PANEL 2: CORPORATE GOVERNANCE IN A GLOBAL CONTEXT

MODERATOR: Helen Scott
PANELISTS: John Suydam, Melissa Sawyer, Karen Brenner, Laura Unger

KAITLYN SUYDAM: Welcome back from lunch, everybody. We're going to get started with Panel Two, and I will turn it over to Professor Scott to do so.

PROFESSOR HELEN SCOTT: Welcome back. Thank you for returning to the symposium. The topic of this panel is "Corporate Governance in a Global Context." Many of you were at the previous panel and heard a wonderful discussion on issues of the composition of the market and how that might change our views of how markets should be regulated and how corporate governance should be thought of. And where the responsibility might lie for decisions on a variety of matters that the market, as one of the panelists said, "really isn't interested in anymore." In this panel, we're going to continue that discussion into topics on which boards and companies are very involved and with which they're very engaged and have no choice but to take into account corporate governance, broadly speaking.

As many of you may have heard, yesterday John Chambers, the CEO of Cisco Systems, said, from Davos, where I am not, that doing business in other countries, right now, he said, and I quote, "It's a lot easier to do business in the UK or Canada or Russia, which I never thought I would say, or in China than it is in the United States." Now there are lots of reasons why he might have said that. And we're going to look in this panel, I hope, at some of the issues of differences in regulation and differences in cultural expectations for how companies operate and therefore how boards might be structured and how boards might respond to issues on a global basis.

Twenty years ago, of course, the United States' system of business and the United States' business culture was way in the ascendency. And we were not only justifiably proud of the accomplishments of our enterprise system, but we were busy sending it around the world and assuming that most countries, as they matured, and even what a previous Cabinet Secretary

once referred to as the "Old Europe," would be interested in moving towards the U.S. system of thinking about business and thinking about the way companies operate. Since at least the financial crisis and probably a few years before that, this view has waned considerably. And other countries, which have taken other paths towards their economic development and taken other views towards how companies should be structured and how business should be conducted, there's a lot more pushback on, globally on our companies. And so we're going to look at the laws and customs of other jurisdictions and how those jurisdictions respond to our laws and customs. And talk about problems that flow in both directions. We're going to be talking some about issues that are being faced by U.S. companies abroad and some of the issues that are faced by non-U.S. companies when they come into contact with our systems.

As was said in the previous panel, we're probably going to raise a lot more questions than we are going to give answers. Most of these are developing issues, they're rapidly developing in some cases. But I'm glad to say that we have an excellent and extremely well-qualified panel to discuss these issues. And I will introduce the panelists starting from my left with Laura Unger, who is currently Special Advisor to Promontory Financial Group. She provides her clients with strategic advice about matters relating to a wide range of areas, including SEC regulation and the legislative process. Laura was a Commissioner of the SEC and for a period of time its Acting Chair. She was counsel to the Senate Banking Committee. She left the government and worked in a wide variety of environments, including on camera at CNBC and as the independent consultant to JP Morgan Chase as part of their global analyst conflict settlement. She's been an independent director, continues to serve on a number of public company boards and brings a wide range of expertise and thinking on the questions we're going to talk about.

Next to her is John Suydam. John is the Chief Legal and Compliance Officer of Apollo Global Management, which is a New York Stock Exchange-listed investment management firm, which operates on a global basis. Before joining Apollo, John practiced law with a couple of firms, one of which he chaired for a number of years. He is a member of our board of trustees and, of course, a law school graduate, which is an extremely

important credential. And so he has a lot of expertise in how companies deal with the sometimes conflicting demands of a variety of global regulators.

Next to John is Melissa Sawyer, who is a Partner at Sullivan & Cromwell. She is in the mergers and acquisitions and private equity group, and she has dealt with a wide range of corporate governance issues in the context of her practice, mostly in M & A and private equity. She has dealt with U.S. clients, non-U.S. clients and, again, brings a very deep set of experiences to this panel.

And at the end of the table is Professor Karen Brenner. Karen is the Clinical Professor of Business at the Stern School of Business. And I have the distinct pleasure of co-teaching with Karen. Jerry Rosenfeld, in his introductory remarks, talked about our innovative courses called "The Law and Business of . . ." whatever. And Karen and I actually teach two of them together. We inherited the professional responsibility course from Jerry and Si and have created "The Law and Business of Corporate Governance" and are looking into some other areas to create these courses. Karen has been the Chief Executive Officer and board member of a number of public and private companies in a variety of industries. She has an extensive background in board governance and crisis management, and has been an advisor to various private equity firms, venture capital companies, and boards of directors.

So we have on this panel an enormously broad range of experience. People who are advisors to companies, on boards of companies, with some regulatory experience, with some turnaround experience, with global compliance experience. I think we have a panel that is pretty well-equipped to deal with just about any of the questions that we're going to raise.

We will be touching on a number of topics. For many years academics were entranced with the idea and remain, to some extent, entranced with the idea of convergence. You may be familiar with the idea of the convergence of accounting standards and auditing standards. But there's also been a lot of talk about the convergence of corporate governance and other corporate regulatory standards. That process towards convergence seems to have hit some roadblocks and slowed down in a number of areas. And other jurisdictions have asserted their interests in various ways in these issues of governance and

structure. We're going to start our discussion with Laura, who is going to talk about some of the issues surrounding international implementation of some of the new U.S. initiatives, including some of the Dodd-Frank regulations, many of which are in development. Some of which are in concept, some of which are in development and some of the particular problems those present. Melissa will start off our conversation on some of the effects of U.S. laws in extraterritorial situations and some of the issues that boards in their fiduciary capacities have to deal with both U.S. and non-U.S. companies. John will start our conversation on the evolving risk management and compliance structures that companies must develop to operate in a global, integrated business setting. We may spend some time on differences between U.S. investors and non-U.S. investors. Do they want different things? Do they expect different things? How do they deal with their companies? And Karen will return, as Roy Smith did in the earlier panel, to the question of the board and the structure of the board and how should one put together a board of directors and what lessons can we learn from other jurisdictions who have taken some similar positions to the U.S. and some not similar.

This, we hope, will be an interactive session, as the last one was, so, please, if you have comments or questions or objections, please feel free to raise them at any time during the discussion. So with that, Laura.

MS. LAURA UNGER: Okay. My first test is getting the mic to work. Okay. Well, I am glad, this is just like law school where nobody's sitting in the front or the center. They must all be in Davos, I guess, I don't know. But it's a pleasure to be here today and I have the interesting and enviable task of sort of giving you a high level view of some of the regulatory and legislative, in some ways, challenges involving extraterritorial reach of Dodd-Frank Act.

