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LOOKING AT CORPORATE GOVERNANCE FROM THE INVESTOR'S PERSPECTIVE

Luis A. Aguilar[*]

INTRODUCTION

Thank you for inviting me to speak in connection with the launch of Emory Law School's newest journal, the *Emory Corporate Governance and Accountability Review.* Before I begin my remarks, let me issue the standard disclaimer that the views I express today are my own, and do not necessarily reflect the views of the U.S. Securities and Exchange Commission ("SEC" or "Commission"), my fellow Commissioners, or members of the Commission's staff.

Corporate governance has always been an important topic. It is even more so today, as many Americans recognize the need to develop a more robust corporate governance regime in the aftermath of the deepest financial crisis since the Great Depression.

Although the recent financial crisis—aptly named the "Great Recession"—has many fathers, there is ample evidence that poor corporate governance, including weak risk management standards at many financial institutions, contributed to the devastation wrought by the crisis.[1] For example, it has been reported that senior executives at both AIG and Merrill Lynch tried to warn their respective management teams of excessive exposure to subprime mortgages, but were rebuffed or ignored.[2] These and other failures of oversight

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[*] Commissioner Aguilar's speech was originally published on the website of the U.S. Securities and Exchange Commission on April 21, 2014 (*see* http://www.sec.gov/News/Speech/Detail/Speech/1370541547078#.U_SkzPldWuI). It has been republished herein with special permission and with slight modifications to ensure conformity with *The Bluebook* (Nineteenth Edition) and with *The Chicago Manual of Style* (Sixteenth Edition).

[1] *See, e.g.*, United Nations Conference on Trade and Development (UNCTD), Corporate Governance in the Wake of the Financial Crisis (2010), *available at* http://www.unctad-docs.org/files/CG-in-Wake-of-Fin-Crisis-Full-Report.pdf.

[2] BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS 190 (Penguin, 2010); *see also In re Lehman Brothers Holdings Inc.* p. 959 Chapter 11, Case No. 08-13555 (JMP), Report of Anton R. Valukas, Examiner (Bankr. S.D.N.Y., Mar. 11, 2010 (Similarly, according to the court-appointed examiner, a Lehman executive warned the firm's outside auditor, Ernst & Young, about unethical accounting practices at Lehman Brothers, five months before Lehman's bankruptcy

continue to remind us that good corporate governance is essential to the stability of our capital markets and our economy, as well as the protection of investors.

Unfortunately, the important lessons of the recent past have been quickly forgotten. For many, the Great Recession, which began in late 2007, is already in the rearview mirror.[3] Last month, the S&P 500® hit record highs,[4] while Wall Street bonuses reached their highest levels since the 2008 crash.[5] In addition, recent reports suggest that retail investors are beginning to return in volume to the stock market.[6]

All of this has taken place even though other reports suggest that there is only tepid confidence in the actual recovery.[7] Many Americans continue to lack trust not only in the stock market, but also in financial institutions and the U.S. economy. According to researchers at the University of Chicago, trust in America's financial system languishes at about the 24 percent level, with many expressing continued concerns regarding both excessive compensation and a lack of integrity among top corporate managers.[8] Only 17 percent of those surveyed expressed trust in America's large corporations.[9] This is a serious issue, because trust is fundamental to both trade and investment. When there is a lack of trust, both Wall Street and Main Street suffer.[10]

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filing. Reportedly, E&Y spoke to Lehman's audit committee the day after it met with this whistleblower, but failed to inform the committee of such allegations).

3 *See* U.S. Bureau of Labor Statistics, The Recession of 2007–2009 (Feb. 2012), *available at* http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf. ("The most recent recession began in December 2007 and ended in June 2009, though many of the statistics that describe the U.S. economy have yet to return to their pre-recession values.")

4 Angela Moon, *S&P 500 ends at another record after strong jobs data*, REUTERS (Mar. 7, 2014), http://www.reuters.com/article/2014/03/07/us-markets-stocks-idUSBREA210XF20140307.

5 Edward Krudy, *Wall Street cash bonuses highest since 2008 crash: report*, REUTERS (Mar. 12, 2014), http://www.reuters.com/article/2014/03/12/us-usa-bonuses-idUSBREA2B0WA20140312.

6 Jed Horowitz, *Discount brokers' volumes rise as small investors pile into stocks*, REUTERS (Mar. 14, 2014), http://in.reuters.com/article/2014/03/14/usa-stocktraders-discount-idINL2N0MB10G20140314. ("The three biggest U.S. discount brokerage firms said their stock trading volumes jumped in February from a year earlier, an indication that confidence by small investors in the stock market is continuing to gain after being fairly moribund in 2013.")

7 Press Release, *Schroders Survey: As Global Investor Confidence Rebounds, U.S. Investors Are The Exception*, (Feb. 26, 2014), http://online.wsj.com/article/PR-CO-20140226-907561.html.

