Washington and Lee Law Review

Volume 44 | Issue 3 Article 9

Summer 6-1-1987

One Share, One Vote: The Sec'S Duty To Protect Investors And Ensure Fair Administration Among The Securities Exchanges

ONE SHARE, ONE VOTE: THE SEC'S DUTY TO PROTECT INVESTORS AND ENSURE FAIR ADMINISTRATION AMONG THE SECURITIES EXCHANGES

Since 1926, the New York Stock Exchange (NYSE) has prohibited registered companies of the NYSE from creating a class of common stock that gives shareholders more than one vote per share of common stock.[1] Neither the American Stock Exchange (AMEX) nor the National Association of Securities Dealers (NASD), the two national securities exchanges with which the NYSE competes, has a similar prohibition respecting voting provisions for common stock.[2] Recently, several registered companies of the

---

1. *See* NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 313.00 (1983) [hereinafter NYSE MANUAL] (since 1926 New York Stock Exchange (NYSE) has refused to allow registered companies to list nonvoting or disparate voting common stock). The NYSE listing manual specifically states that the exchange may refuse to list on the exchange any corporation that issues a class or series of common stock that has unusual voting provisions. *Id.* § 313.00(C). The NYSE defines the term "unusual voting provisions" as provisions that tend to nullify or restrict shareholder voting. *Id.* The NYSE offers as an example of unusual voting common stock a class of stock that has the power to veto the actions of the other common stock shareholders. *Id.* The NYSE reasons that when management divides voting power between the common stock and one or more other classes or series of stock under normal conditions, the NYSE will consider the proportion of the total voting power represented by the other classes or series of stock to their relative equities in the company. *Id.* § 313.00(D); *see* Karmel, *Is One Share, One Vote Archaic?*, N.Y.L.J., Feb. 26, 1985, at 2, col. 3 (discussing developments leading to disparate voting stock). In *Is One Share, One Vote Archaic* Ms. Karmel attributes the rising corporate interest in disparate voting stock to hostile tender offers, the institutionalization of public securities markets, the extensive disclosure requirements respecting proxy statements, increased sophistication of investors, and the NYSE's competition with the other securities exchanges for corporations to trade their securities on the NYSE. *Id.* *See generally* Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"*, 56 CORNELL L. REV. 1 (1970) (relating historical evaluation of growth of one share, one vote rule); Rohrlich, *Corporate Voting Majority Control*, 7 ST. JOHN'S L. REV. 218 (evaluating 1920's trend away from one share, one vote rule).

2. *See* J. Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 691-92 (1986) (discussing American Stock Exchange (AMEX) and National Association of Securities Dealers (NASD) restrictions on common stock voting rights); *see also* AMERICAN STOCK EXCHANGE, COMPANY GUIDE §§ 101-17 (1983) [hereinafter AMEX GUIDE], *reprinted in* 2 Am. Stock Ex. Guide §§ 10,001-17 (CCH) (1983) (AMEX standards for listing corporate securities are similar to NYSE, but less rigorous). Professor Seligman in *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy* claims that the AMEX rule governing common stock voting rights is minimal compared to that of the NYSE. Seligman, *supra*, at 691. The *AMEX Guide* states that the AMEX will disapprove an application for the listing of a nonvoting common stock, but that the exchange may approve the listing of a common stock that has the right to elect only a minority of the board of directors. *AMEX Guide* § 122, *reprinted in* 2 Am. Stock Ex. Guide (CCH) § 10,022, at 3525 (1985).

Professor Seligman in his article explains that the NASD currently has no restrictions

NYSE have requested the NYSE to allow them to create a class of common stock that has more than one vote per share.[3] The NYSE directors fear that unless they adopt a less stringent requirement concerning common stock voting provisions, or unless the SEC requires the AMEX and the NASD to adopt similar restrictions, numerous NYSE registered companies will transfer their memberships from the NYSE either to the AMEX or to the NASD to take advantage of the less restrictive voting provisions of the AMEX and the NASD.[4]

To prevent the NYSE registered companies from transferring to the AMEX and the NASD, the NYSE has proposed to the Securities and Exchange Commission (SEC) that the SEC allow the NYSE to abandon the one share, one vote rule.[5] Currently, the exchanges and the major institu-

---

regarding the voting rights of common stock that its registered companies issue. Seligman, *supra*, at 692; *see* Karmel, *The SEC's Power to Regulate Stockholder Voting Rights*, N.Y.L.J., Aug. 21, 1986, at 2, col. 2 (noting that NASD, which maintains NASDAQ trading system, has no requirements regarding common stock voting rights). In July of 1985, however, the NASD submitted to the SEC for comment two alternative proposals for shareholder voting rights. Seligman, *supra*, at 692. The first proposal would require NASD registered companies to adhere to the one share, one vote system, but would permit any existing issues of disparate voting common stock to continue to exist under a grandfather provision. *Id.* The second proposal would require the NASD registered companies to adhere to the one share, one vote rule unless the shareholders of a two-thirds majority of the outstanding shares of common stock approved the disparate voting stock. *Id.* However, the second proposal would place a ceiling on the ratio in voting rights of ten to one. *Id.* The NASD, nevertheless, failed to adopt either of the two proposals. *Id.*

3. *See* Brandow, *The NYSE's One Share/One Vote Rule*, N.Y.L.J., Dec. 9, 1985, at 33, col. 2 (evaluating NYSE reasons that registered companies are seeking dual class capitalization). In *The NYSE's One Share/One Vote Rule* Brandow points to the Figgie International and A. O. Smith companies, which left the NYSE in 1983 because of the creation of new classes of common stock having unequal voting rights, as indicative of the trend of NYSE registered companies to delist from the NYSE. *Id.* at 47 n.2, col. 4. Since early 1984, the General Motors Corporation, Dow Jones & Company, and the Coastal Corporation have issued common stock with disparate voting rights. *SEC Request for Additional Comments and Announcement of Hearings for NYSE Dual Voting Rights Proposal*, [July-Dec.] SEC. REG. & L. REP. (BNA) 1697, 1697 n.6 (Nov. 21, 1986) [hereinafter *SEC Request*]. Professor Karmel states in *The SEC's Power to Regulate Stockholder Voting Rights* that the threat that registered companies listed on the NYSE will depart from the exchange impairs the NYSE's ability to maintain the one share, one vote rule. Karmel, *supra* note 2, at 2, col. 2. Brandow in his article notes that the managements of many NYSE registered companies have concluded that their companies could thwart any hostile tender offers by issuing disparate voting common stock. Brandow, *supra*, at 33, col. 3.

