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Cover Page Footnote

Associate Professor, The University of Alabama School of Law. I would like to thank Dean Ken Randall and my colleagues on the faculty and the Alabama Law School Foundation for their generous support of my research. I greatly appreciate input from Alfred L. Brophy, Montré Carodine, and Norman Stein. I also thank Catherine Crosby Long, Eric Rumanek, and Thomas Simpson for excellent research assistance.

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ARTICLE

"WHO KILLED KATIE COURIC?" AND OTHER TALES FROM THE WORLD OF EXECUTIVE COMPENSATION REFORM

*Kenneth M. Rosen**

With average Americans perturbed about executive pay, government officials are taking action. Officials appear to be racing against each other to battle corporate excess. The U.S. Securities and Exchange Commission (SEC) engaged in major rulemaking related to the disclosure of executive compensation, and Congress quickly considered executive compensation legislation. More reform, however, is not always better. Concurrent reform by multiple regulators presents perils.

This Article adds to the dialogue about scandal-driven reform. While much discussion exists about the advisability of particular reforms, the focus here is on the process of reform. The Article conducts a comparative analysis of the SEC and House of Representatives' reform processes, which reveals that different policy-making processes may be more or less likely to yield positive reforms. The Article argues that promoting distinct, more delineated roles for certain public actors could improve synergies between regulatory reform efforts.

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* Associate Professor, The University of Alabama School of Law. I would like to thank Dean Ken Randall and my colleagues on the faculty and the Alabama Law School Foundation for their generous support of my research. I greatly appreciate input from Alfred L. Brophy, Montré Carodine, and Norman Stein. I also thank Catherine Crosby Long, Eric Rumanek, and Thomas Simpson for excellent research assistance.

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INTRODUCTION

Compensation received by executives increasingly draws the attention not only of corporate governance specialists, but of the media, shareholders, and government officials. Following expansive news coverage of various corporate scandals, the inner workings of major corporations today seem to be scrutinized more closely. The average American now can learn details about the bathroom accessories[1] favored by corporate executives as well as other purportedly generous pecuniary benefits of those executives' positions.[2]

1. When former Tyco International chief executive officer (CEO) Dennis Kozlowski stood trial for allegedly taking millions of dollars for "unauthorized personal expenses," prosecutors showed video of his apartment that featured a $6000 shower curtain and a $15,000 umbrella stand dog sculpture. *See* Kevin McCoy, *Jury Sees Kozlowski's Posh Digs via Video*, USA Today, Nov. 25, 2003, http://www.usatoday.com/money/industries/manufacturing/2003-11-25-tyco_x.htm.

2. One newspaper proclaimed that median chief executive officer compensation amounted to $14 million in 2004. *See* H.R. Rep. No. 110-88, at 3 (2007) (citing Gary Strauss & Barbara Hansen, *Special Report: CEO Pay 'Business as Usual,'* USA Today, Mar. 30, 2005, at 1B); *see also* Dan Slater, *The Activist Professor*, Deal, June 4, 2007, at 40 (describing CEO compensation at Home Depot and an exit package for a CEO purportedly worth $210 million). In addition to basic forms of compensation, more exotic forms of compensation, such as stock options, garner additional attention. *See* Mark Hulbert, *Why Backdated Options Might Be Contagious*, N.Y. Times, Jan. 21, 2007, § 3, at 5 (discussing the problem of "retroactively granting options to executives and directors on dates when a company's stock price was lower"); *see also* M.P. Narayanan et al., *The Economic Impact of Backdating of Executive Stock Options*, 105 Mich. L. Rev. 1597, 1601–05 (2007) (providing an overview of backdating and forward-dating issue).

Such scrutiny may affect the confidence of investors, whose dollars are critical to U.S. businesses and the American economy. With average Americans perturbed about executive pay,[3] government officials are acting to assuage that anxiety. Indeed, various officials at times appear to race against each other to battle corporate excess and to implement legal reforms. For instance, former New York Attorney General Eliot Spitzer pursued litigation to recover millions of dollars from former New York Stock Exchange Chairman Richard Grasso for alleged overcompensation.[4] In addition, the U.S. Securities and Exchange Commission (Commission or SEC) engaged in major rulemaking related to disclosure of executive compensation.[5] And, the U.S. Congress quickly moved to consider executive compensation legislation in its new term.[6] More reform, however, is not always better. The phenomenon of concurrent reform by multiple regulators presents its own perils.

In previous work, I cautioned generally against crafting corporate reform in the crucible of scandal.[7] I am not alone in raising questions about recent reform efforts such as those undertaken in the enactment and implementation of the Sarbanes-Oxley Act of 2002[8] by Congress and the SEC.[9] An important dialogue is developing about scandal-driven reform, and I seek to add to that discussion with this Article. While much of this discussion is about the advisability of particular reforms, I aim to focus on the *process* of reform. I do so in the area of executive compensation by engaging in a comparative analysis of the reform processes of the SEC and House of Representatives. This analysis reveals that different policy-making processes may be more or less likely to yield positive reforms. I argue that promoting distinct, more delineated roles for certain public

3. *See* Andrea Coombes, *Wage Gap: Workers Say Execs Paid Too Much; Report Being Happier with Performance Pay*, MarketWatch, June 20, 2007, http://www.marketwatch.com/news/story/workers-say-execs-pay-too/story.aspx?guid=%7b33B1BB3D-F9CB-4838-81B8-C01FB5F361B7%7d&print=true&dist=printTop.

