

# Directors & Boards

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## The case for the 'legal director'

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# Dual-class stock: Governance at the edge

*The edge of diminished board accountability? Or the edge of heightened management performance? Our panel debates the drawbacks and benefits.*

**W**HEN GOOGLE was going public in 2004 with a dual-class share structure, in which the Class A common stock being offered would have one vote per share while a Class B common stock held by management and existing shareholders had 10 votes per share, the company advised potential new investors thusly:

“Google has prospered as a private company. We believe a dual class voting structure will enable Google, as a public company, to retain many of the positive aspects of being private. We understand some investors do not favor dual class structures. Some may believe that our dual class structure will give us the ability to take actions that benefit us, but not Google’s shareholders as a whole. We have considered this point of view carefully, and we and the board have not made our decision lightly. We are convinced that everyone associated with Google — including new investors — will benefit from this structure. However, you should be aware that Google and its shareholders may not realize these intended benefits.”

This was a remarkably forthright ‘heads up’ to potential shareholders. Google has subsequently followed up its successful IPO appearance as a dual-class company with a proposal earlier in 2012 to issue a new class of non-voting stock that would further consolidate management’s control — or, “complete chokehold,” as critics like Reuters *Breakingviews* news service called it — of the company. And coming to market within the past year with a dual- or multiple-class structure have been such hotly anticipated (at the time of their IPO) tech companies as Facebook, Zynga, Groupon, and LinkedIn. The spotlight on dual-class stock is not reserved just for technology IPOs. The high-profile U.K. sports organization Manchester United went public on the New York Stock Exchange with dual-class shares

in July 2012 as this article was being prepared for publication, and a dual-class ownership structure has been a sore point for shareholders of the Rupert Murdoch-dominated News Corp., especially since the hacking scandal broke last year.

*Financial Times* columnist Andrew Hill perhaps best formulated the conundrum facing any analysis of dual-class stock: “The advantage of a dual-class share structure is that it protects entrepreneurial management from the demands of ordinary shareholders. The disadvantage of a dual-class share structure is that it protects entrepreneurial management from the demands of shareholders.”

Is there any reconciling the conflicting sentiments and analyses? In April 2012 Charles Elson convened a panel at the University of Delaware’s Weinberg Center for Corporate Governance to examine the tradeoffs of dual-class stock. The panel was a smartly composed mix from the corporate and legal sector, the media, academia, and the institutional investor community. (This is the fifth in a series of roundtable collaborations that DIRECTORS & BOARDS has done in conjunction with the Weinberg Center of Governance over the past dozen years.) Highlights of the panelists’ spirited debate follow.

— James Kristie

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## **Charles Elson: You’re exporting the monitoring function**

*Charles Elson is the Edgar S. Woolard Jr. Chair in Corporate Governance and director of the Weinberg Center for Corporate Governance at the University of Delaware. He has served on several corporate boards, including a present directorship on the HealthSouth Corp. board. He is a member of the DIRECTORS & BOARDS editorial advisory board.*

Our legal system of governance has traditionally been predicated around the notion of voting control based on one share, one vote — the idea being that if you didn't like what managers were doing you could vote them out. But a dual-class structure is an odd exception to this typical formula, and it raises all kinds of legal issues, particularly about the obligations of the controlling shareholder to the other shareholders.

One view of dual-class stock is that the only ones potentially being harmed are those that invest in a company with a dual-class structure. After all, they don't have to make that investment. If you read the Google IPO document it has a very explicit warning about its having a dual-class structure and that investors may not be happy with the ramifications of that.

But are the harms limited only to the shareholders? Are the harms actually much broader, much more societal-based? Where you have dual-class stock, the controlling shareholder controls the board. Though having legal responsibilities to oversee management and monitor effectively, the board, practically speaking, becomes much less of a monitor.

Instead, what you're doing is exporting the monitoring function to third parties — to the government, the courts, the regulators. That then creates a significant public cost. In the end, when there is a problem and someone has to clean up the mess that maybe a beholden board has not caught, the damage isn't just limited to the shareholders. The damage is to society in general and the public pays for it.

The debate over dual-class share ownership is moving beyond the notions of board accountability impacting cost to the individual investor to a wider economic rationale based on cost to the public.

