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Untenable Status of Corporate Governance Listing Standards Under the Securities Exchange Act

By Douglas C. Michael*

INTRODUCTION


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The Commission’s role as supervisor of self-regulation has been analyzed and discussed widely. See, e.g., David A. Lipton, The SEC or the Exchanges: Who Should Do What and When? A Proposal to Allocate Regulatory Responsibilities for the Securities Markets, 16 U.C. Davis L. Rev. 527 (1983) (suggesting that “supervised self-regulation” is only partially descriptive, and proposing guidelines for when the Commission should use its direct regulatory authority); Walter Werner, The SEC as a Market Regulator, 70 Va. L. Rev. 755, 779-83 (1984) (criticizing the Commission’s relative inactivity in its role as market regulator).

That system includes substantive regulation of the traders and the issuers of securities traded in those markets through the use of listing standards.3

These listing standards have a unique status. They are part of a self-regulatory system, but are not classic self-regulation. The markets do not govern the traders of which it consists; rather, it governs outsiders—the issuers. The markets4 and the Securities and Exchange Commission5 have sought to control issuers in ways not clearly related to trading in the market by imposing “corporate governance” listing standards.6

The first judicial consideration of these corporate governance listing standards came only recently, upon review of Exchange Act Rule 19c-4 (Rule 19c-4), a voting rights standard promulgated by the Commission in 1988.7 In Business Roundtable v. SEC,8 the court invalidated Rule 19c-4 because it was not consistent with the purposes of the Exchange Act. Consistency with the Exchange Act is a requirement imposed upon Commission-promulgated rules by section 19(c) of the Act. In tortured dictum, however, the court created a theory to save the marketplaces’ ability to impose corporate governance listing standards.

This Article argues that the more logical and correct result is to admit that corporate governance listing standards have no place in marketplace rules, whether promulgated by the Commission or by the markets themselves. These standards were not designed to protect shareholders, but originated primarily as marketing campaigns by the exchanges. They cannot stand against Congress’ clear command in the Exchange Act that rules, whether of the Commission or the markets, must be consistent with the purposes and objectives of the Act.

3. Listing standards are the requirements of each registered securities exchange applicable to securities sought to be listed for trading on that exchange and to the issuer of that security as well. See infra note 9. Some of these standards, listed in detail infra notes 9-15 and accompanying text, appear as criteria for listing a security, and others simply are “rules,” “policies” or “suggestions” of an exchange applicable to issuers of already-listed securities.

4. For the purpose of this Article, the term “markets” means The New York Stock Exchange, Inc. [hereinafter NYSE] and the American Stock Exchange, Inc. [hereinafter Amex], both national securities exchanges registered under § 6 of the Exchange Act, 15 U.S.C. § 78f (1988). “Markets” also refers to the National Association of Securities Dealers’ [hereinafter NASD] Automated Quotation System [hereinafter NASDAQ], the sole “national securities association” registered under § 15A of the Exchange Act, 15 U.S.C. § 78o-3 (1988). The NYSE and the Amex account for virtually all of the securities listed for trading on United States securities exchanges (91.4% by number and 99.8% by market value of all common and preferred stocks listed on exchanges as of December 31, 1988 were listed on these two exchanges). U.S. Securities and Exchange Commission, 55th Annual Report 139-40 (1989). NASDAQ is the only other market which offers liquidity competitive with the exchanges. See infra note 9. Thus, these three institutions set standards for most of the issuers of securities traded in the United States.

5. The system of supervised self-regulation, see supra note 1 and accompanying text, establishes the Securities and Exchange Commission [hereinafter Commission or SEC] as the supervisor. See Securities Exchange Act §§ 6(b), 15A(b) and 19(a), 15 U.S.C. §§ 78(b), 78o-3(b), 78(a) (1988).

6. See infra notes 12-13 and accompanying text (definition of “qualitative” listing standards).


More importantly, a world without marketplace-imposed standards likely would not be detrimental to corporations or shareholders.

The first section of this Article defines "corporate governance" listing standards and traces their development in each major marketplace and traces the development of the federal securities laws governing listing standards. The second section reviews the history of Rule 19c-4 and the Business Roundtable opinion, and concludes that the court's dictum, which would permit markets to impose corporate governance listing standards, is inconsistent with the Exchange Act and is unworkable. Finally, the third section describes a world without corporate governance listing standards and explains how any attempt to remove them likely will be made only by the Commission.

DEVELOPMENT OF LISTING STANDARDS

CORPORATE GOVERNANCE LISTING STANDARDS DEFINED

Listing standards are the requirements placed upon issuers whose securities are listed and traded on a national securities exchange under section 12 of the Exchange Act. A listing standard usually is intended to facilitate an efficient, continuous auction market by setting minimum numerical standards for capitalization, number of shares and shareholders, or by establishing disclosure requirements. Other listing standards, however, do not affect the trading market directly, but are concerned with corporate governance, that is, "the relationship between the management of public corporations and their shareholders." Table 1 lists the major corporate governance standards currently


The term "national securities exchange" is used in § 6(a) of the Exchange Act, 15 U.S.C. § 78f(a) (1988), to refer to any exchange registered under the Act, and includes the registered regional exchanges as well as the NYSE and the Amex.

For purposes of this Article, "listing standards" include the standards adopted by the National Association of Securities Dealers, Inc. for securities to be designated as "national market system" [hereinafter NMS or NASDAQ/NMS] securities. See infra note 92 and accompanying text (discussion of mechanics of NMS designation). Although the NASD is not a national securities exchange, nor are securities "listed" on NASDAQ/NMS within the meaning of § 12, "only NASDAQ's National Market System offers sufficient over-the-counter liquidity to compete with the NYSE or [American Stock Exchange]." Jeffrey N. Gordon, Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice, 76 Cal. L. Rev. 1, 70 n.207 (1988).


12. Roberta Karmel, Qualitative Standards for "Qualified Securities": SEC Regulation of Voting Rights, 36 Cath. U. L. Rev. 809, 814 (1987); see also Comment, Stock Exchange Listing
promulgated by the nation's major securities markets, which are the focus of this Article.

The word "standard" implies more objectivity than actually exists in many cases. Some listing standards are cast as mere guidelines, expectations or suggestions. This makes the actual binding rule or effect difficult to discern. In addition, facially objective rules have their ambiguities. Notwithstanding such generalities, most corporate governance listing standards were developed in specific response to an identified problem. Such problems, however, were not

Agreements as a Vehicle for Corporate Governance, 129 U. Pa. L. Rev. 1427, 1434 (1981) (citing as examples "provisions that affect corporate conduct in areas such as voting power, matters required to be voted upon by shareholders . . . [and] classes of directors").

One standard particularly difficult to classify is the requirement of profitability. Both the NYSE and the Amex require demonstrated profitability of the issuer at the time of listing its security. The Amex standard is less stringent, however, and may even allow listing under "alternative criteria" with no specific profitability requirement. See NYSE Listed Company Manual, 102 (1989); Amex Company Guide, 1-1 to 1-2 (1988). Although these clearly are numerical or quantitative criteria, they have little to do with an efficient trading market and do not address the corporation-shareholder relationship as do corporate governance standards.

13. One example of this variety is the NYSE Listed Company Manual's standard on concentration of voting power.

[The] concentration of a substantial proportion of a common stock issue in one holding, or in several affiliated holdings is not necessarily an obstacle to the listing of a company's securities. However, in considering its listing, the Exchange will take into account the proportion of the total voting power represented by such concentrated holdings.

NYSE Listed Company Manual, 3-2 (1986). The factors other than numerical standards to be considered in determining eligibility for listing are even less clear.

Although the amount of assets and earnings and the aggregate market value are considerations, greater emphasis is placed on questions such as the degree of national interest in the company, the character of the market for its products, its relative stability and position in its industry, and whether or not it is engaged in an expanding industry with prospects for maintaining its position.

Id. at 1-2 (1989).

In contrast, the NYSE requirement for annual meetings is succinct and clear. "Listed companies are required to hold an annual shareholders' meeting during each fiscal year." Id. at 3-1 (1986).

14. To put it succinctly, these standards are "essentially devoid of content." Joel Seligman, Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy, 54 Geo. Wash. L. Rev. 687, 700 (1986). For example, consider the NYSE Listed Company Manual's "long standing commitment to encourage high standards of corporate democracy . . . [requiring] every listed company . . . to follow certain practices aimed at maintaining appropriate standards of corporate responsibility, integrity and accountability to shareholders." NYSE Listed Company Manual, 3-1 (1986). Professor Seligman notes that "[i]t is far from obvious what, in fact, these standards mean; nor has the NYSE Listed Company Manual based its policy on a principle or theory that could clarify the ambiguities in the policy." Seligman, supra, at 700.

15. For example, the Amex's specific listing requirements for capitalization, net income, and number of shareholders, are followed by the general disclaimer that "an application may be approved even though the company does not meet all of the numerical guidelines." Amex Company Guide, 1-1 (1988). In reviewing these Amex numerical standards, the Commission noted that they "are not always dispositive of a company's application for listing." Exchange Act Release No. 24,043, 52 Fed. Reg. 4071, 4071 n.1 (1987).
those of the listed companies, but rather those of the exchanges themselves, as seen in the following section.

**HISTORY OF CORPORATE GOVERNANCE LISTING STANDARDS**

The history of listing standards spans almost one hundred years. Table 1 lists the respective dates of adoption by each securities market of the major corporate governance listing standards.

**NYSE**

A history of corporate governance listing standards must primarily focus on the NYSE. Although other securities exchanges have been active during the NYSE’s history, none has achieved the status and market dominance of the NYSE to be able to impose requirements on the issuers of securities traded there. Corporate governance listing standards, as discussed below, developed in the NYSE at three distinct times: the first standards appeared in the early history of listing agreements, from 1900 through the 1920s; the second group of standards appeared in the 1950s; and a later significant standard was added in 1977.

Originally, any security could be “listed” on the exchange. The first limitations on the addition of stocks to the list called for trading appears in the constitution of the NYSE’s predecessor adopted in 1856. It is the listing agreement, however, developed just prior to the turn of the century, which made listing “standards” possible. The first “standards” were no more than terms inserted in a given listing agreement. The standards were set as general rules, but developed on a case-by-case basis, each listing agreement differing slightly from the last as new policies were developed or as the individual

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18. The first such agreements were entered into in 1897; see Birl E. Shultz, *The Securities Market and How It Works* 14 (1942). By 1899, these agreements had become “a regular part of the listing procedure.” NYSE Listed Company Manual, 7-4 (1988).

19. See Schultz, supra note 18, at 36. For Schultz’s chronicle of the development of terms in listing agreements from the early 1900s, see Schultz, supra note 17, at 18-22.
circumstances of each applicant required. The listing standards commonly are referred to as "rules," but they are not necessarily uniform, and even today not every issuer of listed securities is subject to the same rules.

The NYSE first was broadly successful in requiring financial information from listed companies as early as 1895, but could not impose strict standards on listed companies because listing was not a requirement for trading at the exchange. Earnest development of standards, therefore, began only after the NYSE's abolition of its "Unlisted Department" in 1910. The initial focus of

20. Meeker, supra note 17, at 93-94; Shultz, supra note 17, at 36; Teweles & Bradley, supra note 17, at 106. For a discussion of several specific incidents which led to NYSE "rules," see Livingston, supra note 17, at 182-89.

21. At first glance, it may seem problematic whether ad hoc provisions in listing agreements rise to the status of "rules." Regardless of their initial status, each of the listing standards discussed in this article have been promulgated by the NYSE Listed Company Manual in its Listed Company Manual and thus are considered "rules" under the Exchange Act, as defined by § 3(a)(27), 15 U.S.C. § 78c(a)(27) (1988) and Rule 19b-4(b), 17 C.F.R. § 240.19b-4(b) (1991). The Business Roundtable court considered and rejected the argument that listing standards, no matter how much they may be rules in form, concern subjects beyond those regulated by the Exchange Act and thus are not "rules" under the Act. See infra note 159.

22. See Teweles & Bradley, supra note 17, at 109 which states that:

Companies could be held only to agreements that they had signed, some of which had been entered into very many years before. If new and additional agreements were formulated by the Exchange, old listed companies could not be compelled to comply except by Exchange persuasion or if they applied for further listing of stock.

Id.; see also 1963 Special Study, supra note 1, at 566 ("[D]ifferent companies are bound by different agreements, depending upon when they last listed shares. However, the [New York Stock] Exchange urges companies which have not signed the current listing agreement to comply with its provisions, and asserts the authority to take action for failure by these companies to comply.").

23. See Livingston, supra note 17, at 181.

24. The Unlisted Department was created in 1885. "[T]he New York Stock Exchange was at that time mainly a railroad market . . . [T]he Exchange . . . created an Unlisted Department . . . where the new industrial shares which could not altogether meet the increasingly strict requirements of the Committee on Stock List could nevertheless be admitted for trading purposes." Meeker, supra note 17, at 71. The public had become dissatisfied with the performance of rail stocks but "had shown a disposition to buy" the industrials. Francis L. Eames, The New York Stock Exchange 64 (1894). The NYSE sought to capture business which was going to other markets, but "[u]nfortunately for the speculating public, it proved a handy tool for bankers and promoters who were thus able to place behind unsound stocks of untried companies the prestige of the New York Stock Exchange." Humphrey B. Neill, The Inside Story of The Stock Exchange 122 n.1 (1950). Because no information at all was required of unlisted issues, "[m]any of the most notorious manipulations may be ascribed to the 'convenience' of the unlisted department." Id. at 122. In 1909, a "Committee on Speculation in Securities and Commodities" established by New York Governor Charles E. Hughes, recommended in its report, among other things, that unlisted trading on the NYSE Listed Company Manual be abolished. W. C. Van Antwerp, The Stock Exchange From Within 415, 425 (1913).

The abolition of the Unlisted Department in 1910 "[s]et the Exchange right with the public by ridding [it] of anything approaching the blind pools of early days and at the same time forcing certain wealthy corporations to abandon their policy of concealment or lose the privilege of the floor." Van Antwerp, supra, at 167; see also Neill, supra, at 177-78. Most of the companies in that department applied for listing and "slow but steady progress" was made by the Exchange in
the NYSE was financial disclosure. By the time the Securities Exchange Act of 1934 was enacted, the NYSE required listed companies to submit their annual financial reports to audit by independent certified public accountants, and most agreed to submit quarterly reports as well. The NYSE thereby proved itself able to extract certain behavior from issuers desiring to list their shares. The competition had been tested cautiously and had not prevented such hard bargaining by the NYSE.

The early emphasis on disclosure generated the first corporate governance standard: annual stockholders' meetings. The exchange initially required periodic publication of financial information, but over the next few years this release of information was tied to the issuer's annual meeting. By 1909, listing agreements required the issuer to publish certain financial statements prior to obtaining commitments to qualitative standards from these companies. Teweles & Bradley, supra note 17, at 106.


26. By 1931 the Exchange had persuaded 83% of listed companies to follow this rule, and in 1932 mandated the rule for all new listings. Teweles & Bradley, supra note 17, at 107.