4. *See* Krysten Crawford, *Spitzer Seeks $100M from Grasso*, CNNMoney.com, May 24, 2004, http://money.cnn.com/2004/05/24/markets/spitzer_grasso.

5. *See infra* Part I.

6. *See infra* Part II.

7. *See* Kenneth M. Rosen, *Mickey, Can You Spare a Dime?* DisneyWar, *Executive Compensation, Corporate Governance, and Business Law Pedagogy*, 105 Mich. L. Rev. 1151 (2007).

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

9. *See, e.g.*, Larry E. Ribstein, *Sarbox: The Road to Nirvana*, 2004 Mich. St. L. Rev. 279; Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 Yale L.J. 1521 (2005). Of course, some others take a more positive view of the Act. *See* Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 Geo. L.J. 1843 (2007) (responding to academic claims that empirical research finds Sarbanes-Oxley problematic and arguing for optimism). I certainly would not claim that the Act is devoid of any positive ideas. Rather, my critique is that the reforms undertaken were not necessarily the most optimal. I make this point with Professor Jill Fisch in an article judging section 307 of the Act as a second-best solution for corporate governance problems. *See* Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 Vill. L. Rev. 1097 (2003).

actors, especially Congress, could improve synergies between regulatory reform efforts to address business crises.

To amplify this thesis, I proceed in the following manner. In Part I, I explore the SEC's adoption of executive compensation disclosure rules with special reference to its decision *not* to include disclosure of nonexecutive employees' compensation—a proposal that some dubbed the Katie Couric Clause—in its initial round of reforms. Understanding the Commission's response to the public notice and comment process for its rulemaking shows how administrative agencies properly can tailor regulation in a deliberative fashion even when the agency faces pressure created by scandal to rush reform.

In Part II, I provide the contrasting story of the House of Representatives' passage of Bill 1257, the Shareholder Vote on Executive Compensation Act. Hasty passage of the bill illustrates pitfalls of reform processes driven by scandal. I argue that the House's process followed disturbing trends in mandating content for SEC regulation, rather than conferring general regulatory authority on the agency, and in failing to account adequately for possible synergies between concurrent regulatory efforts.

In Part III, I conclude by suggesting a framework that identifies when congressional action on business regulation seems most appropriate given concurrent regulatory efforts. I discuss Congress's important potential role in settling authority issues, providing oversight to administrative agency reforms, and being prepared to intervene when agencies are recalcitrant about enacting necessary rule changes. In offering this framework, I move beyond executive compensation issues to see how Congress might deal with other crises of confidence in business regulation. Areas for potential application of the framework include the regulation of hedge funds, imported toys and other consumer products, proxy voting, and subprime lending.

I. EXECUTIVE COMPENSATION REFORM AT THE SECURITIES AND EXCHANGE COMMISSION

Capital markets are a critical resource for funding U.S. businesses and thus are vital to the American economy. The federal securities laws exist to foster integrity and order in those markets and to that end grant the Commission great authority to regulate U.S. businesses. At times, the SEC serves both as an enforcer of the federal securities laws as well as a major policy maker and promulgator of new securities rules. These roles result from the authority initially granted to the Commission by Congress as well as additional grants of authority made pursuant to subsequent legislation.[10]

10. The Securities Exchange Act of 1934, as amended through the years, provides much of this authority. The U.S. Securities and Exchange Commission (Commission or SEC) possesses authority to prosecute certain securities law violations and to sit in judgment of whether some violations have occurred. *See* SEC, The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://www.sec.gov/about/whatwedo.shtml (last visited Mar. 11, 2008). The SEC also

Importantly, in the role of promulgator and in the wake of recent corporate scandals, just as Congress implemented new legislation, including the Sarbanes-Oxley Act, the SEC too engaged in substantial rulemaking activity.[11]

Years after the Sarbanes-Oxley Act's passage, the Commission continues to address corporate scandals with additional administrative rules. One type of rule often utilized by the Commission is the sort that requires some type of disclosure. Although the Commission does not select specific investments for Americans, it has long tried to ensure that investors possess information about companies when they make investment decisions. In providing an early statutory framework for the regulation of publicly traded companies, not surprisingly, the Securities Act of 1933[12] arguably embodied the philosophical view famously expressed by former U.S. Supreme Court Justice Louis Brandeis that "sunlight is the best of disinfectants."[13] Under the Securities Act, investors receive important information about a company's securities offered for public sale, and under the subsequent Securities Exchange Act of 1934, the SEC gained the power "to require periodic reporting of information by companies with publicly traded securities."[14] As securities continue to trade after their initial sale to the public, ensuring that information is available to persons seeking to invest in those companies can be critical.

When issues related to executive compensation drew the SEC's attention, the Commission naturally turned to disclosure as a means to address perceived problems. In 2006, the Commission adopted new rules related to disclosure of such compensation. It is useful to understand better the process that led to the SEC's chosen reform path and, in particular, to recognize a path not chosen.

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enjoys administrative rulemaking authority in a variety of areas related to the regulation of securities. *See, e.g.*, 15 U.S.C. § 78k-1 (2000) (providing rulemaking authority related to the national market system).

