BOARDROOM ROULETTE — A REFLECTIVE LOOK AT INTERNATIONAL GOALS, FAILURES, CRISES AND REMEDIES IN THE FIELD OF CORPORATE GOVERNANCE

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INTRODUCTION

International corporate governance changes swiftly amid major global economic developments; these changes are made from country to country—and now these changes must accommodate an international global marketplace. Today, as the pressures of an increasingly interdependent global economy are thrust upon the corporate world, corporations and boards of directors must be cautious of every decision they make—and of the risks associated with such decisions. "Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined."[1] Corporations today are no longer simply domestic entities;

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1. PETRI MANTYSAARI, COMPARATIVE CORPORATE GOVERNANCE: SHAREHOLDERS AS A RULE–MAKER 1, 9 (2005).

instead, many corporations are now expanding into international markets and adding international representatives to their boards.[2] Now more than ever companies and their boards of directors must place an increased emphasis on their corporate governance procedures.[3] Boards of directors face numerous challenges in today's struggling economy.[4] Boards of directors are faced with the tasks of planning a corporation's long–term strategy, monitoring performance and compliance, determining executive compensation, dealing with risk management, handling shareholder proxy access, and working effectively as a functioning board of directors.[5] As the global economy undergoes major changes, governmental agencies in the U.S. and abroad are looking into these issues in hopes of stabilizing and developing the global economy. Previously, corporate governance issues in the U.S. have dealt with actions of the board of directors in the face of hostile takeover bids[6] and whether the board fulfilled their fiduciary duties owed to their shareholders under the "Business Judgment Rule"[7]—the fiduciary duties of loyalty and due care.[8] Since the 2007–2008 financial crisis, these issues now represent only a small part of the puzzle that is corporate governance.

Part I presents a general background of corporate governance measures and principles. This section discusses the importance of the "Business Judgment Rule," the "Enhanced Scrutiny Test," and the "Entire Fairness Test." This section also discusses the background of corporate governance in the areas of shareholder proxy access, executive compensation, risk management, and the goals sought by regulation in such areas on an international scale. Part I then discusses the controversy surrounding current corporate governance issues. Part II discusses and compares the board of directors' duties regarding the issues of executive remuneration and risk management.[9] Parts III and IV discuss the trends of international corporate governance, the impact it will have globally, and potential resolutions to the upcoming problems that face international corporate governance. Part IV will also discuss potential solutions to the problems facing corporations in the United States and European Union.[10]

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2. *See generally* Russ Banham *How GLOBAL Is Your Board?*, CHIEF EXECUTIVE, Nov/Dec 2009, at 58.

3. Memorandum from Wachtell, Lipton, Rosen & Katz, Risk Management and the Board of Director*s* (Nov. 2009) [hereinafter Board of Directors].

4. *Id.*

5. Memorandum from Wachtell, Lipton, Rosen & Katz on Some Thoughts for Boards of Directors in 2010 (Nov. 30, 2009) at 1–3 [hereinafter Thoughts for Boards].

6. *See, e.g.*, Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

7. "The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ." DEL. CODE ANN. tit. 8, § 141(a) (West 2010).

8. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

9. *See infra* Part I, Part II.

10. *See infra* Part III, Part IV.

I. General Principles And History of Corporate Governance Measures

A. United States

United States corporate governance principles are "grounded in the common interests of shareholders, boards and management teams in the corporate objective of long–term value creation, the accountability of management to the board, and ultimately the accountability of the board to shareholders for such long–term value creation."[11] Stockholders are suppliers of capital for corporations and are expected "to want corporate efficiency, honesty, productivity and profitability."[12] The corporate governance responsibilities for a board of directors are cumbersome and require that directors act as the primary vehicle for oversight and accountability.[13] In dealing with this daunting task, directors are faced with tough decisions: how to organize the board, how the board should function, and what priorities the board should set for the corporation.[14]

Corporate governance in the United States typically follows the lead of the Delaware Chancery Court and the Delaware General Corporation Law ("DGCL")—which because of its well established legal history of dealing with the complexities of corporate and business law has been established as a leading authority in the field.[15] Corporations choose to incorporate in Delaware because of the flexibility allowed by the DGCL.[16] In order to understand the general principles and background of corporate governance in Delaware and the United States, the first step is to understand the DGCL statute and the goals it attempts to accomplish through established case law. The relationship between the board of directors of a corporation and its shareholders is akin to an "agency" relationship between an agent and principal.[17] Courts have commonly recognized that corporations are organized and continued primarily for the profit of the stockholders.[18]

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11. NAT'L ASS'N OF CORP. DIRS., KEY AGREED PRINCIPLES TO STRENGTHEN CORPORATE GOVERNANCE FOR U.S. PUBLICLY TRADED COMPANIES 5 (2008) [hereinafter KEY AGREED PRINCIPLES].

12. MANTYSAARI, *supra* note 1, at 1.

13. KEY AGREED PRINCIPLES, *supra* note 11, at 5.

14. *Id.*

15. *See About Agency*, DEL. DEP'T ST.: DIV. CORPS., http://www.corp.delaware.gov/aboutagency.shtml (last visited Feb. 9, 2011) [hereinafter *About Agency*].

16. *See id.*

17. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

18. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the

Within this agency relationship, laws are set in place in order to protect shareholders from abuse of the agency relationship. Actions of the board of directors must align with specific standards of conduct; they must fulfill the fiduciary duty of care[19] and the duty of loyalty.[20] Delaware Courts—along with other U.S. courts—follow three different standards of review.[21] These standards of review are the: (1) Business Judgment Rule, (2) Entire Fairness Test, and (3) Enhanced Scrutiny Test. The "Business Judgment Rule" protects decisions made by the board of directors.[22] There are also pre–conditions that must be met before the board is accorded protection under the "Business Judgment Rule."[23] These pre–conditions are five–fold.[24] First, the board must exercise "process due–care" in coming to an informed decision.[25] Second, the board must exercise reasonable business judgment.[26] Third, the board must be composed of disinterested and independent directors, which establishes that the board had no conflict of interest.[27] Fourth, there must be an absence of fraud or illegality in the transaction made by the board to demonstrate that the board acted lawfully.[28] Lastly, the board must show that the decision is attributed to any rational business purpose.[29] However, when fraud, illegality, self–dealing or gross negligence are present, the "Business Judgment Rule" does not apply; instead, Courts apply the "Entire Fairness Test."[30]

The "Entire Fairness Test" has two parts: fair dealing and fair price.[31] Fair dealing relates to the circumstances surrounding the transaction: the timing, or, in other words "how it was initiated, structured, negotiated, disclosed to the directors and how approval from the directors and stockholders were obtained."[32] On the other hand, fair price looks towards the economic and financial considerations of a proposed course of action.[33]

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reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.").

19. *See generally Van Gorkom* 488 A.2d 858.

20. *See generally* Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971).

21. *See generally* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 927–28 (Del. 2003).

22. DEL. CODE ANN. tit. 8, § 141(a) (West 2010).

23. *See generally Van Gorkom* 488 A.2d 858.

24. *See generally* Memorandum from Wachtell, Lipton, Rosen & Katz on Takeover Law and Practice (2009) at 23–27 [hereinafter Takeover Law and Practice].

25. *Id* at 24–26.

26. *Id*.

27. *Id*.

28. *Id*.

29. *Id* at 24–25.

30. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (en banc).

31. *Id.* at 711.

32. *Id*.

33. *Id*. (stating that "[r]elevant market factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.").at 711 ("Relevant market factors: assets, market value, earnings, future prospects,

In determining the overall fairness of a transaction entered into by a board, both parts of the "Entire Fairness Test" must be met.[34] Furthermore, the "Entire Fairness Test" requires a duty of candor as part of fair dealing.[35] However, when a board makes a decision that looks self–interested, Delaware courts review using the "Enhanced Scrutiny Test."[36]

The "Enhanced Scrutiny Test" is a takeover test, which, in order to satisfy, the board must "show that they had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed . . . ."[37] This burden can be satisfied by a showing of "good faith"" and "reasonable investigation."[38] Under the "Enhanced Scrutiny Test," the decision of the board must be reasonable in relation to the threat posed.[39] Additionally, boards must show that their chosen action falls within the "range of reasonableness" in proportion to the threat posed.[40] If the court finds that the board satisfied this burden in showing that the decision was within the range of reasonableness, then the "Business Judgment Rule" applies.[41] However, if the court finds the decision of the board to be "draconian," the "Entire Fairness Test" applies.[42] In addition to the takeover circumstances that implicate the *Unocal* "Enhanced Scrutiny Test," another specific subset of facts triggers application of the test. When it becomes apparent that the breakup of a company is inevitable due to takeover bids, and the board of directors then recognizes that the company is for sale, the board's duties owed to the stockholders changes from the preservation of the company as a corporate entity to the maximization of the company's value at a sale for the stockholder's benefit.[43] At this point, "[t]he directors' role changes from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[44]

In an effort to protect the stockholders from directors who may abuse the corporation, Delaware Courts have applied the DGCL to preserve

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and any other elements that affect the intrinsic or inherent value of a company's stock.") *Id.* at 711.

34. *Id.*

35. *Weinberger*, 457 A.2d at 701.

36. *See Unocal*, 493 A.2d at 954.

37. Cheff v. Mathes, 199 A.2d 548, 555 (Del. 1964).

38. *Id.* at 555.

39. *Unocal*, 493 A.2d 955 (applying the "Enhanced Scrutiny Test" is when board decisions pertain to defensive measures implemented during or resulting from a perceived hostile takeover threat). *See also id.* ("Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders…, the risk of nonconsummation, and the quality of securities being offered in the exchange.").

40. Unitrin v. American General Corp., 651 A.2d 1361, 1388 (Del. 1955).

41. *Id.* at 1388.

42. *Id.* at 1387.

43. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

44. *Id.* at 182.

stockholder rights.[45] Stockholders are entitled to be present at annual or special meetings of the corporation—either by means of remote communication or by proxy.[46] Stockholders have the right to vote at meetings[47] and make amendments to the corporation's Articles of Incorporation.[48] A survey performed by *Directorship Magazine* shows that since the recent financial crisis, investors have lost confidence in corporate boards.[49]

These protections are often helpful; yet, it is often easier for small investors to remain passive in corporations due to the cost of becoming active within the corporation.[50] Stockholder activism is commonly regarded as a positive aspect of corporate governance;[51] however, much of the time stockholder activism can be regarded as unnecessary due to the lack of sufficient knowledge and expertise in knowing how to vote or what they are voting on.[52]

1. *The Corporate Governance Marketplace Today – Resulting Regulation from the Wild Rollercoaster Ride of the Last Decade*

Since 2000, market activity has been a rollercoaster ride of peaks and valleys. This has resulted in advancements in the area of corporate governance.[53] With the "dot–com" bubble bursting between 2000 and 2001, the terrorist attacks of September 11th, 2001, and the Enron and WorldCom corporate scandals—the markets were extremely unstable.[54] Investors began to lose confidence in public companies, public accounting, and in the marketplace itself as more and more large companies filed for bankruptcy.[55] The market was able to briefly regain some stability until the financial crisis of 2008 ensued and resulted in one of the deepest recessions in United States history.[56] As market recovery continues to remain a focus for

45. *See generally About Agency, supra* note 15.

46. DEL. CODE ANN. tit. 8, § 211(a)(2) (West 2010).

47. tit. 8, § 212 (West 2010).

48. tit. 8, § 242(b)(2) (West 2010).

49. *See generally* Directorship Editors, *What Society Thinks: Where Main Street Meets the C-Suite*, DIRECTORSHIP – BOARDROOM INTELLIGENCE (Dec. 15, 2009), http://www.directorship.com/main-street-meets-c-suite/ [hereinafter *Where Main Street Meets the C-Suite*]. *See generally What Society Thinks: Where Main Street Meets the C-Suite*, DIRECTORSHIP – BOARDROOM INTELLIGENCE (Dec. 15, 2009), http://www.directorship.com/main-street-meets-c-suite/ (last visited Sept. 29, 2010).

50. MANTYSAARI, *supra* note 1, at 1.

51. *Id.*

52. *Id.*

53. N.Y. STOCK EXCH. REPORT OF THE NEW YORK STOCK EXCHANGE COMMISSION ON CORPORATE GOVERNANCE 10 (2010) [hereinafter REPORT OF N.Y.S.E.].

54. *Id.*

55. *Id.* at 11.

56. *Id.*

regulators and investors in the United States, market volatility presently continues and investors remain wary of what the future holds.[57] In particular, investors are concerned with the pace and sustainability of the economic recovery in the United States and Europe.[58]

As a result of the events of the last decade, there has been increased corporate governance and disclosure regulation. In an effort to restore investor confidence in capital markets, Congress adopted the Sarbanes–Oxley Act of 2002.[59] Sarbanes–Oxley addressed corporate governance in several significant ways.[60] The Act established the Public Company Accounting Oversight Board, thereby regulating public accounting companies used by publicly–listed companies; increased independence standards for auditors; required certification by officers for quarterly and annual reports; and established up–to–date reporting rules expanding the range of current reports.[61] Since Sarbanes–Oxley, the Securities and Exchange Commission ("SEC") has implemented numerous additional public disclosure requirements for public companies.[62] Since the SEC's adoption of these rules, companies must now provide disclosure for "new executive compensation and related person transactions,"[63] notice and access of proxy materials for shareholder meetings,[64] and "enhanced proxy statement disclosure regarding risk management, compensation consultants, background and qualification of directors, diversity of directors, board leadership structure, and real-time disclosure of shareholder meeting results."[65] Companies must also provide proxy access policies that allow flexibility for longer–term shareholders or shareholder groups that hold at least three–percent of the company's stock for at least three years in order to gain access to a company's proxy statement.[66]

In addition to Sarbanes–Oxley's additional requirements, the New York Stock Exchange ("NYSE") made enhancements to its corporate governance

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57. *Id.* at 12.

58. REPORT OF N.Y.S.E., *supra* note 53, at 12.

59. *See* Sarbanes–Oxley Act of 2002, Pub. L. No. 107–24, 116 Stat. 745 (2002).

60. *See generally id.*

61. *See* REPORT OF N.Y.S.E., *supra* note 53, at 18.

62. *Id.* at 19.

63. *See* Executive Compensation and Related Person Disclosure, Exchange Act Release No. 33–8732A, 71 Fed. Reg. 53,158 (Aug. 29, 2006); *see also* REPORT OF N.Y.S.E., *supra* note 53, at 19.

