, Proctor & Gamble, Raytheon). To some extent, however, this support was conditioned on the retention of management discretion with respect to the timing, format and content of the reports (e.g., AT&T, Florida Mining, Hawaiian Electric).

On the other hand, a majority of the corporate and legal commentators stated that post meeting reports should be encouraged but not required by the Commission (e.g., ABCNY-SR, ASCS, BONY). These commentators took the position that a post meeting report requirement would be expensive and burdensome, particularly for small companies which do not mail quarterly reports to shareholders (e.g., Levi Strauss) and that shareholders are not sufficiently interested in such reports to justify the costs of requiring them (e.g., Castle &Cooke, Proctor & Gamble). Moreover, it was suggested that few significant events, other than the election of directors, take place at annual meetings (C. Schwartz) and that it is more appropriate to deal with important issues in proxy materials than post meeting reports (Cary).

Alternatively, a few commentators suggested that limited post meeting reports be required to be disseminated in certain special situations — e.g., when a shareholder proposal receives significant support at the meeting and the proponent requests that a summary of the discussion be reported to shareholders (Bialkin, et al.). However, most commentators favored a report containing more comprehensive information, such as a summary of the matters acted on and discussed at the meeting (e.g., Gulf), a summary of shareholder comments on management proposals offered at the meeting and during the proxy solicitation period (e.g., M. Brown, Gulf, R. Smith), a discussion of management responses to shareholder questions (Neilson), and a discussion of other matters of special interest (Gulf).

Despite disagreement among the commentators regarding a Commission rule requiring post meeting reports, a majority of the commentators addressing this issue favored promulgation of a rule requiring disclosure of the availability of post-meeting reports upon request. Some opposition to this approach was voiced, however, by commentators who believe that no legitimate purpose would be served by requiring corporations which do not provide post meeting reports to disclose that fact (e.g., ASCS, AT&T), particularly because interested shareholders can inquire about the availability of the report.

2. Transcripts

Non-corporate commentators, including individuals and religious orders expressed the view that transcripts of the annual meeting should be made available to shareholders upon payment of a reasonable fee (e.g., Frankland, D. Jones, Silberman). Some corporations and other commentators agreed. (AT&T, Columbia Gas, J. Gilbert, P. H. Glatfilter Co, PP&L). In the alternative, one commentator suggested that the minutes of the annual meeting should be sent to shareholders on request, in the absence of available transcripts. (MAPI).

Proponents of a Commission requirement that transcripts be kept and made available upon request noted that transcripts may have a valuable antiseptic effect on the actual proceedings at the meeting, and that, unlike post meeting reports, transcripts would not permit censorship and editorializing by management (e.g., Frankland, D. Jones). In addition, the Network-Adrian Dominican Sisters commented that attempts to obtain transcripts under existing law are often costly and time consuming. The Sisters reported in this regard that prior to obtaining a transcript from one corporation, they were required to file notarized requests attesting to their ownership of stock, necessitating the hiring of legal counsel.

K. Miscellaneous Disclosure Proposals

Miscellaneous disclosure proposals submitted by the commentators included the following:

1) The Commission should require disclosure of the staff and resources available to members of the board of directors. (Professor Weiss, Sommer). Matters which should be disclosed include the staff available to outside directors (Sommer), whether such directors have authority to retain outside counsel, whether board members receive at least two days in advance of meetings an agenda and all documentary material necessary to consider matters which management intends to propose, and whether the board or a committee thereof took action on matters during the previous year without such advance information (Professor Weiss);

2) Issuers should briefly describe the procedures and objective criteria used by their boards to evaluate management performance (Professor Weiss);

3) Shareholders should be informed in a timely manner of insiders' purchases and sales of securities (Holland, Petrie);

4) Issuers should inform shareholders of the stockholding in other corporations of directors, nominees and executive officers (Duncan, Murphy);

5) Annual reports to shareholders should include critical statements of outside analysts and management's response thereto (Stroual);

6) The issuer's dividend policy should be described in the annual report to shareholders (H. Brown);

7) To stimulate shareholder interest, proxies should be included in the annual report (First Manhattan, Greely);

8) A summary of the annual report should be sent to shareholders with the proxy material (CLPI);

9) Issuers should disclose whether any directors voted against a management proposal and the identity of such director (Gould, Rosen); this disclosure should also state whether such director will be available at the meeting to answer shareholders' questions;

10) Corporations should be obligated to honor a request of a director who desires to express his views to shareholders with respect to a management proposal (Gould);

11) Fuller disclosure of unfunded pension liabilities should be required. Specifically, unfunded pension liabilities should be disclosed under liabilities with specific data on cost projections and investments (Duncan);

12) The Commission should require more complete disclosure of income taxation including the statutory tax rate, provisions for reduction of tax and actual cash tax payments and deferrals (Duncan);

13) Proxy statements should list shareholders' rights (Frankland);

14) Analyses and justifications for corporate investments should be available for shareholder review (Duncan);

15) Commercial and industrial companies should disclose how they voted their holdings in other companies (Gilbert);

16) Corporations should disclose their 30 largest shareholders (Maryknoll Sisters);

17) Issuers should disclose in proxy statements the procedure which is followed at annual meetings of shareholders, e.g., whether Robert's Rule of Parliamentary Procedure or any other formal procedure will be followed (Long & Levit);

18) Corporations should make the information they give to securities analysts available to requesting shareholders (Welstand);

19) By-law changes made since the last annual meeting should be disclosed (Gilbert);

20) Shareholders should be informed of the potential dilution of their holdings by reason of new option plans and the actual dilution caused by prior plans (Gilbert);

21) Issuers should disclose whether corporate assets are used for political purposes or for the purchase of special favors (Jones);

22) Whether management or the board has ever considered or discussed "going private" should be disclosed (Kaye);