27. See Twentieth Century Fund, Inc., supra note 25, at 591. Much of the progress in persuading listed companies to make quarterly or even annual reports was made in the 1920s. See id. at 590-91.

28. See Teweles & Bradley, supra note 17, at 109 ("In looking back over the period 1869-1934, however, it is not difficult to see why the standards of the Exchange could progress no faster than they did."). In language prophetic of the one share, one vote controversy that surfaced over 50 years later, Meeker wrote in 1930:

[T]he Stock Exchange has and seeks no power over the corporations of the country. If it should attempt to set itself up as a self-appointed censor of all American businesses, the Exchange would invite and deserve public criticism. If its regulations with regard to listing should become excessive and inequitable, they would soon prove valueless, since the corporations would refuse to list their securities there. The Exchange can and does, however, employ moral suasion with the corporations of the country, and thus has been all along an important factor in the constantly rising standards of corporation ethics which are apparent in this country.

Meeker, supra note 17, at 97. Some companies, of course, were willing to sacrifice the "prestige and the broad market that goes with [NYSE] listing" in exchange for less extensive disclosure requirements. Twentieth Century Fund, Inc., supra note 25, at 236-37.

29. There is no date recorded for the first uniform requirement of annual shareholder meetings that could be considered a "rule." The NYSE Listed Company Manual itself has referred to this only as a "long standing policy." New York Stock Exchange Policies Re Proxy Rules 1 (Dec. 14, 1984) (unpublished report to the NYSE Listed Company Manual Board of Governors, on file with author).

30. See Shultz, supra note 18, at 14.
the annual meeting. Thus, the requirement of an annual report became intertwined with the requirement of an annual meeting.

In the 1920s, the celebrated use of nonvoting stock resulted in voting rights standards ultimately known as the "one share, one vote" rule. The NYSE began listing nonvoting stock in 1925, and the ensuing criticism grew to "a matter of general public concern." In response, the exchange indicated that the next year it would give "careful thought" to the matter of voting control in listing new issues. It was not until 1940 that the NYSE "hardened and further articulated" what could be considered a "policy" with respect to voting rights.

What motivated the NYSE to develop these standards? The NYSE recognized that "standards were good for [its] business," and it pursued them as a means to a competitive advantage. The nature of that advantage, however, must be stated delicately, for while a NYSE listing may be a "valued hallmark," it cannot be used as an endorsement of the merits of a security. A

31. Shultz, supra note 17, at 18 (discussing the 1909 listing agreements of American Woolen Co. and E.I. DuPont de Nemours and Co.).
32. The listing agreement was standardized at least by 1930 to require the issuer to submit a set of financial statements "at least once in each year and submit [them] to stockholders at least fifteen days in advance of the annual meeting of the corporation." Meeker, supra note 17, at 561.
33. For a comprehensive chronicle of the development of the New York Stock Exchange's "policy" of refusing to list nonvoting common stock, see Seligman, supra note 14, at 693-99.
34. See id. at 693-97.
35. Id. at 699.
36. Livingston, supra note 17, at 179.
37. The NYSE during this period faced intense direct competition from the Consolidated Stock Exchange, and to a lesser degree from the Curb Exchange (predecessor of the Amex) and some miscellaneous specialty exchanges which developed in the 1920s. See Garvy, supra note 16, at 137-40.
38. Livingston, supra note 17, at 179. The Exchange itself promotes the "prestige" of an NYSE listing. See Shultz, supra note 18, at 85-86; see infra note 212 and accompanying text.
39. "The popular conception too frequently implies that when the New York or some other stock exchange admits a security to its list it recommends that security for favorable consideration by investors and speculators. This conception is entirely wrong." Huebner, supra note 25, at 151. "The fact that a security has been listed on the Exchange cannot be considered as a guarantee of its value nor as an endorsement or recommendation by the New York Stock Exchange." Twentieth Century Fund, Inc., Stock Market Control 52 (1934).

Notwithstanding these disclaimers, this "popular conception" has proved resilient.

We find inviting [the position] that to the American investing public listing on the New York Stock Exchange carries with it implicit guarantees of trustworthiness. The public generally understands that a company must meet certain qualifications of financial stability, prestige, and fair disclosure, in order to be accepted for that listing, which is in turn so helpful to the sale of the company's securities.

Van Gemert v. Boeing Co., 520 F.2d 1373, 1381 (2d Cir. 1975) (reversing dismissal of portion of complaint alleging civil liability for violation of listing standards for notice of redemption to convertible security holders). The resiliency of the popular conception may be due in part to the occasional boost given by Exchange officials. See infra note 212.
listing does, of course, confirm the legitimacy of the issuer and the security, but the NYSE's development of corporate governance listing standards, even in its infancy, indicated a concern beyond assuring such basic requirements. The exchange was "trying to see that stockholders' rights as stockholders were protected against improper and dubious practices of investment bankers, brokers, and managers of corporations, themselves."\(^4\)

The second period of modification of corporate governance listing standards occurred during the 1950s. With one minor addition, the extension of minimum voting rights to preferred stock in 1940,\(^4\) the NYSE's corporate governance listing standards had remained essentially unchanged from 1926. In 1953, the NYSE first announced its minimum quorum rules for shareholder meetings.\(^4\) Beginning in 1955, the exchange required shareholder approval of acquisitions that would result in an increase of more than 20% in the outstanding shares.\(^4\)

The requirement of two independent directors appeared in 1956.\(^4\) In 1959, the NYSE mandated solicitation of proxies for all stockholder meetings.\(^4\) In 1960, the NYSE strengthened the voting rights rules by requiring a shareholder vote upon a "change in control" of the company.\(^4\)

The impetus for these changes appears to have been the NYSE's focus during that time on bolstering trading volume. Trading volume had fallen by 1953, not because of poor performance of the market, but because of the concentration of

40. See Huebner, supra note 25, at 152-53. Meeker appreciated this distinction when he described listed securities as "strictly legitimate although frequently speculative." Meeker, supra note 17, at 86.
41. Livingston, supra note 17, at 179.
42. Preferred stock was required to be able to vote for two directors in the event of default of six consecutive dividends, and on all material changes to the charter or preferred stock agreement, for which two-thirds approval was required. See Teweles & Bradley, supra note 17, at 108; Birl E. Shultz, The Securities Market and How It Works 81 (A. Squier ed. 1963).
44. 4 Louis Loss & Joel Seligman, Securities Regulation 1827 n.269 (3d ed. 1990). In 1960, this rule's measure was changed from number of shares to market value of the shares and "other consideration" received. See NYSE, NYSE Chronology 1960 at 5 (1961) [hereinafter NYSE Chronology] (unpublished annual chronology); NYSE Press Release 1 (Mar. 29, 1960). This value-based measure was removed in 1989, as the NYSE found it difficult to value the "other consideration," and the SEC, in approving the change, stated that it is "the issuance of securities [which] is central to the transaction in question." Exchange Act Release No. 27,035, 54 Fed. Reg. 30,490, 30,491-92 (1989).
shareholdings in institutional hands. The Amex, which had been more successful than the NYSE during this time at increasing volume, may have provided the necessary competitive motivation. NYSE President Keith Funston began a campaign in the 1950s to court the small investor. He believed that an emphasis on "corporate democracy" was essential to these investors. While the Amex increased volume primarily by searching out new listings, the NYSE sought new investors for already-listed shares. The listing standards of the day were pitched with the individual investor in mind, heralded by the NYSE as furthering "broader shareownership" and "greater shareowner participation in corporate affairs."

The third major change in listing requirements developed in the mid-1970s. During this post-Watergate era, the Commission focused on questionable corporate payments and corporate governance generally. As one method to improve corporate governance, the Commission believed that each corporation ought to establish an audit committee composed solely of unaffiliated directors. The Commission staff had articulated legal grounds for a Commission rule directly requiring such committees, but it chose instead to suggest the idea to

49. See id. at 199.
50. 1963 Special Study, supra note 1, at 561 (noting the scope of the NYSE's advertising program "has increased dramatically during President Funston's tenure").
51. See Sobel, supra note 48, at 200.
52. "It would be misleading to say that [then Amex President Edward T.] McCormick's sales efforts were directed primarily toward the public. Although he was more visible and accessible than previous presidents, his road trips were taken to secure additional listings for the Amex, and not new investors." Robert Sobel, Amex: A History of the American Stock Exchange 1921-1971, at 227 (1972).
53. The NYSE officially considered its efforts to be educational only, but its true purpose was to bring new individual investors to the stock market. The NYSE claimed credit for the rapid increase in the number of individual stockholders during the 1950s. See generally 1963 Special Study, supra note 1, at 561-63.
55. NYSE Press Release 1 (March 29, 1960) (release announcing additional shareholder voting requirements, quoting NYSE President Keith Funston).
57. The Commission first expressed its belief in the independent audit committee some 35 years earlier, but the concept had not spread quickly among public corporations. See Roberta S. Karmel, Regulation by Prosecution 151 & nn. 36-37 (1982).
58. See id. at 153 & n.43; Homer Kripke, The SEC, Corporate Governance, and the Real Issues, 36 Bus. Law. 173, 190 & n. 74 (1981) (both citing Opinion of SEC General Counsel on the
the NYSE as a listing standard\textsuperscript{59} applicable even to companies whose securities were already listed.\textsuperscript{60} The NYSE dutifully complied,\textsuperscript{61} and the Commission approved the rule.\textsuperscript{62}

Although the NYSE did not develop this listing standard on its own initiative,\textsuperscript{63} it was not without competitive implications, since the exchange was the only market to impose such a requirement.\textsuperscript{64} The rule's mandatory impact, however, was rather limited by the time of its adoption in 1977, as most listed companies already complied with the rule.\textsuperscript{65} Furthermore, the competing exchanges certainly were not opposed to audit committees.\textsuperscript{66} Unlike the initiatives of the 1950s, the NYSE was adopting a standard in response to an apparently irresistible request.\textsuperscript{67}
After 1977, the NYSE focused on modifying its existing corporate governance listing standards.68 No new initiatives were taken until the proposed repeal of the one share, one vote rule which led to the recent controversy and the Business Roundtable decision. The NYSE first proposed to repeal its voting rights listing standards in 1985 in response to pressure from its listed companies, which were eyeing competing markets without similar standards. The Commission desired a uniform voting rights standard for all the markets, and when negotiations among the markets failed, the Commission imposed a uniform standard with rule 19c-4.69 Shortly thereafter, the NYSE independently adopted rule 19c-4 as its own rule.70

Amex

Corporate governance listing standards are a more recent development at the Amex. Unlike the NYSE, the Amex did not take the fundamental step of abolishing unlisted trading until 1934.71 The Amex's first listing standard, a corporate governance standard, appeared in 1946, when the exchange determined, as had the NYSE twenty years earlier, "to consider applications to list nonvoting common stock only on a case-by-case basis."72

68. During this time, the NYSE's activities have been limited to rescinding or modifying corporate governance listing standards and restricting the applicability of other standards to foreign issuers. See Table 2.

69. See infra notes 120-37 and accompanying text (background of the one share, one vote dispute and adoption of Rule 19c-4).


71. In 1934, 70 percent of all securities traded at the Amex were unlisted, comprising 82 percent of all Amex transactions. Sobel, supra note 52, at 111, 129; see also Twentieth Century Fund, Inc., supra note 25, at 256 (Amex in 1933 traded about 1700 unlisted stocks (81% by number) and 400 listed stocks (19% by number)). Not surprisingly, the Amex led the fight to permit the continuation of unlisted trading privileges, which the original version of the Exchange Act would have abolished. See Sobel, supra note 52, at 110-13; Louis Loss, Fundamentals of Securities Regulation 593 n.d (2d ed. 1988). Unlisted trading was vital to the Amex’s survival. See Sobel, supra note 52, at 111; Twentieth Century Fund, Inc., supra note 25, at 256 (“without the volume of unlisted trading, the [Amex] would not be able to continue in existence”). The fight was successful, and the existing unlisted trading privileges were “grandfathered” in § 12(f)(3) of the Exchange Act, 15 U.S.C. § 78f(f)(3) (1988). Loss, supra, at 593 n.d; Exchange Act Release No. 21,498, 49 Fed. Reg. 46,156, 46,157 n.6 (1984).

There remain only a handful of Amex-listed securities grandfathered by the 1934 exemption. Although the Commission recently has expanded unlisted trading on securities exchanges, it has done so only with respect to securities designated as NMS securities. See Exchange Act Release No. 22,412, 50 Fed. Reg. 38,640, 38,646 (1985). The Commission initially limited each exchange's unlisted trading privileges in NMS securities to 25 securities, id., but is considering a request to increase the limit to 100 securities. See Exchange Act Release No. 27,178, 54 Fed. Reg. 37,067, 37,070 (1989). Furthermore, issuers of NASDAQ/NMS Securities are now subject to the NASD's "listing standards." See infra notes 90-98 and accompanying text.

Most of the Amex's listing standards were first set in the early 1960s, during a comprehensive reform of the Amex.\(^\text{73}\) By then it was clear that the Amex's campaign for more listings in the 1950s resulted in a higher quantity but arguably lower quality of listed companies.\(^\text{74}\) The first "meaningful" quantitative listing requirements imposing minimum public shareholdings and stock prices came into effect in 1962,\(^\text{75}\) and a stricter voting rights policy was announced the following year.\(^\text{76}\) At about the same time, listing standards requiring proxy solicitation and shareholder approval of certain stock issuances first appeared.\(^\text{77}\) Minimum quorum requirements and a "recommendation" for independent directors were part of the Amex listing standards by 1968.\(^\text{78}\)

In the 1970s and 1980s, only minor changes were made to these standards. Through the mid-1970s, the voting rights policy was further refined,\(^\text{79}\) and

\(^{73}\) See generally Sobel, supra note 52, at 285-305 (discussion of revelation of scandals in 1960-61 which led to a special SEC investigation, the resignation of most of the Amex senior management, and complete reorganization of the Amex); see also Securities and Exchange Commission, Staff Report on Organization, Management, and Regulation of Conduct of Members of the American Stock Exchange (Jan. 3, 1962), reprinted in 1963 Special Study, supra note 1, at 751-813 (1963) (SEC report of general investigation of the Amex in response to the revelations of 1960-61).

\(^{74}\) See 1963 Special Study, supra note 1, at 771 ("The emphasis placed by the [American Stock] Exchange on obtaining listings and the somewhat perfunctory administration of the flexible listing policies are perhaps reflected in the quality of certain stocks listed on the Exchange."); see also Sobel, supra note 52, at 233-34 (1972) (Amex President McCormick "had to make certain that the new issues [listed on the Amex] represented more than a press agent's dream. On many occasions, he failed to do so."). The failure to develop any meaningful listing standards was only one part of the systemic problems at the Amex at this time. See supra note 73.