4. *See Public Hearings on New York Stock Exchange's Proposal Amending "One Share, One Vote" Rule* (Dec. 16-17, 1986) 4-485 [hereinafter *NYSE Proposal Hearings*] (transcript available at Bechtel Information Services in Washington, D.C.). In testifying, before the Securities and Exchange Commission (SEC), the CEO of the NYSE claimed that although the NYSE supports the spirit of the one share, one vote rule, the NYSE cannot stand alone in the securities marketplace in applying the rule. *Id.* at 11; *see supra* note 3 (discussing companies registered with NYSE that have issued disparate voting stock).

5. *See SEC Request*, *supra* note 3, at 1697 (SEC announcement of NYSE's proposal to abandon one share, one vote rule). Section 19(b) of the '34 Act requires all securities exchanges to file with the SEC copies of any proposed rule or proposed rule change to the

tional and individual investors are speculating on whether the SEC will or should accept the NYSE's proposal to abandon the one share, one vote rule.[6] The possibility of the SEC requiring, as an alternative to approving the NYSE proposal, all the exchanges to maintain the one share, one vote rule has intensified the exchanges' concern over the proposal.[7] As the SEC considers whether to approve or to disapprove the NYSE proposal and even after the SEC takes action, the fundamental question remains whether the SEC has the authority to accept the proposal, reject it, or require all the exchanges to adhere to the one share, one vote rule.[8]

---

rules of the exchanges including a concise general statement of the basis and purpose for the proposed rule or rule change. 15 U.S.C. § 78s(b)(1) (1981). The SEC then must publish notice of the proposed rule or rule change together with a description of the proposed rule or rule change. *Id.* The SEC must allow all parties interested in the proposed rule or rule change an opportunity to submit written data, views, and argument concerning the proposed rule change. *Id*; *see also NYSE Proposal Hearings*, *supra* note 4, at 4-485 (public testimony allowed by SEC concerning NYSE proposal to eliminate one share, one vote rule).

6. *See NYSE Proposal Hearings*, *supra* note 4, at 6-66, 179-485 (testimony from presidents of NYSE, AMEX and NASD and major individual and institutional investors).

7. *See id.* at 323 (testimony by SEC commissioner on SEC's authority to impose one share, one vote on AMEX and NASD); *see also* 15 U.S.C. § 78s(c) (1981) (statutory authority for SEC to impose one share, one vote on AMEX and NASD).

8. 15 U.S.C. § 78s(b)(2) (1981). The SEC must within 35 to 90 days from the date of publication of notice approve an exchange proposal for a rule change or institute proceedings to determine whether to disapprove the rule change. *Id.* The SEC must conclude within 180 days of the notice date any proceeding that results in disapproval of the proposed rule change. *Id.* Upon finding good cause for an extension or the exchange proposing the rule change consents to the extension, the SEC may extend the disapproval proceedings for up to 60 days. *Id.*

The SEC must approve a proposed rule change if it finds that the rule change is consistent with the requirements of the Securities Exchanges chapter of Title 15 of the United States Code. *Id.* The SEC must disapprove a proposed rule change, however, if the rule change is inconsistent with the Securities Exchange chapter of the Code. *Id.* In enacting section 19(b) of the '34 Act, Congress recognized that the SEC's approval of any proposed rule change would constitute a determination by the SEC that the rule change is within the permitted purposes and in conformity with the specific standards of the '34 Act. *See* S. REP. No. 75, 94th Cong., 1st Sess. 2, 28 (1975), *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 180, 206; *see also* Gordon v. New York Stock Exch., 422 U.S. 659, 667 (1975) (holding that SEC can compel exchanges to adopt rules when necessary to ensure fair dealing between exchanges and to protect public shareholders). The United States Supreme Court in *Gordon v. NYSE* held that the SEC had explicit statutory authority to review all exchange rules and practices dealing with the exchange's commission rates. *Id.* at 685; *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 129 (1973) (discussing SEC's limited authority prior to 1975 amendments to regulate securities exchanges). The United States Supreme Court in *Merrill Lynch v. Ware* held that the initiative and responsibility for promulgating regulations pertaining to the administration of the securities exchange's ordinary affairs rested with the exchanges themselves. *Id.* at 130. The Supreme Court recognized that the congressional aim of supervised self-regulation was to ensure fair dealing between the exchanges and to protect investors from harmful or unfair trading practices. *Id.* The Supreme Court in *Merrill Lynch* held that Congress authorized the SEC to step in and compel exchanges to act only when the exchanges have failed to protect investors adequately. *See id.* (citing S. REP. No. 792, 73d

Congress designed the Securities and Exchange Act of 1934 ('34 Act) to protect the investing public trading on the exchanges and to regulate the securities industry effectively.[9] Thus, Congress granted the SEC broad powers to combat new schemes designed to defraud the investing public and manipulate the securities markets.[10] In section 19(b) of the '34 Act Congress authorized the SEC to alter the rules of the exchanges when necessary to protect investors, to ensure fair dealing in securities trading, or to ensure fair administration of exchanges in respect to nine specific matters.[11] In 1975 Congress amended the '34 Act to broaden the SEC's powers under section 19(b) by removing the original restrictions that limited the SEC's powers over the exchanges to specific subject matters.[12] Under

---

Cong., 2d Sess. 13 (1934)).

In section 19(c) of the '34 Act, Congress authorized the SEC to abrogate, add to, and delete from the rules of an exchange as the SEC deems necessary or appropriate to ensure the fair administration of the securities exchanges. 15 U.S.C. § 78s(c) (1981). Under section 19(c), the SEC must notify the exchange and also publish notice of the proposed rulemaking in the Federal Register. *Id.* The SEC must give persons interested in the proposed rule change an opportunity to offer an oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions regarding their own views on the proposed rule change. *Id*; *see NYSE Proposal Hearings*, *supra* note 4, at 4-485 (SEC public hearings on NYSE proposal to eliminate one share, one vote rule); *infra* notes 15-25, 33-50, 64-69 and accompanying text (discussing how NYSE proposed rule change could harm investors and disrupt competition between exchanges).