But first—just to sort of lay some groundwork, it's interesting, I think, Helen's kind of talking about perspective and having—I am a New Yorker, but I have been transplanted to Washington for a number of years. So I do have a little New York perspective and personality left in me, but having spent now 23 years in Washington, I can't believe it, I have also spent a lot of time on Capitol Hill and, as a regulator. And what's really interesting to me is that we're having this conversation here today, and I left the government ten years ago. Eight

years ago I was at a director's education course conveniently located in Pepperdine, California, which was wonderful. And Mike Milken was the speaker at dinner. Which, of course, I could not resist as a former SEC person. I sat next to him and he talked about the world, sort of the transformational impact—the fact that the U.S. was not going to be competitive and that the world economic leaders in probably ten years would be India and China. And I thought that's just not possible. Yet he had all of these facts at his fingertips that made a very compelling case. And, in fact, I think we are sort of at that tipping point in terms of the shift of the capital markets being so obviously U.S. based to perhaps shifting—to moving—overseas. A large part of that, I think, is due to regulation. And so that's kind of where I'm going to start this conversation. What we've seen from this last financial meltdown obviously, which apparently cycles through every couple of years, this one was particularly bad because it was so far reaching. But it really emphasized the global nature of the financial markets, and the interconnectedness of our markets. Which makes us both very efficient in raising capital, yet very vulnerable to market disruptions. And what we strive to achieve as regulators, and I think what Congress intends as well, is to really strike the appropriate balance, particularly in the federal securities laws, of fostering innovation and competition, yet making sure that the markets have integrity, they're safe for investors and that people have confidence in the markets. We saw that completely evaporate in 2008 and 2009, which is what led to the very onerous, very long and— people like to just say it's 2,000 pages and leave it at that, which it is— legislation called the Dodd-Frank, I don't even know the whole title, Wall Street Responsibility and Reform Act. But the concern began before that in terms of—and so I'm going to just back up and lay that as, you know, where we are. But in terms of us as a competitive capital marketplace, before Dodd-Frank was enacted, there was certainly a lot of focus on the U.S. capital markets and this whole notion of regulation. And we'll get to the convergence in a minute, but as you recall, in 2007, Mayor Bloomberg and Senator Schumer were concerned about the exodus of IPOs from the U.S. capital markets overseas and, in fact, commissioned this study which led to the Treasury Blueprint for Financial Reform and Modernization. What we now see is that a lot of the concepts in that have been adopted by Dodd-Frank

or included in Dodd-Frank, and yet we still have, at the same time, this level of complexity in the legislation seeking to reform the markets and rebuild the confidence, yet maintaining our preeminent position in the capital markets. So in actually writing the rules around the law, one of the big challenges has been how do we look at the global markets? How do we regulate the global markets from a U.S. vantage point and do it in a way that makes sense and that doesn't disadvantage the U.S. competitors and that, in fact, the foreign businesses will continue to conduct their business in the U.S.? So Dodd-Frank actually specifically says it only applies to U.S. companies, yet, of course that's impossible to extricate U.S. operations from overseas operations for many of these institutions.

So what I thought I would do is give you a couple of examples of, you know, where we are in maybe some of the things you've read about and some of the challenges in terms of this extraterritorial application. And the first one is the registration provisions under Title 7. Title 7 is the title that covers the derivatives trading and the establishment of a central trading platform and registration of major participants and that whole sort of new regime. So the SEC and CFTC actually proposed registration provisions for swap dealers and major swap— security-based swap participants, but they left open how this will apply to the global operations of the registered security-based swap entities. So right now that means that these foreign companies do not know what will happen in terms of registration, whether they'll be required to register or not. And there's an ability to do a provisional registration, but of course everyone's scratching their head saying, "Why would we do that?" So the SEC and the CFTC have been looking to address the extraterritorial application of Title 7 in an interpretive release, yet they can't agree on what the parameters should be and what the guidance should be. So they have this statutory deadline. So they have adopted the registration provisions, but not necessarily described how it will apply.

The second example—and, of course, this leads to a lot of uncertainty among these firms, the second one is the Volcker Rule. And that basically prohibits banks from engaging in propriety trading. The whole idea is you have taxpayer-funded deposit base or, sorry, taxpayer-guaranteed – I guess you could call it funded – deposit base, and you shouldn't be using that to gamble in the markets. So banks can no longer engage in

propriety trading and there are a couple of exemptions. One of the exemptions is in government securities, but it's only U.S. government securities, not sovereign debt or any foreign government securities. And you may have seen the C Section of the *Wall Street Journal* today which talks about the Volcker Rule and its impact on market liquidity if U.S. banks can't act as a principal in buying sovereign debt, then what will happen to that market, and the fact that it will dry up or that there will be some issues when these markets are already feeling a huge pinch on the liquidity and the lack of ready purchasers for their sovereign debt. So there's a clear case of U.S.-centric focus in terms of what's permissible. A couple of years ago, of course, there would have never been a carve out for foreign debt. But given the publicity and the politics around what's been happening with the sovereign debt crises, then of course the U.S. had to carve them out from being permissible activities. Foreign banks trading outside the U.S. would be exempt from Volcker, but only under circumstances where they have absolutely no nexus at all to the U.S. No employees, no principal place of business, no agents transacting the trades or anything like that. So that, of course, is probably very difficult to achieve and has sparked some backlash from the overseas regulators who have no interest in adopting a Volcker-like regime for their institutions, per se, but have been looking to perhaps embody some of those concepts in ring-fencing retail and investment banking.

The third example—and how come nobody's jumped in to ask me a question yet? Am I really just going to drone on about this stuff? I thought you were interactive! Okay. The third is systemic designation. And systemic designation was right out of the box, so the big thing everybody was really worried about. We had clients that were beside themselves at the thought of nonbanks being regulated by the Fed. And coming under prudential regulation. Now, of course, these clients that I'm talking about are securities firms, and securities firms understand the Fed and what prudential regulation means. But this provision applies to any nonbank financial firm who could pose a systemic risk to the financial system. So it's turning out to be, I wouldn't say much ado about nothing, but the potential was to have the prudential standards and oversight and regulation by the Fed, which, of course, would result in additional capital requirements and things that don't necessarily

lend themselves to nonbank financial activities. Or that was the concern. And then the question that we were being asked from a foreign institution perspective is what happens if we're a foreign institution and we have substantial operations in the U.S. There's a whole notion in the rest of the world of global SIFIs and it's the same kind of concept, but it's on a global basis. So if you are a global SIFI in your home country, what does that mean in the U.S.? Does that mean the U.S. has to designate you a SIFI, which is the Systemically Important Financial Institution. So would that mean you would automatically become a SIFI in the U.S.? And then whose regulation would prevail? Is there a way to be designated as a SIFI, but be subject to your home country regulation? And this has kind of died down a little as people have shifted over to Volcker. So it kind of becomes the issue *du jour* in terms of where the rule writing activity is. The FSOC, which is the Financial Stability Oversight Council, consists of all the financial regulators, an insurance regulator and then a state regulator, is sort of the new oversight body. Kind of like an enterprise risk management system on top of the financial system. They are charged with preempting systemic risk in the financial markets. They have been putting out guidance and interpretive releases on this systemic designation. I think the thinking is, right now, that it will most likely be a large insurance firm, an asset management firm and, what was the third? An insurance holding company, finance company, so AIG, GE and then I don't know who the asset management firm is. There are a couple that people have talked about, Apollo, I think?

MR. JOHN J. SUYDAM: No.

MS. UNGER: And so these discussions continue. And did you have a question?

AUDIENCE MEMBER: Yeah. Actually, Laura, as you were sort of going through, the political dialogue, which isn't necessarily real, but, you know, but it's dialogue.

MS. UNGER: [interposing] Sounds real.

AUDIENCE MEMBER: The political dialogue has tended to be recently around, if we "overregulate" in the U.S., all the business will flee to other markets. It's a rerun of the Chuck Schumer, Mayor Bloomberg notion about all the IPOs will disappear from the New York Stock Exchange and go to London or Hong Kong. So do you worry about this race to the bottom

in some sense where various jurisdictions will attempt to make themselves more attractive for trading businesses and really fulfill the political fear mongering? Or is that sort of not in your thought process?