64. *See* Shareholder Choice Regarding Proxy Materials, Exchange Act Release No. 34–56135, 72 Fed. Reg. 42,221 (July 26, 2007); *see generally* REPORT OF N.Y.S.E., *supra* note 53, at 20.

65. *See* Proxy Disclosure Enhancements, Exchange Act Release No. 33–9089, 74 Fed. Reg. 68,334 (Dec. 16, 2009); Proxy Disclosure Enhancements; Correction, Exchange Act Release No. 33–9089A, 75 Fed. Reg. 9100 (Feb. 23, 2010); *see generally* REPORT OF N.Y.S.E., *supra* note 53, at 20.

66. *See* Facilitating Shareholder Director Nominations, Exchange Act Release No. 33–9136, 75 Fed. Reg. 56,668 (Aug. 25, 2010); *see generally* REPORT OF N.Y.S.E., *supra* note 53, at 20.

regulations in the NYSE Listing Requirements at the behest of the SEC.[67] The NYSE also requires that the make–up of boards be comprised of a majority of independent directors;[68] the independent directors meet regularly without management directors for executive meetings held on a regular basis;[69] companies issue charters for nominating governance, compensation and audit committees, where each committee holds specific responsibilities for various issues within each committee's respective subject area;[70] companies gain shareholder approval for all equity compensation plans;[71] the CEO annually complete certification of compliance with corporate governance standards;[72] the company include disclosure requirements within proxy materials or annual reports of different corporate governance requirements;[73] and companies provide disclosure of several corporate governance matters on the company's website.[74] On a similar note, Delaware General Corporation Law made several changes affecting the governance structure of corporations.[75] One of the most notable changes involved permitting proxy access in a corporation's bylaws.[76]

As swiftly as Sarbanes–Oxley followed the Enron and WorldCom scandals, other congressional legislation quickly followed the financial crisis of 2008 and 2009. Specifically, the "Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010" ("Dodd–Frank") made numerous significant changes to corporate governance in the United States.[77] The changes arising from Dodd–Frank mainly addressed financial reform issues arising from the economic crisis of 2008 and 2009; numerous topics of corporate governance also were addressed in the legislation, including public disclosure of compensation, "say on pay," proxy access, board

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67. REPORT OF N.Y.S.E., *supra* note 53, at 18.

68. *See* N.Y.S.E. Listed Company Manual §§ 303A.01–02 (2009) [hereinafter N.Y.S.E.]; *see also* REPORT OF N.Y.S.E., *supra* note 53, at 18.

69. *See* N.Y.S.E., *supra* note 68, § 303A.03; *see also* REPORT OF N.Y.S.E., *supra* note 53, at 18.

70. *See* N.Y.S.E., *supra* note 68, § 303A.04–07; *see also* REPORT OF N.Y.S.E., *supra* note 53, at 18–19.

71. *See* N.Y.S.E., *supra* note 68, § 303A.08; *see also* REPORT OF N.Y.S.E., *supra* note 53, at 19.

72. *See* N.Y.S.E., *supra* note 68, § 303A.12; *see also* REPORT OF N.Y.S.E., *supra* note 53, at 19.

73. *See* N.Y.S.E., *supra* note 68, § 303A.00, .02–05, –.07, .09–11; *see also* REPORT OF N.Y.S.E., *supra* note 53, at 19.

74. *See* N.Y.S.E., *supra* note 68, § 303A.04–05, –.07(b), .09–10; *see also* REPORT OF N.Y.S.E., *supra* note 53, at 19.

75. *See generally* REPORT OF N.Y.S.E., *supra* note 53, at 21.

76. *See* DEL. CODE ANN. tit. 8, § 112 (West 2010); *see generally* REPORT OF N.Y.S.E., *supra* note 53, at 21.

77. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, H.R. 4173 (2010) [hereinafter Dodd–Frank Act].

composition, and independence of committee members.[78] Specifically in the area of corporate governance, Dodd–Frank authorizes the SEC to adopt rules regarding proxy access, requires enhanced stock exchange listing standards on independence of compensation committee members and hiring of advisors, mandates further disclosure of the relationship between financial performance and executive compensation, and demands corporate policies regarding clawback of executive compensation in particular situations.[79] The implementation of new corporate governance regulations—whether followed under the DGCL, NYSE, SEC or Congress—attempt to provide greater investor confidences in the capital markets. Resulting impacts from such regulations extend beyond the United States' borders and have a profound impact globally on international firms.

B. European Union History, General Principles, and Goals

The principal focus of European Union company law is the freedom of establishment.[80] Corporate governance regulation in the EU focuses on: (1) freedom to decide what form the company should take in the EU, (2) widespread coordination of regulating securities markets and financial reporting in the EU,[81] and (3) EU binding rules and non–binding Commission recommendations.[82] Company law in the EU has a minimal number of binding rules that make up the field of corporate governance.[83] Even so, regulations exist in the area of share capital and mergers or divisions which are within the breadth of EU law.[84] In addition to the binding rules, non–binding EU Commission recommendations exist relating to the role and compensation of directors, quality assurance baseline standards for statutory audits and the independent status of the statutory auditors.[85] The European Community Treaty ("EC Treaty") acts in furtherance of the principal goal of EU company law by prohibiting any restrictions on the freedom of establishment of citizens of Member States in the territory of another Member State within the EU.[86]

Early on, European Community institutions were wrought with disorganization; no clear–cut goal or agreed upon rationale for company law

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78. *See* REPORT OF N.Y.S.E., *supra* note 53, at 22.

79. *See* Dodd–Frank Act.

80. MANTYSAARI, *supra* note 1, at 35.

81. *Id.* ("The disclosure of information to investors is largely governed by derivative EU law.").

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 43, Feb. 26, 2001, 2006 O.J. (C321) 39 (as in effect 2006) (now TFEU art. 49) [hereinafter EC Treaty].

existed.[87] After several Company Law Directives failed, the Commission took aim at passing a Statute for the European Union.[88] Starting in the 1990s, the EU company law legislative process has changed allowing more political deference to national laws of Member States, including more references to national rules of Member States in the legislative proposals.[89] The legal rationale behind this methodology lies in the principle of "subsidiarity."[90] This harmonization approach allowed for more flexibility which ultimately "resulted in the adoption of the Regulation of the European Company Statute (Societas Europaea) in October 2001."[91] Presently, the traditional continental European approach to corporate governance is commonly followed, which assumes that companies will finance privately opposed to the more recent trend of corporations publicly financing through capital markets.[92] However, companies are regulated and must still follow mandatory provisions of Company Company Law, which were put into effect to protect minority stockholders and creditors.[93] In the past, EU legislation concentrated on the maintenance and alteration of capital, representation of the company and its transactions with third parties, financial reporting standards, and issues regarding disclosure of information to investors.[94]

In 2003 the Commission proposed its Action Plan.[95] The goals of the plan sought: (1) strengthening stockholders' rights along with providing protection for employees, creditors and other parties interacting with companies and (2) promoting efficiency and competitiveness of business, specifically targeting issues of cross-border transactions.[96] The Commission believed that the European regulatory framework required modernization and explained that its reasoning occurred because of: (i) the increasing trend of European companies operating cross-border within the internal market;

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87. *See* MANTYSAARI, *supra* note 1, at 37.

88. *Id*. at 37.

89. *Id*. at 38.