11. Some SEC rulemaking occurred prior to the Sarbanes-Oxley Act's passage. *See, e.g.*, Requirements for Arthur Andersen LLP Auditing Clients, Securities Act Release No. 8070, Exchange Act Release No. 45,590, 67 Fed. Reg. 13,517 (Mar. 22, 2002) (attempting to address issues related to the indictment of Arthur Andersen LLP). Other regulatory efforts followed enactment of the Sarbanes-Oxley Act, sometimes pursuant to its dictates. *See, e.g.*, Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Release No. 25,919, 68 Fed. Reg. 6296 (Feb. 6, 2003) (implementing section 307 of the Sarbanes-Oxley Act).

12. 15 U.S.C. § 77a (2000).

13. *See* SEC, Invest in Your Legal Career, http://www.sec.gov/jobs/lawyers.htm (last visited Mar. 11, 2008) (internal quotation marks omitted).

14. SEC, The Laws That Govern the Securities Industry, http://www.sec.gov/about/laws.shtml (last visited Jan. 29, 2008); *see also* Securities Exchange Act of 1934, 15 U.S.C. § 78a (2000).

A. *Initiation of Disclosure Reform, the Katie Couric Clause, and Critiques of the Clause*

On January 27, 2006, the Commission proposed significant changes to the existing system of disclosure related to executive and director compensation.[15] In proposing these changes, the Commission "intended to provide investors with a clearer and more complete picture of compensation to principal executive officers, principal financial officers, the other highest paid executive officers and directors."[16] In addition to altering disclosure of compensation, the SEC further proposed changes to disclosure of "related party transactions and director independence and board committee functions" as it viewed "participation by executive officers, directors, significant shareholders and other related persons in financial transactions and relationships with the company" to be "[c]losely related to executive officer and director compensation."[17]

Receiving particular attention was a section of the proposed rules related to the disclosure of the compensation of certain individuals who were not technically executive officers.[18] That provision became known as the Katie Couric Clause because it was expected to require disclosure for individuals such as television news anchor Katie Couric.[19] More specifically, the Commission proposed to require specific disclosure for these nonexecutives under Item 402 of Regulation S-K. Regulation S-K provides instructions for filling out forms required by the Securities Act and the Securities Exchange Act, and those instructions thus add content requirements to the SEC's reporting system for affected U.S. companies.[20]

The SEC proposed an instruction for filling out Item 402(f), requiring that affected companies,

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15. Executive Compensation and Related Party Disclosure, Securities Act Release No. 8655, Exchange Act Release No. 53,185, 71 Fed. Reg. 6542 (Feb. 8, 2006).

16. *Id.* at 6543.

17. *Id.* Because the SEC recently had revised its rule requiring interim reports about businesses to be filed on Form 8-K, *see* 17 C.F.R. § 240.13a-11 (2007), it also "propose[d] to reorganize and more appropriately focus . . . requirements on the type of compensation information that should be disclosed on a real-time basis," *see* Executive Compensation and Related Party Disclosure, 71 Fed. Reg. at 6543.

18. *See infra* notes 26–43 and accompanying text.

19. *See* Marcy Gordon, *Investors Get Clear Picture of Big Bucks*, St. Louis Post-Dispatch, Dec. 16, 2006, at A37; Jerry Stroud, *Companies Give Sneak Preview of New SEC Disclosure Rules*, St. Louis Post-Dispatch, Sept. 10, 2006, at E4. At the time of Katie Couric's move to the CBS television network to become the network's evening news anchor, it was speculated that significant compensation would greet her upon her arrival at CBS. *See* Lola Ogunnaike, *No Surprise but Some Sadness for 'Today' Fans on the Plaza*, N.Y. Times, Apr. 6, 2006, at C4 ("Although the specifics of Ms. Couric's CBS salary are unknown, all of those interviewed agreed that the prospect of a big payday was behind her decision to leave NBC.").

20. *See* Standard Instructions for Filing Forms Under Securities Act of 1933, Securities Exchange Act of 1934 and Energy Policy and Conservation Act of 1975—Regulation S-K, 17 C.F.R. pt. 229 (2007). *See generally* Thomas Lee Hazen, The Law of Securities Regulation (5th ed. 2005) (describing the background and contents of Regulation S-K).

> [f]or up to three employees who were not executive officers during the last completed fiscal year and whose total compensation for the last completed fiscal year was greater than that of any of the named executive officers, disclose each of such employee's total compensation for that year and describe their job positions.[21]

Thus, the pool of employees required to disclose compensation would expand beyond one traditionally limited to a company's executive officers.[22] The Commission believed that this would give shareholders "information about the use of corporate assets to compensate extremely highly paid employees in a company."[23] Interestingly, the SEC focused on disclosure of the amount of compensation and nature of the position and did not require that the individuals be named. It also appeared to anticipate a concern that would soon be raised for the rule: what level of disclosure was appropriate where the individuals do not perform a "policy making function" for the company.[24]

As is the norm for its administrative rulemakings, the Commission solicited public comment on its proposed rules related to executive compensation.[25] The SEC's proposals attracted much attention, drawing over 20,000 comments—among the most comments for a proposal in the Commission's history.[26] The comments discussed various aspects of the SEC's proposal, and numerous comments spoke specifically to the Katie Couric Clause.