23) Issuers should disclose the economic and financial significance of management proposals, e.g., the cost of management incentive plans (Greely);

24) The concept of "management's" proxy statement should be eliminated (Gilbert, Professor Eisenberg);

25) The Commission should require disclosure of the number of proxies actually marked for or against any proposal (Gilbert);

26) To encourage communication among shareholders, they should be able to find out about shareholder proposals withdrawn or withheld from votes at the meeting (Pullen);

27) Lawsuits should be reported to shareholders as rapidly as restrictions permit, and at least with the next dividend mailing (Pullen);

28) Proxy statements and annual reports to shareholders should contain a uniform statement informing shareholders of the significance of the Hochfelder decision (Newman);

29) Issuers should disclose their energy costs and savings, and their fuel sources and plans (Duncan);

30) Shareholders should be informed of the social criteria involved in any major board policy decision (Jones); and

31) The Commission should require companies to give two years advance notice of any large scale lay-off or plant closing unless such notice is impracticable for reasons beyond the control of the company (Ryder).

Disclosure: Costs/Benefits

Most commentators stated that it was difficult to ascertain the costs which would be imposed on issuers by the adoption of new disclosure requirements since the proposals were general in nature and there is little empirical evidence on which to base an evaluation (e.g., Kenneth Bialkin, et al., Hawaiian Electric, PP&L).

Only a few of the commentators believe that the direct costs of expanded disclosure would be substantial, with the possible exception of providing transcripts (e.g., ABA, ASCS). Some concern was expressed, however, that expansion of the proxy statement would result in increased mailing expenses. In this regard, PP&L estimated that the increase in its postal expenses might total $20,000. Because of concern about the length of the proxy statement, Raytheon suggested that any additional disclosure requirements should be susceptible to a condensed presentation. In this regard, Professor Weiss estimated that the disclosure proposals he advocated, if adopted, would add only three or four pages to the average proxy statement.

In contrast to direct costs, some of the commentators believe that the "indirect" costs, particularly the time of management, of some of the proposals would be substantial (e.g., ASCS, Sosin). Several commentators believe that additional disclosure would make proxy statements less readable by cluttering them with unnecessary information, thereby diminishing their usefulness to shareholders (e.g., Phillips, Sun). Other commentators indicated that although the costs are difficult to quantify, because so few shareholders are interested in additional information the de minimis benefits of additional disclosure would almost necessarily be outweighed by the costs. The Bank of America, however, asserted that additional disclosure may have a salutary effect which is not susceptible to a traditional cost/benefit analysis.

VII. Changes in the Format of Proxies

A. Abstentions from Voting on Proposals

Several commentators proposed that the Commission adopt a rule requiring that proxy cards include boxes whereby shareholders could register their absention from voting on a particular issue (e.g., Neuhauser). While it is currently possible to abstain by, for example, crossing out a proposal, it was pointed out that a box for abstentions would make this process easier for the shareholder (e.g., Sr. Regina Murphy). Alternatively, it was suggested that shareholders be provided with instructions for using alternative means of abstention (Freund).

B. Registering "No" Votes for Nominees

Eight commentators suggested that shareholders be provided a means of voting against management's slate of nominees for the board of directors or individual nominees thereon. It was pointed out that giving the shareholders an opportunity to vote "no" would be useful in permitting a shareholder to vent his dissatisfaction (e.g., Gulf Oil), even though it would have a substantive effect no different from withholding his vote.

C. Voting with Respect to Individual Director Nominees

A fair number of commentators suggested that shareholders be provided a means of withholding their votes from certain nominees on management's slate, rather than casting or withholding their votes with respect to the slate as a whole (e.g., Neuhauser). Representatives of Gulf Oil and American Telephone and Telegraph indicated that their proxy cards already include means by which shareholders may withhold votes from individual nominees; General Motors Corporation indicated that it planned to modify its proxy card in this manner. George W. Coombe, Jr., testifying on behalf of the Bank of America, also suggested that corporations might provide a means to withhold votes from an individual nominee, but stressed that this is a matter which should be left up to individual corporations on a voluntary basis.

Taking an opposite view, the ACSC stated that the desirability of listing particular nominees would not outweigh the expense so involved. The Society was concerned as to whether data processing cards could continue to be used in the event of such a change. AT&T also expressed the view that any change in the format of proxy cards should be accomplished in a manner which would permit the continued use of tabulating cards.

D. Voting of Unmarked Proxies

Several shareholders and shareholder organizations, were of the opinion that corporate management should not be permitted to vote unmarked proxies. Most expressed the view that unmarked proxies should be counted as abstentions, although some would permit the use of such proxies to obtain a quorum. Sr. Regina Murphy suggested that if unmarked proxies were to be voted by management, further disclosure of this fact should be made in the proxy materials.

Corporate commentators, however, supported the current practice of giving management authority to vote unmarked proxies. It was pointed out that shareholders are informed as to how such proxies will be voted by a statement in bold face type pursuant to Rules 14a-4(b) and (c) of the Proxy Rules (e.g., Union Carbide). Further, it was argued that the shareholder's signature on the proxy card is sufficient evidence of his intent to grant management authority to vote his shares (CBA) and that those shareholders who want to leave their decisions in the hands of management should not be forced to make business judgments (Chemical New York) or adhere to complicated instructions in order to give voting authority to management (GM). Finally, it was noted that counting unmarked proxies as abstentions would make it difficult to obtain a quorum (C. Schwartz), and that the Commission does not have the authority to deny management the right to vote unmarked proxies (Chemical New York).

E. Proxy Grants of Discretionary Authority

A few commentators supported the current practice of permitting proxy grants of discretionary authority in certain limited circumstances. It was argued that most shareholders have confidence in management (as evidenced by the return of proxies) and wish to grant management some discretionary authority (GM). It was also stated that there is no evidence of abuse of grants of discretionary authority, and that denial of the use of such proxies would effectively disenfranchise the vast majority of shareholders, as matters arising unexpectedly at a shareholders' meeting might be decided only by those present (Union Carbide).