90. EC Treaty art. 5 (as in effect 2006) (now TFEU art. 5) ("In areas which do not fall within its exclusive competence, the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."). GERT–JAN VOSSESTEIN, MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION-A PLAN TO MOVE FORWARD 19 (2010) [hereinafter MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE].

91. MANTYSAARI, *supra* note 1, at 38. *See also* Council Regulation 2157/2001/EC, of 8 October 2001 on the Statute for a European company (SE), 2001 O.J. (L 294) 1.

92. MANTYSAARI, *supra* note 1, at 47.

93. *Id*.

94. *Id*. at 47–48.

95. *Commission Proposal for Recommendations on Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*, at 1, COM (2003) 284 final (May 21, 2003) [hereinafter *Modernising Company Law*].

96. *Id*. at 8–9.

(ii) the ongoing incorporation of European capital markets; (iii) the high-speed of growth in new information and communication technologies; (iv) the imminent expansion of the European Union to ten new Member States; and (v) the disastrous effect of financial scandals.[97]

European Company Law protects stockholders through the use of directives.[98] These directives are implemented within EU member states "to the extent necessary"[99] with the perspective that such stockholder safeguarding directives will become standard and mutually similar throughout the European Community.[100] In following EU Company Law and the objective of freedom of establishment, the EC Treaty also provides that any procedure which would stand in the path of the freedom of establishment, by means of directives will be abolished.[101] The principles behind the adoption of Article 44(2)(g) of the EC Treaty rest on the premise that allowing freedom of establishment based on a minimum number of requirements allows easier start–up for companies to establish themselves in different Member States where the regulatory structure is comparable; they also rest upon the idea of building trust between firms which enter into cross-border economic relationships[102] by "ensuring legal certainty in intra-Community operations" due to the existence of common safeguards. [103]

In addition to freedom of establishment, European Union Company Law seeks to accomplish many other goals. European Union company law seeks to remove obstacles to trade that interfere with the internal market and adjust the structures of production to the European Community ("Community") sphere.[104] Companies transact business beyond national boundaries, creating choice of law problems; these conflicts between laws of conflicting Member States give rise to legal and cultural difficulties.[105] In order to help foster efficiency and competitiveness of businesses, the Commission recommended implementing EU initiatives that tackle only specific cross–border issues, where subsidiarity cannot be accomplished and Community intervention is the only means to accomplish the goals.[106] Also, these initiatives allow for reduced uncertainties stemming from the harmonization of the defined national issues.[107] Companies operating within

97. *Id*. at 6–7.
98. EC Treaty art. 44(1) (now TFEU art. 50).
99. EC Treaty art. 44(g) (now TFEU art. 50(2)(g)).
100. MANTYSAARI, *supra* note 1, at 35.
101. EC Treaty art. 44 (2)(c) (now TFEU art. 50(2)(c)).
102. *Id*.
103. MANTYSAARI, *supra* note 1, at 36.
104. *Id*.
105. *Id*.
106. *Modernising Company Law*, *supra* note 95, at 9 ("e.g. cross-border merger or transfer of seat, cross-border impediments to the exercise of shareholder rights.").
107. *Id*.

the Member States are also given flexibility in circumstances where governance structures are considered comparable.[108]

In responding to stockholder protection, EU Company Law states that "it is necessary to ensure *minimum equivalent protection* for both shareholders and creditors of companies as well as other people doing business with companies."[109] EU legislation finds it necessary to guarantee that the "principles of *equal treatment of shareholders* in the same position are observed and harmonised."[110] This is necessary to guarantee that competition within the internal market is not disrupted by differences in the laws of Member States so that Community companies may be able to compete equally in global markets.[111] Along those same guidelines, legal hurdles that hinder company development on the European front must be eliminated to allow companies to operate throughout Europe in the same fashion they would in their Member State.[112] Another important objective of EU company law is ensuring protection of investors and the safeguarding of investor confidence in the financial markets.[113] The Commission provided that strengthening shareholder rights and third parties protection was a key objective in its Action Plan.[114] The Commission indicated this objective to be at the core of company law policy and that effectuating a sound framework for protection of shareholders and third parties creates a high degree of confidence in the business relationship.[115] The relevancy of this protectionism increases continually due to the increased mobility of companies within EU Member States.[116] The Commission provided guidelines to aide European companies in achieving and maintaining efficient protection for stockholders and third parties.[117] These guidelines provide for the Commission to contemplate new initiatives aimed at shareholder rights and providing clarity as to duties of management.[118] The proposed guidelines also provide for a distinction between the different

108. *Id.*

109. Council Directive 68/151, recital 5, 1968 O.J. (L 65) 8 (EC); Council Directive 77/91, recitals 2, 3, 1977 O.J. (L 26) 1 (EC); Council Directive 78/855, recital 3, 6, 8, 1978 O.J. (L 295) 36 (EC).

110. Council Directive 77/91, recital 4, 1977 O.J. (L 26) 1 (EC).

111. MANTYSAARI, *supra* note 1, at 36.

112. *Id. See also* Council Regulation 2157/2001/EC, recital 6, 2001 O.J. (L 294) 1.

113. *See* Commission Regulation 1606/2002, Application of International Accounting Standards, 2002 O.J. (L 243) 1; *See also, e.g.,* Council Directive 2003/6, Insider Dealing and Market Manipulation, recitals 1, 2, 2003 O.J. (L 96) 16.

114. *See Modernising Company Law*, *supra* note 95, at 8.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* ("The provisions related to the protection of creditors should be modernised with a view of maintaining a high quality framework.").

categories of companies[119] and provide that company law should facilitate and support the use of current information and communication technologies by companies in their various relationships with stockholders and third parties.[120] Lastly, the Commission sought protection of stockholders and third parties by implementation of carefully constructed, yet limited amount of measures designed at preventing fraud and abuse of legal forms.[121] Aimed towards boosting investor confidence, the Commission recommended that "a common approach should be adopted at EU level with respect to a few essential rules and adequate coordination of corporate governance codes should be ensured."[122]

After the "dot–com" bubble burst and the financial crisis of Enron and WorldCom, the Commission took aim at enhancing corporate governance disclosure at the EU company level.[123] Under the Action Plan, the Commission recommended specific disclosures that should be required in a company "Annual Corporate Governance Statement."[124] Specifically, listed companies should be required to include at least the following items: (1) "the operation of the shareholder meeting and its key powers, and the description of the shareholder rights and how they can be exercised;"[125] (2) the make–up and functionality of the board of directors and its committees; (3) the majority shareholders whom own major holdings and those shareholders voting rights, control rights and key agreements; (4) other direct and indirect relationships among major shareholders and the company; (5) any and all material transactions with other related parties; (6) existence and character of a risk management system; and (7) "a reference code on corporate governance, designated for use at national level, with which the company complies or in relation to which it explains deviations."[126]

These suggestions work side–by–side with strengthening stockholders' rights because such disclosures allow for access to information by investors. Stockholders of listed companies should be furnished relevant information regarding the company by use of electronic means in a timely manner in advance of the corporation's Annual General Meetings.[127] The Commission

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119. *Id.* ("A more stringent framework is desirable for listed companies and companies which have publicly raised capital. They should be subject to a certain number of appropriate detailed rules, in particular in the area of disclosure.").

120. *Modernising Company Law*, *supra* note 95, at 8.

121. *Id.* at 9.