8 Press Release, Chicago Booth/Kellogg School Financial Trust Index, The Results: Wave 21, (Feb. 7, 2014), *available at* http://www.financialtrustindex.org/resultswave21.htm.

9 *Id.*

10 *See* Paola Sapienza and Luigi Zingales, *A Trust Crisis*, INTERNATIONAL REVIEW OF FINANCE, Vol. 12, No. 2 (2012), 123.

So, how can trust be restored? I believe that a key driver of greater trust is the oversight that comes from robust corporate governance.[11] This is one reason why the work of the new *Emory Corporate Governance and Accountability Review* will be so important.

I. INVESTORS AS OWNERS AND THE SOURCE OF CAPITAL

As you embark on the study of corporate governance, I urge you to look at the issues involved from the investor's perspective. I firmly believe that an approach that focuses on investors is central to developing an effective corporate governance framework. It is, after all, investors that provide the capital that businesses need to grow, compete, succeed, and create jobs. They are, in a very real way, the fuel that keeps the engine of our economy moving.

Investors, of course, are not limited to the so-called "one percent." In fact, the vast majority of investors make their livings on Main Street, not Wall Street. They are school teachers and sanitation workers, factory workers and first responders—indeed, anyone with a mutual fund, a pension fund, or a 401(k) plan. About half of all U.S. households participate, either directly or indirectly, in the stock market; and while that percentage is far less than it was during the boom years prior to the financial crisis, it remains true that millions of households invest in stocks, bonds, and mutual funds in order to save for retirement, to put together a down payment on a house, or to pay for their children's college—and law school—education.[12] These hardworking Main Street Americans are the investors that need to be kept in mind as we think about corporate governance.

So, what does corporate governance mean for investors? Simply this: it means that the owners of the company are those who have paid to own the company's stock, and that management are merely their employees—albeit often well-paid employees. The separation of ownership and control is the hallmark of the modern corporation. It would be neither possible nor desirable for the many, widely-dispersed shareholders of any public company to come together and manage that company's business and affairs. As a result, full-time management is essential for public companies to operate, and any investor will tell you that talented management is extremely valuable.

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[11] *Id.*

[12] Lydia Saad, *U.S. Stock Ownership Stays at Record Low*, Gallup Economy (May 8, 2013), http://www.gallup.com/poll/162353/stock-ownership-stays-record-low.aspx.

But even the most capable management, left unchecked, can make bad decisions, leading to undesirable results for a company and its shareholders.[13] That is why shareholders elect a board of directors to represent their interests.[14] Good corporate governance helps shareholders and their representatives to hire the right managers, and helps make sure that the managers remember they ultimately answer to shareholders. Additionally, good corporate governance also helps to remind the company's directors that they work for the company's shareholders, not for themselves, and certainly not for management.

This is not a new concept. The question of how to make management accountable to shareholders has been around since the modern public corporation was invented.[15] The duties of loyalty and due care that govern the conduct of corporate directors have their roots in English common law[16] and have been developed by a century and a half of jurisprudence in Delaware chancery and other state courts.[17] But it is not enough to simply state what the duties are: the exercise of these duties requires the development of a corporate culture, as well as specific processes and practices that promote the fundamental principles of corporate governance.

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13 The Commission has brought numerous enforcement actions against public companies and their senior management for violations relating to undisclosed executive perquisites and other examples of management overreaching. *See, e.g., SEC v. L. Dennis Kozlowski,* SEC Lit. Rel. No. 17722 (Sep. 12, 2002); *SEC v. Tyson Foods, Inc.,* SEC Lit. Rel. No. 19208 (Apr. 28, 2005); *In the Matter of infoUSA Inc.,* Sec. Exch. Act Rel. No. 61708 (Mar. 15, 2010); and *SEC v. NIC, Inc.,* SEC Lit. Rel. No. 21809 (Jan. 12, 2011).

14 *See* DEL. CODE ANN. Tit. 8, § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.").

15 *See* Eugene F. Fama and Michael C. Jensen, *Separation of Ownership and Control,* 26 J. L. & ECON., 327 (June 1983), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=94034. ("Separation and specialization of decision management and residual risk bearing leads to agency problems between decision agents and residual claimants. This is the problem of separation of ownership and control that has long troubled students of corporations. For example, potential exploitation of residual claimants by opportunistic decision agents is reflected in the arguments leading to the establishment of the Securities and Exchange Commission and in the concerns of the modern corporate governance movement."), *emphasis added*. *See also* Adam Smith, *The Wealth of Nations* (1776) ("The directors of such [joint-stock] companies, however, being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company.")

16 *See* ROY C. SMITH & INGO WALTER, GOVERNING THE MODERN CORPORATION: CAPITAL MARKETS, CORPORATE CONTROL, AND ECONOMIC PERFORMANCE (Oxford Univ. Press 2006).