Ms. UNGER: No, it absolutely is in my thought process and Jerry is a colleague of mine on the CIT Board, or I'm a colleague of his. But it's as if you predicted my thinking on this, because I actually had some statistics and, by exchange, in 2010, the Shenzhen had 23% of the global total of IPOs and the New York had 6%. And Hong Kong, by capital raised, had 20% and New York had 12%. So there obviously is a shift in terms of IPOs and capital raising and the markets. And the question is, is it because the U.S. has this long, convoluted process of building a very complex regulatory infrastructure that nobody would craft today as opposed to these newly emerged markets where they can actually take the best of what we do and just pop it right in there and apply it? So, yes, I spent some time in Singapore this fall and while I checked, they're at 1%, so they're not any big, challenging force right now. They are very myopically focused on being the preeminent financial market. They want to understand what people need. They want to understand, in terms of capital raising and financing. They want to attract companies to come and have offices there. They have a very strong partnership in terms of public/private, and there's only one government. So there isn't the political vitriol that you're referring to. And they can really get things done. It's amazing. They have a game plan and they're executing on it and I think they're doing a phenomenal job as a result of that. So that doesn't address your question of race to the bottom, but certainly race. And I don't think anyone, because there's a lot of transparency around regulation now and a lot of people are very knowledgeable about it, I don't think you could get away with no regulation or very little regulation and hold the position of a preeminent capital market for very long. But you are certainly at an advantage if you're creating one today with the technology and understanding of the complexity of the market as opposed to 1934. John.

MR. JOHN J. SUYDAM: Yeah, just to mention one thing. On SIFI, because you were venturing a guess on who the other Systemically Important Financial Institutions might be.

Ms. UNGER: This is the scuttlebutt in Washington.

MR. SUYDAM: Yes. The test, I think, that came out was a financial institution that had consolidated assets of 50 billion or more.

MS. UNGER: That automatically applies.

MR. SUYDAM: Automatically puts you into SIFI.

MS. UNGER: Yes.

MR. SUYDAM: And panels about how different corporate governance issues throughout the world are impacting you, one of the things that was concerning to some of the alternative asset management firms was there's a push right now that began in Europe to force consolidation onto the balance sheet of any fund that you manage. In most fund structures the manager will have a 2% interest in the fund, we'll get some carry participation, we'll get a management fee, but you don't consolidate that fund. European accounting regulators have been pushing to actually force that to be consolidated on the balance sheet of the management company. U.S. regulators have also put out potentially that view, though they've had a lot of response on it. If that gets passed, the $50 billion test and who it includes will change dramatically because any alternative asset management firm of any real size, most of the ones would now be SIFIs that weren't SIFIs before because European regulators have pushed to cause you to consolidate on your balance sheet assets that you don't own.

MS. UNGER: Well, it's interesting. The automatic designation— the automatic trigger I didn't mention because it's pretty much built into the statute, and there's no discretion involved. What you're talking about is the systemically significant test for other institutions. And the FSOC put out a second NPR, notice of proposed rulemaking, where they specifically deferred consideration of the metrics around asset management because they don't fully understand the appropriate way to count those assets and to assess the risk in that industry. And so there's a new requirement called Form PF, which any private advisor to, or the advisors registered to private funds and hedge funds of $150 million in assets or more, will have to file with the SEC and then FSOC or OFR, the Office of Financial Research, their holdings. And so it will give the regulators and the FSOC the ability to see what assets are out there in these previously unreported capital pools.

MR. SUYDAM: Yes.

MS. UNGER: So I think that's going to be the jumping off point.

MR. SUYDAM: They're going to use that information when they're assessing this in the future.

MS. UNGER: Yes.

MR. SUYDAM: And that form is an extremely detailed and very difficult, the first filing is coming up quite soon, very difficult for people to deal with on the first go-round. There's a tremendous amount of data that you need to pull that you haven't historically pulled.

MS. UNGER: Well, it includes things like leverage and your portfolio, so there's an ability to see where the concentrations are in the industry.

PROFESSOR SCOTT: Laura, I had a question for you. We have seen in the past, after Sarbanes-Oxley, for example, and other times, that there are two very different types of responses as these consequences start to become clear. One is pushback from other governments where they simply don't want their companies or their entities or their banks to be governed by our regulations, and sometimes we've even seen laws passed specifically to prevent domestic companies from— their domestic companies from complying. On the other hand, we've also seen our regulators make exceptions to kind of smooth the way for non-U.S. companies to comply when they're present in the U.S. markets. Are you seeing any of that kind of activity? Are you seeing people pull out of the U.S. market? Do you think the regulators are cooperating across borders at this point?

MS. UNGER: I think part of the challenge the regulators are facing has to do with the *Morrison* Supreme Court case on extraterritorial application. I have to confess-I have a very limited knowledge of the intricacies of that case, although I know generally what it stands for. And I do need to read it, but that is what the CFTC and SEC are dancing around now in terms of their constraints. I don't want to say what it says. Okay. So in terms of your question though, I do think we are seeing, and I know some policymakers are looking very closely at not just that generally, "capital will flee offshore," because we've been hearing that for every regulation forever, but really trying to quantify what that means. I think, just to give you a sense of what some of the potential short-term solutions are, people are

looking at forms of mutual recognition. How can we possibly allow home country regulation of some of these institutions to be a proxy for U.S. regulation? So I work with a Japanese investment bank client and, you know, they have a very strong set of home country regulations. And so for that deference to be accorded by the U.S. regulators would be very helpful and would go a long way towards not being considered U.S.-centric. The problem is when you get into picking and choosing among these jurisdictions, and this has been the reason we haven't adopted mutual recognition 20 years ago, this is very difficult to do. And with a floodlight on certain countries that have the sovereign debt issues, there are questions about the efficacy of their regulatory regimes. So there's a little bit of a political landmine there, but what we're seeing happen, though, is the FSB is developing some teeth and becoming more of an authoritative body and taking these issues on. Right now they have a taskforce on shadow banking. A big concern, shadow banking is the unregulated banking part of the financial services industry. So if things are going to move offshore, are they going to move to an unregulated part of the market? That's a concern. And so there are work streams and there's a lot of parallel thinking going on, but as in the case of Volcker, you're not going to see them embrace that concept overseas. They're looking at the Vickers, which I said earlier, which is ring fencing. We don't do ring fencing here. So you have some cultural issues. But to the extent that we can, again, accord mutual recognition— like treatment to countries that do have strong systems of regulation, I think that will be helpful in many ways. And I guess that would pretty much conclude what I would have to say about this issue. And, of course, I'm sure we'll continue this lively dialogue.

MR. SUYDAM: To make one point, like in most instances, mutual recognition is extremely important because there are also regulations that we've been dealing with in our business in the EU. In particular, marketing of funds, there was a whole new set of regulations that were put in and they have the concept of passporting. Within the EU, they will passport if you're within, and whether they will passport from the U.S. into the EU I think is as much a political question relating to what we'll do for them in the United States. So most financial services companies at this point are fairly global in nature, so we could be impacted in Europe because of impact in the U.S.

Ms. UNGER: So there is a fear of retaliation. And then you look at the compensation where the UK has gone so much further than us, in terms of many actions. I think someone else is going to be talking about that.

PROFESSOR SCOTT: Melissa, would you like to talk about some of your experiences with these—and now actually implementing with companies? Some of these concepts?

Ms. MELISSA SAWYER: My experience as an M & A lawyer is that I actually have to turn around and implement a lot of these extraterritorial statutes, both ones from the United States as well as from a lot of other countries because I have a cross-border practice where I represent companies both here and abroad. I, as a practitioner, don't spend a lot of time questioning whether governments have jurisdiction over my clients. I'm more focused on advising my clients in situations where time is of the essence of how to comply with this complex, intersecting lattice of different corporate governance laws and standards.

