The Corporate Governance Provisions of Dodd-Frank

Stephen M. Bainbridge*

Abstract

This essay provides a brief overview of the seven principal corporate governance provisions of The Wall Street Reform and Consumer Protection Act of 2010 (better known as "The Dodd-Frank Act").

1. Section 951 creates a so-called "say on pay" mandate, requiring periodic shareholder advisory votes on executive compensation.
2. Section 952 mandates that the compensation committees of reporting companies must be fully independent and that those committees be given certain specified oversight responsibilities.
3. Section 953 directs that the SEC require companies to provide additional disclosures with respect to executive compensation.
4. Section 954 expands Sarbanes-Oxley Act's rules regarding clawbacks of executive compensation.
5. Section 971 affirms that the SEC has authority to promulgate a so-called "proxy access" rule pursuant to which shareholders would be allowed to use the company's proxy statement to nominate candidates to the board of directors.
6. Section 972 requires that companies disclose whether the same person holds both the CEO and Chairman of the Board positions and why they either do or do not do so.
7. Section 989G affords small issuers an exemption from the internal controls auditor attestation requirement of Section 404(b) of the Sarbanes-Oxley Act.

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* William D. Warren Professor of Law, UCLA School of Law.

In response to the financial crisis of 2007-2008, Congress passed The Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank" or "the Act").[1] Most of the Act deals with financial regulation. Six provisions of the Act, however, impose new corporate governance regulations not just on Wall Street banks but also on all Main Street public corporations. A seventh provides limited regulatory relief from § 404 of Sarbanes-Oxley[2] for the smallest public corporations.

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4. Section 954 expands Sarbanes-Oxley Act's rules regarding clawbacks of executive compensation.
5. Section 971 affirms that the SEC has authority to promulgate a so-called "shareholder access" rule pursuant to which shareholders would be allowed to use the company's proxy statement to nominate candidates to the board of directors.
6. Section 972 requires that companies disclose whether the same person holds both the CEO and Chairman of the Board positions and why they either do or do not do so.
7. Section 989G affords small issuers an exemption from the internal controls auditor attestation requirement of Section 404(b) of the Sarbanes-Oxley Act.

Compared to some of the proposals floated in Congress following the 2007-2008 financial crisis, Dodd-Frank's corporate governance provisions were relatively modest. Senators Maria Cantwell's and Charles Schumer's Shareholder Bill of Rights, for example, would have mandated the use of majority voting in the election of directors.[3] It also would have banned the use of staggered boards of directors and required creation of board-level risk management committees.[4] None of these provisions made it into the final

[1] The Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (hereinafter cited as "Dodd Frank").

[2] The Public Company Accounting Reform and Investor Protection Act, Pub. L. No. 107-204, 2002 U.S.C.C.A.N. (116 Stat.) 745 (codified in scattered sections of 15 and 18 U.S.C.).

[3] Press release, Sen. Charles E. Schumer, Schumer, Cantwell Announce 'Shareholder Bill of Rights' to Impose Greater Accountability on Corporate America (May 19, 2009), http://schumer.senate.gov/new_website/record.cfm?id=313468. Specifically, they proposed that nominees to the board of directors would have "board directors to receive at least 50% of the vote in uncontested elections in order remain on the board." Id.

[4] Id. Dodd-Frank § 165 does mandate risk management committees, but only for non-bank financial services companies supervised by the Federal Reserve and bank holding companies.

Dodd-Frank Act. Other provisions of the Cantwell-Schumer bill made it into Dodd-Frank only in a much weakened form. Instead of instructing the SEC to adopt a proxy access rule, Dodd-Frank merely affirms that the SEC has authority to do so.[5] Instead of requiring that companies separate the positions of CEO and Chairman of the Board, with the latter being an independent director, Dodd-Frank merely requires companies to disclose their policy with respect to filling those positions.[6] Even so, however, the remaining provisions impose important new duties and expand the federal regulatory role in corporate governance.