17 *See* William T. Quillen and Michael Hanrahan, *A Short History of the Delaware Court of Chancery*, DEL. STATE COURTS (1993), http://courts.delaware.gov/chancery/history.stm, *see, e.g.*, *Richards v. Seal*, 1861 WL 1223, at *1–2 (Del. Ch.1861).

To that end, I would like to focus on three fundamental principles that should drive the establishment of an effective corporate governance regime—accountability, transparency, and engagement. Rather than discuss these principles in the abstract, I will examine them in the context of the executive compensation process. In addition, I will highlight just a few of the ways in which the SEC incorporates these important principles in its rulemaking and enforcement programs.

II. ACCOUNTABILITY

It is particularly fitting that the name of Emory Law School's new journal—the *Emory Corporate Governance and Accountability Review*—makes it clear that accountability is central to effective corporate governance.

Accountability means that actions have consequences. When corporate governance embodies the principle of accountability, shareholders know that performance will be measured. They know that good performance will be rewarded, and poor performance will not. And, most importantly, they know that misconduct will not be tolerated.

A. Executive Compensation

One important measure of accountability involves executive compensation. Common sense would indicate that good corporate governance should align compensation with performance. However, recent history has to make you wonder if the principle of accountability is lacking in today's corporate governance.

It is well known that the last thirty years have seen rapid growth in the compensation of corporate executives.[18] Much of that growth reflects the trend towards equity-based and other incentive compensation. This form of pay is intended to align the interests of public company shareholders and corporate managers. The concept is straightforward: When stock prices rise, shareholders benefit and managers share in the wealth through stock options, appreciation rights, and other awards. In essence, when the companies do well, so do executives. During the boom years, executive pay soared.

But a strange thing has been happening: many executives have been enjoying the benefits of the pay-for-performance boom, without necessarily

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[18] *See* Lawrence Mishel and Alyssa Davis, *CEO Pay Continues to Rise as Typical Workers are Paid Less*, ECON. POLICY INST., (Jun. 12, 2014), http://s1.epi.org/files/2014/ceo-pay-continues-to-rise.pdf.

delivering increased performance. In fact, the development of the golden parachute has often meant that, in practice, executives have been rewarded handsomely for failure.[19] To give just a few examples, in 2006, Viacom gave roughly $85 million in severance pay to its then CEO after just nine months in the top job.[20] The former CEO of CVS received a severance package worth $185 million when he left in early 2011, even though his company's net earnings had declined the prior year.[21] And last week it was reported that the former chief operating officer of Yahoo!, who was fired earlier this year, received about $96 million in compensation for his fifteen months on the job, including about $58 million in severance payments.[22] Many other top executives have been shown the door with seven- and eight-figure severance payments. As many commenters have observed, safety nets of these sizes undermine management incentives from the moment they are granted.[23] When even failure can vastly increase your wealth, you don't need to worry about working hard to be successful. Nor do you need to worry about being accountable.

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19 *See* Eric Dash, *Outsize Severance Continues for Executives, Even After Failed Tenures*, THE NEW YORK TIMES (Sept. 29, 2011), http://www.nytimes.com/2011/09/30/business/outsize-severance-continues-for-executives-even-after-failed-tenures.html?pagewanted=all&_r=0.

20 Jeff Green, *Jumbo Severance Packages for Top CEOs Are Growing*, BLOOMBERG BUSINESSWEEK (June 6, 2013), http://www.businessweek.com/articles/2013-06-06/jumbo-severance-packages-for-top-ceos-are-growing; *see also* Andy Fixmer, *Viacom to Pay Ousted Chief Tom Freston $84.8 Million*, BLOOMBERG (Oct. 18, 2006, 4:02 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=awT94a.FifM8.

21 Nathaniel Parish Flannery, *Executive Compensation: The True Cost of the 10 Largest CEO Severance Packages of the Past Decade*, FORBES (Jan. 9, 2012), http://www.forbes.com/sites/nathanielparishflannery/2012/01/19/billion-dollar-blowout-top-10-largest-ceo-severance-packages-of-the-past-decade/.

22 Vindu Goel, *Yahoo's Former No. 2 Received $96 Million*, THE NEW YORK TIMES (updated Apr. 17, 2014, 9:35 PM), http://profit.ndtv.com/news/corporates/article-its-official-yahoos-former-no-2-made-a-lot-more-than-his-boss-385747.