What I wanted to do was start by giving a few practical examples of how I've seen this come up in my practice in just the last few months, to put it in context. And then I'll talk a little bit about a few other legislative developments that have made this an increasingly challenging area for practitioners, like me, in the recent past. And then, finally, I'll just conclude with a few broader statements. I'll pretend, for a moment, that I'm not just a practitioner, and that I have something bigger to say about it all. But just to start with some practical examples. One that comes to mind immediately is working with companies who are trying to joint venture, whether it's in the U.S. or abroad, but if the two shareholders or joint venturers are from different jurisdictions, both of them will have different sets of compliance, standards and policies that they'll want to apply to the joint venture entity. And, frankly, it doesn't really matter whether one of them is taking a much bigger stake than the other. Even shareholders taking a minority stake frequently want their compliance policies to be the governing policies of any entity that they invest in. So negotiating what compliance policies the combined entity is going to have to live with for a long time to come can be extremely thorny, and, in fact, can delay the completion of these transactions quite significantly. So that's one practical example. Another one would be just in a typical buyer/seller situation. So not a joint venture, but let's

say a U.S. company is considering buying a target in Latin America. I run into this all the time. They're going to have to conduct some due diligence to evaluate whether the target is complying with not just the target's laws, but also the sorts of standards that apply to the buyers because the buyer knows that they're going to have to quickly integrate the target company into their own compliance policies. And this is where you start to get into some difficult issues around cultural differences as well. Because, frankly, when a U.S. buyer goes to, I'll use Mexico as an example, and says, "We need to investigate whether you're going to be compliant with the FCPA," let's say the target is a family-owned company. I've seen this happen again and again, the target's controlling shareholder or officers and directors may get very offended when you start climbing all over their internal compliance policies and reviewing how they've accounted for various payments over the last few years. And so that also can create a lot of tension in a transaction negotiation.

Another example that I run into frequently is in relation to the composition of boards of directors. So it's quite common when a shareholder takes a large stake in a company to obtain a board seat. But taking a board seat has now become a lot more complex when it's linked to share ownership. Especially if the shareholder has any sort of competing businesses or related businesses that might be involved in transactions with that company in the future. The U.S. actually is not the worst offender in terms of adopting difficult legislation addressing related-party transactions with directors. I've recently had occasion to look at this in the UK, and there the United Kingdom Listing Authority and the Companies Act, the substantial property rules are extremely complex and make it very difficult, in fact, to put a related director on a board of a UK company. And yet, that's something that's viewed as often being quite desirable from the perspective of the economics that are motivating the investment. So those are some practical examples.

I mentioned FCPA as a statutory source of some of these difficulties, and I know that there's another panel today on FCPA issues, so I won't dwell on it too long, but that's a very hot topic among M & A lawyers right now, in part because it is so difficult to administer FCPA compliance policies following a large acquisition. I've been involved in transactions where the

buyer has purchased a multinational conglomerate that has subsidiaries in 30 or 40 countries, and administering a uniform compliance policy immediately upon the completion of an acquisition and making sure that all the employees and all those new companies and new countries are on the same page can be extremely challenging. And by challenging, I really mean costly.

We mentioned Sarbanes-Oxley earlier. It is, I think, the tenth anniversary of Sarbanes-Oxley this year. That's another one that created a lot of heartburn for people when it was first adopted, and I think people have gotten used to it now. But in my practice, I certainly saw a lot of non-U.S. companies that were formed under civil law regimes and had two-tier board structures kind of struggling with the independent audit committee requirements of Sarbanes-Oxley. So that's another example.

Laura also mentioned some securities laws issues around the *Morrison* decision, and securities laws are certainly another area where this type of integration activity in M & A transactions becomes a concern. Administering an insider trading policy for people that have never lived with that before can come as quite a shock. Telling officers and directors when they can or cannot exercise options around earnings announcements sometimes, again, creates a lot of tension in a transaction. So those are some practical examples of statutory rules that apply. I also see applications of corporate governance standards that don't rise to the level of being laws, but they're still things that I have to tell my clients to consider when they're making decisions about M & A transactions. Just to give you an example of that, I did a transaction involving a Canadian company a few years ago where the ISS, that's the Institutional Shareholder Service, which advises institutional investors about how to vote on M & A transactions. The Canadian arm of ISS evaluated this Canadian transaction, but in their report, they cited U.S. corporate governance standards as a reason that they didn't recommend this Canadian transaction to the Canadian shareholders. They said that the transaction did not satisfy norms of U.S. corporate governance. So that's an example where standards and norms are being applied extraterritorially; they don't have the same weight of being laws, but I think they still affect the outcome of M & A transactions. So all of this creates a lot of work for M & A lawyers, which I'm

not necessarily complaining about. And, frankly, I don't necessarily complain about the U.S. efforts to reduce corruption involving government officials. It's hard to say that that's a bad thing. It does, in some ways, inhibit the free flow of capital across borders, and that touches on something that Laura was saying— that people worry about reciprocity. And certainly if some of these laws became less secular and driven by religious motivations, political motivations, protectionist instincts in different jurisdictions, the complexity associated with cross-border transactions may become so difficult to deal with and so costly, that, in fact, we may see some companies draw back from completing these types of transactions. They already have to hire lawyers in many of the countries where they engage in these transactions. They already have to hire financial advisors who are familiar with these different markets and environments, so you've got a high cost of advisors. When you add on to that, the high cost of compliance on a going forward basis, it does become a little tricky. Any questions?

PROFESSOR SCOTT: Melissa, you mentioned a variety of different things, some legal, some cultural. Do you find them equally in these transactions? Do you find the cultural issues predominate?

MS. SAWYER: I find the legal issues are easier to deal with because there's a playbook for them. People understand them; they can wrap their heads around them. They understand how to comply. I think the cultural issues are much more difficult to deal with. And you don't always know what you're going to face. As I mentioned, you could have a situation where you have a company that was founded by a family – this is much more common outside of the United States – the family patriarch is accustomed to controlling the company and expects to have a position on the board of directors. And if you have an outside investor who comes in and says, "As a compliance matter we can't have insiders and family relationships on our board of directors; we really need to have an independent board." That's a fundamental tension with the genesis for the company to begin with, and it's very hard to explain that to somebody who's not familiar with that process and approach.

PROFESSOR SCOTT: I just want to ask one more question along those lines, and that has to do with compensation and compensation schemes, and how they are differently regarded in different jurisdictions.

Ms. SAWYER: Well, I'll start by saying that most jurisdictions are not as transparent about executive compensation as the U.S. So to begin with, our transparency alone is an issue for many non-U.S. managers. It's frightening to them that their subordinates can learn what they've earned in the last year or two. So that's a scary thing to begin with. The other thing is that, in the U.S., we have pretty strict rules that consider most value that's paid, whatever form it may be paid in, to be part of the compensation arrangements. Whereas in a lot of other jurisdictions around the world, people look at cash compensation and bonus, but there are a lot of perks associated with managerial positions, such as use of an apartment or a car, which in other countries are considered just like having a secretary, whereas here we consider those to be part of compensation. And so those are some differences that you have to navigate as well.

Ms. UNGER: I think you're raising what is perhaps the biggest challenge in coming up with a global system of regulation, and that is that there are many disparate cultures and values that should remain intact, not the corruption pieces and things like that. But what we consider to be corruption in the U.S., of course, is how they do business in other countries. And so being able to bridge that gap and come up with something that everyone can sort of shake hands on and agree will get us to the common good is a huge challenge, which is why we have yet to accomplish global financial market regulation or perhaps any other system of global regulation. I think it continues to be a challenge. And even ideas of getting there sort of in a bilateral treaty way, two countries having agreements with each other, and even if you had 22 MOUs or bilateral agreements, you still have then the fear of recriminations or retaliation in making judgments about other people's systems of regulation. And that is a very hard bridge to cross.