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21. *See* Executive Compensation and Related Party Disclosure, 71 Fed. Reg. at 6615.

22. The SEC's release identified the relevant officers. At the time of the release, the SEC required disclosure by a covered company's CEO and the four other most highly compensated executive officers as well as up to two more individuals who would otherwise be excluded because they left their executive officer posts before the end of the fiscal year. *See id.* at 6563 & n.162. The SEC's release also proposed modifying that active executive officer list to include the principal executive officer, the principal financial officer, and the three other most highly compensated executive officers. *See id.*

23. *See id.* at 6558.

24. *Id.*

25. *See generally* Executive Compensation and Related Party Disclosure, 71 Fed. Reg. 6542.

26. *See* SEC, Comments on Proposed Rule: Executive Compensation and Related Party Disclosure, http://www.sec.gov/rules/proposed/s70306.shtml (last visited Mar. 27, 2008); Press Release, SEC, SEC Votes to Adopt Changes to Disclosure Requirements Concerning Executive Compensation and Related Matters (July 26, 2006), http://www.sec.gov/news/press/2006/2006-123.htm (citing Chairman Christopher Cox's comment that "[w]ith more than 20,000 comments, and counting, it is now official that no issue in the 72 years of the Commission's history has generated such interest . . ."); David M. Katz, *SEC Drops Celebrity Pay Proposal*, CFO.com, July 26, 2006, http://www.cfo.com/article.cfm/7218890?f=search.

Some commenters supported the rule.[27] However, notwithstanding the SEC's proposal only to require limited disclosure and not to require the names of covered employees under the Katie Couric Clause, many still bemoaned the fact that, as a practical matter, the Commission's rule might capture employees who were not corporate policy makers.[28] The value of

27. *See* Executive Compensation Disclosure, Securities Act Release No. 8735, Exchange Act Release No. 54380, 71 Fed. Reg. 53,267 (Sept. 8, 2006). These commenters, often individuals, seemed generally interested in disclosure of the inner workings of companies, especially public companies. *See, e.g.*, Letter from Michael Bruch to SEC (May 12, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/mbruch051206.htm; Letter from James B. Hubbard to SEC (May 12, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/jbhubbard5244.htm; Letter from Preston W. Huey to SEC, President, Strategic Commc'ns, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/pwhuey2580.htm. Some commenters also appeared attracted to the proposal because, as noted below, it was opposed by some in the media and entertainment industry. *See, e.g.*, Letter from Preston W. Huey to SEC, *supra*; Letter from Robert Kammer to SEC (May 12, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/rkammer8788.htm. Accordingly, sympathizers of the proposal might view the proposal as fair to investors rather than invading the targeted employees' privacy. *See, e.g.*, Letter from Jack Ciesielski, President, R.G. Assocs., Inc., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/jtciesielski3899.pdf.

28. *See, e.g.*, Letter from Martha L. Carter, Senior Vice President and Managing Dir., Corporate Governance Institutional S'holder Servs., to SEC (Mar. 28, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/mcarter9965.pdf; Letter from Cleary Gottlieb Steen & Hamilton, LLP, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/cleary041006.pdf; Letter from Jack Ehnes, CEO, Cal. State Teachers' Ret. Sys., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/calstrs041006.pdf; Letter from John Faulkner, Chairman, Capital Mkts. Comm., Sec. Indus. Assoc., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/sia041006.pdf; Letter from Sharon D. Fiehler, Executive Vice President, Human Res. & Admin., Peabody Energy, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/sdfiehler4530.pdf; Letter from Roberta D. Fox & Michael Sorensen, Hewitt Assocs. LLC, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/hewitt041006.pdf; Letter from Henry H. Hopkins, Chief Legal Counsel, & Darrell N. Braman, Assoc. Legal Counsel, T. Rowe Price Assocs., Inc., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/s70306-374.pdf; Letter from Dixie Johnson, Chair, Comm. on Fed. Regulation of Sec., Am. Bar Ass'n, to SEC (May 15, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/djohnson051506.pdf; Letter from Jeffrey Katzenberg, CEO, DreamWorks Animation SKG, Inc., to SEC (Apr. 6, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/s70306-145.pdf; Letter from Michael E. Keane, Vice President and Chief Fin. Officer, Computer Scis. Corp., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/mekeane041006.pdf; Letter from John P. Kelsh, Sidley Austin LLP, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/jpkelsh6991.pdf; Letter from Cary Klafter, Vice President, Legal & Gov't Affairs, Dir., Corporate Affairs & Corporate Sec'y, Intel Corp., to SEC (Apr. 6, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/ciklafter6947.pdf; Letter from Elizabeth Krentzman, Gen. Counsel, Inv. Co. Inst., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/ici041006.pdf; Letter from Jeffrey C. McGuiness, President, HR Policy Ass'n, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/jcmcguiness041006.pdf; Letter from Michael Pollack, Principal, Retirement et al., Towers Perrin, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/towersperrin041006.pdf; Letter from Scott Renwick, Senior Vice President and Gen. Counsel, Unitrin, Inc., to SEC (Apr. 10, 2006),

disclosure for those who do not make policy was of more dubious value than for true policy makers. True policy makers are subject to a greater risk of a conflict of interest if they might influence their own or others' compensation by virtue of their policy-making positions at the company. Thus, disclosing their compensation might act as a check on such a conflict. In contrast, nonexecutive employees who do not make corporate policy have fewer opportunities to influence their own salaries in a pernicious way;[29] theoretically, the market often drives their compensation levels.[30] Indeed, it was suggested that the relevant nonexecutives' compensation being higher than that of other executives reinforces the idea that market factors drive their compensation levels.[31] It would be hard to understand why executives would pay nonexecutives more than themselves if the market did not demand it. Thus, the comments identify a potentially fundamental flaw with the Katie Couric Clause proposal.