On the other hand, some commentators opposed the use of discretionary proxies, primarily on the grounds that shareholders do not generally realize that they are bestowing on management a limited grant of discretionary authority when they sign a proxy (*e.g.*, Ash). Alternatively, it was suggested that the grant of discretionary authority be more prominently disclosed in the proxy materials (D. Schwartz).

F. Designation of Alternate Proxy

A few commentators expressed the view that corporate proxy cards should provide a means for the shareholder to designate his own proxy, as opposed to those persons named by mangement (*e.g.*, Neuhauser). It was pointed out that this change would make it easier for shareholders' representatives to attend the shareholders' meeting.

G. Management Recommendations

A few commentators were opposed to management's being permitted to make voting recommendations on the form of proxy (e.g., Soss). However, Charles Boyce testifying on behalf of Gulf Oil Corporation, expressed the view that management, as a fiduciary, might have the obligation to advise shareholders of its opinion and that management recommendations should be permitted.

H. Miscellaneous Suggestions for Changes in Proxy Format

The following miscellaneous changes were recommended by one or more commentators:

1) Proxy form and statement should be simplified and made more intelligible (*e.g.*,Wheat);

2) Proxy form should permit write-ins for non-management candidates (Pullen);

3) Proxy form could provide space for suggestions, or be accompanied by a questionnaire (International Paper);

A number of corporations indicated satisfaction with the current proxy format and expressed the view that changes would not improve shareholder participation in corporate governance (*e.g.*, Castle & Cooke, Washington Gas Light).

VIII. Other Means of Improving Corporate Accountability

A. Voluntary Action by Corporations

An overwhelming majority of commentators expressed the view that great improvements are taking place in corporate governance and corporate accountability through voluntary action by corporations, and that this trend should be allowed to continue without governmental interference. It also was suggested that voluntary action is preferable to change mandated by the government because of its innovativeness and flexibility.

While there was disagreement as to whether corporations had "felt the heat or seen the light" (Garrett) and some suggestion that business has reacted to pressure for change rather than taking the initiative, there was general agreement that significant changes are occurring in the corporate community (Sommer, Feis, Yavitz, B. Smith, Ruder). Among the changes which have been adopted voluntarily are the establishment of audit, compensation, nominating and other committees composed primarily of outsiders (GM, Ruder, Wheat), outside boards (Ruder, ASCS, Gould), voluntary disclosure (e.g., Bank of America, GM), the appointment of of women and minority directors (GM), codes of conduct (B. Smith), the holding of regional meetings, the availability of post meeting reports and transcripts of annual meetings, and permitting shareholders to vote for individual directors (Hoy). Organizations such as the ABA, which published the Corporate Directors Guidebook, and the NYSE, by virtue of its audit committee requirement, have contributed to the voluntary trend (Wheat). The Commission and some private litigants have also furthered this movement by virtue of the settlements that have been reached in civil suits which require board restructuring (Wheat).

The advantages of a voluntary approach in lieu of governmental action is that it allows for creativity in planning and adaptability to individual situations. Unlike regulation, it is not rigid, adversarial, inefficient or self-perpetuating (Yavitz, Guedry). It is also thought to be likely to work because a majority of corporate leaders are becoming increasingly aware of the pressure for change. These pressures include: 1) media and public attention to questionable corporate activities; 2) a continuing trend toward greater social responsibility; 3) changes in the perception of management responsibilities; and 4) a growing awareness that the alternative to voluntarism is mandatory action (Yavitz).

Despite the strong preference of these commentators for a voluntary approach, several suggest that some continuing governmental pressure is essential to the success of voluntarism. The availability of the regulatory option or the knowledge that private action is being monitored and appraised is considered by some commentators to be a necessary element in achieving voluntary progress (Guedry, Yavitz).

B. Increased Role for Shareholders

A central question underlying many of the issues raised in the proxy rule re-examination was whether increasing the role of shareholders in corporate governance would have any impact on corporate accountability. Though a number of commentators believed that increased shareholder activity would be beneficial, the majority of persons addressing this issue expressed doubt that corporations would be made more accountable if the role of shareholders were expanded.

Thus, persons who favored increased shareholder activity as a means of improving corporate accountability suggested that it would lessen the ability of inefficient managers to entrench themselves (Eisenberg) and stated that shareholders, even in small groups, can have an impact on management (Hoy, Hayden), simply by bringing issues to their attention (C. Schwartz). It was suggested that an increased role for shareholders would improve investment return by improving corporate governance, would introduce new ideas from outside sources and could lessen the perceived need for burdensome government intervention (Conant). In a similar vein, it was suggested that corporations must be accountable to someone, and that initially, it is appropriate to make them accountable to shareholders. If, after trying this approach, it appears that shareholders are only interested in investment results and are not truly representative of public concerns, the cost of having learned this will have been de minimus (Frank).

On the other hand, a majority of the commentators agreed that strengthening shareholder rights will not provide an effective means to eliminate any perceived evils and that shareholders as a group are incapable of strongly influencing corporations (Wander, Fine, Bank of America). While appealing in concept, shareholder democracy is not realistic, since most shareholders (except institutions and employees) lack the time and inclination to participate actively in corporate affairs (Lazarus).