MR. SUYDAM: Yeah. The cultural issues can't be understated. Someone mentioned Mexico. I've been involved in a situation where we were looking in FCPA issues in Mexico in a small business where they weren't paying a governmental official, they were trying to keep the people in their store from being killed by guys who walked in with machine guns. Do you ask them when they walk in, "Are you doing this on your own or are you the agency of some government?" Because if it's a government, I can't pay you and if not, then, you know, we can

maybe do that. So the realities of what people live with, depending on where they live and how they conduct business is, it differs.

PROFESSOR SCOTT: Well, John, you were going to talk about risk management.

MR. SUYDAM: Yeah.

MS. SAWYER: That's a perfect segue, isn't it?

MR. SUYDAM: Segue into it.

PROFESSOR SCOTT: I didn't know that you were going to talk about bullet proof vests, but I guess that's part of it.

MR. SUYDAM: All right. I try to approach risk management from a little different perspective. The panel is really talking about corporate governance, and in corporate governance most people usually focus on what the board of directors is or is not doing within an organization. But you really need to step down a level underneath the board of directors, because a lot of the corporate governance, particularly as it relates to risk, boils up to the board of directors through a series of apparatuses.

To give a little background, and thank you for the nice introduction, Professor Scott. I am an NYU graduate. I also learned corporate and securities law from Professor Scott, so why I've gotten to where I am.

PROFESSOR SCOTT: I'm much younger than I look.

MS. UNGER: So everything he says is right.

MR. SUYDAM: There we go. At Apollo Management, we run an alternative investment firm. We're investing funds in leveraged buyouts, growth investments, debt investments, distressed investments. And we operate in the United States and in a couple of locations— London, Germany, Luxemburg, Singapore, Hong Kong, Mumbai. And all of the offices, other than the United States, have been opened within the last five years. So it's kind of a rapidly expanding business. We also have controlling interests, or minority interests, in a tremendous number of companies, some of them located in the United States. Even the ones in the United States typically have fairly significant overseas operations, and many of them located overseas, some of which have U.S. operations and some of which don't. So to go through, these are trends I've seen on what I'll generally call the enterprise risk management area, which from what I've seen really breaks down into three to four separate areas.

Most of them you can basically point back to some developments in one country or another through a crisis that caused people to do things a certain way.

The first one I'll talk about is global compliance. Virtually all companies of significance now in the United States will have a global compliance function. Much of which came from U.S. sentencing guidelines a number of years ago that would basically give you a chance to be dealt with in a much better way with U.S. regulatory authorities if you could show that you had an effective compliance procedure that would try to detect failure to comply with laws. Most large companies have a compliance group that is manned by a lot of lawyers, typically. Quite often others who are dedicated to a career in the compliance function. And what that group tries to do is to both develop a compliance program for the company, which will vary based upon what the company does and which laws the company needs to comply with. So for a U.S. financial services firm, you will have a compliance group that spends a lot of time on U.S. securities laws, broker/dealer laws, Investment Advisor Act issues, and then will also deal with the Foreign Corrupt Practices Act, antitrust, and the myriad of other issues. For companies that are manufacturing retail companies, they will deal with a whole other set of issues, putting products into the supply chain, numerous other laws that they have to comply with. That global compliance function then feeds up sometimes in through a general counsel, sometimes differently, and then ultimately information will get to the board, and we'll get back to that in a minute, because different companies in different jurisdictions do this differently.

The second group is really the finance group within a corporation, which has a tremendous amount of input into risk management within a company. The finance function in most companies is a fairly independent organization, meant to be so in order to have a check on operations so that the people who are responsible for selling the product aren't also responsible for recording the profit from selling that product. Through Sarbanes-Oxley, that function has become much more regimented and detailed about how they not only look at what they do, but also test what they do to ensure that it's accurate and done in an appropriate way for U.S. and, frankly, other countries' securities laws on disclosure.

An adjunct to that, which, I believe, started more as an adjunct to the finance and Sarbanes, is an internal audit function. And the internal audit function at most companies started as folks who would go in and, if there was an issue or a risk that you thought within your financial statements was an important risk, periodically internal audit, which would normally report into the CFO, would go in and take a look at that risk, dive down into it, do some detailed analysis of it. That function over the last couple of years has changed. I think the internal audit function at most companies has gone from simply being folks who will go in and do audit on financial issues, to folks who will go in and do audit on anything that needs kind of an independent set of eyes to go in, see if we're doing what we're supposed to be doing correctly, whether it's finance, whether it's compliance or marketing within an organization and come back and report. So those three functions then are sometimes not linked and sometimes are linked to what people are generally referring to now as enterprise risk management.

And enterprise risk management – and I did get one quote that I wanted to share on it – encompasses, frankly, I think, all of the issues that I've talked about. "Enterprise risk management is a process effected by an entity's board of directors, management and other personnel; applied in a strategic setting and across the enterprise; designed to identify potential events that may affect the entity and manage the risk to be within the right risk appetite for that entity." So with most companies that we're looking at in our company, enterprise risk management looks at what's going on with the global compliance, what's coming up through finance to make sure that, you know, Sarbanes-Oxley, the way we're reporting, and it's aided by internal audit. All those things rolled up, and then risk management goes broader than that. What are reputational issues associated with what we're doing? What are we doing in different countries? And I think some of these things began more as U.S.-styled developments, though I think enterprise risk management was at least as much outside the United States as it was in the United States. But there's a bit of a convergence here where each of these are feeding into a risk management profile within a company where you get different data points to try to assess where you can get in trouble.

PROFESSOR KAREN BRENNER: I totally agree with you. I actually had raised this issue for one of my boards and was tasked with helping create the infrastructure for it for the company and led that risk and compliance committee. And it's really interesting how people respond to the notion of enterprise risk management or having that function performed at the board level. Oh my gosh, you would have thought I was asking for the moon and the stars. "Risk? Everything's a risk. What do you mean we should be looking at the risks?" But in point of fact, as you had nicely articulated, it's tied to the strategy of the company. So there's a materiality component of it where you're charged with risk appetite, and there's been a ton of focus on risk appetite, and you're charged with all the risks associated with being a public company. And then all the risks associated with your strategy. Which all of these are sort of dynamic, and they change over time in terms of priorities. But it's really interesting and fun to see – maybe not everybody would think it was fun – to see though how you can sort of reorder the internal thinking of a company around that and have it infiltrate the culture of a company in terms of thinking about risks. We just considered a new capital allocation program and had a very robust conversation around the risks associated with that, which I'm not sure we would have done three or four years ago before we had this in place. So I just thought I'd give you my personal experience with enterprise risk management. It's a really invaluable practice, and it helps refine your thinking, and it can be as granular as you want it to be. But most people aren't, except the people that are collecting the facts leading up to the very top.

MR. SUYDAM: Yes. I kind of wanted to—it's a chain coming up through and then how it feeds into the top, we'll talk, at least my experience and how it does.

MS. SAWYER: Well, I was going to cite a slightly less positive example of this though, which I see regularly in my practice, which is boards sometimes going through the motions of risk analysis and risk management because they're required to do that by compliance policies. But, frankly, I've seen people do this without their hearts really being in it. And you end up seeing things like risk matrices, you know, little charts that plug Xs and Os into where the risks might be the worst or the best and that's how decisions are sometimes being made because a board doesn't always have the time or the insight into

the granular aspects of a business to really be making risk decisions. So I think that these committees and these compliance roles for boards of directors can have a lot of value. But they need to be carefully tailored so that only issues, as Laura said, that rise to the requisite of materiality are actually being presented to a board.