\(^{75}\) The Amex announced uniform quantitative listing standards in late 1961. Before that time, the Amex had ""no rigid policy as to size of applicant corporations from the viewpoint of either assets or earnings power."" 1963 Special Study, supra note 1, at 770 (quoting American Stock Exchange, Inc., Advantages of Listing (Feb. 1961)); see also Sobel, supra note 52, at 206 n.\(^*\) (lack of "meaningful" quantitative standards before 1962). The Amex's current quantitative listing standards, though concededly clear, are not necessarily of more binding effect. See supra note 15 (numerical standards "not always dispositive" of an application for listing).

\(^{76}\) "[T]he Exchange determined not to list nonvoting stock unless the holders were given the right to vote in all cases in which the Exchange's rules require special shareholder approval." Amex Voting Rights Report, supra note 72, at 4.


\(^{79}\) At first, in 1972, the Amex decreed that no nonvoting shares would be issued. Amex Voting Rights Report, supra note 72, at 4.

This policy seems to have derived from pressure put on AMEX by state securities administrators in the 1970s. Apparently, they indicated that they would favorably consider AMEX's request for the granting of exempt status to its listed securities if it adopted the administrators' current policies with respect to nonvoting shares.

annual meetings were required in 1973. In 1980, the Amex “recommended” that its listed companies have an audit committee composed solely of independent directors. This step was a response to renewed pressure from the Commission after the NYSE adopted its audit committee listing standard. In 1982, the Amex made miscellaneous changes to its requirements for shareholder approval of the issuance of additional securities, based in part on “changes in the quality and timeliness of corporate disclosure and in the composition and standards of corporate boards of directors which have taken place in the two decades since [the rules] were adopted.” Several specialized listing standards for unique types of securities also were developed during the early 1980s.

Within the last year, the Amex has undertaken several initiatives in the area of corporate governance listing standards. First, it made mandatory its prior “suggestion” that listed companies have an audit committee and at least two independent directors. Second, the Amex recently approved a new voting rights listing standard which would permit multiple class capitalization in many cases prohibited under Rule 19c-4. Although the Amex now proposes to have a voting rights rule different from that of the NYSE and the NASD, it believes

In 1976, this strict policy was loosened somewhat to accommodate the listing of Wang Laboratories, Inc., which switched its listing from the NYSE. Amex Voting Rights Report, supra note 72, at 4. Hence, the Amex’s voting rights policy became known as the “Wang formula.” Id.; Seligman, supra note 14, at 704-05.

The requirement of annual meetings first appears in the 1973 edition of Listing Form L. See Amex Constitution and Rules (CCH) at 3591 (1973). Prior to that time, the Amex “did not require annual meetings of shareholder to be held on any particular date, but did expect listed companies to hold regular annual meetings in compliance with applicable state or other law and their by-laws.” American Stock Exchange, Inc., Company Guide 181 (1968).


Both the NYSE and the NASD have adopted Rule 19c-4 as a rule of their own organization. See supra note 70 and accompanying text (NYSE); see also infra note 95 and accompanying text (NASDAQ). The Amex was unable to agree with the NYSE and the NASD on a voluntary uniform voting rights rule, a failure which precipitated the Commission’s proposal of Rule 19c-4. See
that a uniform rule is "almost inevitable," and that its rule "would be appropriate as a uniform policy" for all markets.\footnote{89}

The corporate governance listing standards at the Amex were thus born in the early 1960s as the entire exchange was undergoing general reform. Those rules have been marginally modified since then, but most dramatically in the area of voting rights, where the Amex maintains distinctive rules while advocating uniformity among exchanges.

**NASD**

In 1985, the NASD first proposed "corporate governance" standards for NASDAQ National Market System (NMS) securities\footnote{90} similar to those applied by the NYSE and Amex.\footnote{91} Ultimately adopted in 1987,\footnote{92} the standards include the submission of annual and periodic reports to shareholders, maintenance of independent directors, maintenance of an independent audit committee, requiring shareholder participation in certain corporate transactions and execution of a "Listing Agreement."\footnote{93} In 1989, these rules were expanded to require shareholder approval of certain corporate transactions.\footnote{94} Shortly after the Business Roundtable decision in 1990, the NASD proposed and the Commission approved a rule adopting the substance of Rule 19c-4 as a rule of the NASD.\footnote{95} The NASD also modified its shareholder approval requirements to conform to earlier NYSE changes to its listing standards.\footnote{96}


89. Amex Voting Rights Report, supra note 72, at 3.
90. See supra note 9 (definition of NMS securities).


95. See Exchange Act Release No. 28,517, 55 Fed. Reg. 41,626, (1990). The NYSE had done the same thing, but its rule proposal was approved prior to the Business Roundtable decision. See supra note 70 and accompanying text. The NASD rule was more limited than Rule 19c-4, as it applies only to NMS securities, while Rule 19c-4 applied to all NASDAQ securities. Exchange Act Release No. 28,517, supra, at 41,626. The effect of the NASD's action is the same as the NYSE's: the rule remains binding on issuers of NMS securities despite the invalidity of Rule 19c-4.
The NASD's motivation for adopting these standards was to obtain equivalent status with the securities exchanges in the eyes of state securities regulators. Because NYSE or Amex listed securities are exempt from registration under most state "blue sky" laws, "[t]he NASD has made no secret of its desire to achieve the same securities market exemption." Indeed, the latest NASD proposals were made pursuant to an express understanding with the state regulators.

Summary: The Central Role of Listing Standards in Marketplace Competition

It appears that corporate governance listing standards were first developed by the NYSE in order to assure investors that a listed stock was a legitimate investment with some protection against "improper and dubious practices." In the 1920s, the "one share, one vote" policy developed in response to public outcry against the use of nonvoting stock. In the 1950s, the corporate governance standards developed in response to the rise of institutional investors and the decline of individual stock ownership. Thus, the voluntary efforts by the NYSE to develop corporate governance listing standards were undertaken in order to capture or retain trading business and commissions for its members, though a byproduct was to promote shareholder participation.

Only a few years later, when general reforms prompted the Amex to consider significant corporate governance and quantitative standards, the NYSE standards already were considered the norm. The Amex was under considerable pressure to demonstrate to the Commission and to investors that its standards were meaningful. The perception was that "listing" at the Amex meant no more in the 1950s than it did before the Exchange Act, when unlisted trading dominated the exchange. The listing standards developed by the Amex were essentially those of the NYSE, and for the same reason: to attract customers for Amex members.

The NASD never has pretended that its corporate governance standards were intended to do anything but keep customers for its members. The NASD deems

97. Seligman, supra note 14, at 707. See also Exchange Act Release No. 24,633, supra note 92, at 24,234 (NASD believes that with corporate governance standards, "additional states will grant NMS issuers an automatic exemption from blue sky laws.").


99. See supra text accompanying note 41.

100. See supra notes 33-34 and accompanying text.

101. See supra notes 48-55 and accompanying text.

102. This limitation excludes the 1977 audit committee standard, as it really was not the NYSE's idea. See supra note 61.

103. See supra notes 54-55 (remarks of NYSE President Funston).
it critical for NASDAQ/NMS “listing” to achieve the same status under state law as an NYSE or Amex listing.\textsuperscript{104}

Thus, the genesis of these listing standards was an attempt by the NYSE to obtain and keep individual investors in its listed securities, with the accompanying business benefit for the NYSE members. In addition, the listing standards adopted by other markets primarily were not only a competitive response to the NYSE but also a response to pressure from the Commission and state regulators.\textsuperscript{105} It is important to remember the origin of these rules because they have taken on a life of their own, with their original intent long forgotten.\textsuperscript{106}

Typically, they are vaunted as a bastion of shareholder protection.\textsuperscript{107} While that may have been an incidental result, it hardly was the motivation for the exchanges in adopting corporate governance listing standards.

**CORPORATE GOVERNANCE LISTING STANDARDS AND THE FEDERAL SECURITIES LAWS**

The Exchange Act originally empowered the Commission to “alter or supplement the rules of [an] exchange . . . in respect of such matters as . . . the listing . . . of any security.”\textsuperscript{108} Notwithstanding this authority, one commentator maintains that “[u]ntil 1975, exchange listing standards were clearly the subject

104. See supra notes 97-98 and accompanying text.

105. As indicated above, the Amex was under pressure from the Commission. See supra note 73 and accompanying text. The NASD was under competitive pressure imposed indirectly by state securities regulators. See supra notes 97-98 and accompanying text.

106. Given this history, it is interesting that the debate over the “one share, one vote” rule has referred to the competition in listing standards as a “race to the bottom.” See, e.g., Exchange Act Release No. 25,891, 53 Fed. Reg. 26,376, 26,378 (1988). The early history of listing standards follows the theories of Professor Fischel in rebutting the “race to the bottom” thesis, namely, that exchanges compete for volume (not only number of listings, but trades as well), and that competition motivates them to adopt rules which enhance shareholder welfare. Daniel R. Fischel, Organized Exchanges and the Regulation of Dual Class Common Stock, 54 U. Chi. L. Rev. 119, 129-30 (1987). The race for new listings apparently is the one toward the bottom; the race for more transactions in listed securities apparently was one toward the top, or at least involved listing standards which had the byproduct of shareholder protection. See supra text accompanying note 103.

107. Interestingly, it usually is the Commission which takes this view. See, e.g., Exchange Act Release No. 24,939, 52 Fed. Reg. 36,657, 36,658 (1987) (stating in release approving Midwest Stock Exchange, Inc. mandatory audit committee rule that uniform exchange listing standards “assure investors that all the companies traded in those markets will have the fundamental safeguards they have come to expect of major companies”); Exchange Act Release No. 24,633, supra note 92, at 24,235 (stating in release proposing NASDAQ/NMS corporate governance standards that “the exchanges have become accepted as sources of fundamental investor protections”); Exchange Act Release No. 13,346, supra note 56, at 14,795 (stating in release approving NYSE mandatory audit committee rule that “the NYSE in particular has developed listing policies to promote stronger standards of corporate governance”); Brief for Respondent at 33, Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) [hereinafter SEC brief] (characterizing corporate governance listing standards as “a well-established scheme of [exchange]-mandated investor protection”).

of private or contract law between an [exchange] and listed companies.\footnote{Karmel, supra note 12, at 828.} Congress recognized in 1975 that, apart from scattered provisions such as the one quoted above, “there is nothing in the Exchange Act which explicitly limits or defines an exchange’s rule-making authority,”\footnote{S. Rep. No. 75, 94th Cong., 1st Sess. 26-27 (1975).} noting that section 6(c) of the Exchange Act permitted exchanges to have “any rule not inconsistent with this [Act] and the rules and regulations thereunder.”\footnote{111. See id. at 27 (quoting Securities Exchange Act of 1934, § 6(c), 48 Stat. 881, 886 (1934)).} In addition, once an exchange has been registered and had its rules officially reviewed by the Commission, it “is free to change those rules at any time thereafter without similar advance scrutiny or approval.”\footnote{112. Id. at 30.}

In the 1975 Securities Acts Amendments, Congress made three basic changes to clarify the Commission’s authority over the exchanges and the NASD and the scope of those institutions’ rulemaking jurisdiction. First, the statutory standards for rules of national securities exchanges and national securities associations (the NASD) were made identical.\footnote{113. In contrast to the “seemingly open-ended authority” given the exchanges under old § 6(c), see supra note 111 and accompanying text, the provisions of the Exchange Act governing national securities associations provided clear and comprehensive standards. The Senate Committee, in discussing what ultimately became § 19(b) of the Exchange Act, stated that “the statutory pattern governing the scope of the NASD’s authority is basically sound. The bill would extend the pattern now applicable to registered securities associations to exchanges.” S. Rep. No. 75, 94th Cong., 1st Sess. 30-31 (1975).} Second, section 6(c) was repealed and section 19(b) was added, requiring the Commission to review each new or amended rule, approving it only if it “finds that such proposed rule change is consistent with the requirements of this [Act] and the rules and regulations thereunder.”\footnote{114. Exchange Act § 19(b), 15 U.S.C. § 78s(b) (1988). See S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975). The requirement of an affirmative finding of consistency with the Exchange Act differed significantly from § 6(c) of the previously existing law, see supra note 111 and accompanying text, as well as from the House bill. The House version would have retained § 6(c) and added §§ 6(f) and 15A(f) to the Exchange Act, providing that stock exchange and NASD rule changes would automatically become effective after 45 days unless the Commission disapproved the rule “as inconsistent with the purposes of this title or otherwise inconsistent with the public interest.” H.R. Rep. No. 123, 94th Cong., 1st Sess. 4, 16 (1975) (emphasis added). The Senate’s version ultimately was enacted. See H.R. Conf. Rep. No. 229, 94th Cong., 1st Sess. 99-100 (1975).} Finally, section 19(c) was added, giving the Commission authority to directly change the rules of an exchange or the NASD if the Commission deems such a change “necessary or appropriate to insure the fair administration of the self-regulatory organization, . . . or otherwise in furtherance of the purposes of [the Exchange Act]. . . .”\footnote{115. Exchange Act § 19(c), 15 U.S.C. § 78s(c) (1988).}

Thus, Congress clearly had redesigned and streamlined the Commission’s authority over the exchanges and the NASD. This was done, however, with primary focus on those organizations’ powers over their members and with little attention given to those organizations’ powers over issuers of listed securities.
Hence, there remains some uncertainty about how the Commission should apply its new powers to listing standards.\textsuperscript{116}

The uncertainty created by Congress in 1975 concerning the Commission's role in approving listing standards persists today. In approving listing standards, the Commission rarely explains its rationale. Instead, it routinely finds that the listing standards in question generally meet section 19(b)'s "consistency" requirement, being in each case consistent with Exchange Act Section 6 generally or Section 6(b)(5) specifically.\textsuperscript{117} In addition, the Commission never exercised its section 19(c) power to write exchange rules with regard to listing standards until the adoption of Rule 19c-4.\textsuperscript{118}

Because there was no further statement of Congressional intent and no litigation to force further consideration of the question, the interpretation of the 1975 amendments was left to the Commission. In approving new listing standards, the Commission did not face squarely the question of how such standards might be "consistent" with the Exchange Act. No listing standard had been adopted or amended in the public spotlight nor with any potential for adversarial challenge.\textsuperscript{119} It was not until the adoption of Rule 19c-4, thirteen

\textsuperscript{116} There even was scant reference to the NYSE's "one share, one vote" rule—the primary then-existing corporate governance listing standard—during Congress' original consideration of the Exchange Act in 1934. \textit{See} Business Roundtable v. SEC, 905 F.2d 406, 413 (D.C. Cir. 1990). The 1975 amendments clearly were focused on exchange regulation of members, not issuers.

Because of the unique system of self-regulation in the securities industry, the principal markets for securities, i.e., the exchanges, are also the principal regulators of the activities of broker-dealers using those markets. Meaningful reform of this country's securities trading mechanisms will, therefore, be impossible unless there is also a reform of the method and manner by which the self-regulatory organizations operate and in the way that the SEC oversees the performance of their regulatory responsibilities.