Say on Pay

Dodd-Frank § 951 creates a new § 14A of the Securities Exchange Act, pursuant to which reporting companies must conduct a shareholder advisory vote on specified executive compensation not less frequently than every three years.[7] At least once every six years, shareholders must vote on how frequently to hold such an advisory vote (i.e., annually, biannually, or triennially).[8] The compensation arrangements subject to the shareholder vote are those set out in Item 402 of Regulation S-K.[9] In addition, a shareholder advisory vote is required with respect to golden parachutes.[10]

The vote must be tabulated and disclosed, but is not binding on the board of directors.[11] Indeed, the Act makes clear that the vote shall not be deemed either to effect or affect the fiduciary duties of directors.[12] Accelerated and large accelerated filers must describe in their compensation disclosure and analysis whether and how their compensation policies and decisions take into account the results of the say on pay vote.

A proposed SEC rule mandates that proxy statements must provide shareholders with the choice of selecting 1, 2, or 3 years, or to abstain. The company's board of directors may include a recommendation as to which frequency shareholders should choose.

Curiously, the Act does not specify whether the "say when on pay" vote on how frequently the shareholder say on pay vote must be taken will be binding on the board. A

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[5] Compare Dodd-Frank § 971 (affirming authority), with Press Release, supra note 3 (mandating adoption).

[6] Compare Dodd-Frank § 972 (requiring disclosure), with Press Release, supra note 3 (mandating separation).

[7] Dodd-Frank § 951.

[8] Id.

[9] See id. (requiring a vote "to approve the compensation of executives, as disclosed pursue- ant to section 229.402 of title 17, Code of Federal Regulations, or any successor thereto").

[10] See id.

[11] S. Rep. No. 111-176, at 133.

[12] Dodd-Frank § 951, to be codified at 15 U.S.C. 78n-1.

proposed SEC rule would require the company to disclose whether it will treat the frequency vote as non-binding. The company must disclose the results of the vote and its decision as to the frequency of say on pay votes in its next quarterly or annual report.

The Act gives the SEC power to create exemptions. The SEC is specifically directed to evaluate the impact of the say on pay rule on small issuers.[13]

The effectiveness of say on pay is highly contested. The Senate committee report argued that:

> The UK has implemented ‘‘say on pay’’ policy. Professor John Coates in testimony for the Senate Banking Committee stated that the UK's experience has been positive; ‘‘different researchers have conducted several investigations of this kind . . . These findings suggest that say-on-pay legislation would have a positive impact on corporate governance in the U.S. While the two legal contexts are not identical, there is no evidence in the existing literature to suggest that the differences would turn what would be a good idea in the UK into a bad one in the U.S.’’[14]

In contrast, Professor Jeffrey Gordon argues that the U.K. experience with say on pay makes a mandatory vote a "dubious choice."[15] First, because individualized review of compensation schemes at the 10,000-odd U.S. reporting companies will be prohibitively expensive, activist institutional investors will probably favor only a narrow range of compensation programs, that will tend to push companies towards a one size fits all model.[16] Second, because many institutional investors rely on proxy advisory firms, a very small number of gatekeepers will wield undue influence over compensation.[17] This likely outcome seriously undercuts the case for say on pay. Although proponents of say on pay claim it will help make management more accountable, they ignore the probability that say on pay really will shift power from boards of directors not to shareholders but to advisory firms like RiskMetrics.[18] There is good reason to think that boards are more accountable than those firms. "The most important proxy advisor, RiskMetrics, already faces conflict issues in its dual role of both advising and rating firms on corporate governance that will be greatly magnified when it begins to rate firms on their compensation plans."[19] Ironically, the only constraint on RiskMetrics' conflict is the

[13] Id.

[14] S. Rep. No. 111-176, at 134.

[15] Jeffrey N. Gordon, "Say on Pay": Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-in, 46 Harv. J. Legis. 323, 325 (2009).

[16] Id.

[17] Id. at 326.

[18] See Stephen M. Bainbridge, Will the Unaccountable Power of RiskMetrics Put Teeth in the Dodd Bill's Say on Pay Provision?, ProfessorBainbridge.com (Apr. 22, 2010), http://www.professorbainbridge.com/professorbainbridgecom/2010/04/will-the-unaccountable-power-of-risk-metrics-put-teeth-in-the-dodd-bills-say-on-pay-provision.html (making this point).

