

Gaining the Whip Hand in Silicon Valley

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On 11/13/07 I attended a very interesting early morning program sponsored by the [NACD Silicon Valley Chapter](#) provocatively called "How Institutional Shareholders Are Gaining the Whip Hand ...and What It Means for You as a Public Company Director." The panel discussion was led by [Eric Finseth](#), a partner at Mayer Brown who oversaw and administered the SEC's shareholder proposal program during the 2006 proxy season. Panelists included [Cornish Hitchcock](#), who represents Amalgamated Bank's LongView Funds and others; [Rachelle Silverberg](#), a partner with Wachtell, Lipton, Rosen & Katz, well known for inventing the poison pill and other defense mechanisms; and [Godfrey Sullivan](#), CEO of Hyperion Solutions.

Finseth led off with a brief updated summary of his co-authored [Storming the Ramparts: The Ongoing Shift In the Balance of Power Between Shareholders and Incumbent Boards of Directors](#). He sees core drivers of the shift in power from incumbent boards to institutional shareholders:

- Shift from plurality to majority voting standard
- Anticipated elimination of broker discretionary voting in director elections

Also important are the proxy access movement and the rise in the use of mandatory bylaw amendments. "The overall effect of these recent and anticipated changes to the proxy and voting landscape will be a sharp rise in the power and influence of shareholders to shape corporate policy and remove any director perceived as being unresponsive or standing in the way."

Panelists came out about as might be expected. Hitchcock noted continuing impediments, such as supermajority requirements and the SEC providing a "no action" letter to CA on LongView's proposal to remove two directors. (Longview asked that CA shareholders be allowed to remove directors by a majority vote of the shares outstanding -- something they are entitled to do under the laws of Delaware, where the company is incorporated.) Longview had much greater success with proposals asking companies to fix grant dates before the fiscal year begins and to price options at an average of the stock's opening and closing price on the grant date. Most of their proposals were withdrawn following constructive talks with the companies but they won 47% at Apple, which held out.

During discussion, Hitchcock offered that proxy access can add positive value by adding board members with fresh perspectives.

Silverberg argued that directors balance competing needs, not simply the short-term interests of a transitory shareholder base. She raised the canard of "special interest directors" put up by hedge funds seeking short-term profits. (see her firm's [comments](#) on the SEC's proxy access proposals) She said corporations are "representative democracies" where directors are ultimately accountable. She also raised the likelihood that hedge funds will increasingly "supersize" their votes and will attempt to profit by voting against shareholder interests in complex derivative actions.

Godfrey noted that tech firms paid little attention to governance issues until the recent restatement brought problems to light. CEOs now need to spend more time explaining to shareholders why and how to vote. He fears that increased shareholder power will lead to the need for self-defense mechanisms, such as expanding boards and more staggered elections. More importantly, growing democracy might force CEOs and boards to take their eyes off growing their companies, in order to focus on elections.

During the discussion, Finseth put forward the idea that pensions should have to get permission from fund holders on how to vote on their behalf. Beneficiaries shouldn't have to allow the pension to vote in ways they disagree with. Afterwards, I discussed with him how this might be accomplished by branding, as proposed by [Mark Latham](#).

The program was informative and led to a lively discussion. I was pleased to see the NACD Silicon Valley Chapter was able to gather a panel of such luminaries. Unfortunately, the program was held the day after a holiday, instead of their normal Thursday; attendance was about half of normal. If you're in the area, be advised to attend future events.