A number of commentators asserted that shareholders are predominantly economically motivated (Davis) and do not necessarily share the same concerns as does our society as a whole. It was suggested that shareholder bodies are too large and diffuse to be effective (Newman). Therefore, it is difficult to obtain an intelligent resolution of a question which is closely related to the ongoing business of a corporation through proxy voting (Wheat). Furthermore, in the view of these commentators, shareholder democracy is not necessary since shareholders have the option of "voting with their feet" and selling their shares (Kearn, Harper, Pearlman & Copeland). Moreover, where true shareholder democracy has been tried (e.g., under the Alaska Native Claims Settlement Act of 1977, where no management slate or proxies have been utilized), the results have been discouraging. Elections proved to be long, expensive and complicated; management and board time was wasted to the detriment of the business; the lack of continuity

of management resulted in companies being unable to obtain financing, and politically skilled but unqualified persons were elected to the board (Keane, Harper, Pearlman & Copeland).

C. Strengthening the Role of the Board of Directors

In commenting on ways in which corporations could be made more accountable to shareholders and the public at large the view most frequently expressed by commentators with diverse interests and background was that a strong board of directors is the key to improved corporate accountability. Various proposals for improving board structure and strengthening board effectiveness were suggested.

1. The Existing Role of the Board - Need for Greater Definition

A small number of commentators discussed, in general terms, the role of the board, as it has evolved recently, and whether directors need guidelines in order to better discharge their duties. In this regard, Professor Mace discussed the findings from his research conducted in the late 1960's;

> "I found that in most large, medium-sized, and small companies, Boards of Directors served as sources of advice and counsel to the CEO, if he wanted it — and some did and some did not."
>
> Secondly, they served as some sort of discipline. Management knew that periodically — monthly, quarterly, or whatever the period the meetings were — he had to go before in a sense a group of his peers and account for his stewardship.
>
> Now, those are certainly two very passive, non-involved roles. And many of the directors were going to the meetings and they didn't have to do a stroke of homework, and they could go there and be quietly silent, and nobody would ever discover that they hadn't done anything in preparing for the meeting. That's the two passive roles.
>
> There was a more active role, and that was a third function I found, and that is Directors acted when there was some sort of crisis in the organization — and a crisis could be of one or two kinds: (1) the President died or became incapacitated, and the Board is there as the legal entity to assure the continuity of the organization, established to operate into perpetuity; and the Board was there and did it.
>
> The second type of crisis was when the performance of a CEO became so bad, so unsatisfactory, that even the CEO's mother finally said "you ought to leave for the good of the company." And it usually had to be that bad before the Board would step in and do anything about it. But in that case the Board did have an active, involved role."

Most of the commentators (e.g., Lazarus, Yavitz) agreed that the functions of the board should include the following:

1) Responsibility for selection and removal of top management;

2) Active involvement in the formulation of long-term corporate plans, including resource allocation plans;

3) Overseeing corporate financial performance;

4) Consideration of the social impact of corporate activities, and consideration of the views of constituencies other than shareholders concerning such activities.

With respect to such consideration, Ralph Lazarus stated:

> "The Board's responsibility is to direct the enterprise in the interest of the owners, subject to the constraints imposed by law. However, the interest of shareowners cannot be conceived solely in terms of short-range profit maximization. The owners have an interest in balancing short-range and long-term profitability and in the political and social viability of the enterprise. Moreover, shareowners and directors alike have an interest in behaving ethically and as good citizens. The board's duty then to consider the interests and views of non shareholder groups arises not out of some ill-defined and extra-legal obligation to these groups, but out of the responsiblity to act in the interest of the shareowners."

A number of commentators particularly stressed the role of the board in monitoring management (e.g., Professor Mace, Professor Weiss, Guedry). According to William Feis:

> "The board must monitor the honesty and reliability of management. How accurate is the information the corporate executives are giving to the board? Are the executives objective in their evaluation of the position and the momentum of the Company. Do the internal accounting and legal controls reasonably ensure that management is being appropriately supervised?"

Several commentators expressed concern that in the past, boards may have been ineffective because they lacked a clear idea of their role (e.g., Yavitz). Joel Seligman believes that state corporation law and Commission rules and enforcement actions have not provided a clear statement of the duties of directors.

Senator Metzenbaum, among others, was concerned that uncertainty about what will be required of directors is causing many qualified persons to avoid service on boards. In this regard, he stated:

> "I think the question is, what are the reasonable standards that a board member has to live up to in order not to be negligent, or in some other manner to default in his or her responsibility to shareholders. That is a very sensitive area... it causes board members to lean over backward or I think even more importantly, to refuse to serve or to be absolutely certain that there is sufficient amount of insurance."

Professor Mace and others recommended that corporations provide to directors a written statement of their duties. J. Wilson Newman, however, opined that any person who must read a guidebook to learn of his duties is not qualified to be a director. Reference was made by Gardner Heidrick to the statement of responsibilities and liabilities which AT&T furnishes to its directors. Thomas Loo and others endorsed the development of the Corporate Directors Guidebook by a subcommittee of the ABA. Sidney Sosin suggested that it would be appropriate for the Commission to publish guidelines. Ray Garrett disagreed:

> "Certainly I wouldn't want the Commission to revive any guidelines projects such as I inherited as Chairman....You start out setting something as general principles, but when they come out with the Commission's imprimatur, they look too much like Commission rules. If you get too vague people say you've done nothing. If you get too precise, you have certainly done something silly, or that you will regret, such as how many hours a director should spend in his director duties... they are not susceptible to precise rules."

Ray Garrett and Thomas Loo opined that when the Commission expresses its view on particular director conduct such as in the Stirling Homex and Killearn Properties cases, 5/ it is performing a useful educational function.

5/ SEC v. Stirling Homex, (D.DC, 1975), LR-6960 (Jul. 3, 1975); SEC v. Killearn Properties, Inc. (N.D. Fl., 1977), 421 SRLR D-2 (Sept. 28, 1977).