\textsuperscript{117} Exchange Act § 6(b)(5), 15 U.S.C. § 78f(b)(5) (1988), requires that the rules of an exchange be:

\begin{quote}
[D]esigned to prevent fraudulent and manipulative acts and practices . . ., to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and . . . not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.
\end{quote}

\textit{Id.} In approving rule changes by the NASD, the Commission instead cites to § 15A(b)(6), 15 U.S.C. § 78o-3(b)(6) (1988), which contains almost identical language relating to the rules of national securities associations. These releases are listed in Table 2. The Commission occasionally refers to specific clauses in its releases. \textit{See}, \textit{e.g.}, Exchange Act Release No. 24,634, \textit{supra} note 85, at 24,232-33 (discussing the "investor protection" requirement of § 6(b)(5)).

\textsuperscript{118} The Commission has exercised its § 19(c) powers only in two other areas: the partial elimination of "off-board" trading restrictions, \textit{see} Exchange Act Rules 19c-1 and 19c-3, 17 C.F.R. §§ 240.19c-1 and 19c-3 (1991); and the multiple listing of options, \textit{see} Exchange Act Rule 19c-5, \textit{id.} § 240.19c-5.

\textsuperscript{119} Although some publicity accompanied the NYSE Listed Company Manual's audit committee rule in 1977, \textit{see supra} note 56 and accompanying text, no exchange has adopted a binding
years after the 1975 amendments, that the Commission first attempted to describe the relationship of corporate governance listing standards to the purposes of the Exchange Act, resulting in a court challenge to its new listing standard.

RULE 19c-4 AND THE BUSINESS ROUNDTABLE OPINION

The long-awaited judicial review of corporate governance listing standards was the curious culmination of an unusual process. This section reviews the developments preceding the Business Roundtable lawsuit, and the court's correct holding and unfortunate dictum.

THE UNDERLYING “ONE SHARE, ONE VOTE” DISPUTE

While Rule 19c-4 was proposed in 1987, its recent history begins in 1984, when several corporations whose stock was listed on the NYSE proposed capitalization plans in violation of the NYSE's so-called “one share, one vote” rule. Not relishing delisting some of its most widely traded securities, the NYSE instead declared a moratorium on enforcement of its rule, and created a study group, the Subcommittee on Shareholder Participation and Qualitative Listing Standards of the Public Policy Committee of the NYSE Board of Directors.

listing standard with which most of its listed companies were not already in compliance. See, e.g., Exchange Act Release No. 13,346, supra note 56, at 14,794 n.9 (by the time of the NYSE audit committee proposal, 93% of listed companies either had such a committee or had developed plans to create one); Exchange Act Release No. 29,796, supra note 86, at 51,955 (release adopting Amex mandatory audit committee and independent director rules recites that 85% and 93% of listed companies, respectively, already comply with those rules); Exchange Act Release No. 22,505, supra note 92, at 41,698 (“[M]ost [National Market System] companies already comply with the NASD's proposed corporate governance standards”).

120. Proposing Release, supra note 88, at 23,665; Business Roundtable v. SEC, 905 F.2d 406, 407 (D.C. Cir. 1990); Comment, Rule 19c-4: The SEC Goes Too Far in Adopting a One Share, One Vote Rule, 83 Nw. U. L. Rev. 1057, 1064 (1989). The primary motivation of those corporations was to take advantage of the tremendous defense against takeovers which dual class capitalization provides if the insiders hold most or all of the voting stock. See Seligman, supra note 14, at 701.

121. Seligman, supra note 14, at 700; Comment, supra, note 120, at 1064. Ultimately, 46 NYSE-listed companies adopted “disparate voting rights plans,” Proposing Release, supra note 120, at 23,666, including General Motors Corp., Hershey Corp., Dow Jones & Co. and Coastal Corp. Karmel, supra note 12, at 817 n. 58; Seligman, supra note 14, at 703 n.81.

The NYSE felt competitive pressure to loosen its requirements,\textsuperscript{123} for the Amex had a more limited “one share, one vote” rule,\textsuperscript{124} and the NASD had no such rule at all.\textsuperscript{125} The Subcommittee recommended such a modification in 1985, and the NYSE sought formal SEC approval of the rule change in 1986.\textsuperscript{126} Approval of a self-regulatory organization’s rule change ordinarily is a routine matter, but not in this case. Not only was the matter handled directly by the Commission rather than by the staff through delegated authority,\textsuperscript{127} but the Commission chose to hold public hearings on the proposal, a rare occurrence in such matters.\textsuperscript{128} Seven months later, the Commission proposed Rule 19c-4 for comment, and it was adopted a year later,\textsuperscript{129} with minor modifications mostly to the effective date.\textsuperscript{130} Rule 19c-4 adds to the rules of each stock exchange\textsuperscript{131} and the NASD a prohibition on listing stock of a company which “issues any class of security, or takes other corporate action, with the effect of nullifying, restricting, or disparately reducing the per share voting rights holders of an outstanding class or classes of common stock of such issuer registered pursuant to Section 12 of the [Exchange] Act.”\textsuperscript{132} The Rule provides two sets of examples of corporate action, one presumed to be acceptable under this general standard,\textsuperscript{133} and the other unacceptable.\textsuperscript{134} The Rule delegates further interpretive power to the exchanges and the NASD.\textsuperscript{135}

The Commission likely recognized that it would be breaking new ground with a “one share, one vote” rule. In both the releases proposing and adopting


\textsuperscript{124} See supra note 79 (discussion of Amex rules).

\textsuperscript{125} See supra notes 93-96 and accompanying text (discussion of NASD rules).

\textsuperscript{126} NYSE Rule Proposal, supra note 123, at 37,529-30.

\textsuperscript{127} The Director of the SEC’s Division of Market Regulation has the delegated authority to approve rule changes. 17 C.F.R. § 200.30-3(a)(12) (1991).

\textsuperscript{128} The SEC decided to hold public hearings because of “the significant issues raised by the NYSE’s proposal.” Proposing Release, supra note 120, at 23,667. See also Karmel, supra note 12, at 818-19 (the SEC’s decision to hold public hearings indicated “the importance and difficulty of the issues involved”).

In fiscal year 1987, the SEC received 205 proposed rule changes from the stock exchanges, yet this NYSE proposal is the only one specifically cited in the SEC’s Annual Report as the subject of public hearings. U.S. Securities and Exchange Commission, 53rd Annual Report 42-43 (1988).


\textsuperscript{130} See id. at 26,385-87.

\textsuperscript{131} The two smallest registered national securities exchanges, the Intermountain and Spokane Stock Exchanges, were not covered by the Rule. See Adopting Release, supra note 129, at 26,376 n.1.

\textsuperscript{132} Exchange Act Rule 19c-4(a), 17 C.F.R. § 240.19c-4(a) (1991) (applicable to national securities exchanges). Identical language appears in subsection (b), id. § 240.19c-4(b), applicable to national securities associations.


\textsuperscript{134} See id. at subsection (c), 17 C.F.R. § 240.19c-4(c) (1991).

\textsuperscript{135} See id. at subsection (f), 17 C.F.R. § 240.19c-4(f) (1991).
Rule 19c-4, the Commission took the unusual step of discussing at length its perceived statutory authority to adopt the Rule.\textsuperscript{136} Not even the Commission's other arguably controversial rules had been so discussed in the past.\textsuperscript{137}

\textbf{THE INVALIDATION OF RULE 19c-4}

Invoking Exchange Act Section 25(b),\textsuperscript{138} The Business Roundtable brought the validity of Rule 19c-4 before the Court of Appeals for the District of Columbia Circuit.\textsuperscript{139} In the language of the statute authorizing review, the

\textsuperscript{136} The issue first arose in connection with the NYSE's original rule proposal. In soliciting additional comments and announcing public hearings on the rule proposal, see \textit{ supra} note 126 and accompanying text, the Commission solicited comments generally on whether a uniform rule should be applied to all markets and whether "the Commission or Congress should mandate such a policy." Exchange Act Release No. 23,803, \textit{ supra} note 122, at 41,718.

Although this was not necessarily a solicitation of comments on the Commission's authority, 27 such comments were received out of a total of approximately 240 comments. Proposing Release, \textit{ supra} note 120, at 23,667, 23,670. The Commission responded to these comments when initially proposing Rule 19c-4. \textit{See id.} at 23,674-76. Although the Commission solicited no further comments concerning its authority, it received 32 such comments out of a total of approximately 300 substantive comments. Adopting Release, \textit{ supra} note 129, at 26,377 & n.23, 26,379. The Commission responded to those comments in the release adopting Rule 19c-4, \textit{see id.} at 26,391-93, with the same arguments ultimately used in the Commission's brief. \textit{Compare id. with SEC Brief, supra} note 107, at 36-41.

\textsuperscript{137} For example, in 1984 the Commission adopted amendments to Exchange Act Rule 10b-4, 17 C.F.R. § 240.10b-4 (1990), which would prohibit so-called "hedged tendering" of securities. In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930 (2d Cir. 1986), the court reversed a district court holding that an arbitrator's award to an investor was reversible because it was in "manifest disregard" of Rule 10b-4. The \textit{Bobker} court hinted, without deciding, that Rule 10b-4 "has no rational basis as a means of implementing the purpose of § 10(b)," and thus the arbitrators did not manifestly disregard the law when they refused the brokerage firm's defense based on that Rule. \textit{Id.} at 936. Later, in proposing and adopting amendments to Rule 10b-4 in response to \textit{Bobker}, the Commission did not separately discuss nor invite comment on its authority to promulgate the Rule, but only noted that the \textit{Bobker} discussion was dictum. \textit{See Exchange Act Release No. 28,660, 55 Fed. Reg. 50,316, 50,318 n.23 (1990).}

When the Commission proposed Exchange Act Rule 3b-9, defining banks as "brokers" and "dealers" for certain purposes of the Exchange Act, it did not discuss its authority to promulgate the rule. \textit{See Exchange Act Release No. 20,357, 48 Fed. Reg. 51,930 (1983).} After receiving many comments suggesting that it had no authority to adopt the Rule, the Commission briefly summarized and refuted these comments when adopting rule 3b-9. \textit{See Exchange Act Release No. 22,205, 50 Fed. Reg. 28,385, 28,392-93 (1985).} On appeal, the Rule was held beyond the Commission's authority. \textit{See American Bankers Ass'n v. SEC, 804 F.2d 739 (D.C. Cir. 1986).} The discussion in the release adopting rule 3b-9 also was limited in comparison to the extensive discussions in both the releases proposing and adopting Rule 19c-4.

\textsuperscript{138} 15 U.S.C. § 78y(b)(1) (Supp. II 1990), which states in pertinent part: "A person adversely affected by a rule of the Commission promulgated pursuant to section ... 19 of this title may obtain review of this rule in the United States Court of Appeals ... by filing in such court ... a written petition requesting that the rule be set aside."

\textsuperscript{139} The Business Roundtable, according to its brief, is an association of 200 major corporations, most of whom have publicly traded securities, and who are "directly affected by Rule 19c-4; their stock would be banished from trading in the nation's public securities markets if they took any action or issued any security prohibited by the rule." Brief for Petitioner at 2, Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) [hereinafter Business Roundtable Brief]. The petitioner
question before the court was whether “the Commission’s action in promulgating the rule is ... in excess of statutory jurisdiction.” The statutory jurisdiction in question is that of Exchange Act Section 19(c), which required the Commission in adopting Rule 19c-4 to conclude that the rule was “in furtherance of the purposes of” the Act.

First, the Commission alleged that Rule 19c-4 was valid because it furthered the purposes of Exchange Act Section 14(a). That section, according to the Commission, is concerned with “fair corporate suffrage,” and suffrage is unfair when shareholders can be deprived of their voting rights “in a coercive or involuntary manner.” The court, however, agreed with the Roundtable’s construction of section 14(a) as primarily directed at disclosure. The court recognized that section 14(a) does authorize regulation beyond full disclosure, but not to the virtually unbounded extent suggested by the Commission.

Second, the Commission alleged that Rule 19c-4 was valid because it furthered the purposes of Exchange Act Section 11A, which states in subsection (a)(1)(C) Congress’ finding that “[i]t is in the public interest ... to assure ... asserted standing on behalf of its members under Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333 (1977); see Business Roundtable Brief, supra, at 3. The question of petitioner’s standing was not mentioned by the Commission in its reply brief nor by the court.

141. 15 U.S.C. § 78s(c) (1988), provides in pertinent part:

[T]he Commission, by rule, may abrogate, add to, and delete from ... the rules of a self-regulatory organization ... as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title. ... Id.

142. Id. The Commission did not suggest that any of the standards of § 19(c) other than the third were appropriate. See Business Roundtable v. SEC, 905 F.2d 406, 410 (D.C. Cir. 1990).

143. Securities Exchange Act § 14(a), 15 U.S.C. § 78n(a) (1988), which provides in pertinent part: “It shall be unlawful for any person, ... in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit ... any proxy.”

The Commission also alleged that Rule 19c-4 furthered the purposes of the Exchange Act evidenced by § 6(b)(5), 15 U.S.C. § 78f(b)(5) (1988), applicable to national securities exchanges, and § 15A(b)(6), 15 U.S.C. § 78o-3(b)(6) (Supp. II 1990), applicable to the NASD, requiring each to have rules that are designed “to protect investors and the public interest.” Although the Commission attempted to establish this as a separate justification for Rule 19c-4, all parties recognized this as simply a restatement of the argument that Rule 19c-4 furthers the purposes of § 14. See Adopting Release, supra note 129, at 26,392; Business Roundtable Brief, supra note 139, at 37; SEC Brief, supra note 107, at 39-40; Business Roundtable, 905 F.2d at 413-14.

144. Adopting Release, supra note 129, at 26,391. The Commission demonstrated that shareholders voting on a proposal to limit their voting rights may irrationally agree to do so because of “collective action” problems. See Business Roundtable, 905 F.2d at 411 (citing Proposing Release, supra note 120, at 23,672).

145. Business Roundtable Brief, supra note 139, at 32-34, Business Roundtable, 905 F.2d at 410.

146. Business Roundtable, 905 F.2d at 411.
fair competition among . . . exchange markets and between exchange markets and [other] markets.\textsuperscript{147} Competition for issuer listings based on differences in voting rights listing standards was viewed by the Commission as harmful,\textsuperscript{148} but by the Roundtable as potentially beneficial (and likely not within the intent of section 11A in any event).\textsuperscript{149} The court finessed any decision on the benefits of listing-standard competition, holding instead that these standards simply were irrelevant to any of the purposes of section 11A.\textsuperscript{150}

\textbf{THE COURT'S ATTEMPT TO RESCUE CORPORATE GOVERNANCE LISTING STANDARDS}

The Business Roundtable court thus concluded that Rule 19c-4 was invalid because it was not in furtherance of any stated purpose of the Exchange Act.\textsuperscript{151} The court now realized the sweeping implication of that holding: the same rationale applied not only to the Commission's rule, but to \textit{each one of the exchanges' listing standards} as well.\textsuperscript{152} If the Commission cannot promulgate a voting rights rule, asked the court, how could the exchanges have had such rules in the first place?