9. *See* Sacks v. Reynolds Sec., Inc., 593 F.2d 1234, 1244 (D.C. Cir. 1978) (citing S. REP. No. 792, 73d Cong., 2d Sess. 4 (1934)). The United States Court of Appeals for the District of Columbia in *Sacks v. Reynolds Securities* recognized that Congress anticipated three modes of securities control to protect the investors: statutory provisions, SEC regulations, and exchange rules. *Id.* Congress granted the exchanges with quasi-governmental power and transformed the exchanges from private trade associations into organizations sharing responsibility for the maintenance of an orderly and fair securities market. *Id.* In establishing the tripartite system, Congress contemplated active self-regulation of the securities industry and the exchanges aggressive promulgation of rules concerning the registered companies. *Id*; *see* Silver v. New York Stock Exchange, Inc., 373 U.S. 341, 351 (1963) (holding that combination of exchanges growth in power, impact of exchanges in economy, and exchanges inability and unwillingness to curb abuses that harmed investors moved Congress to enact '34 Act). The United States Supreme Court in *Silver v. NYSE* concluded that although by empowering the SEC to compel exchanges to make changes in their rules and to disapprove any rules adopted by an exchange, Congress did not grant the SEC jurisdiction to review particular instances of enforcement of exchange rules. *Silver*, 373 U.S. at 357; *see* Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264, 273 (7th Cir. 1970) (noting Congress intended '34 Act to protect investors and that investor protection is SEC's area of expertise). *See also* PBW Stock Exch., Inc. v. SEC, 485 F.2d 718, 722 (3d Cir. 1973) (stating that section 19(b) before 1975 amendments provided procedures for both voluntary and compelled adoption of SEC recommendations in specified regulatory areas). The Third Circuit in *PBW Stock Exch. v. SEC* noted that prior to the 1975 amendments, section 19(b) of the '34 Act empowered the SEC to proceed against a single exchange by rule, regulation, or order. *Id.* at 732.

10. *PBW Stock Exch., Inc.*, *supra* note 9, at 722.

11. *See* Drayer v. Krasner, 572 F.2d 348, 356 n.9 (2d Cir. 1978) (prior to 1975 amendments subsection (3) of section 19(b) allowed SEC to amend exchange rules concerning listing or striking from listing of any security).

12. *Id.* at 357.

the amended section 19(b), only the language "[when] necessary for protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds . . . ." circumscribes the SEC's power to accept or reject the NYSE's proposal or to require all the exchanges to retain the one share, one vote rule.[13] To approve the NYSE proposed rule change, the SEC, pursuant to section 19(b), must determine whether the NYSE proposal is necessary to protect investors and to ensure fair dealing among the exchanges within the meaning of the '34 Act.[14]

SEC approval of the NYSE proposed rule change would threaten the right of shareholders to protect themselves as owners of the corporation under the concept of corporate democracy by disenfranchising shareholders.[15] The NYSE proposal would allow corporate management to issue a second class of common stock with either disparate or zero voting rights upon the approval by both a majority of the corporation's independent directors and a majority of the corporation's public shareholders eligible to vote.[16] The proportionate right to vote, however, is fundamental to the idea

---

13. *See id.* at 359 (citing S. REP. No. 75, 94th Cong., 1st Sess. 27-28, 31 (1975)); *see also* 15 U.S.C. § 78s(b)(3)(B) (permissive statutory authority for SEC to approve proposed rule changes). Congress also included in section 19(b) the mandatory language that requires the SEC to approve a proposal for a rule change when the proposal is consistent with the Securities Exchange chapter of Title 15 of the United States Code. *Id.* § 78s(b)(2). The NYSE proposed rule change appears to satisfy all the requirements of the Securities Exchange chapter of the United States Code, therefore, the permissive language of section 19(b) is of primary relevance to the SEC in deciding whether or not to approve the NYSE proposed rule change. *Id*; *infra* notes 15-25, 33-50, 64-69 and accompanying text (discussing ramifications for investors if SEC approves NYSE proposal).

14. 15 U.S.C. § 78s(b)(3)(B); *see supra* notes 11-13 and accompanying text (discussing SEC requirements for approving proposed rule change under section 19(b)).

15. *See NYSE Proposal Hearings*, *supra* note 4, at 349 (worst aspect of disparate voting stock is disenfranchisement of shareholders); *see also infra* notes 16-25 and accompanying text (discussing how NYSE proposed rule change will disenfranchise shareholders).

16. *See SEC Request*, *supra* note 3, at 1697 (SEC announcement of NYSE's proposal to abandon one share, one vote rule). On September 16, 1986, the NYSE directors, pursuant to section 19(b) of the '34 Act, submitted to the SEC the NYSE's proposed rule change to eliminate the one share, one vote rule for listing common stock. *Id.* The NYSE proposal would allow the management of NYSE registered companies to issue disparate voting stock after management satisfies certain prerequisites. *Id.* at 1698.

In June of 1984 the NYSE directors named a Subcommittee on Shareholder Participation and Qualitative Listing Standards (Subcommittee) to study the public and private sectors' response to the possibility of eliminating the one share, one vote rule of the NYSE. Brandow, *supra* note 3, at 33, col. 3. After collecting information from NYSE registered companies, academicans, state securities administrators, lawyers, and major institutional investors, the Subcommittee recommended that, if the registered corporations issuing the disparate voting stock meet certain requirements, the NYSE should not delist the registered company from the NYSE for authorizing two classes of common stock one of which has disparate voting rights. *Id.* at 47, col. 1.