122. *Id.* at 12.

123. *See generally id.*

124. *Id.*

125. *Id.*

126. *Modernising Company Law*, *supra* note 95, at 12–13.

127. *See* Council Directive 2007/36 on the Exercise of Certain Rights of Shareholders in Listed Companies, 2007 O.J. (L 184) 17 (EC). The Annual General Meeting is where shareholders come together to exercise their voting rights as shareholders on items placed upon the agenda to vote upon.

bases its strengthening of shareholders' rights on the principles of providing shareholders with information regarding their numerous existing rights and how these rights are utilized, as well as developing the services essential to ensure that these rights are effectively employed.[128] Stockholders require disclosure as a safeguard to ensure the boards of companies they invest in are not being mismanaged. One responsibility of a board of directors is ensuring the shareholder–director relationship remain strong, since it is essential if companies are to continue to raise capital at the lowest cost through public financing. In a continued effort to restore confidence in the markets, the Commission enhanced directors' responsibilities by holding the entire board collectively responsible for key non–financial and financial statements.[129]

The Commission's Action Plan recommended a modernization of the board of directors as part of its plan to modernize EU corporate governance policy.[130] The Commission recommended three areas for modernization: (1) "Board composition,"[131] (2) "Directors' remuneration,"[132] and (3) "Directors' responsibilities."[133] The Commission recognized the importance of implementing new measures designed primarily for restoration of confidence in the markets by its adoption of Commission Directive 2010/43/EU on July 1, 2010.[134] One key area where the Commission recommended modernizing deals was with regard to conflicts of interest among executive directors, which are directors who are paid for the work they perform on the board.[135] Decisions which could be considered within the spectrum of "conflict of interest" should instead be left to non–executive or supervisory directors who are in the majority independent.[136] As far as nomination of directors for appointment under national law, the Commission recommended that this responsibility be assigned to a group mainly comprised of executive directors because of their vast knowledge of the obstacles that face the company and the experience and skill required to

128. *Modernising Company Law*, *supra* note 95, at 14.

129. Commission Directive 2010/43; *see also Modernising Company Law*, *supra* note 95, at 16.

130. *See generally Modernising Company Law, supra* note 95, at 15.

131. *Id*.

132. *Id*. at 16.

133. *Id*.

134. *See generally* Commission Directive 2010/43 Implementing Directive 2009/65/EC of the European Parliament and of the Council as Regards Organisational Requirements, Conflicts of Interest, Conduct of Business, Risk Management and Content of the Agreement Between a Depositary and a Management Company, 2010 O.J. (L 176) 42 (EU). [hereinafter Commission Directive 2010/43].

135. *See*, *e.g.*, *Modernising Company Law*, *supra* note 95, at 15 ("remuneration of directors, and supervision of the audit of a company's accounts.").

136. Commission Directive 2010/43, arts. 18, 19. Commission Directive 2010/43, *supra* note 134, arts. 18, 19.

handle these obstacles.[137] In an attempt to ensure that a satisfactory control mechanism is in place, the EU adopted requiring a permanent compliance function and an internal audit function.[138] The goal of the audit function is to ensure and evaluate that the different control mechanisms which the company implemented are followed.[139]

In addition to the enforcement of the control mechanisms, the Commission recommended that the appropriate regulatory scheme regarding directors' remuneration should consist of four key components.[140] The first two key components involve disclosure of the "remuneration policy in the annual accounts [and] disclosure of details of remuneration of individual directors in the annual accounts."[141] The last two components involve "prior approval by the shareholder meeting of share and share option schemes in which directors participate [and] proper recognition in the annual accounts of the costs of such schemes for the company."[142]

C. Lithuania

Member States within the EU have their own national laws and their own corporate governance regulations... One of these member states is Lithuania.. The Republic of Lithuania amends its "Law on Companies" as needed, and has amended such Company Law Company Law as recently as July 17, 2009.[143] In accordance with EU Company Law, the National Stock Exchange of Lithuania Corporate Governance Code provides a recommended framework of measures companies in the Republic of Lithuania should follow.[144] The objectives of the Code are to provide basic principles which seek to ensure transparent management and operation for both domestic and foreign investors; to encourage listed companies to continuously improve their governance framework and continuously

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137. *See Modernising Company Law*, *supra* note 95, at 15.

138. Commission Directive 2010/43.

139. *See Modernising Company Law*, *supra* note 95, at 15 ("In view of the recent accounting scandals, special emphasis will be placed on the audit committee [or equivalent body], with a view to fostering the key role it should play in supervising the audit function, both in its external aspects [selecting the external auditor for appointment by shareholders, monitoring the relationship with the external auditor including non-audit fees if any] and its internal aspects [reviewing the accounting policies, and monitoring the internal audit procedures and the company's risk management system]"); *see also* Commission Directive 2010/43.

140. *See Modernising Company Law*, *supra* note 95, at 16.

141. MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE, *supra* note 90, at 16 (alteration in original).

142. *Id.* (alteration in original).

143. Law on Companies, 2000 07 13, No. VIII-1835, *as amended by* 2009 07 17, No. XI–354 (Lith.).

144. *See* NAT'L STOCK EXCH. OF LITH., THE CORPORATE GOVERNANCE CODE FOR THE COMPANIES LISTED ON THE NATIONAL STOCK EXCHANGE OF LITHUANIA, 2004 2 (2004) [hereinafter NAT'L STOCK EXCH. OF LITH.].

improve disclosure of information; to promote listed companies to develop quality management as a method of increasing performance of the company; to promote activities which involve the listed companies at the international level while at the same time improve domestic and foreign investor confidence, as well as the confidences of stakeholders within the companies and their corporate governance structure; and to promote internationally the activities of the National Stock Exchange of Lithuania to improve domestic and foreign investor confidence in the Lithuanian capital markets.[145] The goals of Company Law in the Republic of Lithuania are aligned with those of EU Company Law. Similar to EU Company Law, the Republic of Lithuania provides property and non–property rights for shareholders.[146] Non–property shareholder rights include the right to attend General Meetings of Shareholders; submit of questions to the Company in advance of the General Meeting of Shareholders regarding issues on the agenda; vote at General Meetings of Shareholders; receive information about the company; and file a derivative claim of damages arising out from nonfeasance or malfeasance for conduct by a manager of the company and members of the Board of their duties listed under the Law on Companies and the company's Articles of Incorporation.[147]

In an effort to provide adequate transparency, the Republic of Lithuania requires that companies provide a response to questions regarding issues on the agenda of the General Meeting.[148] Questions from shareholders to the company must be received no later than three working days before the General Meeting.[149] Lithuanian Company Law does not require that companies reveal trade secrets or other confidential information; yet it does require that companies inform the shareholders that answering such a question would reveal confidential information and thus cannot be answered.[150] Lithuanian Company Law provides shareholders with the right to vote in accordance with the rights carried by the type of shares owned.[151] With the common goal of regaining confidences in capital markets, the Lithuanian Company Law affords shareholders the right to information concerning the company.[152] In order for shareholders to provide shareholders with information, a written request must be sent to the

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145. *Id.*
146. *See generally* Law on Companies, art. 14.
147. Law on Companies, art. 15.
148. Law on Companies, art. 16. *See also* First Council Directive 68/151/EEC, art. 58, 1968 O.J. SPEC. ED. ("on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies . . . with a view to making such safeguards equivalent throughout the Community.").
149. Law on Companies, art. 16.
150. *Id.*
151. Law on Companies, art. 17.
152. Law on Companies, art. 18.