23 Paul Hodgsn and Greg Ruel, *Twenty-One U.S. CEOs with Golden Parachutes of More Than $100 Million*, GMI (Jan. 2012), http://go.gmiratings.com/rs/gmiratings/images/GMIRatings_GoldenParachutes_012012.pdf. *See also*Lucian A. Bebchuk, Alma Cohen, and Charles C.Y. Wang, *Golden Parachutes and the Wealth of Shareholders*, 25 J. CORP. FIN. 140, 154 (2014) ("Our findings raise the possibility that, despite their positive effect on facilitating some value-increasing acquisitions, golden parachutes have, on average, an overall negative effect on shareholder wealth. This average negative effect could be due to GPs increasing managerial slack and/or by GPs providing executives with incentives to go along also with some acquisitions that do not serve shareholder interest."); *see also* Sanjay Sanghoee, *Golden Parachutes: Why it's bad business*, FORTUNE/CNNMONEY, http://management.fortune.cnn.com/2014/04/11/golden-parachutes-why-its-a-sour-deal-for-business/.

B. Say on Pay

One important way to enhance accountability is to make sure that shareholders are able to express their views. In 2010, Congress took steps to address this concern in the context of executive compensation, by requiring public companies to give shareholders a voice through so-called "say-on-pay" votes. Specifically, Section 951 of the Dodd-Frank Act[24] requires public companies to conduct shareholder advisory votes to approve the compensation of executives, at least once every three years.[25] In addition, companies soliciting votes to approve merger or acquisition transactions must disclose, and in some circumstances hold a shareholder advisory vote on, any golden parachute compensation arrangements.

In January 2011, the SEC adopted final rules to implement these "say-on-pay" provisions.[26] Although these votes are not directly binding on the corporation, they do nevertheless enhance accountability. Experience demonstrates that corporate boards pay close attention to the voting results and will seek to avoid "no" votes greater than 25–30 percent.[27] Moreover, early signs suggest that some companies have reacted positively to the "say-on-pay" regime and have begun to re-evaluate compensation packages when pay outstrips performance.[28] As Senator Carl Levin has said, these provisions are

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24 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act").

25 Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 951 (adding § 14A of the Securities Exchange Act of 1934 (the "Exchange Act"), which generally requires a shareholder vote to approve the compensation of executives disclosed pursuant to SEC regulations).

26 *Shareholder Approval Of Executive Compensation And Golden Parachute Compensation*, SEC Rel. No. 33-9178 (Jan. 25, 2011).

27 Thomas A. Germinario, SVP, D.F. King & Co., Inc., Henry Klehm III, Partner, Jones Day, and Aimee S. Weisner, Corp. Vice President & Gen. Counsel, Edwards Lifesciences, Presentation at RR Donnelley SEC Hot Topics Inst.: 2011–12 Corporate Governance Update, (available at http://www.rrdonnelley.com/_documents/industry-solutions/financial_services/5_corporate_governance_sec_ht_irv2011.pdf)("Companies with a significant "no" say-on-pay vote (*e.g.*, 30% or more) should be wary of potential consequences of inaction in 2012 season); *see also* Robin Ferracone, Exec. Chair, Dayna Harris, Vice President and Farient Advisors LLC, *Say on Pay: Identifying Investor Concerns,* COUNCIL OF INST. INV.S (Sept. 2011), http://www.cii.org/files/publications/white_papers/09_26_11_say_on_pay_identifying_investor_concerns.pdf. *Cf. 2011–2012 Policy Survey Summary of Results* INST. SHAREHOLDER SERV.S INC., (Sept. 2011), http://www.issgovernance.com/files/PolicySurveyResults2011.pdf, (asked, "At what level of opposition on a say-on-pay proposal should there be an explicit response from the board regarding improvements to pay practices?" Seventy-two percent of the investors surveyed, and 40% of the issuers surveyed, said that the board should respond to "no" votes above 30%, or lower thresholds).

28 *See* Theo Francis and Joann S. Lublin, *CEO Pay Keeps Rising, but Not as Quickly, Not for All*, THE WALL STREET JOURNAL (Mar. 27, 2014), http://online.wsj.com/news/articles/SB20001424052702304026304579448961007000986.

intended to "instill a culture of accountability in the executive pay arena."[29] This accountability will be further enhanced when the Commission finalizes its long overdue rules to implement another provision within Section 951 of the Dodd-Frank Act, which requires large investment managers to publicly disclose their "say-on-pay" votes.[30]

C. Enforcement Actions Relating to Executive Misconduct

An additional way to enhance accountability is by making sure that companies are playing by the rules. While this is true as to many issues, it is particularly troubling when management is willing to break the law to boost its paycheck. For example, in the last decade, some companies secretly backdated stock options to give executives and other employees the benefits of favorable stock price movements. Others manipulated exercise dates so that executives could profit unfairly at the expense of the corporation and its shareholders.

The SEC has pursued such cases aggressively, charging dozens of public companies and their executives with fraud and reporting violations. Sadly, many of the individual defendants who participated in such schemes were company general counsels and other lawyers, who should have known better—and clearly should have done better.[31]

Commission enforcement actions are a key mechanism for imposing accountability on corporate officers and gatekeepers. This is particularly important when self-dealing or other breaches of duty result in violations of the Commission's rules regarding fraud, reporting requirements, books and records, or financial controls.[32] When such violations occur, the Commission has a number of tools at its disposal, including the ability to seek disgorgement of ill-gotten gains, to impose civil penalties, and to bar wrongdoers from serving as a public company officer or director.