In addition to emphasizing this fundamental issue, the comments usefully lay out additional problems with the proposal. For example, some questioned the precedent that the proposal might set in turning away from a tradition of not always breaking down and disclosing to investors all specific company expenses; this raised questions about why the SEC singled out compensation for three employees rather than other expenses for such disclosure and what the Commission might require to be disclosed next.[32]

Moreover, other commenters suggested that the costs of the reform to companies ultimately might accrue to the detriment of investors. Some companies worried that the proposed rule would negatively affect internal

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available at http://www.sec.gov/rules/proposed/s70306/srenwick041006.pdf; Letter from Laraine S. Rothenberg, Fried, Frank, Harris, Shriver & Jacobson, LLP, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/lsrothenberg3444.pdf; Letter from Top Five Data Servs., Inc., to SEC (Apr. 7, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/topfive040706.pdf; Letter from Richard M. Whiting, Executive Dir. and Gen. Counsel, Fin. Servs. Roundtable, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/rmwhiting041006.pdf. In issuing a call for additional comments on the rule, discussed below, the Commission itself recognized many of these comments and the arguments proffered by the commenters. *See generally* Executive Compensation Disclosure, 71 Fed. Reg. 53,267.

29. *See* Letter from Jeffrey Katzenberg to SEC, *supra* note 28.

30. *See* Letter from Joseph A. Grundfest, William A. Franke Professor of L. & Bus. and Codirector of the Rock Ctr. on Corporate Governance, Stanford L. Sch., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/jagrundfest3135.pdf; Letter from Elizabeth Krentzman to SEC, *supra* note 28; Letter from James B. Lootens, Corporate Sec'y, Eli Lilly & Co., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/jblootens041006.pdf; Letter from Richard M. Whiting to SEC, *supra* note 28.

31. *See* Letter from Joseph A. Grundfest to SEC, *supra* note 30.

32. *See, e.g.*, Letter from David Chavern, Vice President and Chief of Staff, U.S. Chamber of Commerce, to SEC (Apr. 7, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/dchavern7512.pdf; Letter from Dixie Johnson to SEC, *supra* note 28; Letter from Linda E. Rappaport & George Spera, Shearman & Sterling LLP, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/shearmansterling041006.pdf.

morale as employees learned about more highly paid colleagues' compensation and perhaps questioned their relative standing at the company.[33] And, the three highest paid nonexecutives might suffer angst as well. Commenters noted that publishing information about their compensation might invade their privacy.[34] Even though the proposal would not give the names of the three nonexecutives, the descriptive disclosure required by the rule could allow one to determine the individual employees' identities.[35] This new reality might motivate certain employees to change or not to change jobs or firms to avoid having their salary information disclosed.[36]

And regardless of whether the disclosed information would satisfy investors' personal curiosity, some commenters believed it would threaten the competitive position of the companies those investors hoped would succeed. For instance, the rule might advantage nonpublic companies, not subject to the disclosure rule, over public companies.[37] When the public companies disclose compensation information, competitors might use it to recruit the disclosing company's talent or to reformulate their own

33. *See, e.g.*, Letter from Cravath, Swaine & Moore LLP to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/ewhilfers2953.pdf; Letter from Diane Doubleday, Mercer Human Res. Consulting, Inc., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/mercer041006.pdf; Letter from Sharon D. Fiehler to SEC, *supra* note 28; Letter from Joseph A. Grundfest to SEC, *supra* note 30; Letter from Jeffrey Katzenberg to SEC, *supra* note 28; Letter from Dennis Ling, Chair, Comm. on Corporate Fin., Fin. Executives Int'l, to SEC (Apr. 21, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/dling5873.pdf; Letter from Jeffrey C. McGuiness to SEC, *supra* note 28; Letter from Pearl Meyer & Partners to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/jrich7010.pdf; Letter from WorldatWork to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/rmjohnson5604.pdf.

34. *See, e.g.*, Letter from Diane Doubleday to SEC, *supra* note 33; Letter from Sharon D. Fiehler to SEC, *supra* note 28; Letter from Joseph A. Grundfest to SEC, *supra* note 30; Letter from Dixie Johnson to SEC, *supra* note 28; Letter from Jeffrey Katzenberg to SEC, *supra* note 28; Letter from James B. Lootens to SEC, *supra* note 30;

35. *See* Letter from David Chavern to SEC, *supra* note 32; Letter from Cleary Gottlieb Steen & Hamilton, LLP, to SEC, *supra* note 28; Letter from Sharon D. Fiehler to SEC, *supra* note 28; Letter from Joseph A. Grundfest to SEC, *supra* note 30; Letter from Henry H. Hopkins to SEC, *supra* note 28; Letter from James B. Lootens to SEC, *supra* note 30; Letter from Jeffrey C. McGuiness to SEC, *supra* note 28; Letter from Linda E. Rappaport & George Spera to SEC, *supra* note 32; Letter from Scott Renwick to SEC, *supra* note 28; Letter from Daniel J. Winnike, Fenwick & West LLP, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/djwinnike041006.pdf.