company and within seven days of receiving such a request, the company is required to provide access or copies of the information to the shareholder.[153]

In order to protect the rights of shareholders, Lithuanian Company Law provides that "the management organs of the company must act for the benefit of the company and its shareholders . . . ." The structure of management in Lithuania is governed by a single company manager, a collegial supervisory body composed of the Supervisory Board and a collegial management organ (the "Board.")[154] The Supervisory Board may or may not be formed within the company; if the Supervisory Board is not formed from within the company, then the duties allocated to its scope of powers shall be executed by the company manager.[155] In furtherance of providing corporate governance transparency, companies may elect or remove the manager of the company either by the Board, or—if there is no Board—by the General Meeting of Shareholders.[156] In addition to electing the manager, this governing body will also set the manager's salary, approve his job description, including the duties he must fulfill while in office, offer incentives and impose penalties.[157] Possessing both a Supervisory Board and a separate Management Board facilitates a clear separation of management and functions delegated to the Supervisory Board allowing for a transparent and efficient management process.[158] In the formation of the Management Board, the Stock Exchange of Lithuania posits that providing a mechanism that ensures objective and fair monitoring operates to safeguard shareholder rights and impart accountability upon the Supervisory Board to the shareholders.[159] To ensure independence, the Stock Exchange of Lithuania proposes that for a member

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153. *Id.* Upon a written request from shareholders, companies must give access or provide copies of the following documents:

> [T]he Articles of Association of the company, set of annual financial statements, annual reports of the company, the auditor's opinion and audit reports, minutes of the General Meetings of Shareholders or other documents executing decisions of the General Meetings of Shareholders, the recommendations and responses of Supervisory Board to the General Meetings of Shareholders, the lists of shareholders, the lists of members of the Supervisory Board and the Board, also other documents of the company that must be publicly accessible under laws as well as minutes of the meetings of the Supervisory Board and the Board or other documents executing decisions of the above-mentioned company organs, unless these documents contain a commercial (industrial) secret of the company, confidential information.

Id.

154. Law on Companies, art. 19.
155. *Id.*
156. Law on Companies, art. 37.
157. *Id.*
158. NATI'L STOCK EXCH. OF LITH., *supra* note 144, at 3.
159. *Id.* at 3.

to serve on the Management Board, the member is not deemed independent when the member: (1) is connected or is the controlling shareholder of the company; (2) previously served as chief executive officer or another empowered employee of the company within the previous three years; (3) served as head of the company that consulted with the company within the previous three years; (4) currently is a client or major supplier of the company or head, employee, or member of said supplier or client; (5) currently is bound by material contractual agreements with the company; (6) previously served as a member of a collegial body of the company for a period that may be considered long enough to influence the determination of that member to act in the best interests of the company; and (7) has relations that potentially can cause a conflict of interest and influence the determination of that member to act in the best interests of the company.[160]

In comparison, Delaware General Corporation Law § 144 takes aim at the independence of the directors of Delaware incorporated firms.[161] The DGCL permits interested directors to attend, participate, or even vote so long as: (1) material information regarding the interested director's relationship to the subject transaction are made known to the board and the board acts in good faith in voting affirmatively for the transaction, even if disinterested directors make up less than quorum, or; (2) the interested director discloses such material information to the shareholders and the shareholders in good faith vote affirmatively for the subject transaction, or; (3) the subject transaction is fair to the corporation at the time it is authorized, approved or ratified, by the directors, a committee or by the stockholders.[162] For the Board to avoid possible conflicts of interest, the Stock Exchange of Lithuania recommends the Board establish an Audit Committee, a Remuneration Committee, and a Nomination Committee.[163] The tasks these Committees perform offer greater management transparency and continue the restoration of confidence in the Lithuanian capital markets.

The Board's powers enumerated in Lithuanian Company Law also serve the goal of protecting shareholders and offering transparency.[164] The Board is entrusted with determining the proper operating strategy of the company and the proper management structure and placement of its employees.[165] To further the confidence in Lithuanian capital markets, Lithuanian Company Law provides checks and balances by requiring that the Board oversee information offered by the manager of the company regarding the implementation of the company's operating strategy and the organization of the company's financial status and activities.[166] The General Meeting of

160. *Id*. at 3–4.
161. *See* DEL. CODE ANN. tit. 8, § 144 (West 2010).
162. tit. 8, § 144(a)(1) – (3) (West 2010).
163. NATI'L STOCK EXCH. OF LITH., *supra* note 144, at 4.
164. Law on Companies, art. 34.
165. *Id.*
166. Law on Companies, art. 34.

Shareholders offers many exclusive rights involving actions of the company, including (1) amending the Articles of Incorporation of the company; (2) electing or removing members of the Supervisory Board, collegial board or the manager of the company; and (3) selecting and removing auditors of the firm that perform the audit of financial statements.[167]

II. Executive Remuneration and Risk Management

Boards have increased their focus on risk management techniques and issues of executive remuneration in an attempt to restore investor confidence in the capital markets after the volatility of the previous decade. After the financial crisis in 2008, public outcry grew over the excessive executive compensation policies and over the intertwining connection between these policies and the risk taking and short term mindset.[168] In the United States, this has led to regulation under Dodd–Frank regarding "say–on–pay," "clawbacks," and "compensation consultant independence."[169] Due to the changes enacted by Dodd–Frank, proxy disclosure regulations require information concerning executive compensation in regards to the relationship of compensation policies to risk, to the compensation consultant independence and to the reporting of stock options and other equity awards.[170] As a result of Dodd–Frank, disclosure of compensation risk is only mandated in a few limited situations.[171] With the new regulations in force, corporations must now disclose compensation policies used for all employees, "and their risk management philosophy only if the risks arising from their compensation programs are 'reasonably likely to have a material adverse effect' on the company."[172] Shearman & Sterling's Survey of Corporate Governance ("Shearman Survey") found proxy statements to be consistent regarding components listed to support a corporation's finding that policies dealing with compensation do not pose a risk to the venture.[173] The Shearman Survey provided that of the Top 100

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167. Law on Companies, art. 20.

168. Thoughts for Boards, *supra* note 5, at 4–5.

169. *See generally* Dodd–Frank Act.

170. Survey from Shearman & Sterling LLP, 2010 Corporate Governance of the Largest US Public Companies – Director & Executive Compensation (2010), *available at* https://reaction.shearman.com/reaction/pdf/Eighth_Annual_Director_&_Executive_Compensation_Survey.pdf [hereinafter 2010 Corporate Governance].

171. *Id.* at 4.

172. *Id.*

173. *Id.* at 5 (including listed items such as: "providing a mix of cash and equity and of annual and longer-term incentives; using multiple metrics to determine payout in order not to put too much emphasis on any single measure; caps on incentive and award payouts; share ownership guidelines that require employees to retain award shares for a specific period, or through retirement, so that they retain the risks of share ownership; multi–year vesting periods; and implementing and enforcing clawback policies").