### **Ann Yerger: Fundamentally flawed as a long-term capital model**

*Ann Yerger is executive director of the Council of Institutional Investors. The Council is an organization of more than 140 public, corporate and Taft-Hartley pension funds that manages over \$3 trillion in assets. She joined the Council in 1996 and was named to her present position in 2005.*

The Council of Institutional Investors opposes dual-class stock structures because we are opposed to unequal voting rights. While dual-class structures may seem attractive when brilliant founders are running the entity, we believe the structure is fundamentally flawed as a long-term capital model.

The Council has long believed that when it comes to public equity markets voting power should be proportional to the economic interests of the holders. When the Council formulated its bill of rights after it was formed in 1985, the first provision was "one share, one vote." The vote is very important. It's a tool for holding management accountable and having a say on major issues.

You have to remember that not all investors are actively selecting their equities. Some equities are owned because they're part of broader indexes, like the Russell 3000, which have a number of dual-class companies in them — Google, Comcast, Ford, News Corp., New York Times Co. Council members are heavy users of passive strategies and can't simply exercise the Wall Street Walk and sell if they're unhappy with management.

The argument that a dual-class stock is priced at a discount — so, "no harm, no foul" — is of no solace for us when the company may hit hard times, or when second generation of leadership isn't doing the same excellent job that the first generation has been doing. Council members want boards that are empowered to actively oversee management and to make course corrections when appropriate. When directors essentially can be hired or fired by a single person or a family makes it difficult for directors to exercise fully their legal duties to act in the best interest of all shareholders.

Finally, to those proponents who argue that the structure promotes long-term thinking which is in the best interest of the company and its shareholders, let me make this observation. Clearly, Council members are long-term owners. They have long investment horizons, they're passive, so they applaud boards and management for focusing on the long term. However, I think dual-class stock is created with short-term thinking in mind, because this is really about entrenching leaders — those taking a company public — at the expense of the company's long term.



**Charles Elson**



**Ann Yerger**

## Geoff Colvin: A legitimate issue of public policy

*Geoff Colvin is senior editor-at-large for Fortune magazine. He has been a longtime editor and columnist for Fortune and is one of its keenest commentators on corporate leadership. During his time at the*

*magazine he has also done extensive and award-winning work as a broadcaster, speaker, and book author.*



**Geoff Colvin**

**The capital markets system** we have in this country makes sense when voting power is proportional to economic interest. It was designed on the basis that the people with the greatest economic interest in the business determine the board of directors. That's the mechanism we've built, one by which the board can then do its job, including the task

that some would say is its most important, which is making sure that the company always has the right CEO, and, if not, can fire the CEO.

In a company with dual-class stock, the mechanism is disabled because the CEO, as a practical matter, can fire the board. We no longer have rule of law, we have rule of man. Now, rule of man can work out great, if the person in charge happens to be enlightened and intelligent — the Robertses at Comcast, Bill Ford at Ford. Rule of man can work out great in a nation, too. Nonetheless, we don't tolerate this in our important institutions. We don't allow the rule of man and then hope that we get one of those enlightened people running the show. But we do tolerate it in one group of our most important institutions — publicly traded companies.

Now, I am a big proponent of free markets, but it seems there is a very legitimate question as to whether this matter of dual-class stock should be an issue of public policy.

The founders of the United States didn't survey types of government around the world and then run a regression analysis to figure out which was going to be the most effective. They set up a governance system according to the principals that they thought made the most sense, and as a result we have what some people call a system designed by geniuses so that it could be run by idiots.

It's the same nature of argument that we have here. Just as you can never say that in a democratic country you're not going to have any scoundrels or scandals or simply bad government, we can't say

that by eliminating dual-class companies we could make sure that all companies are great performers. The argument is that we can move the needle a little bit — that by putting in the right incentives to behave the way the mechanism was meant to behave, we will incentivize better behavior under a single-class system than under a dual-class system.

## Scott Goebel: Shareholders shouldn't just be along for the ride

*Scott Goebel is senior vice president and general counsel of Fidelity Management & Research Co., one of the world's largest providers of financial services. It has assets under administration of \$3.7 trillion, including managed assets of more than \$1.6 trillion. He is responsible for legal matters pertaining to Fidelity's investment advisory businesses, including its mutual funds.*

**At Fidelity, we have several** hundred funds and nearly as many different investment styles and approaches, but I can boil down our approach to a relatively simple idea, which is that we try to do things that will increase the return of our funds, consistent with the investment objective of each fund. Our portfolio managers by and large are empiricists, by which I mean that if you can demonstrate a correlation that a particular activity or approach leads to enhanced value, we are more like to engage in that activity.