[19] Gordon, supra note 15, at 326.

market—i.e., the possibility that they will lose credibility and therefore customers—the very force most shareholder power proponents claim doesn't work when it comes to holding management accountable.[20]

As for the U.K. experience, Gordon's review of the empirical evidence finds that shareholders almost invariably approve the compensation packages put to a vote.[21] He further finds that while there is some evidence that pay for performance sensitivity has increased in the U.K., executive compensation has continued to rise "significantly" in the U.K.[22] Indeed, the growth rate for long-term incentive plans has been "higher" than in the U.S.[23]

Gordon concludes "that 'say on pay' has some downsides even in the United Kingdom, downsides that would be exacerbated by a simple transplant into the United States."[24] He recommended that any federal rule be limited to an opt-in regime or, if some form of mandatory regime was politically necessary, that it be limited to the very largest firms.[25] Gordon's proposal finds support in a recent behavioral economics laboratory experiment finding that say on pay has a more positive impact on investors when it is voluntarily effected by companies than when it is mandated.[26] As we have seen, however, Congress went in a different direction.

Compensation Committees

Section 952 of Dodd-Frank contains a number of provisions relating to compensation committees, including:

- The SEC is to adopt rules prohibiting the stock exchanges and NASDAQ (collectively self-regulatory organizations) from listing any issuer that does not comply with specified requirements relating to the independence of compensation committee members.

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[20] See Bainbridge, supra note 18 (making this point).

[21] See Gordon, supra note 15, at 341 (explaining that "shareholders invariably approve the Directors Remuneration Report, with perhaps eight turndowns across thousands of votes over a six-year experience"). The same is true of the limited U.S. experience with voluntary say on pay. See id. at 339 ("The number of proposals grew only moderately [in 2008], to seventy, and the level of shareholder support has remained at the same level, approximately forty-two percent.").

[22] Id. at 341.

[23] Id. at 344.

[24] Id. at 367.

[25] See id. (setting out recommendations).

[26] Kendall O. Bowlin et al., Say-on-Pay and the Differential Effects of Voluntary Versus Mandatory Regimes on Investor Perceptions and Behavior (August 16, 2010), http://ssrn.com/abstract=1659862.

- The SEC is to direct the self-regulatory organizations to adopt listing standards requiring that each member of an issuer's compensation committee be independent.[27]
- The SEC is to adopt rules requiring that the self-regulatory organizations consider certain factors in defining what constitutes independence in connection with compensation committee membership. These include the source of the director's total compensation, including such items as consulting, advisory, or other fees, and whether the director is affiliated with the company, any of its subsidiaries, or any of its other affiliates. Beyond this, however, the self-regulatory organizations are allowed to develop their own definition of independence.
- The compensation committee must have authority to retain at company expense independent legal and other advisors, including compensation consultants.
- The committee is to be solely responsible for selecting, retaining, and determining the compensation of such advisors.
- If a compensation consultant is retained, the proxy statement must so disclose, as well as disclosing any conflicts of interest raised thereby.

Curiously, there is disagreement as to whether Section 952 mandates that SRO listing standards require all listed companies to have an independent compensation committee. The relevant section, parsed of exceptions, provides that:

> The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer ... that does not comply with the requirements of this subsection.

Nothing in that provision nor anything else in Section 952 mandates expressly the use of compensation committees. Instead, it says that a compensation committee must be independent.

The key issue here relates to NASDAQ-listed companies. NASDAQ listing standard 5605(d) requires executive officer compensation decisions to be made by independent directors. Under the rule, this can be done either by a majority of the independent directors, or by a committee comprised solely of independent directors. If the company chooses to rely on a vote of a majority of the independent directors, the independent directors must meet alone in executive session to make these decisions. The plain text of § 952 does not appear to require a company making use of this option to create a compensation committee.

Commentators differ on the issue.[28] Dorsey & Whitney lawyers Thomas Martin and Kimberley Anderson, for example, opine that "Section 952 of the Act requires the SEC to adopt, on or before July 16, 2011, a rule that will prohibit the listing of issuers that do not have independent compensation committees." In contrast, King & Spalding lawyers Kenneth Rasking and Laura Westfall opine that "Section 952 does not require companies

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[27] Dodd-Frank § 952(a).