The NYSE directors revised the Subcommittee's recommendations concerning the necessary requirements for a registered company of the NYSE to issue disparate voting common stock. *See NYSE Proposal Hearings*, *supra* note 4, at 7 (NYSE proposal provisions). The NYSE of corporate democracy.[17] Thus, the NYSE proposal is an abrogation of the exchange's responsibility to preserve equality in voting which is the essence of corporate democracy.[18] The threat of the proposed rule change to corporate democracy suggests that retention of the one share, one vote rule is necessary to protect shareholders and that, consequently, the SEC has no power under section 19(b) to accept the NYSE proposal.[19]

The NYSE proposal would result in the elimination of corporate democracy by disenfranchising future shareholders of the second class of common stock as well as the current shareholders of the second class.[20] The NYSE directors declined to incorporate into the NYSE proposal a sunset clause that would protect the interests of future shareholders of the second class of common stock.[21] The sunset clause would have required the shareholders of the second class of common stock to reconsider periodically whether that stock should continue to retain the superior voting power.[22] The sunset clause would have allowed the shareholders of a corporation issuing a second class of common stock to regain the voting rights that the previous shareholders forfeited.[23] Thus, the NYSE proposal eliminates the

---

proposal, submitted to the SEC, requires any corporate management of a NYSE registered company attempting to issue disparate voting common stock to acquire the approval from both a majority of the independent directors of the company and a majority of the registered company's public shareholders eligible to vote not just a majority of the shares actually voted before issuing the new class or series of common stock. *Id.* The proposal does not allow corporate officers, directors, members of immediate families of the officers and directors, or the affiliates of the officers and directors, or affiliates of the issuing company to vote in approving the new class or series of common stock. *Id.* The proposal provides that NYSE registered companies currently issuing disparate voting common stock, but failing to obtain the necessary approvals from a majority of the independent directors and the public shareholders, would have two years in which to comply with the approval provisions. *Id.* at 8. The NYSE proposal does not, however, require majority approval from the public shareholders or the independent directors if the disparate voting stock existed when the company went public or if management distributed the stock pro rata to the common shareholders in a transaction in which the management was not the issuer of the disparate voting stock. *See SEC Request*, *supra* note 3, at 1698 (describing NYSE proposal provisions).

17. *NYSE Proposal Hearings*, *supra* note 4, at 290. During the NYSE proposal hearings, critics of the NYSE proposed rule change testified that the rule change would undermine one of the keystones of corporate democracy by disenfranchising shareholders and reducing the ability of public investors to protect themselves. *Id.* at 409.

18. *See id.* at 257 (voting power is basic to shareholder's rights and SEC should force NYSE to maintain its responsibility to shareholders to preserve corporate democracy).

19. *See supra* notes 13-14 and accompanying text (discussing SEC's duty under section 19(b) to approve proposed rule changes that are necessary to protect investors).

20. *See supra* notes 15-19 and accompanying text (approval of NYSE proposal will disenfranchise shareholders); *see also infra* note 21 and accompanying text (noting provisions of NYSE proposal do not include sunset clause).

21. *See NYSE Proposal Hearings*, *supra* note 4, at 35 (little support from NYSE constituents or directors for implementing sunset provision in NYSE proposal).

22. *Id*; *see* Brandow, *supra* note 3, at 47, col. 4 (sunset clause places limited life concept on common stock with disparate voting rights).

23. *See NYSE Proposal Hearings*, *supra* note 4, at 8 (sunset provision would require shareholders of disparate voting stock to confirm continuation of different voting rights at

exchange's responsibility to preserve equality in voting among both the current and the future shareholders of the second class of common stock.[24] The possibility that the NYSE proposal would eliminate the concept of corporate democracy suggests that the one share, one vote rule is necessary to protect the shareholders and that, consequently, the SEC has no power under section 19(b) to approve the NYSE proposal.[25]

The NYSE directors reason that the fundamental basis for allowing management to disenfranchise the shareholders of the second class of common stock is that the shareholders are protected from the corporate management issuing the second class only for the benefit of themselves because the management must receive approval from two public sources within the corporation.[26] The NYSE directors claim that the checks and balance system under the proposal requiring management to obtain approval from a majority of the independent directors and the shareholders eligible to vote is sufficient to protect the investors from the management issuing a second class of common stock that reduces the shareholder's rights in the corporation.[27] The concepts of shareholder approval and independent director approval, however, possibly are inadequate safeguards to protect the investors.[28] In controlling the proxy system that solicits the shareholders' votes on the issue of creating a disparate voting stock, management may influence shareholder approval by offering to the shareholders incentives to approve the disparate voting stock such as higher dividends and bonuses.[29]

---

specific intervals); *see also* Brandow, *supra* note 3, at 47, col. 4 (explaining that sunset provision would allow regular common shareholders to eliminate super vote whenever regular common shareholders did not approve continuation of disparate voting stock).

24. *See supra* notes 21-23 and accompanying text (discussing NYSE's reluctance to include sunset provision in proposal).

25. *See supra* notes 15-24 and accompanying text (relating how NYSE proposed rule change eliminates concept of corporate democracy and disenfranchises shareholders). *See also supra* notes 13-14 and accompanying text (discussing SEC power to approve NYSE proposal if it is necessary to protect investors).

26. *See NYSE Proposal Hearings, supra* note 4, at 22 (noting NYSE's rationale for allowing shareholders to disenfranchise themselves); *see also supra* note 16 and accompanying text (discussing NYSE proposal provisions requiring majority approval from both issuing corporation's independent directors and public shareholders).

27. *See NYSE Proposal Hearings, supra* note 4, at 25 (checks and balance system of NYSE proposal serves corporations as well as United States government by allowing shareholders to use voting power to correct actions of management). The NYSE directors testified before the SEC during the proposal hearings that the NYSE did not have the right to override the shareholders' decision to disenfranchise themselves. *Id.* at 32. The NYSE directors maintained that the approval requirements for the NYSE proposal still exceeded the state law listing standards for securities as well as the listing standards of both the AMEX and the NASD. *Id.* at 11; *see supra* note 16 and accompanying text (outlining NYSE proposal provisions).

28. *NYSE Proposal Hearings, supra* note 4, at 93.

29. *Id.* at 99. Critics of the NYSE proposal testified during the SEC proposal hearings that corporate management can influence a shareholder's decision to approve disparate voting stock with monetary incentives and other techniques that may lead to collective action problems. *Id.* Other critics of the proposed rule change claimed that often management may provide the shareholders with higher dividend payouts than management normally would have provided had management retained the limited voting stock. *Id.* at 137.