2. Compensation Commensurate with Responsibilities

Approximately ten commentators discussed the issue of compensation of non-management directors. All of these commentators believe that compensation for directors should be commensurate with their responsiblities and that if outside directors are required to perform duties involving the commitment of substantial amounts of time and effort, their compensation should be increased (e.g., Elkan Blount, CLPI, Professor Seligman). Bryan Smith referred to a survey conducted by Heidrick & Struggles which shows that the average compensation of non-management directors has increased 73% over the past five years and that for companies with sales of $1 billion or more, the average compensation is $12,500. He pointed out that Texas Instruments requires its outside directors to devote a minimum of 30 days to the company and that each director is paid a minimum of $30,000. The company also compensates them for additional days of service. Each of its outside directors spends 30-65 days earning fees of from $30,000 to $55,000. Professor Jacoby believes that directors should receive an annual retainer plus a per diem fee for attending meetings, based on the daily pay rate of the top executives of the corporation.

3. Satisfying Informational Needs of the Board

A small number of persons commented on the informational needs of the board and whether it is necessary or appropriate for the board to have a separate staff to meet those needs. These commentators agreed that the timely receipt of information on all significant matters is essential if the board is to adequately perform the functions assigned to it (e.g., Newman, Leiman). Gardner Heidrick stated that directors often are not furnished adequate documentary materials. Keith Louden and Stanley Grant, however, opined that the more frequent problem is that the director receives too much information and has too little time to review and analyze it. Several of these commentators favored an independent staff for the board or for committees composed of outside directors, with the outside directors having the sole responsibility of hiring and firing staff members (e.g., Hal Amens, CLPI, Nader).

In this regard, Senator Metzenbaum stated:

> "...Former Supreme Court Justice Arthur Goldberg... has made the point publicly that the director is unable to have available to him or her the necessary tools to really find out what the corporation is doing except at a very superficial level. And perhaps the major corporations which have outside directors, perhaps there ought to be some kind of staffing for the board... not responsible to the executive officers, because no outside board member can really find out much about the company's activities except by the pro forma kind of responses... when you ask for a report."

Ralph Lazarus and Dean Yavitz opposed on the other hand, the concept of a separate staff although they believe the board should have access to the services of the regular corporate staff. Dean Yavitz stated with respect to proposals for a separate staff:

> "I have a sense that that's liable to turn into an expensive and probably not very effective mechanism. I think it opens too many doors to the kind of our staff against your staff confrontations....So I would rather ...a provision that permits the board to retain outside services, outside talent, if it finds that internal resources fail to meet its needs and requirements."

Leonard Leiman pointed out that medium or small corporations may not be able to afford to pay directors enough to enable them to devote sufficient time to corporate affairs or to provide them with a staff. He emphasized expansion of the role of the professional advisers to the corporation, such as the outside auditors.

4. Limiting Tenure of Directors

A handful of commentators, including Evelyn Davis, Mary Gardner Jones, Mark Green and Winthrop Neilson, favored a limited number of terms for directors. Limited tenure, according to these commentators, would assure independence of directors and permit

the inclusion on the board of persons with new perspectives. While Lee Seidler agreed that over time it may be difficult for outside directors to maintain an objective viewpoint, he did not favor a maximum term of service for directors. He believes that experienced directors will make far better policy decisions and that it will be necessary to rely primarily on the integrity of directors to maintain their independence.

5. Characteristics Which Directors Should Possess

Many commentators referred, at least indirectly, to general characteristics which board members, either individually or as a group, should possess. These commentators often emphasized that absent such qualifications, suggested reforms, such as changes in the composition of the board, would not be effective. J. Wilson Newman, for example, stated:

> "Corporations must take a fresh approach to the selection of directors. Greater attention must be given to finding people who have the ability to deal competently with business affairs and who have exhibited high standards of personal integrity. They must also have the independence to challenge the proposals which management has the duty to present, and the courage to overrule them when necessary. A system of checks and balances is essential, but only the character and ability of the directors will make it work successfully."

These commentators agreed with the view of the Business Roundtable that the board should include directors with different backgrounds, such as women, members of minority groups and persons whose major activity has been in public service or in the academic or scientific communities, because such a "mix" brings to the deliberations of the board different perspectives and experience.

Approximately ten commentators, including several individuals, indicated that it would be desirable if all directors had some equity ownership in the corporation on whose board they serve (e.g., Gilbert, Jacoby, Petrie, Wheat).

According to Francis Wheat:

> "There is an old notion abroad that directors really ought to have some stake, however small, in the company of which they are directors in order partly to insure that they have something important to backstop their interest in and zeal for the rest of the stockholders."

Michael Knoll stated that according to a recent research project conducted by his brokerage firm, in only one of the Dow Jones Industrials, Alcoa, did inside directors own more than 2% of the outstanding voting stock.

6. Constituency Representation

Approximately twenty commentators discussed whether directors should represent distinct constituencies. Persons supporting constituency boards were, however, clearly in the minority. Representative of the proponents of constituency boards was Mark Green who stated:

> "Each director would have the same obligations of — fiduciary obligations they now have to the company. In addition, each would wake up in the morning with a special mission. And we think that unless this were made explicit that those missions to ensure consumer protection, for example, or environmental protection, or technological assessment prior to implementation, are too often - and the evidence is clear on this — simply ignored."

Other commentators who favored particular constituency representation on the board included Allen Mansfield (labor and consumer representation) and Ashley Brown (community representation, particularly on the boards of public utilities).

The majority of commentators, however, opposed the notion of constituency directorships. These commentators, including Ray Garrett, Mary Gardner Jones and Dean Yavitz believed that constituency boards would result in divisiveness and, according to Ralph Lazarus, would eliminate "the common standard and common objectives of Board performance - an obligation that all Board members share to all shareholders." In this regard, Mr. Lazarus pointed out that American Labor is showing little interest in constituency representation at the board level, and both he and Richard Smith believe that labor should not be present on both sides of the bargaining table.