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[29] Letter from Carl Levin, U.S. Senator, to Elizabeth Murphy, U.S. Sec'y SEC (Nov. 18, 2010) (on file with author), *available at* http://www.levin.senate.gov/imo/media/doc/supporting/2010/PSI.MurphySECletter.111810.pdf.

[30] Dodd-Frank Act, *supra* note 18, at §951 (b)(1).

[31] *See, Spotlight on Stock Options Backdating*, U.S. SEC, (last modified July 19, 2010), http://www.sec.gov/spotlight/optionsbackdating.htm.

[32] Luis A. Aguilar, Comm'r, Speech at S.E.C. Open Meeting: Providing Context for Executive Compensation Decisions, Sept. 18, 2013, *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370539813937#_ednref2. The Commission may bring enforcement actions as a plaintiff in federal district court, or through administrative proceedings before hearing officers.

A robust enforcement program helps to reinforce the principle of accountability by punishing those in a position of trust and responsibility who cross the line.

III. TRANSPARENCY

A second principle of corporate governance is transparency. Without transparency, it is difficult to have accountability. After all, shareholders can only hold corporate directors accountable if they know what is going on at the companies they own.

The Commission promotes this principle of transparency by requiring that public companies shine a light on the information that investors need to make good investment and voting decisions. In this regard, the Commission's rules require public disclosure of various types of information, including descriptions of a company's business, its board and management, and financial and operating data, both historical and forward-looking. The access to audited financial information and other required public disclosures is particularly important when it comes to shareholders holding officers and directors responsible for corporate performance.

One of the important ways that the Commission mandates public disclosure is through the proxy process, which is intended to duplicate what would happen in an "in-person" meeting of shareholders.[33] The proxy disclosure regime is an evolving process that takes into account the needs of investors, changes in the markets, and the Commission's own experience.

It should be no surprise that investors have a strong interest in knowing how their companies are performing and also how decisions are being made. This is also true as to matters involving executive compensation. After all, at the end of the day, it is the shareholder that pays the CEO's salary. The question is: how can the average shareholder tell if she's gotten her money's worth?

To help answer that question, over the years the Commission has periodically amended its disclosure rules. For example, in 2006, the Commission amended the proxy rules to help provide investors with a clearer and more complete picture of total compensation for the chief executive, other

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[33] *See* Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29024, 29027 (June 18, 2009) (to be codified at 17 C.F.R. pt. 200, 232, 240 et al.), *available at* http://www.sec.gov/rules/proposed/2009/33-9046fr.pdf.

highly-paid executive officers, and directors.[34] And in 2009, the Commission responded to lessons learned from the financial crisis by significantly enhancing proxy statement disclosures with respect to corporate governance and executive compensation.[35] Noting an increased focus by investors on corporate accountability, the Commission adopted new disclosure requirements regarding risk management and compensation matters, including improvements to the reporting of stock and option awards, disclosure regarding potential conflicts of interest of compensation consultants, and a requirement to discuss how compensation policies and practices may incentivize risk-taking.[36]

All of these disclosures enhance transparency.

A. Disclosure Rules Relating to Executive Compensation

Moreover, in Title IX of the Dodd-Frank Act, Congress has mandated that the Commission adopt rules to address a number of new compensation-related disclosures.[37] These include disclosures as to:

- the relationship between executive compensation actually paid and the financial performance of the issuer;[38]
- company policies regarding the hedging of equity securities held or awarded to directors and employees;[39] and
- the ratio between the compensation of the chief executive officer and the total annual compensation of its average worker (known as "Pay Ratio").[40]

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[34] *See* Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53158, 53159 (Sept. 8, 2006) (to be codified at 17 C.F.R. pt. 228, 229 et al.), *available at* http://www.sec.gov/rules/final/2006/33-8732afr.pdf.

[35] *See* Proxy Disclosure Enhancements, Fed. Reg. 68334, 68334 (Dec. 23, 2009) (to be codified at 17 C.F.R. pt. 229, 339, 240, et al.), *available at* http://www.sec.gov/rules/final/2009/33-9089fr.pdf.

[36] *Id.*

[37] Complementing the Title IX disclosure requirements, Section 954 of the Dodd-Frank Act instructs the Commission to direct the national securities exchanges to adopt listing standards requiring the claw-back of incentive compensation based on erroneous data, if the company's financial information has to be restated. The Commission should promptly propose and adopt rules to fulfill this mandate as well, which would also directly enhance both accountability as well as transparency. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-23, § 954, 124 Stat.1904, 1904 (2010).