Many shareholders also have so much confidence and trust in the management of their respective corporations that they will concede to any suggestions that the management proposes, including whether or not to issue disparate voting stock.[30] Whether independent directors truly act independently of the corporate management is also questionable, because an independent director's salary depends on the approval of the chairman of the board of the company seeking to issue the disparate voting stock.[31] The argument that disenfranchisement of the investors is valid because a majority of both the shareholders and the independent directors approve the disparate voting stock, therefore, is insufficient to allow management to eliminate the concept of corporate democracy by disenfranchising the investors.[32]

Approval of the NYSE proposal would undermine the concept of corporate democracy even further by entrenching the management from any accountability to the shareholders.[33] The NYSE proposal would enable corporate management to reduce the amount of leverage the shareholders could exert on the management by controlling a majority voting position through the disparate voting stock.[34] Shareholders rely on the voting process to protect their investment.[35] Shareholders resort to the voting process to remove current management when the management's performance is unsatisfactory.[36] The shareholder's right to vote on the management of the corporation is also one of the best incentives for management to succeed in achieving the maximum return on the shareholder's investment.[37] By limiting the significance of the shareholder's vote, corporate management would reduce the ability of the shareholders to oversee management and to protect their investment.[38] The argument is plausible that without strong

---

30. *Id.* at 164.

31. *Id.* at 372.

32. *See supra* notes 28-31 and accompanying text (discussing how majority votes from shareholders and independent directors fail to protect investors from corporate management adequately).

33. *NYSE Proposal Hearings*, *supra* note 4, at 349. Opponents of the NYSE proposal pleaded with the SEC during the proposal hearings that approval of the proposal would make it virtually impossible for shareholders to exert pressure on the corporate management to take any specific action, no matter how poor the management's performance. *Id.* Critics of the NYSE proposal testified that approval of the proposal would allow the management issuing the disparate voting stock to remain in control of the corporation's management irrespective of the management's efficiency and shareholder interest. *Id.* at 103.

34. *Id.* at 347.

35. *Id.* at 321.

36. *Id.* at 322.

37. *Id.* at 178. Critics of the NYSE proposal testified during the NYSE proposal hearings that if the SEC approves the NYSE proposal, corporate managements may initiate activities that benefit only the management. *Id.*

38. *Id.* at 263. Opponents of the NYSE proposal claim that to limit a shareholder's vote is to render his ownership interest in the corporation worthless and reduces his ability to oversee the management. *Id.* Opponents also claim that some independence from management is essential, because if management retains a majority of the corporation's voting power, then management controls the elections of the corporation's directors as well. *Id.* at 265.

corporate accountability to shareholders as owners of the corporation, the continued existence of corporations as entities owned by shareholders may cease.[39]

By using disparate voting stock, management could entrench itself from shareholder accountability and also entrench itself from the competition for control that takeovers create.[40] Management could secure a majority voting position by issuing disparate voting stock, which would make takeovers virtually impossible.[41] In preventing takeovers, management eliminates the investor's ability to receive a higher monetary return on his investment from a more efficient management acquiring control of the corporation.[42] The entrenchment of management from takeovers also reduces, if not eliminates, the possibility that an outside corporation through a tender offer would offer the shareholder a higher monetary return on the stock than the shareholder could anticipate from retaining the investment.[43] The NYSE proposal would allow corporate management the necessary security, free from hostile takeovers, to develop and to execute long range decisions and allow the management to sell the corporation on a negotiated basis if so desired.[44] Arguably, it is unfair to deny shareholders the right to decide who would represent their long term interests.[45] Unchecked mismanagement sometimes is the reason for takeovers, and leaving management less accountable not only to the shareholders, but also to outside corporations,

39. *Id.* at 277. *See supra* notes 33-38 and accompanying text (discussing how NYSE proposal entrenches management from accountability to shareholders).

40. *See* Dent, *Dual Class Capitalization: A Reply to Professor Seligman*, 54 GEO. WASH. L. REV. 725, 745 (1986) (dual class capitalization harms shareholders by eliminating potential hostile takeovers); *see also NYSE Proposal Hearings*, *supra* note 4, at 163 (claiming NYSE proposal designed to stop hostile takeovers).

41. Dent, *supra* note 40, at 745; *see also NYSE Proposal Hearings*, *supra* note 4, at 101 (noting that approval of NYSE proposal would create de facto poison pill allowing management to prevent any unwanted takeover attempt). Opponents of the NYSE proposal claim that the threat of hostile takeovers has led corporate America to develop the disparate voting stock as an ultimate defensive tactic to thwart hostile takeovers. *NYSE Proposal Hearings*, *supra* note 4, at 411.

42. *See* Dent, *supra* note 40, at 745 (dual class capitalization reduces threat that takeovers exert on management). Professor Dent in *Dual Class Capitalization: A Reply to Professor Seligman* claims that by granting the management extra votes, shareholders can render a hostile takeover mathmatically impossible. *Id.* Professor Dent also claims that because the management would control a majority voting position through the use of the disparate voting stock a hostile takeover could be prohibitively expensive. *Id.*

43. *Id.* In *Dual Class Capitalization* Dent notes that even if a takeover occurs, the management subject to the takeover can use their superior voting position resulting from the disparate voting stock to retain for themselves much of the profit resulting from the tender offer. *Id.*

44. *NYSE Proposal Hearings*, *supra* note 4, at 344.

45. *Id.* Proponents of the NYSE proposal testified before the SEC that the proposal would allow shareholders with long term interests in the corporation to provide management with the ability to make and to execute long range strategic decisions. *Id.* The proposal also negates the negative influence that speculative investors with short term objectives might otherwise have on the corporation. *Id.*

could compound the mismanagement.[46] Disenfranchising shareholders and entrenching management, therefore, possibly are the worst side-effects to thwarting attempted takeovers.[47] In reality, the NYSE proposal could allow corporate management the opportunity to entrench themselves against shareholder accountability, and also could eliminate the investor's opportunity to realize a higher monetary return on his investment resulting from a tender offer.[48] Because the NYSE proposal disenfranchises both the current and the future shareholders and the proposal entrenches the corporate management, the proposal would fail to protect investors and their respective investments.[49] The possibility of disenfranchisement of shareholders and the entrenchment of corporate management suggests that retention of the one share, one vote rule is necessary to protect shareholders and that, consequently, the SEC has no power under section 19(b) to accept the NYSE proposal.[50]

Retention of the one share, one vote rule is also necessary to ensure fair dealing and competition among the exchanges.[51] Congress structured the 1975 Amendments to the '34 Act to authorize the SEC to eliminate all unnecessary restraints on competition among the exchanges.[52] Congress determined that it was essential to grant the SEC broad discretionary powers to regulate the development of a national market system that would encompass all segments of the corporate securities markets.[53] In regulating the national market system, Congress specifically authorized the SEC to eliminate all practices or rules impeding competition among the exchanges unless

---

46. *Id.* at 283.