36. *See, e.g.*, Letter from Joseph A. Grundfest to SEC, *supra* note 30; Letter from Steve Odland, Chairman, Corporate Governance Task Force, Bus. Roundtable, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/sodland041006.pdf; Letter from Pearl Meyer & Partners to SEC, *supra* note 33; Letter from WorldatWork to SEC, *supra* note 33.

37. *See, e.g.*, Letter from John Faulkner to SEC, *supra* note 28; Letter from Henry H. Hopkins to SEC, *supra* note 28; Letter from Linda E. Rappaport & George Spera to SEC, *supra* note 32; Letter from Sullivan & Cromwell LLP to SEC (Apr. 21, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/s70306-575.pdf; Letter from Daniel J. Winnike to SEC, *supra* note 35.

compensation models to avoid losing their employees.[38] Information underlies bargaining power. Not only might firms lose talent as a result of disclosure, but they also might fail to attract top talent because of the bargaining disadvantage created by disclosure.[39]

Of course, possible compliance burdens attach to tracking the compensation of a group of employees that extends beyond executives.[40] This point brought out special concerns for companies in some industries where compensation is not limited to salaries, making it harder to track. The entertainment industry appeared to be particularly concerned with the difficulties of tracking its highest paid nonexecutives,[41] requiring more guidance as to whether certain "talent" utilized by the companies were employees for purposes of the rule.[42] If so, the fact that the key talent for some companies changes from year to year would make it more difficult to monitor employees to meet disclosure compliance burdens.

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38. *See, e.g.*, Letter from John Faulkner to SEC, *supra* note 28; Letter from Steve Odland to SEC, *supra* note 36.

39. *See, e.g.*, Letter from John Faulkner to SEC, *supra* note 28; Letter from Joseph A. Grundfest to SEC, *supra* note 30; Letter from Linda E. Rappaport & George Spera to SEC, *supra* note 32.

40. *See, e.g.*, Letter from Chadbourne & Parke LLP to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/epsmith2795.pdf; Letter from Cleary Gottlieb Steen & Hamilton, LLP, to SEC, *supra* note 28; Letter from Cravath, Swaine & Moore LLP to SEC, *supra* note 33; Letter from Diane Doubleday to SEC, *supra* note 33; Letter from Foley & Lardner LLP to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/falardnerllp1183.pdf; Letter from Edward A. Hauder, Principal, Technical Solutions & Innovation Team Leader, Compensation Line of Bus., Buck Consultants, to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/eahauder041006.pdf; Letter from Henry H. Hopkins to SEC, *supra* note 28; Letter from Christopher D. Ivey, Stradling Yocca Carlson & Rauth, to SEC (Mar. 31, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/cdivey033106.pdf; Letter from Dixie Johnson to SEC, *supra* note 28; Letter from Michael E. Keane to SEC, *supra* note 28; Letter from Dennis Ling to SEC, *supra* note 33; Letter from Nancy Lucke Ludgus, Attorney at Law, to SEC (Apr. 1, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/s70306-90.pdf; Letter from Jeffrey C. McGuiness to SEC, *supra* note 28; Letter from Pearl Meyer & Partners to SEC, *supra* note 33; Letter from Linda E. Rappaport & George Spera to SEC, *supra* note 32; Letter from Scott Renwick to SEC, *supra* note 28; Letter from Laraine S. Rothenberg to SEC, *supra* note 28; Letter from Sullivan & Cromwell LLP to SEC, *supra* note 37; Letter from Top Five Data Servs., Inc., to SEC, *supra* note 28.

41. *See* Gordon, *supra* note 19 ("Dubbed the 'Katie Couric Clause' by critics, [the SEC proposal] brought a flurry of opposition during the comment period from Hollywood and big media companies."); Matthew Karnitschnig et al., *Studios Are Furious That SEC Is Curious About Hollywood Pay*, Wall St. J., Apr. 10, 2006, at B1; Robert Schroeder, *SEC Tightens Rules on Executive Pay*, Seattle Times, July 27, 2006, at C1.

Special concerns also came from the financial services industry. *See, e.g.*, Letter from Henry H. Hopkins to SEC, *supra* note 28 (expressing fear of a disproportionate negative effect of proposed nonexecutive compensation disclosure on financial services firms).

42. *See* Letter from Linda E. Rappaport & George Spera to SEC, *supra* note 32 (doubting "that guidance and rules that have evolved in the context of executive compensation will be adequate to enable entertainment companies to calculate a total compensation amount for their most valuable 'talent' employees in a consistent and meaningful way").