[38] Dodd-Frank Act, Pub. L. No. 111-23, § 953(a), 124 Stat.1904, 1903-1904 (2010).

[39] *Id*. at 1904–05.

[40] *Id.* at 1904.

Last September, the Commission took an important step to fulfill the Congressional mandate by proposing the Pay Ratio rule.[41] As mentioned earlier, in recent decades, the compensation of corporate executives has taken an explosive upward trend. In fact, reports demonstrate that the compensation growth of public company CEOs has far outpaced the growth in salaries of the typical employee over the years. For example, an April 2013 study by Bloomberg finds that large public company CEOs were paid an average of 204 times the compensation of rank-and-file workers in their industries. By comparison, in the 1950s, it is estimated that the average CEO was paid only about 20 times the typical worker's pay, with that multiple rising to 42-to-1 in 1980, and to 120-to-1 in 2000.[42] Hopefully, disclosing Pay Ratios will help investors evaluate the reasonableness of a CEO's compensation in the context of a company's overall business, provide insight into the effectiveness of board oversight, and offset the upward bias in executive pay that seems to result from benchmarking a CEO's compensation only against the compensation of other CEOs. [43]

The Commission has received an extraordinary number of comment letters regarding the Pay Ratio proposal, most of which have been strongly supportive.[44] I hope and expect that the Commission will move quickly to adopt a final rule this year.

I also urge the Commission to adopt rules requiring the mandated pay-for-performance and hedging disclosures. Taken together with the Pay Ratio rule, these enhanced disclosures will foster accountability by making compensation decisions more transparent, and will help investors to make more informed investment decisions when they exercise their rights as shareholders and owners.

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[41] *See* Pay Ratio Disclosure, 78 Fed. Reg. 60560, 60560, 60591, 60592 (Oct. 1, 2013) (to be codified at C.F.R. pt. 229, 249), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-10-01/pdf/2013-23073.pdf. As proposed, the rule would cover only those public companies that are already required to provide compensation disclosure pursuant to Item 402(c) of Regulation S-K, which would exclude emerging growth companies, smaller reporting companies, and foreign private issuers. The proposal also takes a flexible approach to the process of identifying median compensation, permitting the use of statistical sampling, the use of any consistently applied compensation measure to identify a median employee, and the use of reasonable estimates in certain calculations. *See id*. at 60560, 60591.

[42] Luis A. Aguilar, Comm'r, Speech at S.E.C. Open Meeting: Providing Context for Executive Compensation Decisions, Sept. 18, 2013, *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370539813937#_ednref2.

[43] *See id.*

[44] *See* U.S. Security and Exchange Commission, *Comments on Pay Ratio Disclosure*, http://www.sec.gov/comments/s7-07-13/s70713.shtml (Sept. 29, 2014).

IV. ENGAGEMENT

A third principle of corporate governance is engagement. By this I mean that shareholders need a way to make sure that their voices are heard.

Traditionally, the primary opportunity for shareholders to communicate with directors and management takes place once a year at the Annual Meeting of Shareholders. However, for most shareholders, it is simply not practical to attend the annual meeting.

As a result, shareholders have long complained that more engagement was needed for them to exercise their rights as owners of the company and have pointed out the difficulty of communicating with directors and management.[45] So, how can companies committed to good corporate governance fill that gap? And what can security holders do proactively to protect their rights?

A. Informal Engagement

To address shareholder concerns, many public companies have recently increased their efforts to engage with shareholders—and have become more proactive in investor relations. In fact, one proxy solicitation firm has characterized the current period as "The Era of Engagement."[46] It wasn't so long ago that a large public company could make news by saying that it would meet regularly with investors to discuss executive pay and management practices.[47] However, shareholder-management meetings and other forms of engagement have increased dramatically in recent years.[48] A study that came out in 2011 indicated that 87 percent of the issuers, 70 percent of the asset managers, and 62 percent of the pension funds and other investors surveyed

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[45] *See* The National Association of Corporate Directors, *Framework and Tools for Improving Board-Shareowner Communications* (2004), *available at* https://www.sec.gov/rules/proposed/s71903/nacd030904-attach.pdf. *See also* Letter from William C. Thompson, Jr., Comptroller of the City of New York (Sep. 15, 2003); Letter from Jerry Gabert, UUA Vice President of Finance and Treasurer, Advisor to the UUA Committee on Socially Responsible Investing, Unitarian Universalist Association (Sep. 15, 2003), SEC File No. S7-14-03. *But cf.,* Letter from Cary Klafter, Vice President, Legal and Government Affairs, Director, Corporate Affairs and Corporate Secretary, Intel Corporation (Sep. 15, 2003), SEC File No. S7-14-03 (SEC comment letters in File No. S7-14-03 *available at* http://www.sec.gov/rules/proposed/s71403.shtml).