Companies in the United States, eighty–six provided disclosure of some level of "risk" in their proxy statement.[174] Additionally, of the Top 100 Companies, seventy–one indicated that they maintain a "clawback policy," which triggers after the occurrence of specific events that affect the corporation's financial statements.[175]

The perplexing problem regarding how improvements in boardroom corporate governance can be made often draws regulators' attention to investigating what actions may have caused the investors to lose confidence in the first place. Investors list executive remuneration as a key reason for their lack of confidence in the capital markets.[176] Compensation by means of stock options, bonuses, and cash incentives at corporations has been a method of rewarding boards and other executives for risky, but profitable, business measures undertaken on behalf of the corporation.[177] This dilemma begins with a review of compensation programs previously in place, which rewarded directors for short–term goals as opposed to the corporation's long–term corporate strategy.[178] Regulations are being enacted in hopes of restoring investor confidence after the financial crisis... In order for investor confidence to return, investors must once again believe that a "board's risk oversight responsibility derives primarily from state law fiduciary duties, federal laws and regulations, stock exchange listing requirements and certain established (and evolving) best practices."[179]

Delaware—as the primary authority for corporation law—has developed a framework for the fiduciary duties of corporations.[180] Generally, the rule laid out in *Caremark* imposes director liability only for a failure of oversight where there is "sustained or systemic failure of the board to exercise oversight—such as an utter failure to attempt to assure [that] a reasonable information and reporting system exists."[181] The *Caremark* court also indicated that this is a "demanding test."[182] Since *Caremark*, Delaware courts have stressed their interpretation of its holding, positing that no *Caremark* liability would ensue unless the "directors intentionally failed entirely to implement any reporting or information system or controls or, having implemented such a system, intentionally refused to monitor the

174. *Id*. at 18 ("None of these companies concluded that compensation–related risks are reasonably likely to have a material adverse effect on the company.")

175. *Id*. at 28. (Noting that eight more Top 100 Companies disclosed adoption of a clawback policy that will go into effect after 2010.

176. *See generally* Board of Directors, *supra* note 3; *see generally Where Main Street Meets the C–Suite*, *supra* note 49; *See generally* 2010 Corporate Governance, *supra* note 170.

177. *See generally* Thoughts for Boards, *supra* note 5.

178. *See generally* Board of Directors, *supra* note 3.

179. *Id*. at 2.

180. *Id*. at 2–4.

181. *In re* Caremark International Inc. Derivative Litigation, 698 A.2d 959, 971 (Del. Ch. 1996).

182. *Id*. at 971.

system or act on warnings it provided."[183] The Delaware perspective views risk oversight on the small scale dealing with risk oversight by a board of directors on individual decisions. In comparison, the recently enacted Dodd–Frank legislation imposes risk oversight fiduciary duties on a larger scale dealing with risk oversight and the series of decisions and rationale behind those decisions.

The Dodd–Frank legislation concerns itself more with risk management disclosure issues rather than solely focused on risk oversight functions.[184] While both aspects of risk are important, Dodd–Frank takes aim at directors of corporations who follow risk oversight procedures, but make short–term decisions out–of–line with the corporation's long–term corporate strategy.[185] The conflict arises between the directors' short–term decisions being linked to director compensation and the short–term decisions not being in the best interests of the company and their long–term corporate strategy.[186] Dodd–Frank has thus imposed new rules relating to executive remuneration by requiring a non–binding shareholder vote on executive pay[187] and establishing new guidelines as to independence of members of compensation committees.[188] Regarding executive remuneration, the Act also requires disclosures of executive pay in comparison to the financial performance of the company and the ratio of the Chief Executive Officer's pay to the median pay of every all other employees of the said company.[189] Dodd–Frank also requires "clawbacks," which mandate recovery by the company of funds dispersed to executive officers for improprieties or other certain financial restatements made by the company and its executive officers.[190] One of the most controversial provisions in the Dodd–Frank Act involves proxy access. This somewhat controversial provision in Dodd–Frank would provide shareholders the right—contingent on the shareholder's ownership stake in the company—to include a list of candidates for board positions in the company.[191]

As the United States adapts to investors' call for executive compensation regulation, the European Union adapts as well. In the EU numerous member states currently mandate executive remuneration for listed companies be associated with individual and corporate performance.[192] This required association has brought additional focus on ensuring that compensation is

183. Board of Directors, *supra* note 3, at 3.
184. *Id.* at 4.
185. *See generally id.* at 4–8.
186. *See generally id.* at 4–8.
187. Dodd–Frank Act § 951.
188. *Id.* § 952.
189. *Id.* § § 953.
190. *Id.* § 954.
191. *Id.* § 971. Dodd–Frank allows for this action by way of authorizing the SEC to adopt rules regarding Proxy Access. *See also* Securities and Exchange Act of 1934, Rule 14a–11, 17 C.F.R. § 240.14a–11 (2010).
192. 2010 Corporate Governance*, supra* note 170, at 6.

structured to not incentivize and avoid inappropriate risk taking.[193] As recently as April 2009, the European Commission issued a non–binding recommendation in an effort to institute controls on risk taking.[194] The recommendation provides that "the compensation of executives of *all listed companies* should be principally based on performance and be in the long-term interests of the company."[195] The Commission recommends that certain measures be enacted to further this goal: "(1) limits on the amount of variable compensation; (2) the deferral of a significant portion of variable compensation; (3) imposing performance conditions on variable compensation; and (4) clawbacks of variable compensation awarded on the basis of data that proves to be manifestly misstated."[196] Clawback provisions are becoming more common in the United States, yet such policies are few and far between among EU countries.[197] However, a number of EU countries have adopted advisory "say–on–pay" shareholder voting procedures that have helped voice shareholder concerns for executive compensation procedures.[198] Nevertheless, if shareholders vote significantly against procedures disclosed to them for vote, the results from the non–binding vote provide great feedback for boards so that they may consider alternatives to avoid future backlash. While both the United States and the European Union indicate progress in regulation of executive compensation, neither indicates whether such changes have affected investor confidence in capital markets.

III. INTERNATIONAL TRENDS IN CORPORATE GOVERNANCE

Currently in the United States, federal regulation has increasingly targeted actions which previously were regulated solely by state law. State laws previously regulated such actions as disclosure and shareholders voting rights until federal regulation usurped these actions in order to provide greater transparency and confidence in the capital markets. Regulation in the United States has and continues to be bountiful and swift since recent financial crises. In the United States each crisis has been followed almost immediately with some form of regulation. This trend will likely continue perpetually until market equilibrium is found. The Sarbanes–Oxley Act of 2002 followed after the "dot–com" bubble burst, the September 11th terrorist attacks, and the Enron and WorldCom financial scandals. The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 and other regulatory actions followed as a result of the financial crisis of 2008

193. *Id*. at 6.
194. *Id*.
195. *Id*. at 6–7.
196. *Id*. at 7.
197. *See generally* 2010 Corporate Governance, *supra* note 170, at 10.
198. *See generally id*. at 13–14.

and 2009—which stemmed from the "sub–prime meltdown"—causing the "housing bubble" to burst.