Finally, commenters suggested that some companies could evade the Katie Couric Clause, even if it were adopted.[43] The commenters explained that some companies could restructure employment arrangements into consulting agreements or other structures other than an employment relationship. This further undermined the value of the rule. Collectively, it appears that commenters killed the Katie Couric Clause in the first instance because of the strength of their arguments—arguments that questioned the Katie Couric Clause's utility and identified costs to disclosing companies, particularly to disclosing companies in certain industries.

B. *Adoption of Initial Rules and Continuing Reform*

After reviewing these significant comments, the Commission took action. The SEC's next steps in the reform process, and, in particular, its handling of the Katie Couric Clause, illustrate potential benefits of administrative rulemaking as the foundation of a reform process.

1. Adopting Release and Request for Additional Comments

On August 29, 2006, the Commission adopted new rules on executive compensation that it intended to become effective in November 2006.[44] These rules constituted a major alteration of how companies disclose executive compensation and related matters.[45] However, something noticeably was absent from the newly adopted rules—the Katie Couric Clause.

Instead of moving forward immediately with its entire initial proposal, the Commission adopted some rules and issued a separate release requesting additional comments on disclosure of compensation of those who are not executive officers.[46] The SEC notably recognized that commenters perceived problems with the original proposal to add disclosure for highly compensated employees who did not serve as executive officers.[47] The Commission specifically identified many of the concerns with the proposal noted above[48] and clarified the intended purpose of its proposal, namely, "to provide investors with information regarding the most highly compensated employees *who exert significant policy influence* by having responsibility for significant policy decisions."[49] In clarifying its position, the SEC got more specific about the types of employees who might or might not constitute such policy makers:

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43. *See, e.g.*, Letter from Joseph A. Grundfest to SEC, *supra* note 30.

44. Executive Compensation and Related Person Disclosure, Securities Act Release No. 8732A, Exchange Act Release No. 54302A, 71 Fed. Reg. 53,158 (Sept. 8, 2006).

45. *See generally id.*; James Hamilton, Executive Compensation and Related-Party Disclosure (CCH) (2006) (describing rule changes).

46. Executive Compensation Disclosure, Securities Act Release No. 8735, Exchange Act Release No. 54380, 71 Fed. Reg. 53,267 (Sept. 8, 2006).

47. *See id.*

48. *See supra* Part I.A.

49. *See* Executive Compensation Disclosure, 71 Fed. Reg. at 53,268 (emphasis added).

> Responsibility for significant policy decisions could consist of, for example, the exercise of strategic, technical, editorial, creative, managerial, or similar responsibilities. Examples of employees who might not be executive officers but who might have responsibility for significant policy decisions could include the director of the news division of a major network; the principal creative leader of the entertainment function of a media conglomerate; or the head of a principal business unit developing a significant technological innovation. By contrast, we are convinced by commenters that a salesperson, entertainment personality, actor, singer, or professional athlete who is highly compensated but who does not have responsibility for significant policy decisions would not be the type of employee about whom we would seek disclosure. Nor, as a general matter, would investment professionals (such as a trader, or a portfolio manager for an investment adviser who is responsible for one or more mutual funds or other clients) be deemed to have responsibility for significant policy decisions at the company, at a significant subsidiary or at a principal business unit, division or function simply as a result of performing the duties associated with those positions. On the other hand, an investment professional, such as a trader or portfolio manager, who does have broader duties within a firm (such as, for example, oversight of all equity funds for an investment adviser) may be considered to have responsibility for significant policy decisions.[50]

Having identified the individuals it intended to cover with the proposed rule, the Commission expressed a desire to continue to consider whether disclosure about such individuals was needed and, if it was, exactly what should be disclosed.[51] To that end, the SEC asked commenters to provide additional views on some specific questions.

These specific questions covered a litany of issues.[52] For instance, the SEC asked for views on whether it would be appropriate to require disclosure by employees, who are not officers, if their compensation exceeded that for officers specifically *and* they were not responsible for significant policy decisions within the company or related entities.[53] The Commission also wanted input on its methodology for determining covered employees who are not officers, such as the advisability of including certain pension benefits and other compensation.[54] Moreover, it queried into the impact of applying a new rule only to certain large accelerated filers, who might be able to track employee information better than other businesses.[55] And, the SEC asked to what degree information required by the rule would be material to investors and whether, even if material, privacy concerns outweighed the information's benefits.[56] Finally, in addition to other issues

50. *Id.*
51. *See id.*
52. *See id.* at 53,268–69.
53. *See id.* at 53,268. Such entities could include significant company subsidiaries and the company's principal business units, divisions, and functions. *See id.*
54. *See id.*
55. *See id.* at 53,268–69.
56. *See id.* at 53,269.

related to its proposal, such as the definition of terms, the SEC sought more concrete information on the costs to businesses that would be associated with its proposal.[57] Thus, the Commission's approach to its initial round of reform is an interesting one that deserves further evaluation as a method for regulatory reform.