[28] See Stephen M. Bainbridge, A Question re Compensation Committees Under Dodd Frank 952, Professorbainbridge.Com (Sept. 14, 2010), http://www.professorbainbridge.com/ professorbainbridgecom/wall-street-reform/ (citing authorities on both sides of debate).

to have compensation committees, but does require existing compensation committees to meet its 'independence' criteria." A Paul Weiss client memo likewise states that "[w]hile the Act does not require companies to have compensation committees per se (meaning, for example, that NASDAQ companies that do not have compensation committee structures may be able to continue that practice pending further rulemaking from the exchange), those companies that do must have fully independent committees."

The Act authorizes self-regulatory organizations to adopt exemptions from the independence requirement. In addition, the Act itself excludes a number of categories of issuers, including controlled companies, limited partnerships, issuers in bankruptcy proceedings, open-end investment companies, and foreign private issuers that annually disclose why they do not have an independent compensation committee.

Proponents argued that Congress should "ensure that compensation committees are free of conflicts and receive unbiased advice.''[29] If the Act is read to require that all public corporations must have an independent compensation committee, however, it will do so without support in the empirical literature. Most empirical studies have rejected the hypothesis that compensation committee independence is positively correlated with firm performance or with improved CEO compensation practices.[30]

Section 952 also requires the SEC to adopt rules requiring that compensation committees take into consideration specified factors in determining whether a compensation consultant is independent of management. These include other services provided to the issuer by the consultants, the percentage of the consultant firm's income received from the company, adequacy of the consultant firm's conflict of interest policies, whether the consultant owns stock in the company, and any relationship between the consultant and a member of the committee.

Pay Disclosures

Section 953 requires that each reporting company's annual proxy statement must contain a clear exposition of the relationship between executive compensation and the issuer's financial performance. The disclosure must give investors an easy way of comparing executive compensation and firm performance over time. The proxy statement also must disclose whether employees are allowed to hedge the value of company stock they own.

One aspect of § 953 likely to prove particularly problematic is the requirement that companies disclose "the median of the annual total compensation of all employees of the issuer" except the CEO, the CEO's annual total compensation, and the ratio of the two amounts.[31] This requirement is expected to be hugely burdensome:

> [It] means that for every employee, the company would have to calculate his or her salary, bonus, stock awards, option awards, nonequity incentive plan compensation,

[29] S. Rep. No. 111-176, at 135.

[30] See Iman Anabtawi, Explaining Pay Without Performance: The Tournament Alternative, 54 Emory L.J. 1557, 1582-83 (2005) (reviewing studies).

[31] Dodd-Frank § 953.

> change in pension value and nonqualified deferred compensation earnings, and all other compensation (e.g., perquisites). This information would undoubtedly be extremely time-consuming to collect and analyze, making it virtually impossible for a company with thousands of employees to comply with this section of the Act.[32]

"The rules' complexity means multinationals face a 'logistical nightmare' in calculating the ratio, which has to be based on the median annual total compensation for all employees, warned Richard Susko, partner at law firm Cleary Gottlieb. 'It's just not do-able for a large company with tens of thousands of employees worldwide.'"[33]

Compensation Clawbacks

Under Sarbanes-Oxley § 304, in the event a corporation is obliged to restate its financial statements due to "misconduct," the CEO and CFO must return to the corporation any bonus, incentive, or equity-based compensation they received during the 12 months following the original issuance of the restated financials, along with any profits they realized from the sale of corporate stock during that period. Dodd-Frank significantly expands this provision.