In the European Union, the trend follows a continued improvement approach towards modification of corporate governance. This EU approach to modification of corporate governance may be largely due to the fact that the EU is a relatively new body, whereas the United States is relatively old in comparison. As a result, the EU approach seems to be aimed at discovering what the law of the land should be and to continue to modify the law. Alternatively, the U.S. tweaks its corporate governance laws over time, only after crises or other similar situations provoke action necessary to remedy existing problems. Although the EU approach to corporate governance regulation is more time consuming, it seems to be broader and forward–looking at potential stumbling blocks that could interfere with progress. Unlike the EU, the United States' traditional approach takes aim at removing the stumbling blocks after an event occurs, which requires making a change to the regulation. This difference can be summarized simply as the U.S. living and learning from their mistakes, whereas the EU approach seems to use a slow yet forward looking method of preparation to avoid future potential obstacles of its regulation. Recently, the pattern of U.S. regulation seems to have made a change from the "learn from mistake" approach through enacting the Dodd–Frank Act. In adopting Dodd–Frank, the United States has taken a forward looking approach to corporate governance by providing proxy access to shareholders, allowing for non–binding "say–on–pay" voting, and providing "clawback" provisions. It seems the U.S. is starting to aim at both providing a remedy for problems past and at solving future potential problems in the shareholder–director relationship. However, opponents of Dodd–Frank argue that Congress does not have the Constitutional power to enact such broad sweeping legislation as it did in Dodd–Frank—causing several aspects of Dodd–Frank to remain contested and not in force.

Not only must the European Union make necessary changes reflecting the capital markets in the EU—it must also make regulatory changes in reaction to events occurring in the United States. After the enactment of the Sarbanes——Oxley Act of 2002, European Union corporations seeking expansion into the United States are required to follow U.S. laws relevant to their operation. Specifically, EU corporations operating in the United States were required to follow disclosure requirements implicated by Sarbanes–Oxley. Additionally, with recent adoption of Dodd–Frank, EU incorporated companies are required to follow additional requirements. EU–based companies must now inquire as to what the laws of the United States require of them and adapt. This problem results in a barrier of entry for cross–border expansion. Finding a resolution to this problem helps improve the capital markets of both EU–based companies and U.S.–based companies alike by providing growth opportunities into the markets.

IV. An International Problem with an International Solution

The future of international corporate governance is headed towards the general framework currently utilized in the European Union. The EU framework sets out a few broad directives—which must be followed by all—and then the EU Commission provides recommendations for smooth transitions cross–border. While the United States and European Union both operate differently, the focus of corporate governance in the United States begins at local or state regulation followed by federal regulation. As corporations today grow into global conglomerates, cross–border issues continue to arise resulting in the need for a set of international guidelines on corporate governance. Companies seeking global expansion often find expansion difficult due to confusion and a lack of clarity in interpreting the rules and regulations imposed by other countries. The United States operates with state to state jurisdictional differences and there remain several federal regulations placed upon each and every company. Unlike the United States, the EU operates by placing several directives upon corporations as to how they may or may not operate and additionally provides them with recommendations that the EU Commission believe to be actions considered "good" governance. As corporations continue the outward trend of becoming international conglomerates, problems arise when boards are not familiar with the rules and regulations of the countries in which they seek expansion.

To remedy this problem, I propose the establishment of an International Corporate Governance Regulatory Agency ("ICGRA"). The purpose of this Agency will be to establish a set of cross–border guidelines that are to be followed by both the United States and the European Union, and thus will synthesize the similarities between both entities in order to provide standards when companies seek cross–border expansion. These cross–border guidelines would be followed by corporations with operations in more than one country or member state, in either the United States or European Union. The fusion of the corporate governance similarities will provide companies opportunities to expand into new markets and help remove obstacles that previously stood in the way of growth. This would be similar to the European Union corporate governance ideology of freedom to establishment.[199] These synergies will provide a foundation for companies seeking expansion and how they should begin their expansion efforts.

The ICGRA would also act similar to the EU Commission by providing recommendations for what it believes to be "good" governance features. The ICGRA would provide recommendations for major issues such as: executive remuneration, risk management, proxy access and fiduciary duties owed by boards of directors. The ICGRA's recommendations would not apply solely to the EU or United States, but such recommendations would

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199. *See generally* MANTYSAARI, *supra* note 1, at 35.

be offered for companies operating in both the United States and EU capital markets... These synergies would have a wide–range effect that would allow EU companies and U.S. companies alike to expand into new global markets that were previously unavailable to them.

In providing such synergies, the ICGRA would be able to operate in tandem with local and national regulatory authorities in dealing with corporate governance issues because both are seeking the same goal of improved corporate governance regulations. These regulations, whether enacted regionally, nationally or by the ICGRA would act to pre-empt further problems typically not addressed by both United States and European Union based corporations. Implementation of these ICGRA recommendations would take regulations that were previously solely United States based or solely European Union based and work to implement a recommendation that would aim towards both the United States and European Union. Such regulations would have the effect of allowing efficiencies in the market place where previously one market has fallen behind the other.

The ICGRA would be managed by an international committee composed of members from corporate governance regulatory agencies in the United States and the EU. Members on the committee would include congressional committee members and representatives from the SEC and NYSE for the United States delegation. In the EU, committee members will be selected from the EU Commission and representatives from different Member States in order to provide an international perspective to the ICGRA committee. The diversity gained from such widespread representation will aid the ICGRA in forming recommendations that address issues at the forefront of each regulatory body. With the trend of international representatives on the board of directors of global companies, forming the ICGRA committee in a similar fashion helps the ICGRA stay abreast to potential communication issues that companies encounter and resolve such issues by forming recommendations to account for potential communication conflicts.[200] This format gives the ICGRA an opportunity to learn about problems other regulatory agencies face before they become problems on a larger scale. Learning about these problems earlier and enacting recommendations to resolve potential issues can halt or at least slow down a potentially global problem by addressing it during its early stages. Such diverse representation on the international committee will enhance the transparency and understandability of the ICGRA's recommendations. Another benefit of committee diversity is the opportunity of each member to voice any issues or concerns they may find while forming recommendations. By raising issues or concerns prior to issuing a formal recommendation, the ICGRA can work together and resolve potential conflicts before they arise while at

200. *See* Banham, *supra* note 2.

the same time providing clarity for companies located in both the United States and European Union.

Everyday corporations are facing new obstacles in the marketplace, some local, some regional, some national, and now even global obstacles challenge corporations. With implementation of the ICGRA, the United States and European Union will be taking a prospective approach toward corporate governance. By working together, the ICGRA will look to remove potential obstacles that could stand in the way of corporate development and growth across borders. The elimination of confusion and guidance from the ICGRA will provide easier entry into foreign markets than ever before. Effectively utilizing the ICGRA will have short-term and long–term benefits. In the short-term, the ICGRA will provide clarity to regulations and standards required for entry into cross-border marketplaces. In the long–term, when investors begin seeing the benefits provided from the ICGRA, the decrease in crises because of early actions and the growth in corporate expansion due to the clarity provided by the ICGRA, investor confidences in the markets will be restored.

CONCLUSION

The international corporate governance marketplace changes with each transaction, decision, or meeting; from the smallest family–owned shop to international conglomerates, addressing issues these companies face is a daunting task. Difficulties arise when determining which issues require most immediate action. Addressing these issues properly can prevent future crises, provide smooth transitions into markets and help stabilize and restore investor confidences in the marketplaces. By establishing an international agency whose job is to address potential future issues that could arise in the United States and European Union marketplaces, ICGRA could help prevent a small issue from developing into a crisis. The ICGRA will provide clarity to regulations and standards that corporations are required to abide by in order to expand into new marketplaces. By addressing the issues that investors are most concerned with, the ICGRA will offer an opportunity for restoring investor confidence in the markets.