MR. SUYDAM: I agree. And it's how you get that process up that I think is a big issue. Let me just finish, because I'll be done in a second and then we can run through. The way in which we've seen this handled, and we've been trying to handle, is we don't think that there is one person who can be the enterprise risk management person. It takes too many disciplines and, as I've said, there's a bunch of different areas that are flowing into it and in our experience they all overlap. So, we've adopted a risk management committee that meets weekly that pulls in the different people from the different areas to vet these issues to get people across the enterprise sensitive to what the risk issues are in the different areas of the enterprise. And then the issue becomes, "And then where does that go?" We then report it up through the equivalent of our board of directors, although in many institutions it's done into the audit committee as opposed to the board of directors. And we think it's that process that allows basically to filter down and to come up and for the material issues to then be surfaced and brought up to the people who should be setting the risk parameters generally within the organization. Question?

AUDIENCE MEMBER: I think there is a very useful function for enterprise risk management, but I just— Ms. Sawyer said there are two competing considerations. At times it's really used to insulate the board and the CEO, and where it is really effective is if the risk and audit functions, their hire, fire and pay is not with the CEO. And we've seen that in the financial crisis. And the third thing that comes into play is the white space between the silos. What I have seen is, in some of these situations, the audit, the CFO says, "It's not my job." The compliance guy says, "It's not my job." So unless you have cross functional ownership. . .

MR. SUYDAM: I think I would take your point a step further. In most organizations not only should the person looking at risk be somewhat detached motivationally, which is typically compensation, from some of that decision making, but, in large part, the people who are performing the finance activ-

ities, because they're monitoring and recording what people are doing, the people who are performing the compliance function, because, once again, you don't want them feeling, if they do something or catch something or report something that they're supposed to, they're going to be penalized by the person. So each of these functions needs to have a certain level of independence. And then, without a doubt, have to all tie together because if you do it in isolation, things will fall between the cracks. Having done this, everything goes from one—I haven't seen an issue yet that we've talked about that didn't hit two to three of the different areas. It's never isolated. It's always got a financial reporting impact, it's got a compliance with law impact. It's got a, what can we lose, how can we lose it. Because as you assess it, you've always got to disclose or figure out what the right disclosure is. So you're impacting both your finance team and your legal team.

PROFESSOR SCOTT: John, the elements that you mentioned, they all seem to be generated, at least initially, by U.S. laws— the sentencing guidelines, Sarbanes-Oxley. So are the U.S. laws the floor that you apply around the world?

MR. SUYDAM: No, I think there are other areas, and I was going to get to this in my remarks too, but there are other areas that I think have come more from outside the United States and now being pulled within the United States and probably the biggest one around them. And these, I think, typically end up being more reputational than, you know, somebody's going to come in from a regulatory authority and create a problem for you is ESG, environmental social governance, issues. And those really started more in Europe. Our experience has been United Nations input from developing a set of guidelines. Grudgingly, U.S. companies began to come over to that. The way in which that began to be implemented was getting at the investor base. The UN guidelines started pushing out to institutional investors, and institutional investors started putting pressure on corporations. In our case, money managers who are managing funds to report on these type things, and they include how you're dealing with the environment, environmental sensitivities, diversity, good governance standards, and we've enforced and actually have been fairly proactive about it to make that part of our risk management function because it's very important to our investors. And that's how we make money, by getting people to invest with us.

MS. SAWYER: Are you talking about how you vote your proxies? Or how you make your investments?

MR. SUYDAM: More of it's been on how we make our investments than how we vote our proxies. But we've put in processes where we do an environmental assessment, which we did before, but a formalized environmental assessment on every transaction. We do look at issues that, most of the time, we looked at anyway, but we formalized the process so that we can then go back and report to our investors about that process, because it's very important to them because their constituencies tend to be governmental organizations, labor unions, and others that basically they're managing money for.

PROFESSOR SCOTT: We all saw yesterday's article, I think, about Apple Computer and the contractors that it's using to build its iPad.

MR. SUYDAM: Yes.

PROFESSOR SCOTT: The article suggested, at least to me, that a lot of this was a cultural problem at Apple. That is it wasn't seeing this kind of risk as a potential problem for the company, the U.S. company, the Apple brand. And now it's exploded. So how do you account for those kinds of—do you try to get around these cultural limitations of people thinking of your company as solely a financial services company, for example, or an investment, an asset manager?

MR. SUYDAM: It would be great if we could, but most people won't let us get away with it. So you do have to deal with issues. We look at reputational issues that are coming up from manufacturing companies that we own because inevitably if we own 70% of the company, people are going to reputationally put that on us even though legally they won't be able to. Reputationally they can.

MS. UNGER: Which is why I asked that proxy voting question. Because there was a point in time where they were either voted by a proxy advisory firm or the brokers who held the shares and street name. And so there was no real active participation in policies, governance-related policies, that you're talking about. But I've seen the trend away from that, and there's certainly much more regulatory focus on that and a requirement now for them to disclose how they voted on certain proxies. But rather than use a proxy advisory service, a lot of firms have implemented their own internal guidance—and I'm

thinking of the huge mega, mega asset management firms, and I'm sure it's true of many, and they do actually vote proxy by proxy, within policy guidelines. But somebody reviews them, and I think that makes a big difference in the tenor of these discussions.

PROFESSOR SCOTT: Karen?

PROFESSOR BRENNER: Yes. Actually that's probably a good segue into the area that I was asked to speak about as how to create a board of directors and specifically the issue of diversity. Because if we look at the issue of diversity, as it's been dealt with across the globe, there are sort of many insides that touch on the points that my predecessors here have made in different ways. I think whether it's your comment about Apple, jurisdiction shopping is something companies have done for a long time in many different sectors. So the idea that we're jurisdiction shopping now in the financial sector really shouldn't be a surprise to anybody. What it means in terms of how we adjust our standards and how quickly other standards around the globe are opportunistic about taking advantage of best practices that they think are important to adopt, I think that will shift over time as it has in other industries.

In terms of a board of directors, Chancellor Allen here has a seminal piece talking about if you want to understand the law, you have to understand history and social context. And I think that John's point about Europe really encouraging the view on environmental, social and governance matters, has certainly impacted how we in the U.S. deal with these issues. A board is obviously charged with overseeing the affairs of the company. And we've dealt with issues in determining what is an optimal board of issues of size. What is a good size? What are the criteria in terms of independence? How many independent people is desirable? Too many independent people may know too little about the firm. Too few independent people may have other conflicts of interest. So what is the right balance? And we've dealt with issues of diversity. What kind of diversity is desirable on a board? Most of the attention on diversity has come in the form of gender diversity, which is interesting, but incomplete. The issue of diversity on a board is really a diversity of skill sets and experiences necessary to oversee the affairs of the company. That's not easy to define, but it's specific to the firm and its future strategic plans. Within that, though, as I said, the diversity issue has been the issue that's

gotten a lot of attention. So, for example, we see countries like Norway, which have really led the way, the first European country to define quotas of 40% females on a board with strict penalties for noncompliance. Other countries have followed suit and adopted quotas. Other countries have adopted quotas, but less strict penalties for noncompliance. Many countries around the globe have adopted guidelines, which are merely aspirational quotas, if you will, but not mandated. And the U.S. has basically said to companies please disclose in your proxy how you consider diversity or whether you consider in diversity in compiling your board. But the issue of diversity, as I said, that's gotten the attention, is really gender diversity, and I look at that in really two ways. I look at that, there's a lot of scholarship in this area about gender diversity linking firm performance. Improved firm performance with increasing female representation on a board. I'm not going to get into the scholarship because I think it has some challenges associated with it – issues of causality, specifically – but it really addresses the issue of whether or not the business case needs to be made at all. And similarly to the issue of corporate social responsibility or environmental, social and governance reporting, there's a question whether it's just the right thing to do to make—have a more inclusive, diverse group of human beings that are ethnically, from an ethnic, gender and perhaps geographic diversity. Or whether a business case actually needs to be made.