7. Composition of Board

Almost all of the commentators agreed that the board of directors has a crucial role to play in improving corporate accountability and corporate governance and that to perform this role the board must be able to exercise independent judgment. According to J. Wilson Newman,

> "The board of directors...is really the key to the renewal that is so badly needed... We must realize the democratic potential of the system and make directors stronger representatives of the shareholders who elect them. We must create a balance of power, of authority on the one hand and responsibility within each corporate system. The way to do that is to make the board of directors an independent force in corporate affairs rather than a passive affiliate of management"

Several commentators stressed the need for an independent board to be a "window to the world" and provide innovative thinking (e.g., Senator Metzenbaum). Dean Yavitz stated in this regard:

> "...my argument simply is that a good chief executive officer and a good group of his senior aides are just too deeply involved in corporate affairs, in relatively short run and close to operational affairs to really be able to spot clearly enough and in a sensitive manner the kind of changes that are going on in both expectations and demands of the [external] environment on the corporation."

Most commentators criticized the traditional board of directors, which is dominated by insiders, because they believe that such a board cannot adequately monitor the performance of management (e.g., Professor Jacoby, Nader, Dean Yavitz). Francis Wheat, for example, stated:

> "A board composed largely of officers subordinate to the chief executive, plus a few outsiders hand-picked by him, can hardly be expected to hold the chief executive to a high standard of responsibility if he is otherwise inclined."

This view was seconded by the CLPI, which noted that the Northrop board had been "appointed" by the company's chief executive officer and, as a result, permitted him sufficient isolation to perpetrate illegal activities.

According to Professor Mace, research which he conducted in the late 1960's clearly indicates the reason why boards whose membership is controlled by the CEO are so ineffective:

> "...the CEO's of large, medium, and small-sized corporations controlled the membership on the Board. And, not only that, they controlled what the Directors did or did not do. CEO's, I found, selected traditionalist friends, colleagues, associates, classmates, clubmates, who were not expected to ask discerning questions — certainly they were not expected to do anything more than approve what management proposed."

While a number of commentators affirmed the need for outside directors, without specifying the extent to which they should be represented on the board, and others recommended that the number of outsider directors be significant (e.g., Lazarus, Coombe), a large number of the commentators responding on the issue of board composition favored boards with a majority of outside directors. Most of these commentators believe that a majority of outside directors is necessary for the board to successfully perform its monitoring function (e.g., Alibrandi, Loo, Sommer).

Professor Mace questioned the ability of inside directors to perform this function:

> "How could an inside director with aspirations of continued employment measure objectively the performance of the CEO? The fact is he can't and, he won't and he doesn't...Inside directors maintain discreet silence at meetings and they should, because if they don't they are promoted to become the regional manager in Timbuktu."

Keith Louden, a professional director, and Robert Greely of the FAF pointed out that the contributions of management to the deliberations of the board can be made in their role as managers and, therefore, it is not necessary to include more than a minority of insiders on the board.

A handful of commentators discussed the issue of whether boards should consist entirely of outsiders. Joel Seligman proposed that no full-time operating executive be permitted to serve on the board. He stated:

> "The greatest virtue of a fully independent board would be its tendency to prevent inefficient or illegal transactions from ever occurring. By removing executives from control of the board that is supposed to review their actions, directors will be able to ask tough questions without fear of offending fellow directors; they will be able to confirm operating managers' assertions of fact and subject manager's business initiatives to independent scrutiny."

Richard Smith, however, believes that serving on the board with members of management provides outside directors their best opportunity to evaluate management. Additionally, he opined that outside directors may be reluctant to take a position on major corporate decisions unless members of management share in the board's responsibility for actions taken by voting. Few commentators addressed the advisability of the Chief Executive Officer also holding the office of Chairman of the Board. Most of these commentators did not oppose this practice (e.g., Lazarus, Wheat, Dean Yavitz). Joseph Alibrandi, President of Whitaker Corporation, described the structure of that corporation's board, in which the chairman of the board is an outside director, as unique among American corporations. A strength of this arrangement, according to Mr. Alibrandi, is the ability of an outside director to gain access to independent sources and evaluations of information. In this regard, Mr. Alibrandi stated:

> "...let's say he had a question with regard to some financial data or disclosure...he would not have to put himself in the position where he would have to go to management and say, 'I would like more information on such and such.' He would go to the Chairman of the Board, who has the power to use resources, and when I say resources, he can get an outside law firm to investigate something that the company is doing. He can hire an outside consultant completely on his own to evaluate or develop information...so, in effect, the outside directors would have the maximum capability... to develop that objective view of how management was doing..."

Senator Metzenbaum also favored having an outside director as chairman of the board so that control of the board agenda and annual meeting agenda would not be in the hands of the chief executive officer. He stated: "If you had the chairman independent and half of the board outside, you bring a tremendous breath of fresh air into the board room that isn't there now."

Several commentators (e.g., Geer) were concerned that expectations about the ability of outside directors to prevent excesses by management may not be realistic; Thus, Richard Lemon suggested that reliance on outside directors may be misplaced because they have the same background, the same training and are motivated by the same compensation system as management. Richard Smith and others questioned the ability of outside directors to do more than monitor ongoing management performance. William Gould agreed that management may be able to hide certain activities from the board, but believes that this problem would exist regardless of changes in board structure.

8. <u>"Independent" Directors versus "Outside Directors"</u>

Much of the discussion of how boards should be constituted revolved around the question of whether nonmanagement directors should be completely independent from management. In this regard, Bryan Smith referred to a Conference Board study released in September, 1977, which found that of 99 major U. S. manufacturing corporations surveyed, 83% had boards with a majority of outside directors, and also to an analysis of that study which showed that if former employees had been considered "insiders" the percentage of boards with a majority of outside members would be reduced to 60%. Mr. Smith also referred to the debate, reflected in the comments of the American Society of Corporate Secretaries on the <u>Corporate Directors Guidebook</u>, concerning whether former officers can be considered to be independent of management for any purpose, including audit committee membership.