Dodd-Frank § 954 adds a new § 10D to the Securities Exchange Act, pursuant to which the SEC is instructed to direct the self-regulatory organizations to require their listed companies to disclose company policies for clawing back incentive-based compensation paid to current or former executive officers in the event of a restatement of the company's financials due to material non-compliance with any federal securities law financial reporting requirement.[34] Issuers failing to adopt such a policy must be delisted.[35] The requisite policy must provide for clawing back any "excess" compensation any such executive officer received during the three-year period prior to the date on which the issuer was obliged to issue the restatement.[36] Excess compensation is defined as the difference between what the executive was paid and what the executive would have received if the financials had been correct.[37]

Critics identify a number of concerns raised by § 954. On the one hand, as a deterrent to financial reporting fraud and error, it is over-inclusive. It encompasses all executive officers, without regard to their responsibility or lack thereof for the financial statement in question. Some innocent executives therefore will have to forfeit significant amounts

[32] Warren J. Casey & Richard Leu, United States: New Executive Compensation Disclosures Under Dodd-Frank (August 3, 2010), Mondaq.com, http://www.mondaq.com/unitedstates/ article.asp?articleid=106962.

[33] Jean Eaglesham & Francesco Guerrera, Pay Law Sparks "Nightmare" on Wall St, Fin. Times, Aug. 31, 2010, at 1 .

[34] Dodd-Frank § 954, to be codified at 15 USC § 78j-4.

[35] S. Rep. No. 111-176, at 135.

[36] Id.

[37] Id.

of pay. On the other hand, it is under-inclusive. Executive officers include an issuer's "president, any vice president … in charge of a principal business unit, division or function …, any other officer who performs a policy making function or any other person who performs similar policy making functions …."[38] As the Senate committee acknowledged, the policy therefore applies only to a "very limited number of employees …."[39] The trouble with this limitation is that "decisions of individuals such as proprietary traders, who may well not be among" an issuer's executive officers nevertheless "can adversely affect, indeed implode, a firm."[40]

Another concern is the high probability of unintended consequences. In response to Sarbanes-Oxley's much narrower clawback provision, "companies increased non-forfeitable, fixed-salary compensation and decreased incentive compensation, thereby providing insurance to managers for increased risk."[41] Because current federal policy seeks to promote pay for performance, mandatory clawbacks undermine that goal.[42] There is a significant risk, moreover, that other unintended consequences will develop in light of the "many ambiguities in the legislative language which will have to be clarified in implementing SEC regulations, e.g. is it retroactive, how to calculate recoverable amount, the dates during which the recovery must be sought."[43]

Proxy Access

Dodd-Frank § 971 affirms that the SEC has authority to adopt a proxy access rule.[44] At the same time, however, the legislative history makes clear that Congress intends that the SEC "should have wide latitude in setting the terms of such proxy access."[45] In particular, § 971 expressly authorizes the SEC to exempt "an issuer or class of issuers" from any

[38] 17 CFR § 240.3b-7.

[39] S. Rep. No. 111-176, at 135.

[40] Sanjai Bhagat & Roberta Romano, Reforming Executive Compensation: Focusing and Committing to the Long-Term, 26 Yale J. Reg. 359, 366 (2009).

[41] Id.

[42] See id. ("As critics of executive compensation, including President Obama, object to large pay packages that are independent of performance, firms' adaptation to the clawback provisions had precisely the opposite effect of what they would wish to see of a pay package.").

[43] Ben W. Heineman, Jr., Making Sense Out of "Clawbacks," Harv. L. Sch. Forum on Corp. Gov. & Fin. Reg. Aug. 13, 2010), at http://blogs.law.harvard.edu/corpgov/2010/08/13/ making-sense-out-of-clawbacks/.

[44] S. Rep. No. 111-176, at 146 (discussing proxy access provision then numbered § 972).

[45] Id.

proxy access rule and specifically requires the SEC to "take into account, among other considerations, whether" proxy access " disproportionately burdens small issuers."[46]

Section 971 probably was unnecessary. An SEC rulemaking proceeding on proxy access was well advanced long before Dodd-Frank was adopted, so a shove from Congress was superfluous. Although the SEC lacks authority to regulate the substance of shareholder voting rights, moreover, proxy access almost certainly fell within the disclosure and process sphere over which the SEC has unquestioned authority.[47] By adopting § 971, however, Congress did preempt an expected challenge to any forthcoming SEC regulation.