This tendency presents a bit of a problem when it comes to corporate governance, because much of what seems intuitively correct about governance cannot be proven. But we have three principles that we use in thinking about corporate governance issues broadly: 1) can we align management and the board's incentives with the shareholders, 2) can we create accountability both with respect to management to the board and board to shareholders, and 3) are there going to be appropriate disclosures to shareholders of the relevant governance issues.

If you think about the narrower question of dual-class stock, all other things being equal, this capital structure is less likely to have alignment and less likely to have the accountability that we look for in comparison to single-class stock structures.



**Scott Goebel**

That is because there is a disconnect between the economics and voting authority in the dual-class stock structure.

The traditional model is one in which management actually runs the company on a day-to-day basis with oversight by a board of directors, which in turn has to be accountable to shareholders. Well, that accountability to shareholders is at least mitigated if not completely eliminated in some dual-class structures by the ability for management, through the exercise of super-voting rights, to have a much greater sway over how directors operate. That essentially leaves other shareholders just along for the ride.

A caveat. Although Fidelity funds generally vote against the adoption of dual-class structures, Fidelity funds nevertheless regularly invest in dual-class companies. Why do we do that? For a number of reasons, not the least of which is that some of these holdings have very compelling businesses and very strong management and are performing well.

So I am not proposing that we do away with dual-class stock because it's some sort of a 'poisonous' structure that invariably harms shareholders. But if you're thinking about a long-term approach to how companies should operate, we think that the feedback loop between and among management, boards and shareholders — and in particular the ability for shareholders collectively to monitor and have influence over boards — is vital.

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### **David L. Cohen: *Capital structure is the wrong determinate of accountability***

*David L. Cohen is executive vice president of Comcast Corp., one of the world's leading media, entertainment and communications companies. Before assuming this position in 2002 he was a partner in and chairman of law firm Ballard Spahr Andrews & Ingersoll LLP and, from 1992 to 1997, served as chief of staff to Philadelphia Mayor Edward G. Rendell.*

**I am a lawyer by training** and an executive at a company that has had a multiple-class stock structure since the day it went public. And I am a person who through my career has looked at most issues through the lens of pragmatism and not idealism. I'm not an evangelist for or against multiple-class capital structures. But this is what I would say to investors and the public who are interested in the performance of American business, in creating value for shareholders, in innovation and growth, in creating jobs, and in integrity and honesty: I don't believe the questions about the capital structure of companies are particularly relevant to those goals.

I know that there are numerous academic studies purporting to link capital structure to financial performance, but there are other academic studies that reach exactly the opposite conclusion. Similarly, there are plenty of horror stories about companies with dual-class voting stocks and inappropriate — greedy and even illegal — acts committed by the holders of super-voting stock. But I would argue there are even more stories of similar or worse conduct by senior executives in single-class voting stock companies. And, fortunately, there are plenty of examples of great performance by dual-class stock companies and their senior executives. The notion that those working in a dual-class stock company are somehow



**David L. Cohen**

less accountable to the board and to the shareholders is just not the way that management thinks. It's certainly not the way we think at Comcast.

Put all of that together and there is strong evidence that the prime determinant, the principle generator, of good performance and of the types of things that we all should be interested in from corporate America is not the capital-stock structure of the company. So what's my pragmatic conclusion? I think if you have terrific management, an engaged board of directors, and a strong governance culture, you're likely to have a great company, regardless of its capital structure. And if you have bad management, either by ability or by ethics or by approach to the business, with a subservient or inattentive board, and a poor governance culture, your company is likely to have problems — again, regardless of the capital structure of the company.

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### **Frederick H. Alexander: *Dual-class as a reaction to governance extremes***

*Frederick H. (Rick) Alexander is chair of the executive committee of Delaware law firm Morris, Nichols, Arsht & Tunnell LLP, where his work often involves counseling boards of directors. He has chaired Corporate Law initiatives with both the Delaware State Bar and the ABA, and is the co-author of the reference work, The Delaware Corporation: Legal Aspects of Organization and Operation.*

**Dual-class stock structure** is an important issue in corporate governance and I think it's going to

become more high profile in the next couple of years. Rather than analyze it as a black or white, or good or bad, issue, I want to make three points about the broader context in which this issue can be debated.

First, when you think about a spectrum of corporate governance, a dual-structure is far on one side of that spectrum. So if that is one extreme, then there is an extreme on the other end. And what would that be? I would submit the other extreme is precisely where we seem to be headed in U.S. corporate governance.