Many commentators expressing views on the desired composition of the board and certain standing committees of the board made it clear that the terms "outside" and "non-management" are not synonymous, and that certain affiliations with management may be sufficent to disqualify one from being considered an "outside" director. Thus, William Gould, Esq., stated:

> "I would draw a distinction between the definition of an outside director and what I would call an independent director. I am not satisfied that a board must consist solely of outside directors if you included within the definition of an outside director somebody with a relationship to the corporation. Because in my mind those people are not independent enough to really recognize the responsibility to the shareholders."

A number of commentators agreed with Mr. Gould that retired company employees and persons with important business or professional relationships with the corporation should not be considered "outsiders" or "independent" in determining the composition of the board or membership on the audit, compensation and nominating committees.

Referring to the Conference Board study of board composition, Professor Mace "discovered that 41 percent of all 'outside directors' were...retired people, investment bankers, commercial bankers, and outside legal counsel. And, boy, they are no more outsiders than having the CEO's wife on the Board."

Many commentators believe that the corporation's commercial and investment bankers are not truly independent because they provide services to the corporation (<u>e.g.</u>, Professor Cary, Hutson, B. Smith, Sommer, Senator Metzenbaum). While Bryan Smith believes that the corporation's outside counsel can be considered independent, many commentators disagreed (<u>e.g.</u>, Professor Cary) or objected to counsel serving at all, pointing out the potential ethical conflicts which can arise from having outside counsel sit on the board (<u>e.g.</u>, W. Gould, Sommer).

A few commentators, including Professor Cary and Samuel K. White of Sun Company, also believe that representatives of significant customers or suppliers of the corporation should not be considered outside or independent.

Keith Louden proposed that only persons whose sole source of income from the corporation is a director's fee should be considered "independent".

9. Need for a Committee System

Commentators generally favored the establishment of certain standing committees of the board as a means of efficiently carrying out its legal and operational responsibilities (e.g., Dean Yavitz) and of helping to assure the autonomy and independence of the board (e.g., Heard). Commentators discussing the committee system favored the formation of three standing committees, the audit, compensation and nominating committees, and suggested that these committees be comprised of at least a majority of outside directors.

The audit committee would, according to William Gould, "provide a direct avenue of communication between the outside directors and the corporation's auditors...giving such auditors a responsive level of authority higher than management." According to Lee Seidler, Deputy Chairman of the Commission on Auditor Responsibility, the audit committee should take an active role in negotiations between the corporation and the auditor regarding the auditor's engagement in order to assure that audit quality is not sacrificed because of considerations of cost. A number of commentators referred to a function often assigned to the audit committee of ensuring employee compliance with the corporation's standards of ethical conduct and of attempting to prevent fraud and other illegal activities (e.g., Wheat). These commentators also point out, however, that the audit committee may have difficulty performing the role of in-house policemen. Thus, Professor Mace stated:

> "My concern is that our higher expectation of what the audit committees will do is greater than most audit committees can in fact do. For example, I doubt very much that audit committees are likely to be much more effective in uncovering well-concealed programs for frauds, payoffs, bribes and kickbacks than when we had no audit committees at all."

The compensation committee would conduct arm's length negotiations of salaries and fringe benefits for management according to William Gould and Joel Seligman, among others, which would assure that remuneration levels are reasonable.

The nominating committee would receive suggestions for possible candidates for directors from other board members and shareholders. Richard Smith believes that suggestions could also be made by management and that the committee slate should be reviewed with management before being presented to shareholders. William Gould stated that the nominating committee could define the

standards, qualifications and conflict of interest policies to be used in selecting director candidates and have overall responsibility for preserving the quality of the board. The qualifications for board membership should include, according to Bryan Smith and the CLPI, a substantial, well-defined commitment of time. Several commentators stressed the crucial role to be played by the nominating committee in assuring that boards become truly independent of management. These commentators emphasized that the nominating committee should be composed entirely of outside directors (e.g., CLPI, Professor Eisenberg, Dean Yavitz, J. Newman).

D. Increasing the Role of the Self Regulatory Organizations

The releases announcing the proxy rule re-examination raised the question of whether improvements in corporate governance and corporate accountability could be achieved through amendments to the listing requirements of the self-regulatory organization. A number of commentators addressed the appropriateness and feasibility of such an approach.

1. Commission's Authority to Effect Change Through Influencing Self-Regulatory Organizations

Several commentators questioned the authority of the Commission to attempt to influence self-regulatory organizations to make rules accomplishing changes which the Commission could not bring about itself. Professor William L. Cary, for example, cautioned against requiring self-regulatory organizations to amend their listing requirements and achieve reforms, such as requiring more outside directors on corporate boards, which are currently beyond Commission authority. David Ruder also questioned whether the Commission could act through self-regulatory organizations in order to influence internal corporate affairs. On the other hand, some support was expressed for expanded use of informal Commission suggestions for self-regulatory action, similar to the approach used in connection with audit committees.

At least one commentator, however, challenged the authority of the self-regulatory organizations to promulgate certain rule changes affecting corporate structure and governance. (Union Carbide letter).

2. Appropriateness of Commission Action through Influencing Self-Regulatory Organizations

Whether or not they were of the opinion that the Commission had the authority to act by influencing self-regulatory organizations, a large group of commentators believed that such action was not wise or appropriate. Among the arguments cited for this view were the following:

(1) The Commission should not attempt to do indirectly what it cannot do directly. A number of commentators, such as the ASCS, ABCNY-Securities Reg., and the Business Roundtable, were of the opinion that it would be a bad policy for the Commission to become involved through the self-regulatory organizations in areas in which it has no direct authority.

(2) Rules promulgated by self-regulatory organizations would not be of general applicability. The American Society of Corporate Secretaries pointed out that only about two thousand corporations are listed on

the New York and American Stock Exchanges, whereas almost 6,900 filed proxy material with the Commission in 1977. The Society also suggested that promulgati on of certain rules by the stock exchanges might discourage the listing of securities.