[46] Georgeson, *2013 Annual Corporate Governance Review*, *available at* http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2013.pdf (last visited Oct. 2, 2014).

[47] Shannon Pettypiece & Angela Zimm, *Pfizer Will Start Meetings with Largest Investors*, BLOOMBERG (June 28, 2007), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ajToCiEu_dzU&refer=news..

[48] James Kim & Jason D. Schloetzer, *Global Trends in Board-Shareholder Engagement*, THE CONFERENCE BOARD(Oct. 2013), http://www.conference-board.org/retrievefile.cfm?filename=TCB_DN-V5N20-131.pdf&type=subsite.

reported at least one engagement over the preceding year, with most respondents saying that shareholder-company contact was occurring more frequently.[49]

There are many reasons for the reported increase in shareholder involvement. Some observers credit the role of proxy advisory firms, which they say have helped investors to magnify their influence.[50] Others cite the adoption of "say-on-pay" rules, which provided both a forum for investors to demonstrate their concerns regarding executive pay and other governance issues, as well as a clearly-defined metric of investor sentiment, as evidenced by approval rates.[51] For example, shortly after Johnson & Johnson received a weak 57 percent approval rate for its "say-on-pay" proposal in 2012, the company's compensation and benefits committee chair and presiding director, along with several executives, met with representatives of many of the company's institutional investors to discuss their concerns.

As an advocate for investors, I am gratified by these indications of responsiveness on the part of many public company boards, but let us not confuse activity with progress. According to a 2011 report, management is much more likely than investors to consider such outreach a success.[52] It's one thing to start a dialogue, but it's quite another thing entirely to change behavior. Investors need concrete action to enhance accountability, pay-for-performance, and other goals—not just words.

Moreover, this type of engagement is focused almost entirely on institutional investors—and, in many cases, only the largest of these.[53] Small investors that own shares directly are typically frozen out of the process.[54]

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49 Marc Goldstein, *The State of Engagement between U.S. Corporations and Shareholders*, INSTITUTIONAL SHAREHOLDER SERVS. (Feb. 22, 2011), http://www.irrcinstitute.org/pdf/IRRCISS_EngagementStudy.pdf.

50 Kim & Schloetzer, *supra* note 47, at 1.

51 Georgeson, *supra* note 45, at 4.

52 Goldstein, *supra* note 48, at 4.

53 *See, e.g.*, *Key Developments of the 2013 Proxy Season*, ERNST & YOUNG (June 2013), *available at* http://www.ey.com/Publication/vwLUAssets/Key_developments_of_the_2013_proxy_season/$FILE/Key-developments-of-the-2013-proxy-season.pdf ("many companies' shareholder outreach efforts do not extend past their largest 10 to 15 shareholders.").

54 *See Key Considerations for Board and Audit Committee Members*, PWC (2013–2014 edition), *available at* http://www.pwc.com/en_US/us/corporate-governance/publications/assets/pwc-key-considerations-audit-committee-2013-14.pdf. (Citing its 2013 Annual Corporate Directors Survey, the report notes that 61% of directors reported substantive communications between the board and institutional shareholders, with 29% noting an increase in such communications. By contrast, 43% of directors reported substantive communications with retail shareholders, with only 8% seeing an increase).

That's a problem because, often times, the interests of Main Street and Wall Street are not aligned.

B. Engaging Retail Shareholders

One obstacle to promoting engagement by retail shareholders is that individual shareholders often tend to be passive investors. For example, last year, retail investors voted only 30 percent of their public company shares, as compared to institutional investors, which voted 90 percent of their shares.[55]

One innovation that has the potential to increase engagement by retail shareholders is the use of electronic shareholder forums. To that end, in January 2008, the Commission adopted rules to facilitate the use of this tool by public companies and their shareholders.[56] The intent was to facilitate shareholder communications and uphold shareholder rights by encouraging experimentation, innovation, and greater use of the Internet. Unfortunately, however, reports suggest that only a small minority of U.S. domestic issuers take advantage of this innovation.[57] The Commission should investigate this and determine whether our rules should be amended.

C. Shareholder Proposals

Another way that investors may seek to communicate with directors, management, and each other is by submitting shareholder proposals for consideration at the annual meeting. Long-standing SEC rules address when a company is required to include a shareholder proposal in its proxy materials. Generally, these rules include both substantive and procedural requirements, and shareholders must also meet certain eligibility rules.[58]

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55 *2013ProxySeasonRecap*,PROXY PULSE(2013),http://media.broadridge.com/documents/Broadridge-PwC-ProxyPulse-Third-Edition.pdf.

56 *Electronic Shareholder Forums*, SEC Release. No. 34-57172, 73 Fed. Reg. 4450 (Jan. 25, 2008), *available at* http://www.sec.gov/rules/final/2008/34-57172fr.pdf.