On August 25, 2010, just a few weeks after Dodd-Frank became law, the SEC adopted Rule 14a-11, which will require companies to include in their proxy materials, alongside the nominees of the incumbent board, the nominees of shareholders who own at least 3 percent of the company's shares and have done so continuously for at least the prior three years.[48] A shareholder may not use the rule to take over the company. Instead, the shareholder is limited to putting forward a short slate consisting of at least one nominee or up to 25% of the company's board of directors, whichever is greater.[49] Application of the rule to small companies will be deferred for three years, while the SEC studies its impact on them.[50]

Proxy access has been highly controversial. As SEC Commissioner Troy Paredes pointed out in dissenting from adoption of new Rule 14a-11, proxy access marks a considerable displacement of state corporate law by federal securities regulation:

> Rule 14a-11's immutability conflicts with state law. Rule 14a-11 is not limited to facilitating the ability of shareholders to exercise their state law rights, but instead confers upon shareholders a new substantive federal right that in many respects runs counter to what state corporate law otherwise provides.[51]

Commissioner Paredes further pointed out that:

> The mixed empirical results do not support the Commission's decision to impose a one-size-fits-all minimum right of access. Some studies have shown that certain means of enhancing corporate accountability, such as de-staggering boards, may increase firm value, but these studies do not test the impact of proxy access

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[46] Dodd-Frank § 971(c).

[47] See Stephen M. Bainbridge, The Scope of the SEC's Authority Over Shareholder Voting Rights, Engage, June 2007, at 25 (analyzing relevant case law and legislative history).

[48] Facilitating Shareholder Director Nominations, Exchange Act Rel. No. 62,764 at 108 (Aug. 25, 2010).

[49] Id. at 26.

[50] Id. at 70-71.

[51] Troy Paredes, Comm'r, Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt the Final Rule Regarding Facilitating Shareholder Director Nominations ("Proxy Access") (Aug. 25, 2010), http://www.sec.gov/news/speech/2010/spch082510tap.htm.

> specifically. Accordingly, what the Commission properly can infer from these data is limited and, in any event, other studies show competing results. Recent economic work examining proxy access specifically is of particular interest in that the findings suggest that the costs of proxy access may outweigh the potential benefits, although the results are not uniform. The net effect of proxy access — be it for better or for worse — would seem to vary based on a company's particular characteristics and circumstances.
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> To my mind, the adopting release's treatment of the economic studies is not evenhanded. The release goes to some length in questioning studies that call the benefits of proxy access into doubt — critiquing the authors' methodologies, noting that the studies' results are open to interpretation, and cautioning against drawing "sharp inferences" from the data. By way of contrast, the release too readily embraces and extrapolates from the studies it characterizes as supporting the rulemaking, as if these studies were on point and above critique when in fact they are not.[52]

SEC Commissioner Kathleen Casey pointed out in her dissent that the new rule favors activist investors who may seek to use the new access rights to engage in private rent seeking:

> The paradigm of a power struggle between directors and shareholders is one that activist, largely institutional, investors assiduously promote, and this rule illustrates a troubling trend in our recent and ongoing rulemaking in favor of empowering these shareholders through, among other things, increasingly federalized corporate governance requirements. Yet, these shareholders do not necessarily represent the interests of all shareholders, and the Commission betrays its mission when it treats these investors as a proxy for all shareholders.[53]

A legal challenge by the U.S. Chamber of Commerce to the administrative process by which the SEC adopted proxy access is currently pending and the SEC has stayed implementation of the rule until the 2012 proxy season to provide an adequate opportunity for the challenge to be resolved.

Board Structure Disclosure

Section 972 directs the SEC to adopt a new rule requiring reporting companies to disclose whether the same person or different persons holds the positions of CEO and Chairman of the Board.[54] In either case, the company must disclose its reasons for doing so.

"The legislation does not endorse or prohibit either method."[55] Instead, Dodd-Frank opted for disclosure rather than a substantive mandate that the two positions be separated.

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[52] Id.

[53] Kathleen L. Casey, Comm'r, Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt Amendments Regarding Facilitating Shareholder Director Nominations (Aug. 25, 2010), http://www.sec.gov/news/speech/2010/spch082510klc.htm

[54] Dodd-Frank § 953.

[55] S. Rep. No. 111-176, at 147.