If an exchange may \textit{adopt} listing rules on one share/one vote or other corporate governance matters, must it not (under § 6(b)(5)) rest those rules on some relation to the purposes of the Exchange Act; and, if so, must not the Commission's authority under § 19(c) encompass every aspect of those rules?\textsuperscript{153}

In answering this rhetorical question, the court proceeded to rescue in dictum the exchanges' corporate governance listing standards from the fate accorded Rule 19c-4.\textsuperscript{154} Securities exchanges and associations may adopt rules which have \textit{nothing to do} with the Exchange Act, said the court, so long as they are not enforced by power granted to that exchange or association by the Act, that is, power over its members, not its \textit{listed} companies.\textsuperscript{155} The court stated that because listing standards are not enforced by expulsion of or sanctions against a member firm or associated person, they need not be related to any provision of the Exchange Act.\textsuperscript{156}

\textsuperscript{148} SEC Brief, \textit{supra} note 107, at 40-41.
\textsuperscript{149} Business Roundtable Brief, \textit{supra} note 139, at 39-40.
\textsuperscript{150} See \textit{Business Roundtable}, 905 F.2d at 416-17.
\textsuperscript{151} \textit{Id.} at 416.
\textsuperscript{152} Or, in the court's language, it paused to consider "a puzzle in the relation between § 19 and § 6(b)(5)." \textit{Id.} at 414.
\textsuperscript{153} \textit{Id.} (emphasis in original).
\textsuperscript{154} See \textit{id}.
\textsuperscript{155} \textit{Id.} at 414-15.
\textsuperscript{156} \textit{Id.}
Thus the court solved the problem of original rules which an exchange or association had upon its initial registration, governed by section 6(b)(5). But amendments to original rules are governed by yet another standard. Section 19(b) requires that any change to a rule of an exchange or association must be found by the Commission to be "consistent with the requirements of [the Act]." It was clear by now that listing standards are "rules" within the meaning of section 19. If the fact that a listing standard is inconsistent with or simply irrelevant to the Exchange Act is no bar to an exchange's or association's initial registration, then surely that inconsistency or irrelevancy would be fatal if not removed when that rule is modified. Again, not to worry, said the court, for the Commission's power under section 19 with respect to rules "which do not regulate members and are not related to the purposes of the Act . . . will be quite limited.”

A CRITIQUE OF THE COURT'S RESCUE

In order to save the “one share, one vote” rule on a securities exchange or securities association level, the court creates a “limited” standard of review under sections 6 and 15A for original rules and under section 19(b) for voluntary amendments to rules, each paralleling the limitation on the Commission's section 19(c) power stated earlier in the opinion. Upon closer examination, the court’s attempt to rescue corporate governance listing standards is noble but fruitless. The court’s dictum is inconsistent with the 1975 amendments to the Exchange Act and is unworkable.


159. This is a fundamental issue, for if listing standards are not rules of the exchange, then the Commission would have no regulatory power over them and presumably could not add a new "rule" of this type pursuant to § 19(c). Fortunately, there is little disagreement on this point. See Comment, supra note 12, at 1435-38, which characterized the question as "debatable," but concluded that listing standards are "rules" under the Exchange Act. The Business Roundtable pressed this interpretation with the court, see Business Roundtable Brief, supra note 139, at 23-25, suggesting that no "rules" under the Exchange Act were involved. The court made quick work of this argument. "It seems indisputable that the NYSE's proposed rule modifying its one share/one vote listing standard is a 'rule' covered by § 19(c) and, correspondingly, that Rule 19c-4 does not fall outside of § 19(c)'s ambit for any want of being a 'rule' . . . ." Business Roundtable, 905 F.2d at 409.

Indeed, it was assumed from the beginning of this controversy that the answer to this question was clear. The NYSE obviously assumed that its “one share, one vote” rule was a “rule” under the Exchange Act, as it submitted its proposed amendment to the Commission for approval pursuant to § 19(b), setting in motion the events that led to the adoption of Rule 19c-4 and the Business Roundtable decision. See NYSE Rule Proposal, supra note 123.

160. Business Roundtable, 905 F.2d at 414. In this context, the fact that the power is “quite limited” means that the Commission will have limited power to disapprove the proposed listing standard. See infra note 183.

161. See infra note 183.
The 1975 Amendments

As indicated above,\(^{162}\) the court attempted to justify its dictum by saying that the 1975 Amendments to the Exchange Act\(^{163}\) recognized that consistency with that Act is required only of rules relating to members, and that listing standards do not relate to members.\(^{164}\) Neither part of this statement withstands further analysis.

First, the 1975 Amendments require all exchange and association rules to be consistent with the Exchange Act.\(^{165}\) The court's citation to legislative history misreads those statements\(^{166}\) and ignores the more numerous clear statements granting the Commission plenary authority over all exchange and association rules.\(^{167}\)

In the 1973 Securities Industry Study,\(^{168}\) recognized by Congress as the "genesis" of the 1975 Amendments,\(^{169}\) the Senate Securities Subcommittee noted the perceived regulatory "gap" between stock exchange rules and the Commission's supervisory authority.\(^{170}\) The Subcommittee recommended that the Commission be given "clear and effective jurisdiction over all self-regulatory rules,"\(^{171}\) adding its belief that "[t]he self-regulatory organizations exercise authority subject to SEC oversight. They have no authority to regulate independently of the SEC's control."\(^{172}\) This clear legislative history escaped the Business Roundtable court.\(^{173}\)

The court also attempted to retain some ability for the exchanges and the NASD to regulate issuers independent of Commission control by suggesting that there was a substantive difference among the three statutory provisions

\(^{162}\) See supra text accompanying notes 153, 160.


\(^{164}\) Business Roundtable, 905 F.2d at 414-15 (citing S. Rep. No. 75, 94th Cong., 1st Sess. 28 (1975)).

\(^{165}\) Business Roundtable, 905 F.2d at 414-15. Both passages suggest that Congress was intent upon limiting the exchanges' authority over their members. Neither suggests that Congress intended to limit the Commission's authority over stock exchanges themselves.

\(^{166}\) See supra note 165.

\(^{167}\) See supra note 1.

\(^{168}\) See supra note 1.


\(^{170}\) See supra note 1.


\(^{172}\) Business Roundtable Brief, supra note 139, at 23 (emphasis added).

\(^{173}\) The court does not mention this passage, nor do any of the briefs. Both the Commission and the Business Roundtable acknowledge that most of the legislative history of the 1975 Amendments is centered upon regulation of the brokerage industry. See, e.g., Petitioner's Reply Brief at 14 & n.22, Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) [hereinafter Business Roundtable Reply Brief]. However, statements by Congress similar to that quoted supra text accompanying note 172 and the even clearer language of § 19(b) admit no such limitation. Whatever was "on Congress' mind in 1975," see Bainbridge, infra note 181, at 600, Congress knew how to broaden its discussion beyond the securities industry when it so desired. The Business Roundtable court simply failed to recognize Congress' ability to speak generally in the midst of a report and legislation otherwise focused on more technical aspects of the industry.
governing: (1) Commission approval of original rules [section 6(b)(5)];\(^\text{174}\) (2) Commission approval of voluntary rule amendments [section 19(b)];\(^\text{175}\) and (3) Commission-imposed rule amendments [section 19(c)].\(^\text{176}\) Each of these statutes uses somewhat different language in stating the applicable standard of review. Section 6(b)(5) prohibits, upon initial registration of a national securities exchange, rules which "regulate . . . matters not related to the purposes of [the Exchange Act]."\(^\text{177}\) Section 19(b)(2) requires, in order for a proposed rule to be approved, that the Commission find the proposed rule "consistent with the requirements of [the Exchange Act]."\(^\text{178}\) Finally, section 19(c) requires that the Commission, when amending the rules of a stock exchange, do so in a manner "in furtherance of the purposes of [the Exchange Act]."\(^\text{179}\)

Although these sections use different language, each is restating the same standard for exchange or association rules. The Business Roundtable court recognized that the section 6(b)(5) "related to the purposes" standard and the section 19(c) "in furtherance of the purposes" standard essentially are identical.\(^\text{180}\) The section 19(b) "consistent with" requirement clearly is no different. Although it may appear on first examination that a "consistent with" standard permits listing standards which are irrelevant to but not inconsistent with the Exchange Act, section 19(b) requires an affirmative finding of consistency. Congress made clear that approval of a rule amendment under section 19(b) would be appropriate only if "the rule was within the permitted purposes and in conformity with the specified standards of the Exchange Act."\(^\text{181}\)

\(^{174}\) Exchange Act § 6(b)(5), 15 U.S.C. § 78f(b)(5) (1988). For purposes of this discussion, only § 6(b)(5) will be examined. Section 15A(b)(6) contains identical language applicable to national securities associations.


\(^{180}\) Business Roundtable, 905 F.2d at 414. The court saves the ability of exchanges to adopt standards under § 6(b)(5) by stating that they are not enforceable by members and thus not within the scope of review of that section. The court thus necessarily determines that the § 6(b)(5) "related to the purposes of" standard and the § 19(c) "in furtherance of the purposes of" standard are substantially identical standards.

\(^{181}\) S. Rep. No. 75, 94th Cong., 1st Sess. 28 (1975). This also is apparent when § 19(b) is contrasted with the old language of the Exchange Act. See supra note 114. This reasoning, however, is not uncontroverted. Equating "consistent" with "not inconsistent" is appealing, and many have suggested it, including the petitioner in this litigation. See Business Roundtable Reply Brief, supra note 173, at 16 (describing § 19(b) as "a standard under which a rule change must be approved if it is not inconsistent with" the Exchange Act); Stephen M. Bainbridge, The Short Life and Resurrection of Rule 19c-4, 69 Wash. U. L.Q. 565, 597 (1991) (arguing that "regulating internal corporate affairs . . . through . . . listing standards" is "not inconsistent with the [Exchange] Act," and therefore these standards would be approved by the Commission under § 19(b), "but that is true of all [rule] proposals that are consistent with the [Exchange] Act").

These clearly are defensible lexical or logical arguments. As the legislative history shows in this instance, however, Congress chose to use different language in three different instances to describe essentially the same standard. Were the legislative history not so clear, the use of different words otherwise might be significant, as the above writers suggest.
also stressed this requirement when it explained that the operation of section 19(c) "would give the SEC clear authority to amend any self-regulatory organization's rules in any respect consistent with the objectives of the Exchange Act."\(^\text{182}\)

Thus, there is substantial if not complete overlap among the standards: "related to the purposes," "consistent with" and "in furtherance of the purposes". The result is that a listing standard, whether initially in place upon registration of a securities market, later proposed by that market, or imposed by the Commission, must meet the same statutory standard. The Business Roundtable court was incorrect in suggesting that the Commission could not write a one-share, one-vote rule for the exchanges and the NASD, but that those organizations could impose such a rule themselves. In each case the statutory standard is the same, and the result should be also.\(^\text{183}\)

Moreover, the court's dictum returns the securities markets to a state Congress clearly intended to avoid. Before the 1975 Amendments, the exact scope of the Commission's authority over the exchanges and the NASD was unclear. Congress repealed section 6(c)\(^\text{184}\) and adopted sections 19(b) and (c) to remedy this problem and to clarify the Commission's plenary authority over the exchanges and the NASD.\(^\text{185}\) The Business Roundtable dictum, however, leaves the exchanges and the NASD free to adopt rules which the Commission is powerless to affect, as long as the rules are not enforced against members. The court thus resurrects a problem Congress laid to rest in 1975.\(^\text{186}\)

182. S. Rep. No. 75, 94th Cong., 1st Sess. 31 (1975) (emphasis added). See also Lyman Johnson, Sovereignty Over Corporate Stock, 16 Del. J. Corp. L. 485, 545 (1991) ("[I]t seems likely" that § 19(b) and (c) have identical coverage); George W. Dent, Dual Class Capitalization: A Reply to Professor Seligman, 54 Geo. Wash. L. Rev. 725, 736 (1986) (language of § 19(b) and (c) is "comparable").

183. Although the court suggested that "the Commission's § 19 powers will be quite limited," Business Roundtable, 905 F.2d at 414, this does not mean that the court believes the standards are the same under § 19(b) and § 19(c). If the Commission's § 19(c) power is limited—that is, it cannot impose its own rules—then its power under § 19(b) to approve those same kinds of rules similarly is limited. The court's holding and its dictum indicate that it intended different standards of "relatedness" under these subsections, contrary to the intent of Congress as detailed supra notes 180-82 and accompanying text.

184. Section 6(c) permitted exchange rulemaking outside the scope of the Exchange Act. See supra note 111 and accompanying text.

185. See supra notes 110-15 and accompanying text.

186. See also Johnson, supra note 182, at 546 (if § 19(b) is limited as in Business Roundtable dictum, "it is not clear what SEC approval is supposed to add"). Others have suggested that the exchanges and the NASD retain authority outside of the Commission's oversight. See Bainbridge, supra note 181, at 596 n.143 (1991) (citing Business Roundtable Brief, supra note 139, at 24 (citing H.R. Rep. No. 123, supra note 114, at 62-63)). The House Report cited, however, was referring to the case of Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 17 (1973), which concluded only that the Exchange Act permits state regulation that is not inconsistent with federal regulation. Id. at 137; H.R. Rep. No. 123, supra note 114, at 62. This clearly is different from the conclusion that there is room for exchange regulation that is not inconsistent with federal regulation. In addition, Ware relied upon the pre-1975 version of the Exchange Act, see Ware, 414 U.S. at 129, and that language was changed significantly by the 1975 Amendments, see supra notes 110-15 and accompanying text.
Independent of the legislative history and policy of the 1975 Amendments, the court simply is incorrect in its assumption that listing standards are not enforced by an exchange or the NASD against its members. The ability of these markets to force listing standards upon issuers lies in their ability to prevent their members from trading securities not on their list.\footnote{187}

The markets are required by the Exchange Act to prevent unlisted trading.\footnote{188} If a security is delisted, Exchange Act Section 12(a) prohibits transactions in that security on the exchange.\footnote{189} If a security is removed from NASDAQ, it may not be included in NASDAQ's quotation or transaction reporting system.\footnote{190} These rules clearly are binding on exchange and association members. The exchange or NASDAQ is required under section 19(g)(1) of the Exchange Act "to comply with the provisions of this title [and] the rules and regulations thereunder, and . . . absent reasonable justification or excuse [to] enforce compliance" by its members and associated persons.\footnote{191} Listing standards, therefore, clearly are rules ultimately enforced by the exchange or NASD against its members, and under the \textit{Business Roundtable} court's own analysis, those listing standards must be subject to full review by the Commission.\footnote{192}

Finally, other provisions of the Exchange Act suggest that the Commission retains significant authority to review corporate governance listing standards upon enforcement. A delisting by an exchange must be approved by the Commission under section 12(d), which permits the Commission to consider investor protection\footnote{193} in its approval. Removal from the NASDAQ National