(3) Self-regulatory organizations are not qualified to make rules regarding corporate governance. For example, David Ratner pointed out that corporate governance is a matter of secondary importance to most self-regulatory organizations. Neil H. Jacoby agreed that corporate governance questions were extraneous to the purposes of self-regulatory organizations. Similarly, General Motors Corporation argued that self-regulatory organizations do not have the expertise or capacity to deal with technical questions regarding shareholders' rights. General Electric Corporation expressed concern that rule-making by self-regulatory organizations might be used to evade the legal procedures which must be observed in the Commission's rule making.

(4) Other arguments against rule-making through self-regulatory organizations were that access to capital markets should be as free as possible (Hebert) and that exchange listing rules, for example, might not be flexible enough to allow for exceptional cases (Ruder).

Several commentators expressed varying degrees of support for rule-making action in the area of corporate governance on the part of self-regulatory organizations. Alice E Hennessey of Boise Cascade Corporation, for example, stated that self-regulatory organizations could appropriately implement corporate governance proposals since they understand the needs of the business community and shareholder interests. She indicated however, that Boise Cascade had not actively supported this sort of activity on the part of self-regulatory organizations.

3. Specific Proposals for Amending Listing Requirements of Self-Regulatory Organizations

Among the specific rule proposals suggested for implementation by self-regulatory organizations were the following:

(1) Requiring companies coming under the jurisdiction of the organization to have a majority of "outside" directors (Feis);

(2) Requiring companies to adopt procedures for shareholder nominations (Gallaway);

(3) Promoting voting by the beneficial owner rather than the intermediary in the case of street name stock (Gallaway);

(4) Requiring compliance with federal environmental regulations (Reinisch);

(5) Requiring cumulative voting in the election of directors (Reinisch); and

(6) Requiring federal incorporation if such a statute is adopted (Reinisch).

E. Federal Minimum Standards Legislation

While minimum standards legislation appeared to have more support than a federal chartering approach, it was opposed by a majority of the commentators. In addition to the general concerns about increased federal intervention into internal corporate process, and the widely held belief that existing standards are adequate, opponents of such legislation expressed the view that minimum standards would actually become maximum standards (Georgeson), that they would be no more effective a deterrent to misconduct than the fear of shareholder derivative suits already is (Levi Strauss), that they would not be likely to require a higher standard of conduct than now exists, and that if they did, in fact, make directors insurers of fairness by eliminating the "business judgement rule" defense or limiting indemnification, qualified persons would be deterred from serving as directors (Union Carbide).

Advocates of a minimum standards bill, on the other hand, stressed the need for clearer federal rights of action (CLPI), a higher level of fiduciary standard than can be imposed by states concerned with protecting local companies and producing revenues (Seligman, Cary) and the importance of changing corporate structure (CLPI). They suggested, therefore, that the bill should contain an explicit private right of action (Kaye, Cary, Ratner), require directors to meet a standard of "inherent fairness" (Cary), prohibit staggered boards and other anti-takeover devices (Eskin, Matheson, Mansfield), guarantee cumulative voting (Gintel, Matheson, Soss), mandate structural reforms for boards of directors (Wheat, Metzenbaum), prohibit director indemnification, limit director tenure to four two year terms to maintain consistent turnover (Seligman), require periodic changes of outside auditors (Brown), and outlaw the use of manipulative procedures in connection with annual meetings (Lemon).

F. Federal Chartering

The question of the desirability of legislation requiring federal chartering provoked very heated debate but was supported only by a handful of people. Principal advocates of this type of legislation expressed the view that our state chartering system has "disintegrated" and that a legal system that worked well in the earlier part of this century is no longer adequate, in view of the size of corporations and their potential to do harm (Nader). These persons suggested that most public, multinational corporations are governed entirely through private decision-making, when in fact there is a very real need that persons such as employees, consumers, shareholders, members of the community and other affected constituencies also have a voice in the decision making process. (Ryder, Hayden). The inclusion of their views, would, it was suggested, raise the level of corporate social responsibilities. It would also have the advantage of including all groups affected by big business behavior in corporate governance, rather than limiting this right only to shareholders. Since federal chartering is designed to restructure corporations from within, it would not require a new federal bureaucracy to implement such a law (Hayden).

Opponents of federal chartering, however, expressed strong opposition to this approach. They opined that federal chartering would result in such a concentration of power in the federal government that a basic restructuring of our political organizations would inevitably occur (Bower). Federal chartering was equated with total government regulation of corporations which, it was feared, would become an easy vehicle for total regulation of the American economy (Cary). It was also suggested that the central goal of proponents of federal chartering is not to mprove the law of incorporation but rather, to establish new federal controls designed to remedy various perceived social ills. The abuses cited by those who support such legislation, including pollution and illegal payments, have never been matters covered by state corporation law and the remedies for abuses of this sort lie in specific substantive legislation, separately considered and adopted only after full political debate (Crompton).

G. Reaction to SEC Solicitation of Comments on Need for Legislation

While a number of commentators praised the Commission's concern with the broad issues raised in this proceeding, others found the breadth of this inquiry to be inappropriate. Typical of this reaction was the response of Levi-Strauss, which noted that a corporation has four constituencies: shareholders, employees, customers and the public. The Commission's concern is with shareholders and the sector of the public which is directly involved in the securities market. It should not become

a "self-appointed guardian", of the public interest in areas essentially unrelated to its areas of expertise and competence. Similarly, the ABA noted that the Commission's mandate does not extend to substantive laws relating to corporate governance, and the Pacific Gas and Electric Company emphasized that substituting federal law for existing state law is a matter which should be dealt with on its own merits by Congress, and not by the Commission.