47. *Id.*

48. *See supra* notes 40-47 and accompanying text (discussing how NYSE proposal will eliminate management accountability from takeovers).

49. *See supra* notes 13-14 and accompanying text (describing SEC's authority under section 19(b) to approve proposed rule changes that are necessary to protect investors).

50. *See supra* notes 15-25, 33-49 and accompanying text (discussing how NYSE proposal harms investors by disenfranchising shareholders and entrenching management); *see also supra* notes 13-14 and accompanying text (outlining SEC's authority to approve exchange rule changes when necessary to protect investors).

51. *See infra* notes 52-56 and accompanying text (congressional intent to authorize SEC to maintain fair competitive attitude between exchanges); *see also supra* notes 13-14 and accompanying text (Congress authorized SEC to adopt rules that ensure fair dealing between securities exchanges).

52. *See* S. Rep. No. 75, *supra* note 8, at 2, *reprinted in* 1975 U.S. Code Cong. & Admin. News 181 (Congress intended SEC to pursue goal of centralizing trading of securities). In adopting Senate bill number 249, 1975 amemdment to section 19(b) of the '34 Act, Congress acknowledged that self-regulation of exchanges would continue to exist between the exchange. Congress, however, noted that the SEC would perform a much larger role in regulating the exchanges than before, to ensure that no gap existed between self-regulatory performance and regulatory need. *Id.* Congress also intended that, when appropriate, the SEC would provide leadership for the development of a more coherent and rational regulatory structure to correspond to and effectively police the national market system. *Id.*

53. *Id.* at 7, *reprinted in* 1975 U.S. Code Cong. & Admin. News 185. Congress noted that the Senate bill did not purport to force all markets for securities into a single mold. *Id.*

they serve a valid regulatory purpose.[54] Congress' objective was to enhance competition and to allow economic forces, interacting within fair regulatory confines, to develop appropriate variations in exchange practices.[55] Congress recognized, however, that it was contrary to the purpose of encouraging competition among the exchanges to compel the exchanges to eliminate differences between the exchanges that were competition-enhancing.[56]

In line with the purpose of Congress' intent to uphold competition-enhancing differences among the exchanges, the NYSE directors claim that the proposed rule change is necessary for the NYSE to compete effectively with the AMEX and the NASD.[57] The directors of the NYSE argue that adoption of the proposed rule change is necessary to give the registered companies of the NYSE the flexibility in raising additional capital that the AMEX and the NASD allow their respective registered companies issuing common stock with disparate voting rights.[58] The NASD has no specific rules restricting companies that desire to issue common stock with disparate voting rights.[59] The AMEX restricts only the listing of a nonvoting common

---

54. *Id.* at 8, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 186.

55. *Id.* Congress in the 1975 amendments to the '34 Act noted that since 1936 a major responsibility of the SEC in the administration of the securities laws was to "create a fair field of competition" between the exchanges. *Id.*

56. *Id.* Congress commented that Senate bill number 249 would identify more clearly the SEC's responsibility to enhance competition and also would clarify and strengthen the SEC's authority to carry out its responsibility. *Id*; *see supra* notes 52-55 and accompanying text (discussing Congress' intent to enlarge SEC's scope of authority to regulate exchanges).

57. *See NYSE Proposal Hearings*, *supra* note 4 and accompanying text (noting that although supporting one share, one vote rule, NYSE directors fear that rule impedes NYSE's ability to compete effectively with AMEX and NASD).

58. *See supra* note 4, at 9 (noting that NYSE's CEO testified that NYSE registered companies need flexibility in choosing capital structures and methods for raising money). The CEO of the NYSE testified during the NYSE proposal hearings that in response to the recent proliferation of tender offers and the use of new types of equity to effect acquisitions, shareholders of some of the NYSE registered companies have approved the disparate voting stock to increase their respective company's flexibility in creating a capital structure that will not subject the company to potential takeovers. *Id.* Professor Daniel Fischel in *Organized Exchanges and the Regulation of Dual Class Common Stock* explains how dual class capitalization allows corporate management to retain control of the company without holding 51% of the company's outstanding equity. D. FISCHEL, ORGANIZED EXCHANGES AND THE REGULATION OF DUAL CLASS COMMON STOCK 21-22 (1986) [hereinafter FISCHEL, *Organized Exchanges*]. Professor Fischel notes in his article that dual class capitalization allows the corporation to create a capital structure that relies on outside equity. *Id.* Professor Fischel claims that corporations that use more outside equity are able to pursue investment opportunities that have higher expected returns than alternative uses of capital regardless of the management's personal wealth. *Id.* Professor Fischel also claims that a capital structure based on dual class capitalization allows the management to diversify risk more efficently through the use of outside investors. *Id.* Professor Fischel concludes that dual class capitalization allows management to obtain the benefits of outside equity financing while still retaining control over the firm. *Id. See supra* note 3 (discussing threat of NYSE registered companies to leave NYSE); note 2 and accompanying text (outlining AMEX and NASD requirements on issuing disparate voting stock).

59. *See supra* note 2 and accompanying text (outlining absence of NASD requirements

stock and permits the listing of a common stock that has the right to elect only a minority of the board of directors.[60] Companies registered with the AMEX and the NASD, therefore, are in a more favorable position than companies registered on the NYSE because those companies registered on the AMEX and the NASD may issue disparate voting stock to raise new capital without sacrificing management's control of the corporation.[61] The NYSE directors argue that the exchange's adherence to the one share, one vote rule restricts companies registered on the NYSE from creating a desirable capital structure, unlike the AMEX or the NASD.[62] The main reason for the NYSE proposal, therefore, is that with the option to issue disparate voting stock the NYSE registered companies can raise new capital without sacrificing control of the corporation and, thereby, can compete more effectively with companies registered on the AMEX and the NASD.[63]

Although elimination of the one share, one vote rule by the SEC would permit the NYSE to compete more effectively with the AMEX and the NASD, SEC approval of the proposal may start a "race to the bottom" between the exchanges.[64] The directors of the AMEX have announced that

---

on issuing disparate voting stock). The chairman of the NASD testified during the NYSE proposal hearings that although the NASD does not require that its companies maintain a one share, one vote rule, ninety-five percent of the NASD companies maintain the one share, one vote structure. *NYSE Proposal Hearings*, *supra* note 4, at 61.