\footnote{187. The Senate Report on the 1975 Amendments recognized this power.}{\textit{The self-regulatory organizations exercise government power, and they do so in basically three ways which may adversely affect the interests of particular persons: (1) by imposing a disciplinary sanction, broadly defined, on a member or person affiliated with a member, (2) by denying membership to an applicant, and (3) by requiring members to cease doing business entirely or in specified ways with a particular non-member or with respect to a particular security.}}

\footnote{S. Rep. No. 75, 94th Cong., 1st Sess. 24 (1975) (emphasis added).}{Unlisted trading was permitted by the NYSE until 1910 and by the Amex until 1934. See \textit{supra} notes 24, 71 and accompanying text.}

\footnote{188. Unlisted trading was permitted by the NYSE until 1910 and by the Amex until 1934. See \textit{supra} notes 24, 71 and accompanying text.}{Section 12(a), 15 U.S.C. § 78l(a) (1988), provides in pertinent part that "[i]t shall be unlawful for any member, broker, or dealer to effect any transaction in any security . . . on a national securities exchange unless a registration is effective as to such security for such exchange." Section 12(d) makes clear that a security stricken from listing is also stricken from registration within the meaning of § 12(a). See \textit{infra} note 193.}

\footnote{189. Section 12(a), 15 U.S.C. § 78l(a) (1988), provides in pertinent part that "[i]t shall be unlawful for any member, broker, or dealer to effect any transaction in any security . . . on a national securities exchange unless a registration is effective as to such security for such exchange."}{Section 12(d) makes clear that a security stricken from listing is also stricken from registration within the meaning of § 12(a). See \textit{infra} note 193.}


\footnote{191. 15 U.S.C. § 78s(g)(1) (1988).}{It is only those rules which are not enforced against members as to which the court hypothesized that "the Commission's § 19 powers will be quite limited." \textit{Business Roundtable v. SEC}, 905 F.2d 406, 414 (D.C. Cir. 1990).}

\footnote{192. It is only those rules which are not enforced against members as to which the court hypothesized that "the Commission's § 19 powers will be quite limited." \textit{Business Roundtable v. SEC}, 905 F.2d 406, 414 (D.C. Cir. 1990).}{\textit{Exchange Act} § 12(d), 15 U.S.C. § 78l(d) (1988), provides in pertinent part:}

\footnote{193. \textit{Exchange Act} § 12(d), 15 U.S.C. § 78l(d) (1988), provides in pertinent part:}{[a] security registered with a national securities exchange may be withdrawn or stricken from listing and registration in accordance with the rules of the exchange and, upon such terms as the Commission may deem necessary to impose for the protection of investors, upon application by the issuer or the exchange to the Commission.}
Market System by the NASD may be subject to Commission review, which requires the Commission to pass on the subject rule's consistency with the Exchange Act.\textsuperscript{194} The ability to make "investor protection" findings in a delisting proceeding and the potential requirement of consistency with the Exchange Act in a NASDAQ denial contradict the Business Roundtable court's suggestion that the Commission has "limited" powers in this area.\textsuperscript{195}

\textit{Practical Problems with the Court's Dictum}

Not only is the "limited power" solution proposed by the court at odds with Congress' intent, it is unworkable in at least two respects. First, it provides no guidance to the Commission concerning its review of corporate governance listing standards. Second, it removes a safe harbor from antitrust liability previously enjoyed by the marketplaces but now unavailable in their unregulated activities.

\textit{Id.}

Under Rule 12d2-2(c), however, the Commission purports to avoid the necessity of any findings by providing for automatic effectiveness of an exchange delisting unless the Commission elects otherwise. See 17 C.F.R. § 240.12d2-2(c) (1991). If the review of a listing standard adopted under § 6(b) or § 19(b) is limited in the manner suggested by the Business Roundtable court, then presumably the Commission's ability to review the delisting under § 12(d) similarly must be limited. This consequently would leave the above-quoted portion of § 12(d) without force and Rule 12d2-2 entirely superfluous.

194. The remainder of § 19 of the Exchange Act (not before the Business Roundtable court) contains elaborate procedures for Commission review of self-regulatory organization actions. It is possible that an issuer removed from the NMS against its will could, upon final action by the NASD, petition for Commission review under § 19(f), claiming that this action constitutes "denial of access" by the NASD within the meaning of that section. Section 19(f) requires, upon such review, that the Commission find that the rules violated "...consistent with the purposes of this title." 15 U.S.C. § 78s(f) (1988).

Of similar import and history is Rule 11Aa3-2(e), which provides for appeals to the Commission of "[a]ny action taken or failure to act by any person in connection with an effective national market system." Issuers specifically are included in the examples of "aggrieved persons" entitled to appeal under this rule. See Rule 11Aa3-2(e)(1), 17 C.F.R. § 240.11Aa3-2(e)(1) (1991). Subsection (e)(3) of the Rule requires that, upon appeal, the Commission find that the rules violated "are...consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system." Id. § 240.11Aa3-2(e)(3). Clearly, the review required under these provisions would be even more challenging than that required under Exchange Act § 12(d). \textit{See supra} note 193.

As with the rest of the 1975 Act amendments, these provisions—§§ 19(f) and 11A—were directed primarily at self-regulatory organizations' dealings with their members. As a result, neither the statutes nor their legislative history describes regulation of issuers. To date, these sections have been applied only to market participants, that is, traders and exchanges. The legislative history of the latter parts of § 19 contains no references to regulation of issuers. Although Rule 11Aa3-2 does mention issuers, the sole example provided by the Commission of the application of the rule's appeals process is a dispute among marketplaces, not issuers. \textit{See Exchange Act Release No.} 16,410, 44 Fed. Reg. 72,606, 72,610 n.47 (1979).

195. Although the court did once refer broadly to "the Commission's § 19 powers," \textit{see} Business Roundtable, 905 F.2d at 414, the court never discussed any subsection other than (b) or (c). The court never considered subsections (d)-(f) or § 12(d) in its analysis.
It is unclear how the Commission should implement the Business Roundtable dictum if it so chooses. What “limited” standard ought it use in reviewing a proposed rule if the standard of consistency with the Exchange Act is no longer the norm? Should the Commission approve all such rules which are “not inconsistent” with the Act? Such an approach is an appealing way to state the Commission’s “limited power” as found by the court. It is, however, an interpretation squarely rejected by Congress in the 1975 amendments. In post-Roundtable decisions under section 19(b), the Commission has not addressed this issue.

Furthermore, the markets face an increased probability of antitrust liability in any concerted action they may take. The lack of direct regulation by the Commission under the Business Roundtable’s new “limited review” standard may preclude claims of antitrust immunity. Under settled judicial doctrines, an “implied repeal” of the antitrust laws may exist if a court finds pervasive and active review of otherwise illegal activity by a government agency which has considered the anticompetitive effect of that conduct.

196. The Commission, to date, consistently has ducked this question. After the Business Roundtable decision, the NASD adopted Rule 19c-4 verbatim as a rule of the NASD, and submitted that rule to the Commission for review under § 19(b). The Commission earlier had approved an identical rule of the NYSE, but that action was taken before the Business Roundtable decision. See supra note 70 and accompanying text.

In approving the NASD’s rule, the Commission noted that while the Business Roundtable decision had invalidated Rule 19c-4, it then apparently ignored most, if not all, of the Business Roundtable court’s dictum simply by stating that the Business Roundtable court did not focus on the scope of the Commission’s § 19(b) authority, and that “[t]he Commission believes the analysis contained in the release adopting Rule 19c-4 . . . demonstrates clearly that the NASD’s proposal is consistent with the [Exchange] Act.” Exchange Act Release No. 28,517, supra note 95, at 41,626, 41,626-27 & n.18. There were only three comments filed in response to this proposed rule, and none questioned the Commission’s authority to approve the NASD proposal. Id. at 41,627. The Commission thus had no need to discuss in detail the scope of the “limited” review posited by the Business Roundtable court.

197. This was precisely the interpretation suggested to the court in the brief of the Business Roundtable and clearly rejected by that court. See Petitioner’s Reply Brief, supra note 117, at 16. It also was the language of old § 6(c) as amended by the 1975 Act. See supra text accompanying note 111.

198. The House bill would have allowed amendments to rules to become effective unless the Commission found them to be inconsistent with the purposes of the Exchange Act; that version was rejected in conference in favor of the present language of § 19(b). See supra note 114 (discussing resolution in conference committee) and supra note 181 (discussing difference between “consistent” and “not inconsistent” tests).

199. See supra note 196 (discussing NASD voting rights rule proposal). The Commission shortly may have another opportunity to delineate the scope of its § 19(b) review, when the Amex’s new voting rights rule is submitted for approval. See supra note 87 and accompanying text. Of course, the Commission was rarely very probing with its § 19(b) review even before the Business Roundtable decision. See supra text accompanying note 117. A similar opportunity may arise if the Commission is called upon to review the removal of a security from listing or from NASDAQ for failure to comply with qualitative listing standards. See supra notes 194-95 and accompanying text.

200. In Gordon v. NYSE, 422 U.S. 659 (1975), the U.S. Supreme Court found such an implied repeal and held that the NYSE’s fixed-commission rules did not give rise to antitrust liability. The
may have made it impossible for a court to make such a finding. This does not mean that antitrust liability automatically will attach, of course, but that

Court stated the issue as “whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress.” Id. at 688. This statement clarified the oft-quoted language from an earlier case, Silver v. NYSE, 373 U.S. 341, 357 (1963) that immunity will be found only if “necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary,” making it a legal inquiry and not a factual one. See Gordon, 422 U.S. at 687; Thomas Linden, A Reconciliation of Antitrust Law With Securities Regulation: The Judicial Approach, 45 Geo. Wash. L. Rev. 179, 195-96 (1977).

201. See Johnson, supra note 182, at 546. In order for an “implied repeal” to be found, it is important that the agency’s review be meaningful, and that it include an analysis of competitive effects. Marianne K. Smythe, Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation, 62 N.C. L. Rev. 475, 511-12 (1984); Linden, supra note 200, at 214. See Gordon, 422 U.S. at 691-92 (Douglas, J., concurring), 692-93 (Stewart & Brennan, JJ., concurring) (each stressing the necessity of active review by the agency).

It may be possible for the Commission to steer this hazardous course successfully. It may be able to limit its review of a rule for consistency with the Exchange Act, as required by the Business Roundtable dictum, and at the same time justify any burden on competition, as required in any event by Exchange Act § 23(a)(2), 15 U.S.C. § 78w(a)(2) (1988). Alternatively, it may give the proposed rule a full review, ignoring the Business Roundtable dictum. No one would complain if the rule eventually were approved.

202. If no immunity is found, a myriad of antitrust law questions appear. Questions previously finessed about the specific nature of the defendants’ illegal conduct and the plaintiffs’ right to recover would become relevant.

A hypothetical plaintiff may be a company or shareholder whose security cannot be listed on the NYSE or Amex or traded on NASDAQ for failure to meet those market’s qualitative listing standards. The actionable conduct might be alleged to be a “group boycott” or “joint refusal to deal” by the member brokers of the marketplace in question, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1988). Alternatively, the activity of the exchange might be viewed unilaterally as the anticompetitive activity of a monopolist actionable under § 2 of that Act. Id. § 2 (1988); see Gordon, 422 U.S. at 661; Silver, 373 U.S. at 345 (alleging violations of both §§ 1 and 2 of the Sherman Act).

An alleged violation of § 1 of the Sherman Act likely would be subject to the courts’ “rule of reason” analysis, which would permit otherwise actionable conduct if “the beneficial effects of the conduct to the statutory scheme [the Exchange Act] outweighed the negative effects of the conduct on free competition.” Smythe, supra note 201, at 514. An alleged violation of § 2 of the Sherman Act would require proof of monopoly (shared or individual) or attempted monopoly with some conduct by the marketplaces in furtherance of that monopoly. See 3 Phillip Areeda & Donald F. Turner, Antitrust Law 371-72 (1978).

Further, this plaintiff would need to prove some “conspiracy” among the markets in an action under either §§ 1 or 2 of the Sherman Act. See id. This plaintiff also would need to prove some antitrust injury, either to the corporation or its security holders, which may be difficult. See, e.g., Harding v. American Stock Exch., 527 F.2d 1366, 1366-68 (2d Cir. 1976) (individual and derivative suit by holder of delisted securities alleging injury based on decline in market value of shares); see Comment, supra note 12, at 1455-56 (while denial of membership to a broker-dealer clearly injures that broker-dealer, “[l]isting agreement restrictions do not effect similar restraints”).

None of these antitrust issues have been addressed to date. The only case finding liability, Silver, was concerned primarily with the lack of due process afforded the plaintiff, and the Court found “no occasion . . . to pass upon the sufficiency of the reasons which the Exchange later assigned for its action.” Silver, 373 U.S. at 365. The other cases all have found an implied repeal of the antitrust laws, and thus have not faced these questions. See, e.g., Gordon, 422 U.S. at 662-63; Harding, 527 F.2d at 1370.
possibility may preclude the marketplaces from even considering rules which might be upheld if challenged. 203

THE DILEMMA REVISITED

The Business Roundtable court clearly recognized a dilemma, but failed to resolve it in a manner either practical to apply or consistent with the intent of Congress. The dilemma exists in the following three statements, which all cannot be true: (1) the Commission may not promulgate Rule 19c-4 (the court's holding); (2) the Commission, the exchanges and the NASD are subject to the same standards in their rulemaking; and (3) the exchanges and the NASD may nonetheless themselves promulgate rules such as Rule 19c-4. To resolve this dilemma, the court chose in its dictum to relax statement (2) above. 204 As discussed in the preceding section, this is contrary to the 1975 Amendments. The court never considered relaxing statement (3) in order to resolve the dilemma. If statements (1) and (2) are correct, then the logical conclusion is that the voting rights standards themselves may not properly exist under the Exchange Act's regulatory scheme. In short, the court's dictum should have read as follows: if a rule does not relate to the purposes of the Exchange Act, then no self-regulatory organization may promulgate it under sections 6, 15A or 19(b), nor may the Commission do so for them under section 19(c).

Such a result, however novel, is consistent with the scheme of supervised self-regulation, which is the heart of the Exchange Act. 205 The exchanges and the NASD should be permitted to regulate issuers only in furtherance of their ability to operate fair and efficient markets. Competition based on standards not related to the trading of securities should not be part of that regulation because it is unnecessary, confusing, 206 and distracts these institutions from their proper roles of developing an efficient marketplace and regulating of their members. 207 As the history of these listing standards indicates, they have no necessary

203 A 1971 study requested for the NYSE by William McChesney Martin, Jr., known as the "Martin Report," recommended that the NYSE's immunity from antitrust liability be made explicit. Without such immunity, he argued, "exchanges face the choice of either regulating at their peril, or not regulating at all. . . . This dilemma is an obvious deterrent to effective self-regulation which must be remedied." Report submitted to the Board of Governors of the New York Stock Exchange, reprinted in [1970-71 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,184, at 80,563 (Aug. 5, 1971). The Report's proposal for immunity was considered but rejected by Congress. See Smythe, supra note 201, at 500-02.