When I started practicing law 20-some years ago the classic model for a public company was to have a classified board and to provide for no action by written consent. That meant accountability to stockholders by taking control through the ballot, but only through a multi-year process. Now we're moving in the direction of getting rid of classified boards and of denial of action by written consent, and we're allowing stockholders to call special meetings, all of which suggest that we're approaching an extreme in much of our governance system: immediate access to full control through the ballot. Seeing companies go public with a dual-class structure may be a reaction to that.

A second contextual point is more industry specific: when I started practicing law it was not unusual in reviewing the charter and bylaws of public Silicon Valley companies to find that, unlike many public companies, they did not have any antitakeover protection. They didn't believe in that. They thought they were takeover proof — that “their assets go home every night,” so if anybody tried to take them over, everyone would leave. Well, it became apparent that was not the case and that these companies were as vulnerable as anyone. So I find it very interesting that the same sort of companies — the Facebooks and the Zyngas of the mid to late 1980s and early '90s — who were on one extreme then are the ones leading the charge to this other extreme today of adopting dual-class structures.



**Frederick H. (Rick) Alexander**

The final contextual point of importance is that dual-class stock is largely a public company phenomenon. You want entrepreneurs to have the ability to access the public markets on terms that they're comfortable with. And you also want participants in the public markets to have access to investments across a very broad spec-

trum. With the defined-benefit pension going away, we're moving as a society to a place where individuals are more responsible for their own savings and retirement. So whenever regulation — such as restricting the issuance of dual-class shares — may put somebody in a position where they're then not going to access the public markets, you're not only denying them access to those markets but you're denying savers the ability to access certain investments.

## **J. Michael Cook: *The best of the best?* A dual-class company**

*J. Michael Cook is a director of Comcast Corp. and International Flavors & Fragrances Inc., and has been a member of many other public, private and organizational boards. He began his career as an accountant in 1964 and from 1986 to 1999 served as chairman and CEO of Deloitte.*

**Because the conclusions** on dual-class capital structures are not consistent, and are in fact contradictory, I did an analysis based on my own experience of serving on the boards of eight prominent, well-known, large and sophisticated U.S.-headquartered companies, only one of which happens to have a dual-class structure. It is not a statistical sample by any means but it's a reasonably representative sample. And what I asked myself was: Which are the really good ones, and how good are they, both from a management standpoint and a governance standpoint?

In this group they're all good companies, but in my mind the distribution of performance is fairly wide across them. A number would get As and Bs and a few would get a C or maybe a D. Most of these companies had good governance, with some having superb governance.

What did I learn from my own back-of-the-envelope approach? By far, the best-rated company on my list was the only company that has a dual-class structure — Comcast. So then I asked myself, what is it about this company that sets it apart from the others? And to what extent are those factors governed or affected by the fact that it has a dual class of stock?

The most important thing that people should be looking at when evaluating is whether a company has a superior CEO and a superior senior management team. In my experience, this is perhaps the single most significant factor in whether a company is going to be successful or not. At Comcast, I believe we do. I believe the leadership is very well aligned with the shareholders and is absolutely

committed to shareholder value. We do quarterly reporting like everybody else and we issue a lot of performance information on a quarterly basis. But the board view, and the management view, is very much on the long term.

Is that ability to attract and retain superior people at the top of this organization, and to have a long-term strategic view, influenced by having a

dual-class structure? I can't say for sure. It may not necessarily be any different from one type of ownership to another.

But maybe it is. We have a sensitivity to board and governance issues that is a bit heightened because of the fact that we do have different classes of shareholders. We think long and hard about the fairness — to everybody — of particular transactions and any degree of bias there might be to one shareholder group or another. Comcast's



**J. Michael Cook**

counsel works with us on a very independent basis to help us think through those kinds of questions. So maybe that kind of sensitivity is a good thing. Maybe shareholders would be better served by boards who were a bit more sensitive to fairness kinds of issues.

In fact, a fruitful field of research might be to create an index made up only of companies with dual-class structures and compare performance over time with a standard benchmark like the S&P 500. We might find that to be an attractive group of companies to own.

While in my limited sample the best performance is coming from a company with a dual-class structure, my overall experience is that good people run good companies and will perform well for the shareholders, and bad people will do bad things which will be negative for the shareholders — and this has never had anything to do with the voting rights of classes of shares.