60. *AMEX Guide*, *supra* note 2, § 122, *reprinted in* 2 Am. Stock Ex. Guide (CCH) § 10,022, at 3525 (1985). *But cf.* Ingersoll & Swartz, *AMEX Head Warns of Regulatory 'Excess' if Big Board Drops Voting Rule on Stock*, Wall St. J., Dec. 17, 1986, at 5, col. 1 (claiming AMEX allows its registered companies to issue one class of common stock that has ten votes per share).

61. *See supra* note 58 and accompanying text (discussing how disparate voting stock allows management to raise additional capital by using outside equity without losing control of company).

62. *See NYSE Proposal Hearings*, *supra* note 4, at 9 (NYSE's argument for rule change is that corporate America needs flexibility in choosing desirable capital structure).

63. *See supra* notes 57-62 and accompanying text (discussing NYSE's claim that by eliminating one share, one vote rule NYSE's registered companies could create flexible capital structure).

64. *See SEC Chairman Shad Floats Compromise on NYSE Dual Classification Proposal*, [July-Dec.] SEC. REG. & L. REP. (BNA) 1805, 1806 (Dec. 19, 1986) [hereinafter *SEC Chairman Shad*] (discussing possible "race to bottom" between exchanges if SEC approves NYSE disparate voting rights proposal). *But see* FISCHEL, *Organized Exchanges*, *supra* note 58, at 10-17 (disputing possibility that disparate voting stock will create "race to bottom"). Professor Fischel in *Organized Exchanges* claims that the "race to the bottom" concept contains at least three related misconceptions: that corporate managers prefer exchange rules that allow them to exploit investors; that it is in the interests of the exchanges to adopt rules that exploit investors; and, that the absence of regulation is necessarily evidence of a pro-management, anti-investor bias. *Id.* at 11. Fischel argues that the logical fallacy in the "race to the bottom" concept is that it assumes that managers will seek exchanges that facilitate the exploitation of investors. *Id.* at 12. Fischel explains that the empirical evidence suggests that investors do not perceive a great deal of difference between investing in a company listed on the NASD and a company listed on the NYSE. *Id.* at 14. Fischel claims that proponents of the "race to the bottom" concept assume that the NYSE is a haven for stockholder protection rules, and that the other exchanges are the "bottom" because they do not have these protection rules. *Id.* at

if the SEC approves the NYSE proposal, the AMEX would request that the SEC permit the AMEX to remove all the current stock issuing restrictions on AMEX registered companies that issue disparate voting common stock.[65] The NASD currently has no restrictions on its registered companies issuing disparate voting common stock and, therefore, does not perceive any potential "race to the bottom".[66] Because of the AMEX threat, however, SEC approval of the proposal would create an unnecessary burden on competition between the exchanges attempting to offer the most liberal restrictions for issuing disparate voting common stock.[67] Contrary to Congress' intentions under section 19(b) of the '34 Act, SEC approval of the proposal would eliminate the competition-enhancing element between the NYSE, the AMEX, and the NASD that the one share, one vote rule establishes in favor of a more damaging form of competition between the exchanges in the form of a potential "race to the bottom".[68] The SEC, therefore, does not possess the authority necessary to approve the NYSE proposal.[69]

Because SEC approval of the NYSE proposed rule change could reduce investor protection and could diminish the fair dealing between the securities exchanges, the SEC may decide to impose the one share, one vote rule on the AMEX and the NASD.[70] Section 19(c) of the '34 Act authorizes the SEC to add to the rules of the exchanges when the SEC "deems necessary or appropriate to ensure the fair administration of the exchanges".[71] Con-

---

16. Fischel explains that if this were true, it is logical that the rational investors would pay significantly more for a stock that listed on the NYSE. *Id.* Fischel claims that the existing evidence does not support the proposition that the other exchanges are the "bottom". *Id.* Fischel concludes that the concern that allowing exchanges to compete by adopting voting rules that are pro-management to attract corporations may lead to a race among all exchanges is completely without foundation. *Id.*

65. *NYSE Proposal Hearings, supra* note 4, at 57-58; *see SEC Chairman Shad, supra* note 64, at 1806 (approval of NYSE proposal will force AMEX to reduce its listing standards for disparate voting stock).

66. *See SEC Chairman Shad, supra* note 64, at 1806 (NASD claims that no evidence exists that liberalized listing standards harm shareholder interests).

67. *See supra* notes 52-56 and accompanying text (discussing Congress' intent to broaden SEC authority to allow SEC to eliminate unnecessary burdens on exchange competition); *see also supra* note 65 and accompanying text (describing AMEX threat to eliminate all existing stock restrictions for its registered companies listing disparate voting stock).

68. *See supra* notes 64-67 and accompanying text (discussing how possible "race to bottom" between exchanges would impose unnecessary burden on competition); *see also supra* notes 52-56 and accompanying text (outlining Congress' intentions to enhance competition in securities exchange market).

69. *See supra* notes 13-14 and accompanying text (discussing SEC's authority under section 19(b) to enhance competition among exchanges).

70. *See supra* notes 15-25, 33-50, 64-69 and accompanying text (discussing ramifications on investor protection and fair dealing among exchanges if SEC approves NYSE proposed rule change); *see also infra* notes 71-73 and accompanying text (evaluating SEC authority under section 19(c) to impose one share, one vote rule on AMEX and NASD).

71. Association of Inv. Brokers v. SEC, 676 F.2d 857, 864 (D.C. Cir. 1982); *see supra* note 9 and accompanying text (discussing Congress' intent in enacting section 19(c)); 15 U.S.C. § 78s(c) (1981) (section 19(c) of '34 Act).

gress enacted section 19(c) to empower the SEC to amend the rules of the exchanges in any manner to further the purposes of the '34 Act.[72] Congress, however, restricts the SEC's authority under section 19(c) to evaluate its own regulatory proposals in light of the fundamental national economic policy of furthering competition and prohibits the SEC from promulgating any rule that imposes a burden on competition unnecessary or inappropriate to achieve the purposes of the '34 Act.[73]