204 See Business Roundtable, supra note 119, at 414.

205 See supra note 1.

206 In operating their marketplaces, the "SROs are competing against each other in seeking to attract participants to their respective markets. Reconciling the role of competing promoter with disinterested regulator is not easy. This incongruous pairing of roles can only lead to confusion on the part of the regulated, not to mention the SROs themselves." Miller, supra note 2, at 868.

207 Miller would limit the exchanges' and the NASD's jurisdiction even further in respect of much of their oversight over members. He does not discuss listing standards directly, but concludes that "[o]ne solution might be to redesign the regulatory structure to limit the SROs' purview to market facilities. SROs would seem to be best able to deal with the problems of their marketplaces. . . ." Id. at 885. At least with respect to SROs' listing standards, there is no need to "redesign
relation to the protection of investors, having been adopted primarily to attract new customers.\textsuperscript{208}

The Commission itself has recognized that corporate governance listing standards are not closely related to its fundamental mission of investor protection. When the NASD’s standards first were approved in 1987, the Commission also approved a proposal by the NYSE and the Amex to waive most of their corporate governance listing standards for foreign issuers.\textsuperscript{209} Both the commenters supporting these modifications and the Commission noted that, because periodic financial disclosures are still required, waiver of the corporate governance standards “do[es] not threaten the fundamentals of investor protection.”\textsuperscript{210}

The harm caused by retaining invalid corporate governance listing standards is self-evident. Issuers wishing to be free of these rules must face the prospect of a delisting proceeding, with a clear challenge to the validity of the rules unlikely.\textsuperscript{211} The marketplaces may continue to trumpet their standards as proxies for stability and soundness of their issuers,\textsuperscript{212} and the states may continue to rely upon such listing or trading for exemption from regulation of the regulatory structure” as Miller suggests; that structure already exists in Exchange Act § 19, if properly interpreted.

\textsuperscript{208} See supra text accompanying notes 103-105.

\textsuperscript{209} See Exchange Act Release No. 24,634, supra note 85, at 24,230. The standards waived include “composition and election of the Board of Directors,” “shareholder approval requirements and voting rights” and “quorum requirements for shareholder meetings.” Id. at 24,231.

\textsuperscript{210} Id. at 24,231 (remarks of supporting commenters). The Commission’s own conclusion was that “the Amex and NYSE Listed Company Manual listing standards which most directly relate to investor protection are unaffected by the rule changes.” Id. at 24,232. The NYSE has recently been pressing for relaxation of some of the disclosure and accounting standards for foreign issuers. See William Power, Big Board’s-Donaldson Says SEC Rules Could Cost Exchange Its Global Standing, Wall St. J., Dec. 12, 1991, at CI, col. 2.

\textsuperscript{211} See infra note 227. Although many of these rules likely are considered inoffensive by most issuers, that opinion could change over time. The voting rights standard, for example, was not seriously challenged from its “adoption” in the 1920s until the mid-1980s, when it became controversial. See supra notes 120-25 and accompanying text. In the future, the rise of active institutional shareholders may make the annual meeting and proxy solicitation listing standards as contentious as voting rights listing standards became in the 1980s. See generally Edward B. Rock, The Logic and (Uncertain) Significance of Institutional Shareholder Activism, 79 Geo. L.J. 445 (1991).

\textsuperscript{212} See supra notes 38-41 and accompanying text. Consider, for example, the following recent statement by the past President of the NYSE:

Someone asked me just the other day to explain the value of an NYSE listing. I answered him with another question: “What is the value of that little star that juts up from the hood of a Mercedes?” I was not being facetious. A listing on the NYSE is really a recognizable and internationally accepted sign of quality, dependability, and reliability—both for the listed company and for the investors who want to buy and sell its stocks in what most people regard as the world’s premier securities marketplace.

the merits of or the disclosures given in an offering of those securities. A large infrastructure would remain, based on rules which have no place in the current system of supervised self-regulation and limited federal intrusion into corporate governance.

To the extent these standards are necessary to protect shareholders, other more proper regulators will supply them. These standards will thus be developed not by marketplaces through listing standards subject to uncertain and limited review, but by state or federal lawmakers and regulators, subject to the traditional administrative and political processes. This is the proper place to decide the extent of shareholders' rights.

The correct answer to the Business Roundtable court's dilemma is that corporate governance listing standards should not be permitted under the Exchange Act. The next section examines the future of a marketplace without such standards, and whether such a result is possible.

THE FUTURE OF CORPORATE GOVERNANCE LISTING STANDARDS

A world without corporate governance listing standards would be quite habitable. If the exchanges and the NASD abandon this area, others will step in. The removal of such standards, however, may prove difficult; this responsibility lies primarily with the Commission.

213. Most states currently permit securities listed or approved for listing on the NYSE or the Amex an exemption from registration under state securities (Blue Sky) laws, and many extend this privilege to NASDAQ National Market System securities as well. See supra notes 97-98.

Some of these exemptions may be in jeopardy with the demise of Rule 19c-4. In California, for example, the legislature required that the NASD adopt voting rights rules "substantially similar" to those of the NYSE and Amex and Rule 19c-4 before its National Market System securities could be exempted from qualification (registration) in that state. See Cal. Corp. Code § 25100.1 (West Supp. 1991). Subsequently, after the Business Roundtable decision, the legislature directed each exchange (and the NASD) whose securities are exempt from qualification under California law to file annual reports with the Corporations Commissioner. The reports specifically are directed to discuss "variances from corporate governance and voting rights' standards." Id. § 25100(o). The Corporations Commissioner is in turn to report to the legislature regarding the propriety of continuing any of these exemptions. 1990 Cal. Legis. Serv. 86, § 2 (West).

214. See infra notes 220-25 and accompanying text.

215. Johnson, supra note 182, at 547.

At bottom, corporate suffrage in the 1990s is not a dull, obscure subject to be gratefully consigned to those stock exchange officials who can stomach it. . . . [D]ecisions about voting rights should not be in the hands of those whose livelihood depends on high levels of trading activity in corporate stock. The issue should be in the spotlight. It belongs in a legislative forum.

Id.
MARKETS WITHOUT CORPORATE GOVERNANCE LISTING STANDARDS

Suppose a court held or the Commission stated that existing corporate governance listing standards not consistent with the Exchange Act must be abolished. No marketplace would be permitted to have or amend them, nor could the Commission require them.

Such a rule effectively would abolish most of the corporate governance standards listed in Table 1. It is possible that the rule requiring audit committees and independent directors\(^{216}\) could meet such a requirement; at least as focused on the audit committee, such a rule most likely is consistent with section 13(b)(2)(B) of the Exchange Act.\(^ {217}\) The other standards, however, likely would fail such a consistency test. The Business Roundtable court considered and rejected arguments that these standards are consistent with sections 14(a) or 11A of the Exchange Act.\(^ {218}\) Although the court did not foreclose the possibility that other sections might meet the consistency test, better candidates did not present themselves then nor have they since.\(^ {219}\)

216. This requirement is set forth as two rules, but there really is only one, because the required audit committees must consist solely of independent directors. See NYSE Listed Company Manual, 3-1 (1990); Amex Company Guide, 1-12 (1992); NASD Manual (CCH) ¶ 1812, at 1573-3 (1991).

217. Section 13(b)(2)(B), 15 U.S.C. § 78m(b)(2)(B) (1988), requires certain issuers, including those listed on securities exchanges and traded on NASDAQ, to "devise and maintain a system of internal accounting controls" subject to specified standards. A rule requiring an audit committee likely would be consistent with those requirements. The Commission's push for the audit committee listing standard in 1977 coincided with the enactment of this statute. See supra note 56. Professor Coffee characterized the NYSE's audit committee rule as "a 'substitute' for direct federal regulation." Coffee, supra note 61, at 1274.

The Commission's General Counsel opined in 1978 that § 13(b)(2)(B) or the Commission's preexisting authority to regulate the independence of accountants and the preparation of reports filed with the Commission would provide the legal authority for a rule requiring audit committees. See Opinion of SEC General Counsel, supra note 58.

218. See supra notes 143-46 and accompanying text.

219. See Business Roundtable v. SEC, 905 F.2d 406, 417 n.10 (D.C. Cir. 1990) (specifically referring to Exchange Act § 14(d)-(f)). Though the Williams Act often is suggested as a likely candidate, it would at most support limited regulation of certain actions in the midst of a tender offer, see Dent, supra note 182, at 728-29, and even this support is not unwavering. See Bainbridge, supra note 181, at 595 ("[T]he SEC has no authority under the Williams Act to regulate substantively dual class transactions.").

Professor Karmel suggests that the Commission might also rely upon its authority in Exchange Act §§ 14(e) and 23(a) to promulgate rules "reasonably designed to prevent violations" or "reasonably related to the purposes of" the Exchange Act. Karmel, supra note 12, at 830. She notes, however, that "[t]he extent to which such rulemaking could impose substantive fairness requirements that go beyond disclosure and exceed the requirements of state law is, however, a perplexing question." Id.

Other historically broad bases of Commission authority, such as § 10(b) and Rule 10b-5, would be of little help in this area. The corporate governance standards in Table 1 are not clearly related to the purchase or sale of the underlying securities, and in any event, the connection between § 10(b) and corporate governance absent any connection to manipulation or deception was clearly severed by the Supreme Court in Santa Fe Indus. v. Green, 430 U.S. 462 (1977), and Schreiber v. Burlington Northern, Inc., 472 U.S. 1 (1985). See Thomas L. Hazen, The Law of Securities
The maintenance of these standards would then fall to the Commission or to the states.\textsuperscript{220} It is unlikely that the Commission could impose such standards directly, because its power over issuers is limited to requiring disclosure and suppressing fraud.\textsuperscript{221} The states currently mandate such standards, either indirectly through exemptions from state securities registration for listed securities,\textsuperscript{222} or directly through their corporation statutes. The scope and mandatory effect of such direct regulation, however, is limited.\textsuperscript{223} A combined federal-state

Regulation 762-63 (2d ed. 1990). Professors Loss and Seligman, however, are critical of this analysis, noting that "Business Roundtable does not clearly explain how it can appropriately export limitations in Rule 10b-5 jurisprudence to § 19." 6 Loss & Seligman, supra note 44, at 2722.

If there are better candidates within the Exchange Act to support corporate governance listing standards, they have escaped the scrutiny of many commenters upon the Commission's entire one share, one vote adventure. Furthermore, it is likely that the Commission, which presumably knows the Exchange Act well, put forth its best statutory candidates when called upon to do so in the Business Roundtable litigation.

220. Congressional interest in the specific question of voting rights may produce specific narrow federal rules in that area. Comprehensive federal legislation always is a remote possibility. A federal corporation code is a perennial topic among academicians, but rarely among legislators. See infra notes 235-36 and accompanying text.

221. The Commission's limited direct power over issuers is lodged primarily in §§ 10(b), 12(a), 12(g), 13(a)-(b), 14(a)-(c) and 15(d) of the Exchange Act. To the extent these sections support disclosure requirements, they offer little as a basis for imposing corporate governance standards, which clearly go beyond disclosure, though they may support limited measures such as an audit committee. See supra notes 206-17 and accompanying text. The "antifraud" sections provide no better basis, as "unfairness" or "coercion" simply does not fall within the proscription of an antifraud statute, though there is disagreement on this point. See supra note 219.

Exchange Act § 23(a)(1), 15 U.S.C. § 78w(a)(1) (1988), grants the Commission power "to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title." Thus, the Commission's own rules must relate to the Act, as must the rules of exchanges and the NASD. The scope of the Commission's direct rulemaking power under § 23(a) may be broader than that of the exchanges or the NASD under § 19(b). Alternatively, it is appealing symmetry to say that if the Commission could promulgate a direct rule which passes muster under § 23(a), then a similar exchange or NASD rule would by definition meet the "consistency" test of § 19(b). Neither interpretation is confirmed or refuted by the legislative history. The quoted language of § 23(a)(1) was in large part added by the 1975 Amendments; Congress did not indicate any intention to alter the scope of the Commission's rulemaking powers in this regard. See S. Rep. No. 75, 94th Cong., 1st Sess. 135-36 (1975).

222. See supra notes 97-98 and accompanying text; Seligman, supra note 14, at 714 (noting the "interdependence between the stock exchange and [state] blue sky rules").

223. Consider the Delaware law and the Revised Model Business Corporation Act as representative examples. See William L. Cary & Melvin A. Eisenberg, Cases and Materials on Corporations 102 (6th ed. 1988). Both require annual meetings. Del. Code Ann. tit. 8, § 211(b) (1983) [hereinafter Del.]; Revised Model Business Corp. Act § 7.01(a) (1984) [hereinafter RMBCA]. Both provide rules for quora at shareholder meetings. Del. § 216 (supp. 1990) (minimum quorum of one-third of shares eligible to vote); RMBCA § 7.25(a) (1984) (one-half of shares eligible to vote unless corporation's articles or RMBCA provide otherwise). Both require one vote per share unless the corporation's articles provide otherwise. Del. § 212(a) (1983); RMBCA § 7.21(a) (1984). Finally, both require shareholder approval for new issue of shares in the case of a corporation surviving a merger according to the same "20%" rule of the stock exchanges. See infra Table 2; Del. § 251(f) (Supp. 1990); RMBCA § 11.03(g) (1984).
effort, possibly including Congressional action on voting rights, would fill most, if not all, of the gaps previously filled by corporate governance listing standards.

**THE DIFFICULTY OF ELIMINATING CORPORATE GOVERNANCE LISTING STANDARDS**

Unfortunately, however sensible this arrangement, it will be difficult to obtain the judgment or rule hypothesized in the preceding section abolishing corporate governance listing standards. The peculiarities of this business and the law place this responsibility squarely in the hands of the Commission.

**Inadequacy of Private or Congressional Action**

Private litigants will be unable to mount an effective challenge to listing standards. Since the time for direct review of the Commission's action will have long since passed, a private challenger will be relegated to a collateral attack. For example, a private challenger might raise the listing standard's invalidity as a defense in a delisting proceeding. The marketplace's decision and the Commission's review of it, however, could be based on any one of many alternative grounds. The validity of the challenged rule likely would not be squarely presented to the marketplace, the Commission, or a reviewing court.

224. This probably is the broadest scope of Congressional action in this area. See infra notes 232-36 and accompanying text.

225. Notably lacking is any coverage of the exchanges' current requirement of proxy solicitation for each annual meeting. It is possible that states would not hesitate to add such a requirement to their corporation codes, as it has applied to NYSE-listed issuers for over 30 years. See supra note 46. The rule may have little practical impact in many cases; corporations whose shares are widely held may need to solicit proxies to assure that quorum requirements are met, and Exchange Act § 14(c), 15 U.S.C. § 78n(c) (1988), requires the same disclosure to all security holders as if proxies were solicited.