So I'll leave you with one question about whether the financial imperative is necessary in these arenas. One could take the position that as with corporate social responsibility, it is merely a social responsibility. And as companies are asked to consider issues of their social and environmental responsibilities, that making the organization at the highest levels – the board, senior management and throughout the organization – representative of the customers they serve, the markets they serve, the talent pools that exist in their jurisdictions is appropriate and desirable for its own sake. The concern that I have with the focus on gender diversity specifically is that we make, I think, the false assumption that by having more people who look different in a room, we actually get the diversity of thought. Which is really what the board's challenge is. As I think Roy Smith talked about this morning, he talked about—how did he refer to it? Stuffed animals. He referred to sometimes boards being stuffed animals. In the literature, I think

that's often called the bystander effect where you have a group of people sitting around and sometimes the larger the group, the more the assumption is made that somebody else is going to raise the challenging issue or the difficult issue. And often times you have a convergence of thinking, people sort of go along because there's a desire to get along, to some degree. So I think the biggest mistake or concern about diversity is to assume that, if we have diverse-looking people around a table, we actually have created the right environment to elicit the diversity of thought that's necessary to create good decision making.

Ms. UNGER: Do you believe that boards are still stuffed animals? That's quite a vision, I have to say.

PROFESSOR BRENNER: Well, that was Roy's comment.

Ms. UNGER: My next board member— I'm going to have to picture which animals are which board members.

PROFESSOR BRENNER: Gratefully my experience, and I have fair bit of experience in this area—

Ms. UNGER: [interposing] Yeah, that's what I was thinking.

PROFESSOR BRENNER: I see evidence of people being what I'll call passive engagers or adapters, and I see some evidence of people being very active. So Roy's term was stuffed animals. I think the social science contribution is a bystander effect. And I think that's fairly well-documented that some people are more reticent about speaking up than others. One of the things, I think the conscious group dynamic that occurs, whether it's in a boardroom or a team project, being aware of the potential biases or pitfalls of a group dynamic is something that I think is critical for a board, especially a board that's seeking to get the diversity of thought around any issue. Some of the things that have emerged recently out of some of the regulations or best practices are things like essentially asking a leader to step out of a room. We do have executives sessions at board meetings which is essentially a way of saying to the CEO step out of the room and let the board meet from time to time without the so-called dominance, potentially, of a CEO. Sometimes boards have designated naysayers or institutionalized the practice of having people create an opposing view or the "what if" scenarios. Sometimes boards have adopted subgroups that instead of looking at yes or no decisions, they specifically focus on getting alternative voices and broadening the range of

ideas or inputs that are considered. This really creates a focused institutionalized process for overcoming what sometimes occurs by virtue of group dynamics.

MS. UNGER: Can we—I want to share something with you on the group dynamic point because it's a really, really good point. There are people who you would get their résumé, you'd sit in a room with them, and you'd think this is going to be the best board member ever. Because I run a few nominating governance committees, which means you interview board candidates. Then they come to the board meetings, and they don't talk, and you're amazed that they don't talk and don't contribute because they have so much to contribute. Well, one of my boards was completely dysfunctional. I mean completely. It would be sort of a everybody had to say the same thing, it would start off, like it was kind of storytelling around the campfire. You'll never believe what happened. . ., and it was just—we had issues. We had a deferred prosecution agreement. So there were a lot of things going on. As part of the evaluation process, we had some executive leadership coach in the building, in the company, helping executive management get to the next level. I said, "Why don't we just have him conduct a review of the board?" We ended up doing a 360 on each of the board members. I mean, the Meyers-Briggs, the peer evaluation, the whole thing, top to bottom, which was great not only on an individual basis, I'd never had anything like that, I don't think ever in my career, it really helped sort of you to get to know yourself. It helped you understand what people perceived your contribution to be. And then he came in and helped us work the dynamics as a group, and I can't tell you how much of a difference it has made. It has completely transformed the board. And these are all the same people—not all, but mostly the same people as before. But it's really—the dynamics piece of it is really interesting. Because you have to get to that level of being comfortable. We told our life stories, I mean we did all kinds of things to get to understanding what people's contributions were and people sort of understanding where they were and when to speak up and what was valued. It was really interesting.

PROFESSOR BRENNER: I think that really is the key— is the board has huge range of responsibilities, a larger and larger range of responsibilities. And I think, to your point, given the regulatory environment, there's a tendency especially to check

the box on lots of areas. And boards are much more compressed in terms of their ability to spend time on the key strategic issues of the business. So being an efficient and productive board and one where you really get the benefit of the collective inputs and understanding how to create that dynamic is really essential.

My point on diversity is, while countries around the globe have adopted many different ways of looking at this – and we can debate the social merits of this, et cetera – I just want to caution that assuming we have diverse-looking candidates around the table is really to commoditize the minorities, and that would be a very great misfortune in terms of not only attracting the proper candidates, but in terms of getting the most out of the skillsets around the table. Yes.

AUDIENCE MEMBER: One question. I appreciate your thought that diversity of thought is what you're after rather than status of various kind. But I'm wondering, without using ethnic, gender, race, whatever, as a proxy, what the alternative would be. How you're going to test someone for diversity of thought. And in my experience, which, alas, is not wide, but long, I have rarely found someone in a group who didn't turn out to be a spokesperson for that group.

MR. SUYDAM: One of the, let's keep on saying diversity of thought, I think it's as much diversity of experience as it is diversity of thought. Because I think people in a group setting tend to weigh in a lot more on things that they feel comfortable with because they've had experience that has given them the ability to talk on something. And the experience comes from what they've done before, what their educational, business background's been. And I think that's actually what the SEC now requires when you're going through your nomination. What is the background of the individual and why do you think that background and that experience would be additive to what's on the board? Which I think they hit head on; it's kind of easy to deal with when you're putting in a proxy now. But I think was very insightful.

PROFESSOR BRENNER: Well it forces you to think about it—

MR. SUYDAM: [interposing] Yeah.

MS. UNGER: -and quantify it.

PROFESSOR BRENNER: Yes. And I think when we talk about diversity of skills, it's exactly the same point – diversity of skills by virtue of experience is really very important.

PROFESSOR SCOTT: I think you find a lot of the regulatory aspects of board composition are responses to perceived problems and not necessarily solutions. We mentioned in the blurb about this panel, for example, the concept of independence. And Melissa already talked about how that concept might be at variance in various transactions with what would be the ideal outcome. When those requirements were first put into place by Sarbanes-Oxley— well, by the marketplaces amending their listing requirements, there was a huge battle involving venture capitalists who would not qualify as independent in most of the companies that they had brought to market because of the size of their ownership position. And yet they claimed, and particularly for the audit committee, they claimed they were the best-qualified people to be on the audit committee, they had the greatest economic stake and the greatest experience with the company. But it was, to go back sort of full circle to almost where we started this, it was a political response. The independence requirements were a political response to what was then the last war, which was Enron. Enron and WorldCom. I don't know what the political genesis of the diversity requirements are in some of the northern European countries.