It did so presumably because the evidence on the merits of separating the two positions is mixed, at best:

> At least 34 separate studies of the differences in the performance of companies with split vs. unified chair/CEO positions have been conducted over the last 20 years, including two "meta-studies." … The only clear lesson from these studies is that there has been no long-term trend or convergence on a split chair/CEO structure, and that variation in board leadership structure has persisted for decades, even in the UK, where a split chair/CEO structure is the norm.[56]

Unfortunately, however, some activist investors hope that the provision will shame companies into separating the two positions:

> Mr. Joseph Dear, Chief Investment Officer of the California Public Employees' Retirement System, on behalf of the Council of Institutional Investors, wrote in testimony for the Senate Banking Committee that ''Boards of directors should be encouraged to separate the role of chair and CEO, or explain why they have adopted another method to assure independent leadership of the board.''[57]

Section 404 Relief

Sarbanes-Oxley § 404(a) ordered the SEC to adopt rules requiring reporting companies to include in their annual reports a statement of management's responsibility for "establishing and maintaining an adequate internal control structure and procedures for financial reporting" and "an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting." Section 404(b) required that the company's independent auditors attest to and report on management's assessment.

A 2005 survey put the direct cost of complying with § 404 in its first year at $7.3 million for large accelerated filers and $1.5 million for accelerated filers.[58] "First-year implementation costs for larger companies were thus eighty times greater than the SEC had estimated, and sixteen times greater than estimated for smaller companies."[59] While

[56] John Coates, Protecting Shareholders and Enhancing Public Confidence through Corporate Governance (July 30, 2009), http://blogs.law.harvard.edu/corpgov/2009/07/30/protecting-shareholders-and-enhancing-public-confidence-through-corporate-governance/.

[57] S. Rep. No. 111-176, at 147.

[58] Joseph A. Grundfest & Steven E. Bochner, Fixing 404, 105 Mich. L Rev. 1643, 1646 (2007).

[59] Id. at 1645-46. Reporting companies are those issuers registered with the SEC pursuant to the Securities Exchange Act of 1934. Large accelerated filers are those reporting companies with a market float of $700 million or more. Accelerated filers are those reporting companies having a float of at least $75 million, but less than $700 million. Non-accelerated filers are reporting companies with a float of less than $75 million. The reference to acceleration reflects that the first two categories of companies have a reduced amount of time following the end of a fiscal quarter or year to file their

some of these costs were one-time expenditures, other SOX compliance costs recur annually.

Section 404 compliance costs are disproportionately borne by smaller public firms. Director compensation at small firms increased from $5.91 paid to non-employee directors on every $1,000 in sales in the pre-SOX period to $9.76 on every $1000 in sales in the post-SOX period. In contrast, large firms incurred 13 cents in director cash compensation per $1,000 in sales in the pre-SOX period, which increased only to 15 cents in the post-SOX period. Likewise, companies with annual sales less than $250 million incurred $1.56 million in external resource costs to comply with § 404. In contrast, firms with annual sales of $1-2 billion incurred an average of $2.4 million in such costs. Accordingly, while SOX compliance costs do scale, they do so only to a rather limited extent.

Dodd-Frank § 989H permanently exempted nonaccelerated filers from compliance with the auditor attestation requirement of Section 404(b). The Act further "directs the SEC to conduct a study within the next nine months to determine how the burden of compliance with Section 404(b) could be reduced for companies with market capitalizations between $75 million and $250 million."[60]

Conclusion

Dodd-Frank marks an important expansion of the federal role in regulating corporate governance. The new provisions will have important consequences not only for the Wall Street firms that were at the heart of the recent financial crisis, but also for all publicly traded Main Street firms.

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quarterly and annual reports. See generally Mary E. T. Beach, Continuous Reporting Requirements Under the Exchange Act of 1934, SR043 ALI-ABA 443 (2010) (discussing these terms).

[60] Meredith P. Burbank, Dodd-Frank Act Permanently Exempts Non-Accelerated Filers From SOX Auditor Attestation Requirement, http://www.lexology.com/library/detail.aspx?g=8ee7ed34-1fe6-40a7-b31c-655070fd9f1d.