227. Enforcement would occur, if at all, in a proceeding to strike a security from listing on an exchange or to remove it from NASDAQ. Such a proceeding would have numerous alternative grounds, as exchange and NASD rules permit delisting upon broad "public policy" or "public interest" grounds. See NYSE Listed Company Manual, 8-3 (1985), Amex Company Guide, 10-3 (1988), NASD Bylaws, supra note 10, pt. II, § 3(a)(3), NASD Manual ¶ 1810 at 1567-73.

Although the availability and scope of review of removal from NASDAQ is unclear, see supra note 194, review by the Commission of an exchange's delisting is limited to an examination only of the exchange's compliance with its own procedures. See supra note 193 (delisting requirements under § 12(d) and rule 12d2-2(c); consideration of other issues permitted but not required); see also Intercontinental Indus., Inc. v. American Stock Exch., 452 F.2d 935, 939 (5th Cir. 1971) (affirming Commission's review of a delisting which found only "that the rules of the Exchange relating to delisting had been complied with"). If the Commission's order is in turn challenged in court under § 25(a), a further layer of deference would be added. See, e.g., Business Roundtable v. SEC, 905 F.2d 406, 408 (D.C. Cir. 1990) (court assumed without deciding that deference was due to Commission's interpretation under its own statute). Thus, it is unlikely that the specific application of a corporate governance listing standard to an issuer's conduct would ever require a court to
The markets themselves likely will not volunteer to change their rules. Given the perceived competition among marketplaces based on corporate governance listing standards, they have no interest in abrogating listing standards not in furtherance of the Exchange Act solely for that relatively altruistic reason. Many listing standards, if left alone, need not even comply with current law, because they predate the 1975 amendments and, therefore, were not subject to the "consistency" standard of section 19(b), which did not then exist. If such listing standards have not been amended since their pre-1975 adoption and are never so amended, then they never will be subjected to section 19(b) standards.

Nor is significant reform likely from Congress. Statements in the legislative history of the 1975 Amendments concerning the markets' powers over issuers are few and are overwhelmed by discussion of their powers over members. It is possible that Congress did not concern itself with issuer regulation at all in 1975. Suppose Congress now desires to permit corporate governance listing standards. It could permit the markets to promulgate whatever listing standards consider the substantive validity of the listing standard itself and the exchange's or association's authority to adopt the standard.

228. Such listing standards serve as a competitive basis for attracting issuer listings; this was the impetus for the original NYSE Listed Company Manual rule proposal. See Adopting Release, supra note 129, at 26,377; Seligman, supra note 14, at 701 & n.80. These standards also provide the basis for state law "blue sky" exemptions, which is one of the major motivations for the NASD to adopt its NMS corporate governance standards. See supra notes 97-98 and accompanying text.

In general, this theory of competition assumes that exchange listing standards which permit "exploitation" of investors would ultimately result in lost trading volume. See Fischel, supra note 106, at 124. This competitive theory has its critics and limitations. See, e.g., Gordon, supra note 9, at 69 (there are too few exchanges to permit any "effective competition"); Sobel, supra note 52, at 317 n.* (1972) ("investors and speculators [do not] care very much where the stocks they purchase are traded.").

229. See infra Table 1.

230. See supra note 114 and accompanying text.

231. Section 31(b) of the 1975 Amendments gave the Commission the authority to require securities exchanges and associations to comply with the new laws immediately. Securities Acts Amendments of 1975, Pub. L. No. 94-79, § 31(b), 89 Stat. 97, 170 (1975) authorized the Commission, upon finding after notice and opportunity for hearing that the rules of a national securities exchange or association do not comply with the Exchange Act, to suspend the registration or place limits on the operations of such exchange or association. This authority continued for only one year following the Act's effective date, and never was invoked by the Commission. The Commission, however, was not required to so proceed. The conference committee report further indicated the optional nature of such a proceeding.

[H.R. Rep. No. 229, 94th Cong., 1st Sess. 111 (1975). Thus, the fact that the old rules were not challenged by the Commission under § 31(b) of the 1975 Amendments is not equivalent to approval under § 19(b) of the Exchange Act.

232. "Corporate governance reform through SEC exercise of its 19(c) powers simply was not on Congress' mind in 1975. Congress was concerned with modernizing the securities industry ... by
they desire free from meaningful review by the Commission, in essence affirming the *Business Roundtable* dictum. Alternatively, Congress could make clear that such listing standards do relate to the Exchange Act and thus affirm the Commission's full oversight powers under section 19, in essence reversing the dictum.233 Given the congressional concern over the one share, one vote issue,234 the surrender of federal control inherent in the first alternative is unlikely. The second alternative is equally unlikely. Congress has indicated its willingness to act in the corporate governance area, if at all, only a case-by-case basis.235 Therefore, it is likely that any legislation resulting from the aftermath of the *Business Roundtable* decision will be confined to a one share, one vote rule, consistent with Congress' "surgical approach" to corporate governance issues.236

strengthening the SEC's regulatory powers with respect to the SROs and their member broker-dealers." Bainbridge, *supra* note 181, at 600.

233. Commission Chairman Richard C. Breeden called for such legislation in recent testimony, noting that the *Business Roundtable* decision "has created undue risks to a vital part of the checks and balances that protect investors in national markets." Testimony of Richard C. Breeden before the Subcomm. on Securities of the Senate Comm. on Banking, Housing & Urban Affairs 29 (Oct. 17, 1991).


I will be very candid. . . . It is no accident that I am introducing this legislation tomorrow [to require a one share, one vote rule]. I am very much aware of the meeting that the [NYSE Listed Company Manual, Amex and the NASD] will be having. Is it an inducement to let you know that we are serious about this, and that there was a growing feeling of concern within the Congress as a body, across political lines? Yes, absolutely.


Thus, the Supreme Court has read Congress' intent on at least two occasions to be careful limited action and not wholesale preemption of the states' role in corporate governance. See Dent, *supra* note 170, at 1057-58 (citing *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977) and *CTS*, 481 U.S. 69 (1987)).

The Need for Commission Action

The only remaining alternative is for the Commission to address the question on its own initiative. In its review of proposed amendments submitted under section 19(b), the Commission should begin immediately disapproving any such corporate governance listing standards. In adopting section 19(b), Congress envisioned that the Commission’s review should be substantial “[w]ith regard to rule changes which would have significant policy implications.”\(^2\) To date, however, the Commission rarely has engaged in any substantive review in a section 19(b) proceeding.\(^3\) Such review is long overdue.

Although most corporate governance listing standards have never been subject to section 19(b)’s requirements,\(^2\) these rules are not beyond the Commission’s jurisdiction. They could be removed in a section 19(c) proceeding. Congress made quite clear that any rule may properly be the subject of a section 19(c) proceeding.\(^2\) Such a proceeding may prove difficult, however. The Commission was instrumental through its “regulation by raised eyebrow” in creating some of these corporate governance listing standards in the first place.\(^2\) The Commission would be in the position of defending abolition of some commonly accepted and traditional rules (holding annual meetings, proxy solicitation, audit committees, and the like), not because they are unwise, but simply because they are not in furtherance of the purposes of the Exchange Act. The process of repeal, including public hearings required under section 19(c)(2) for any

It is . . . too sweeping to generalize that because Congress did not intend to enact a federal corporation law, Congress renounced all interest in the functioning of the board [of directors of a corporation] as it affected the substantive requirements of the securities laws. . . . Consequently, governance reform in those pathological situations in which a court has found a violation is not a subterfuge to enable the federal government to get a foot in the federal corporation law door but is a surgical approach to an identified problem.

Id. Others have expressed concern about the scope of legislation in this area.

I think the kind of legislation we might then expect would not just relate to one share one vote. It would relate to exactly what corporations must do, in terms of the Federal chartering of corporations—Who should be on the boards and which constituencies do they represent? And I think that’s a very dangerous path to begin on.

Corporate Takeover Hearings, supra note 234, at 1228 (remarks of Arthur Levitt, Jr., Chairman of the Amex).


238. See supra notes 117-19 and accompanying text. The Commission’s § 19(b) review of the NASD’s adoption of Rule 19c-4 as its own rule, see supra note 95 and accompanying text, was a perfect opportunity for the Commission to begin such substantive review, but the Commission declined to do so.

239. See supra notes 225-31 and accompanying text.


241. See Business Roundtable v. SEC, 905 F.2d 406, 410 n.5 (1990) (citing Schwartz, supra note 235, at 571, referring to pressure by the Commission on the NYSE that eventually resulted in the NYSE proposal of its audit committee rule). See generally Kripke, supra note 58, at 189-92 (discussing many stock exchange rules which were adopted at the urging of the Commission).
"interested persons," might be as highly-charged as the proceedings leading to the adoption of Rule 19c-4. Although the Commission may be reluctant to address these issues, such a proceeding is likely the only way to remove corporate governance listing standards, and remove responsibility for this important area of corporate law from the nation's securities markets, where it does not belong.

CONCLUSION

The development of so-called "corporate governance" listing standards over the last century indicates a genuine concern on the part of the stock exchanges, the NASD, and the Securities and Exchange Commission with the validation of certain rights for holders of securities traded in those markets. We learned for the first time in the Business Roundtable decision that those rules, however venerable, are not valid because they further no purpose of the Exchange Act. After so holding, the court rushed without principle or authority to save these corporate governance rules, arguing that they somehow are beyond the reach of the Commission's clear and unequivocal power to comprehensively regulate national securities exchanges and associations. The court simply was unable to reconcile the invalidity of such rules with their continued existence. The more logical answer is that such corporate governance listing standards are indeed invalid. All of these rules, however, may remain, binding virtually every large American corporation for lack of a sufficient incentive on anyone's part to remove them. Absent courageous action by the Commission, corporate governance listing standards will endure into the foreseeable future: a magnificent monument without foundation, neither supported nor dismantled, but simply suspended precariously in place.

242. The Commission has the power to proceed administratively against an exchange or the NASD, but such a proceeding likely would be improper in this instance. In order to commence such a proceeding, the Commission would have to identify some provision of the Exchange Act or regulations thereunder which the respondent is violating by having such inappropriate rules. See Exchange Act § 19(h), 15 U.S.C. § 78g(h) (1988). It is difficult to conceive of any of the Act's provisions or rules which are being violated. There is no violation of §§ 6(b)(5) or 15A(b)(6), because those provisions applied only at the time of initial registration. Even if such a proceeding were legally feasible, it still would be unlikely, for the Commission has used such authority only four times in its history. See In re Chicago Board Options Exchange, Exchange Act Release No. 26,809, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,413 (May 11, 1989); In re Boston Stock Exchange, Exchange Act Release No. 17,183, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,659 (Oct. 1, 1980); In re Philadelphia Stock Exchange, Exchange Act Release No. 16,648, [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,475 (Mar. 1980); In re San Francisco Mining Exchange, 42 S.E.C. 1004 (1966), aff'd, 378 F.2d 162 (9th Cir. 1967).

243. See Johnson, supra note 182, at 547.
### TABLE 1

**DEVELOPMENT OF QUALITATIVE LISTING STANDARDS ON THE NEW YORK AND AMERICAN STOCK EXCHANGES AND THE NASDAQ NATIONAL MARKET SYSTEM**

<table>
<thead>
<tr>
<th>Standard</th>
<th>Citation to Standards and Dates of Original Adoption</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>NYSE&lt;sup&gt;a&lt;/sup&gt;</td>
</tr>
<tr>
<td>1. Mandatory Annual Meeting</td>
<td>302.00 (1909)</td>
</tr>
<tr>
<td>Common Stock</td>
<td>308.00 (1940)</td>
</tr>
<tr>
<td>Preferred Stock</td>
<td>310.00 (1953)</td>
</tr>
<tr>
<td>3. Minimum Quorum</td>
<td>303.00 (1956)</td>
</tr>
<tr>
<td>6. Shareholder Approvals</td>
<td>303.00 (1977)</td>
</tr>
<tr>
<td>7. Audit Committee</td>
<td></td>
</tr>
</tbody>
</table>

<sup>a</sup> Citations are to sections of the New York Stock Exchange Listed Company Manual (1990).

<sup>b</sup> Citations are to sections of the American Stock Exchange Company Guide (1990).

<sup>c</sup> Citations are to sections of Part III of Schedule D to the NASD bylaws, *reprinted in NASD Manual* (CCH) ¶¶ 1808-1812 (1991).

<sup>d</sup> Currently these are "recommendations" and not requirements for listing on the Amex. *See supra* note 87 and accompanying text.
### TABLE 2

**CORPORATE GOVERNANCE LISTING STANDARDS OF THE NYSE, AMEX AND NASD APPROVED BY THE S.E.C. SINCE THE SECURITIES ACTS AMENDMENTS OF 1975**

<table>
<thead>
<tr>
<th>Market</th>
<th>Vol/Pg</th>
<th>Date</th>
<th>Listing Standards Approved</th>
</tr>
</thead>
<tbody>
<tr>
<td>NYSE</td>
<td>42/14793</td>
<td>3-9-77</td>
<td>Audit committee</td>
</tr>
<tr>
<td>Amex</td>
<td>45/24740</td>
<td>4-3-80</td>
<td>Independent directors recommended</td>
</tr>
<tr>
<td>Amex</td>
<td>47/53541</td>
<td>11-16-82</td>
<td>Shareholder approval requirements</td>
</tr>
<tr>
<td>NYSE</td>
<td>49/11275</td>
<td>3-20-84</td>
<td>Conflict of interest rules (rescinded)</td>
</tr>
<tr>
<td>Amex</td>
<td>50/11972</td>
<td>3-25-85</td>
<td>Voting and nonvoting trust interests</td>
</tr>
<tr>
<td>NYSE</td>
<td>52/24230</td>
<td>6-23-87</td>
<td>Waivers for foreign issuers</td>
</tr>
<tr>
<td>Amex</td>
<td>52/24233</td>
<td>6-23-87</td>
<td>General corporate governance standards</td>
</tr>
<tr>
<td>Amex</td>
<td>53/38131</td>
<td>9-23-88</td>
<td>Rescission of special REIT standards</td>
</tr>
<tr>
<td>NASD</td>
<td>54/1463</td>
<td>1-9-89</td>
<td>Shareholder approval requirements</td>
</tr>
<tr>
<td>NYSE</td>
<td>54/30490</td>
<td>7-14-89</td>
<td>Shareholder approval requirements</td>
</tr>
<tr>
<td>NYSE</td>
<td>54/53227</td>
<td>12-20-89</td>
<td>Voting rights (Rule 19c-4)</td>
</tr>
<tr>
<td>NASD</td>
<td>55/30346</td>
<td>7-19-90</td>
<td>Shareholder approval requirements</td>
</tr>
<tr>
<td>NASD</td>
<td>55/41626</td>
<td>10-5-90</td>
<td>Voting rights (Rule 19c-4)</td>
</tr>
<tr>
<td>Amex</td>
<td>56/51953</td>
<td>10-8-91</td>
<td>Indep. directors, audit comm. required</td>
</tr>
</tbody>
</table>