57 *See* Janet Dignan, *On the Way to the Investor Forum*, IR MAGAZINE (July 30, 2013), http://www.irmagazine.com/articles/social-media/19660/investor-forum/.

58 *Electronic Shareholder Forums supra* note 56 (addressing when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy under Rule 14a-8 of the Securities Exchange Act. Additionally, companies often ask staff in the Division of Corporation Finance for informal advice as to whether a company may properly exclude a proposal without violating Rule 14a-8. Although such staff advice is not binding on the Commission or any court, it can have a significant impact on the ability of shareowners to use the proposal process, given the tight timing of the annual meeting process and the potential costs involved to litigate this issue).

In recent years, common topics for shareholder proposals have included executive compensation, environmental issues, majority voting for directors, and eliminating classified boards. This year, some observers expect "proxy access" to be a popular topic—that is, proposals to establish a procedure that would allow shareholder director nominees to be included in company proxy materials.[59]

Both companies and shareholders have used the shareholder proposal process as an occasion to engage with one another. Last year, for example, it was reported that the management of JPMorgan Chase & Co. actively lobbied institutional investors to oppose a shareholder proposal seeking to separate the CEO and board chairman roles at the bank. Supporters of the proposal also took their arguments directly to investors, including meetings with substantial shareholders.[60] Although in this case management defeated the shareholder proposal, campaigns like these—which are becoming more and more common—underscore the impact that shareholder proposals can have on corporate governance matters. Notably, during the 2013 proxy season, individual shareholders sponsored 49 percent of all shareholder proposals (up from less than 41 percent in 2012), as compared to about 16 percent for public pension plans (down from 21 percent in 2012), and about 26 percent for labor unions (about the same as the prior year). Experience shows that the shareholder proposal process can be an effective tool to amplify the voice of individual shareholders in corporate governance.[61] In fact, often an issue raised through the shareholder proposal process is addressed through negotiations between management and the proposing shareholder, making the inclusion of a shareholder proposal in the final proxy statement unnecessary.

In that regard, it has been reported that companies received over 750 shareholder resolutions with respect to the 2013 proxy season.[62] Although few of these resolutions may actually be approved by vote at a meeting, each provides an opportunity for engagement so that investors can have their views heard and have an impact on corporate governance.[63]

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59 In 2010, the Commission amended Rule 14a-8 to provide that companies may not exclude from their proxy materials shareholder proposals that seek to establish a corporate procedure for including shareholder director nominees in company proxy materials. *Electronic Shareholder Forums supra* note 56 at 4452–54.

60 Dan Fitzpatrick, *et. al.*, *J.P. Morgan Will Lobby for Dimon*, THE WALL ST. J., April 6–7, 2013, at B1.

61 Georgeson, *supra* note 45, Fig. 7, at 20.

62 Holly J. Gregory, *2014 Proxy Season Preview*, THOMSON REUTERS PRACTICAL LAW (Nov. 1, 2013), *available at* http://us.practicallaw.com/1-546-2405.

63 In addition, some shareholders have used proxy contests in board of directors elections, or the threat of such proxy contests, as a tool to influence company management. It is reported that proxy materials were filed

In the end, whatever the mechanism—shareholder proposals, shareholder forums, or "in-person" meetings—it is important that shareholders be able to communicate with their companies. I firmly believe that companies with corporate governance processes that enhance how they engage with their owners will be more successful than those that keep the doors shut.

CONCLUSION

As I come to the end of my remarks, I want to be clear about my views on executive compensation. I am proud to live in a country where hard work, inspiration, and success can be rewarded—and rewarded handsomely. The underlying corporate governance issue regarding executive compensation is not simply about the amount of the compensation—but whether the decision-making process enables accountability through transparency and through shareholder engagement. To that end, it is important to have corporate governance practices that foster these principles, and that fully and fairly explain the compensation process to shareholders.

The principles of accountability, transparency, and engagement apply equally to a myriad of other corporate issues. As owners of public companies and the providers of capital, shareholders have the right to know how their company is being managed, and to understand the board's rationale in overseeing management and in making decisions.

I will conclude as I began, by thanking you for your time and attention, congratulating the entire Emory Law School community on the launch of a new law journal, and urging you to prioritize investors as you consider your study of corporate governance and accountability. I have always been deeply impressed with the passion and scholarship of Emory Law School, and I have faith that this new publication will be a great success.

Thank you.

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by shareholders of 37 issuers last year (up from 34 in 2012 and 20 in 2011). These figures only include proxy contests that resulted in the filing of definitive proxy materials with the SEC. As many as 110 companies were reported to be targets of dissident shareholder activity at some point during the proxy season. Although not all of these contests came to a vote, the activists often earned board representation or other concessions in return for withdrawing a threatened contest and, in those contests that did go to a vote, they were able to gain at least partial representation in at least ten contests. Georgeson, *supra* note 45, at 11.