### **Michael S. Geltzeiler: *You are making a bet on management***

*Michael S. Geltzeiler is group executive vice president and chief financial officer of NYSE Euronext, which operates the world's largest equity exchange group. He is responsible for all aspects of finance, treasury and investor relations. Prior to assuming that role in 2008 he was CFO of the Reader's Digest Association.*

**At the NYSE** our governance rule allows for dual classes of stock. It can be structured that way at the IPO stage. However, once a company is public it can't move to a dual class. NYSE has a long history of supporting investors. We view doing what is right for investors as one of our responsibilities, and we even have an individual investors' advisory committee as part of our governance structure to help make sure investors have a voice in what happens at the NYSE. We are very supportive of job creation and stimulating the economy, so if allowing dual classes of stock permits a company to have access to the public markets which will enable them to grow, stimulate the economy, create more jobs, and provide investors a chance to participate in that growth in a transparent environment, then that certainly is a positive — as opposed to not going public, not growing, and not stimulating the economy if there was no ability to have a dual class of stock.

The tradeoff to investors is you are betting on management and their approach to value creation. The downside comes when the interest of controlling management is not aligned with the shareholders. I have some relevant experience with that from my time at Reader's Digest (RDA).

The company went public in 1990 with dual-class shares. It was owned by two not-for-profit philanthropic foundations created by the founders, the Wallaces. I came in 2001 to be the CFO of the company and had to deal with some complexities of that dual-class structure. We had a situation where these not-for-profits needed cash to do what they do, and pushed us toward a dividend policy that wasn't necessarily right for the company. In fact, for a period of time in the late 1990s, RDA was issuing dividends in excess of cash flows. There was a lack of alignment between the controlling shareholder and many of the other shareholders. Then along came some activist shareholders who felt a not-for-profit should not own a public company. We ended up unwinding the dual-class structure, with the support of the controlling shareholder, back to a single-share structure. That was not easy. In fact, because of the fairness issues, it got to the Delaware Supreme Court.

My conclusion is that public companies are built for the long term. The big challenge comes when a company is faced with strategic alternatives. In my career I worked at Dun & Bradstreet,



**Michael S. Geltzeiler**

where we separated into three public companies. I worked at AC Nielsen, which we sold, and at Reader's Digest, which went private. My current company, NYSE Euronext, was planning a merger with Deutsche Börse. In every one of these cases, when you're faced with strategic alternatives, it's a tough decision for the management and the board. You always want to look at what's the right answer for the company, what's the right answer for the shareholders, what creates the greatest amount of long-term value. That can become more difficult in a dual-class structure if one party views the firm not as the public's company but as their business, one that they own.

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### **Michael Useem: A buffer to be a better strategic partner**

*Michael Useem is the William and Jacalyn Professor of Management at the Wharton School of the University of Pennsylvania. He is also director of Wharton's Center for Leadership and Change Management and is editor of the Wharton Leadership Digest. His research interests include enterprise risk management, corporate change, leadership, and governance.*

The debate over dual-stock capital structures is a kind of window into other important aspects of corporate governance. Here is the argument that I would make that dual-class arrangements are probably a good thing, and can even have an enormous upside.

Boards have, of course, long served as monitors on behalf of stockholders, but also as strategic partners with management. What's happened is that both of these functions have strengthened in recent years, strategic partnering in particular. What has strengthened that partnering function? Given the complexities that companies face and the uncertainties in the market, executives are turning more often to the board for guidance. Take Comcast, for example — it had a tough decision to make in whether to acquire a big television company, but it has a lot of smart people in the boardroom dedicated to the company who can serve as great strategic partners in making a decision like that.

Also, and somewhat ironically, what has strengthened the partnership function is the initiative of organizations like the Council of Institutional Investors and the New York Stock Exchange and Congress to strengthen the monitoring function. The impact of putting stronger, more independent-minded people in the boardroom has been to enhance the board's ability to act in strategic collaboration with top management.

As Google disclosed in its IPO document, the dual-class structure will make it easier for its management team to follow the long term, to be innovative. True, investors will have little ability to influence strategic decisions. But, to put this affirmatively, it gives directors more obligation to work with top management without being quite so policed by outside owners, regulators, and so on. It opens up the opportunity for boards to work with top management to get the job done.

At companies with dual-class stock, it is more incumbent upon those in the boardroom to create that commitment, that obligation, that culture of leadership to work in collaboration with management because nobody is looking over their shoulders. By having a little bit more of a buffer, they have a little bit more opportunity to exercise that strategic partnership.