Disapproval of the NYSE proposed rule change by the SEC alone, however, will not remedy the currently disadvantageous position of the NYSE in competing with the AMEX and the NASD for the registration of corporations.[74] Although the NYSE directors claim that the proposed rule change is necessary for the NYSE registered companies to compete effectively with the AMEX and the NASD, the SEC should recognize that the NYSE proposal could create a situation that hinders the competitive atmosphere among the exchanges more than the competition that the one share, one vote rule creates through a potential "race to the bottom".[75] Because the AMEX and the NASD currently have less stringent stock issuing restrictions, it is necessary and appropriate for the SEC to use its authority under section 19(c) to impose the one share, one vote rule on both the AMEX and the NASD to ensure the fair administration of the exchanges.[76] The one share, one vote rule would not, however, impose an unnecessary burden on competition because all three exchanges would have to incorporate the rule.[77] On the contrary, if the SEC permits the NYSE to eliminate the one share, one vote rule, the competition among the exchanges for the registration of corporations would acclerate in the form of a potential "race to the bottom".[78] The SEC, therefore, should exercise its authority pursuant

---

72. S. REP. No. 75, *supra* note 8, at 131, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS at 308. Section 19(c) of the '34 Act empowers the SEC to abrogate, add to, and delete from the rules of an exchange when the SEC deems it necessary or appropriate to ensure the fair administration of the exchange. 15 U.S.C. § 78s(c) (1981).

73. H. R. REP. No. 229, 94th Cong., 1st Sess. 91, 94, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 321, 325. Congress stated that the SEC's responsibility under Senate bill number 257, the 1975 amendment to section 19(c) of the '34 Act, was to balance the perceived anticompetitive effects of a regulatory policy or decision against the purposes of the '34 Act. *Id.*

74. *See supra* notes 57-63 and accompanying text (NYSE's competitively disadvantagous position among securities exchanges because of one share, one vote rule).

75. *See supra* notes 64-68 and accompanying text (discussing potential "race to bottom" if SEC approves NYSE proposal); *see also supra* notes 51-56 and accompanying text (explaining that Congress empowered SEC to enhance competition between securities exchanges).

76. *See supra* note 2 and accompanying text (discussing AMEX and NASD requirements on issuing common stock); notes 71-73 and accompanying text (outlining SEC's authority under section 19(c) of '34 Act to adopt exchange rules that ensure fair administration between exchanges).

77. *See generally supra* notes 71-73 and accompanying text (discussing SEC's authority under section 19(c) of '34 Act to require all exchanges to adhere to one share, one vote rule).

78. *See supra* notes 64-68 and accompanying text (describing how SEC approval of NYSE's proposal could result in "race to bottom" between exchanges).

to section 19(c) to impose the one share, one vote rule on both the AMEX and the NASD and, thereby, ensure fair competition between the exchanges.[79]

In enacting the '34 Act, Congress authorized the SEC to protect public shareholders and to ensure fair competition between the exchanges in any manner the SEC deemed necessary.[80] In 1975 Congress enlarged the powers of the SEC by granting the SEC the authority necessary to impose rules on the securities exchanges when the exchanges failed to protect investors adequately and failed to maintain fair competition between themselves.[81] The NYSE proposal to eliminate the one share, one vote requirement for NYSE registered corporations issuing common stock with disparate voting rights will harm investors by disenfranchising the shareholders.[82] Because the NYSE proposal harms investors by eliminating the shareholders' right to a proportionate vote equal to the shareholders' ownership interest in the corporation, the SEC has no power to approve the proposal.[83] The proposal would permit corporate managements issuing the disparate voting stock to eliminate management accountability to shareholders and will reduce the degree of management accountability for corporate control that hostile takeovers create.[84] The NYSE proposal also will disrupt the competitive element that the NYSE one share, one vote rule creates and may start a "race to the bottom".[85] The NYSE proposal, therefore, is unnecessary to protect investors and to ensure fair dealing among the exchanges.[86] Indeed, the NYSE proposal harms investors and may create a competitively disruptive "race to the bottom" among the exchanges.[87] Pursuant to its authority

79. *See supra* notes 71-73 and accompanying text (discussing Congress' intent in enacting section 19(c) to enable SEC to ensure fair dealing between securities exchanges).

80. *See supra* notes 9-12 and accompanying text (discussing Congress' intent in enacting section 19(b) of '34 Act).

81. *See supra* notes 13-14 and accompanying text (evaluating 1975 Amendments to section 19(b) of '34 Act).

82. *See supra* notes 15-25 and accompanying text (noting that NYSE proposal will eliminate essence of corporate democracy because disparate voting stock disenfranchises shareholders).

83. *See supra* notes 15-25 and accompanying text (discussing how NYSE proposal would disenfranchise shareholders); *see also supra* notes 13-14 and accompanying text (outlining SEC's authority under section 19(b) of '34 Act to approve exchange rules that are necessary to protect investors).

84. *See supra* notes 33-50 and accompanying text (discussing how management may limit both their accountability to shareholders and to corporate control from takeovers by issuing disparate voting stock).

85. *See supra* notes 64-68 and accompanying text (discussing possible "race to bottom" if SEC approves NYSE proposal).

86. *See supra* notes 13-14 and accompanying text (discussing SEC's authority under section 19(b) of '34 Act to approve only proposed rule changes when necessary to protect investors or to ensure fair dealing among exchanges).

87. *See supra* notes 52-56 and accompanying text (noting Congress' intent to authorize SEC to regulate competition between exchanges).

under section 19(b) of the '34 Act, therefore, the SEC should disapprove the NYSE proposal to abandon the one share, one vote rule.[88] The SEC should recognize, however, the competitive disadvantage that the one share, one vote rule places on the NYSE in competing with the AMEX and the NASD for the registration of corporations.[89] Therefore, under its authority in section 19(c) of the '34 Act to impose regulatory rules on the exchanges to maintain a favorably competitive atmosphere, the SEC should impose the one share, one vote rule on both the AMEX and the NASD.[90]

ROBERT MUTH

---

88. *See supra* notes 13-14 and accompanying text (discussing SEC's authority under section 19(b)); *see also* 15 U.S.C. § 78s(b)(3)(B) (1981) (codifying section 19(b) of '34 Act).

89. *See supra* notes 57-63 and accompanying text (discussing NYSE's competitive disadvantage among other exchanges if SEC requires NYSE to maintain one share, one vote rule).

90. *See supra* notes 71-73 and accompanying text (discussing SEC's authority under section 19(c) of '34 Act); *see also* 15 U.S.C. § 78s(c) (1981) (section 19(c) of '34 Act).