PROFESSOR BRENNER: I think, just as I referenced Chancellor Allen's piece, that it really is a function of social context to some degree. And as John pointed out, in some jurisdictions you have a social system or more of a social conscience perhaps, or a social system where it's very hospitable for them to consider issues of environmental safety and protection or governance or social issues. And so, therefore, promoting minorities at the most senior level of corporations that are thought to have obligations to the community and vice versa is very natural in certain jurisdictions. It's in keeping with their social system. So it's not necessarily, as in the case of the U.S., many of our laws are a result of crises that have occurred and responses to crises. In some areas it's learning from jurisdictions that have a different social orientation and that has been translated around the globe differently in different jurisdictions.

MR. SUYDAM: I think it also had to do a lot more with the view of who the stakeholders in the organization were.

PROFESSOR SCOTT: Yes.

MR. SUYDAM: I mean Europe, in particular. Supervisory boards regularly in most jurisdictions by requirement have labor on the board and have others who—you know, we've, in the United States, come upon the stakeholder concept relatively recently. It's something that they've had for quite a long time now.

PROFESSOR SCOTT: I think a great challenge for U.S. companies operating globally and for other companies operating here is that the concept of what we expect of a corporation, of a business entity of this sort, is not unitary. We'd like to think the U.S. or, at least we used to like to think, the U.S. concept of what a corporation is about and what it's for is a universally shared concept. And, of course, it's not. And that's going to be reflected in the board of directors as well as the legislative enactments. Yes?

AUDIENCE MEMBER: Laura Unger referred to a 360 review of the board. Do you think that would be discoverable in shareholder litigation? And doesn't it terrorize you? I was corporate secretary of a public company in my distant past, and we did something. It wasn't a 360. And after seeing what some of the directors said, I was terrorized by it. I think statutes of limitations have passed since it was done, which is why I'm mentioning it in public. I mean, this is a very serious question.

MS. UNGER: No, it is a very serious question and it actually permeates all director evaluation processes no matter what the board or committees adopt. I think there are many different ways to conduct an evaluation. This was one-off; we don't do that every time. We do it differently now. It was more of an opportunity. We saw that we could do better, and it was an opportunity for us to do something about it. And it was transformational as the company was building an infrastructure and a management team. The timing was actually perfect. Would we have gotten to that point anyway over a couple of years? Probably. Because, again, it's the same personalities and people, but it expedited it. I have this firm and maybe naïve belief that, if you try to do the right thing, you can stay above the fray, and that it's all the intention. And our intention was to do well by the shareholders. I can't see how that intention would translate into litigation. However, my name is in more complaints than I ever thought possible, so certainly it does hap-

pen. But, again, that's the problem with all of this regulation, right, is that it colors your thinking to, "How do I protect myself?" not, "how do I do—what's the policy behind what I'm supposed to do? What's the objective, what's my role?" And that's really where we need to keep our eyes and minds. And not, "Oh my gosh, am I going to get sued for this or sued for that?" Because that's what leads to "check the box," that's what leads to ineffective boards, and that leads to governance by numbers. And really that's not going to help anybody, including providing shareholder return.

PROFESSOR SCOTT: But the question is really an excellent one because board evaluations are a routine matter for boards today.

MS. UNGER: Yes.

PROFESSOR SCOTT: So even without the more robust review that you undertook in your scenario with board evaluations, the question is, "Are those discoverable?"

MS. UNGER: Well, and that's why I answered the way I did. I mean different people have different views on what's discoverable and what's not. So that sometimes colors the way they conduct the evaluations. I know some boards—we do it all by dialogue. I just completed one where we filled out forms, and then I called each of the directors to get additional color on what they said and then provided it during executive session. And then we did a list of things that were sort of the consensus. We were all on the same page, and it was all great feedback in terms of making us a better board. So, "I do not know" is the answer, but you don't certainly want the fear of discovery to prevent you from having a robust evaluation system.

PROFESSOR BRENNER: One of the messages in this, I think, and also it underscores some of the other points, which is the U.S. has typically been a very rules-based system. And we've gotten a little bit caught up in rules that may conflict with rules, or do we have too many rules. And we're trying to adopt some of the learning from other jurisdictions that have a more principled approach. And I think John's point about the disclosure now that's required in a proxy for, "Why did you select this director?" or, "What was your thinking?" essentially has us focusing on these issues more acutely. But it's a principles based approach to some of these issues rather than a quota or setting a rule. Having said that, in other jurisdictions, at least

on this issue, the rate at which they felt, let's say, women in this case were getting added to boards was at glacial speeds, and, from a societal standpoint, totally unacceptable. So they felt without a quota we would never get to where we "should get," at least in their jurisdictions. And so they thought a quota system was necessary. But this all gets back to not only social context, but also even within a board, that one size never quite fits all, and that, as you said, Laura, that we have to really use our best judgment in so many of these cases to get to the right answer. It's not prescriptive.

AUDIENCE MEMBER: Are there organizations that evaluate boards? Because it seems like to me that the News America board— for example, where was everybody? And is there a response that Apple needs to make now—

MR. SCOTT: [interposing] The answer's yes.

PROFESSOR BRENNER: I think Apple is a good example of— there are many companies that have gone before Apple, whether it's Gap or Nike, or even Walmart, that have suffered as a result of reputational harm. And today we have a very efficient system where technology allows us to see how corporations act around the globe. And we form judgments about that, and those judgments have real financial implications to firms. So their ability to be mindful of norms even beyond rules and regulatory requirements, their ability to be mindful of norms that society expects and be responsive to those norms is really critical.

PROFESSOR SCOTT: There are firms which will conduct a review.

PROFESSOR SCOTT: Oh yes.

MR. SUYDAM: There's also institutional and investment and people who advise, but they're not that subjective. They're based more on how often people show up, how do they vote, what's the structure, do they have the following committees.

AUDIENCE MEMBER: I'm sorry to ask yet another question, but I couldn't resist because I did work for a regulator and a project that was brought up was to have a group at the regulator really get down with a few boards and go into corporate governance and find out all the nitty-gritty about how the board was functioning and all the problems and et cetera. And I did wonder about discoverability. They seem to assume a reg-

ulator/regulatee privilege. And, whatever problems were discovered, it could be kept strictly confidential.

PROFESSOR BRENNER: [interposing] That's fiction.

MR. SUYDAM: I was going to say, "Where is that?"

PROFESSOR BRENNER: Right.

AUDIENCE MEMBER: And I never got an answer.

PROFESSOR BRENNER: What regulator did you work for?

AUDIENCE MEMBER: I don't think I should say.

PROFESSOR SCOTT: I will only add one anecdote to this question on discoverability. I just learned the acronym or the text thing "LTL," which I am told comes out of Goldman Sachs, a company which is sensitive to these kinds of issues. It stands for "let's talk live," as opposed to by email or any other recorded form. So next time you see LTL in one of your emails or text messages, someone sensitive to the issue of discovery has sent it.

MS. SAWYER: The only context in which that might make a little more sense is if it's a regulated entity. So the SEC may be looking at the board of Goldman or FINRA or something like that. But, still, I've not really heard of that.

PROFESSOR SCOTT: Well, as is always the case with these panels, we've raised many more questions than we have answered. I thank you for joining us. And the next panel, for those of you who are interested in liability and hot topics in that area, is on the Foreign Corrupt Practices Act and the UK Bribery Act. A new and frightening statute shortly going into effect. So I thank you all for being here, and I thank the panelists very much for your being here.