**Michael Useem**

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### **William Bratton: Let dual-class companies list abroad**

*William W. Bratton is the Nicholas F. Gallicchio Professor of Law at University of Pennsylvania Law School, where he is recognized internationally as a leading writer on business law. He is also co-director of the Institute for Law and Economics, a joint research center of the Law School, the Wharton School, and the Department of Economics at the University of Pennsylvania.*

Dual-class stock was a big issue in the 1920s, when a lot of companies with no-vote common went public. The investment community back then had the same policy discussions on the topic that we're having today. The dual-class side won in the 1920s, but that result was reversed during the Depression. In 1940 the New York Stock Exchange adopted a one share, one vote rule. If you wanted to come to the NYSE to get liquidity, it was one share, one vote, *period*. Well, not quite that. There were some exceptions: if you were a big enough listing you could turn the exchange's head and get a waiver, as happened when Ford Motor went public in the 1950s. But basically for 40 years it was one share, one vote.

The one share, one vote consensus fell apart during the takeover era of the 1980s. Defensive, dual-

class recapitalizations started to occur. One share, one vote companies wanted to become takeover proof, so they left the NYSE to go to the Nasdaq or the American Exchange, both of which did permit dual class. Pressure built up on the NYSE, and in 1984 it suspended enforcement of its rule when GM threatened to leave for the Nasdaq because it wanted to issue low-vote common to Ross Perot in acquiring his company. The SEC tried to get the exchanges back into line, but they could not agree



William W. Bratton

on a common approach. So the SEC adopted a rule called 19c-4. Some remember that rule as an attempt to return to one share, one vote, but what it really prohibited was dual-class common conversions: if you were already publicly traded on a one share, one vote basis, converting to dual class was forbidden.

Is there any way to turn back the clock to 1940? Unfortunately, no. Back in 1940 things were very different. Market participants were much more comfortable with

flat-out prohibitions and were ready to draw bright lines. They were ready to choke off a deal in order to keep a clean market. And they could do so in an isolated national economy. Today we operate globally and regulatory issues don't admit of easy yes and no answers. We accordingly look to disclosure, fiduciary law, and governance institutions to keep agency costs down at dual-class companies.

For myself, I would have no problem with turning back the clock to 1940 to return to one share, one vote. But since that can't be done, what I would favor is forbidding the listing of new dual-class companies on U.S. exchanges. You want to be dual? Then list abroad, and sacrifice some of the yield on your IPO as information asymmetries negatively impact your price.

### Vice Chancellor John Noble: *The shareholder has fewer options*

*The Honorable John W. Noble has been a vice chancellor of the Delaware Court of Chancery since November 2000. Following law school at the University of Pennsylvania he served as a federal district court law clerk and then practiced with Parkowski, Noble & Guerke P.A., in Dover, Del.*

**While many of the other** accountability or take-

over-restrictive devices have come into question as to how well they'll survive and how good of a job they do in protecting the founders' personal interest, dual-class stock seems to continue to offer that option. So this may have a lot to do with why this topic is going to continue to have a fair amount of debate.

One of the questions that comes to mind is: what are the controls in a dual-class setting to drive or encourage good governance? A major risk is that centralized control allows the extraction of private benefits for the controllers, at a cost that is imposed disproportionately on the broader shareholder base. In this setting one can naturally have skepticism about board independence. Even though to some extent a dual-class setting is similar to a company with a large majority shareholder, the most obvious difference is that with a large shareholder we at least have the same proportionate economic shareholding interest. Concerns about proxy fights, losing votes at the shareholders' meetings, simply aren't a real consideration in a dual-class company. It seems, instead, that the general shareholder is left to disclosure, to the fiduciary duties that are imposed upon the directors of these enterprises through the common law, and to various public restrictions — "shaming" being one of them.

Duties of care and loyalty are important, and eventually they will perhaps rein in out of control controllers. But without effective voting control, the shareholder has fewer options. As has been pointed out, you can have wonderful corporate management in a company with dual-class stock, but it depends upon who the controllers are. Some will likely find the opportunity

to take advantage of power — in the sense that absolute power corrupts absolutely — irresistible.

I draw something of an analogy to our alternate entities, limited partnerships and the like, where our law allows for the elimination of fiduciary duties. That's not true in the dual-class setting, but I wonder if the rethinking of using dual-class stock is an effort to get the "benefits," if you can call them that — and I'm not taking a position on that — of private ordering and trying to squeeze as much out of that notion as one can in what otherwise would be a publicly traded corporation subject to all kinds of constraints and conditions that we're familiar with. ■



John W. Noble