2. Assessment of the Handling of the Katie Couric Clause and Continuing SEC Executive Compensation Reform

Analysis of the SEC's course of action in 2006 reveals several positive aspects of its executive compensation reform process.[58] First, some critics of administrative agencies might claim that the administrative rulemaking process is plodding and time-consuming. However, notwithstanding the lack of an externally imposed deadline,[59] this rulemaking illustrated that at least one agency, the SEC, could institute initial reforms relatively rapidly.[60] In less than a year, the SEC proposed new rules, conducted the

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57. *See id.*

58. The following discussion should not suggest that the contents of the SEC's rules are perfect. Some already suggest that additional action might be necessary to address executive pay. *See, e.g.*, Jennifer S. Martin, *The House of Mouse and Beyond: Assessing the SEC's Efforts to Regulate Executive Compensation*, 32 Del. J. Corp. L. 481, 512–28 (2007) (suggesting that current SEC rules alone are not enough to eliminate excessive executive compensation). Others call for moving the dialogue on executive compensation reform beyond pure securities law issues. *See, e.g.*, Sandeep Gopalan, *Shame Sanctions and Excessive CEO Pay*, 32 Del. J. Corp. L. 757, 758–69 (2007) (calling for more focus on norms about executive compensation and shaming in addressing executive pay); Jerry W. Markham, *Regulating Excessive Executive Compensation—Why Bother?*, 2 J. Bus. & Tech. L. 277, 348 (2007) (finding that regulatory reforms might increase compensation and advocating allowing the market to deal with compensation issues); Gregg D. Polsky, *Controlling Executive Compensation Through the Tax Code*, 64 Wash. & Lee L. Rev. 877, 892–926 (2007) (evaluating the possible impact of tax legislation on executive compensation). Moreover, even the basic question of whether executive pay is too high is open to debate. *See* Robert B. Reich, *CEOs Deserve Their Pay*, Wall St. J., Sept. 14, 2007, at A13 (describing the possible economic case for high compensation and investor support for that pay). However, this Article focuses on how some government actors' processes might be more likely than those of others to craft better, if not perfect, reforms. Indeed, as suggested below, the SEC's rules are a work in progress.

59. In contrast, the SEC was forced by Congress in some of its other scandal-driven rulemakings to act by particular deadlines. *See, e.g.*, Standards Relating to Listed Company Audit Committees, Securities Act Release No. 8173, Exchange Act Release No. 47,137, 68 Fed. Reg. 2637 (Jan. 17, 2003) (proposing a new rule that needed to become effective by April 26, 2003, pursuant to section 301 of the Sarbanes-Oxley Act). Of course, as discussed further below, the SEC was aware that some in Congress wished to engage in their own versions of executive compensation reform, which may have influenced the expediency of the Commission's own efforts. *See* Letter from Barney Frank, Ranking Member, U.S. House of Representatives Comm. on Fin. Servs., to SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/bfrank041006.pdf.

60. Moreover, executive compensation reform was hardly the only item on the Commission's 2006 agenda, as it followed the busy years of post–Sarbanes-Oxley rulemakings. *See generally* SEC, SEC Proposed Rules Archive: 2006, http://www.sec.gov/rules/proposed/proposedarchive/proposed2006.shtml (last visited Mar. 11, 2008) (listing 2006 rule proposals); SEC, Final Rules Archive: 2006,

notice and comment process, and adopted rules scheduled to go into effect in November of the year of that proposal.[61] Although the initial set of final rules did not include final versions of every aspect of its proposal, the Commission adopted much of that proposal while accounting for public comments and concerns.[62] Rather than delaying the entire proposal while it sought additional comment on the disclosure for employees who were not officers, the SEC moved ahead with what it was ready to adopt. The newly adopted rules were recognized by some as the most important changes to executive compensation disclosure in years.[63]

Although timely responsiveness may be an element of effective reform, speed alone is not enough to render a reform of the highest quality. Accordingly, other characteristics of the SEC's executive compensation reform process are noteworthy and deserve further exploration. The Katie Couric Clause illustrates that reforms that do not immediately appear controversial can possess serious flaws. In this instance, the notice and comment process fleshed out possible problems. Commenters illustrated that the results of regulation under the Katie Couric Clause could outstrip the SEC's goal of promoting disclosure of corporate policy makers' compensation.

Beyond this general concern, certain commenters identified problems that the reforms raised for particular types of businesses. The potentially disproportional negative impact of the Katie Couric Clause on certain individuals and firms in the entertainment field reflects this point.[64] In the search for a quick solution, ill-considered, scandal-driven reform might miss these special business needs. In recognizing comments already received and searching for possible different reform paths, the SEC is more likely to tailor future regulations to accommodate such needs. Of course, interaction with interest groups raises concerns about capture and inappropriate rent seeking as suggested by public choice theory.[65] This concern should not be ignored, but also should not overshadow the fact that it would be very difficult to produce the most narrowly tailored rules if private parties could not express their concerns about the special effects of the rules on their businesses.

An ancillary benefit of the SEC's attempts to promulgate more tailored regulation through the notice and comment process is the greater chance

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http://www.sec.gov/rules/final/finalarchive/finalarchive2006.shtml (last visited Mar. 11, 2008) (listing 2006 rule adoptions).

61. *See* Executive Compensation and Related Person Disclosure, Securities Act Release No. 8732A, Exchange Act Release No. 54302A, 71 Fed. Reg. 53,158, 53,158 (Sept. 8, 2006).

62. *See* Executive Compensation Disclosure, Securities Act Release No. 8735, Exchange Act Release No. 54380, 71 Fed. Reg. 53,267, 53,267 (Sept. 8, 2006) ("[W]e adopted the rules and amendments substantially as proposed, with certain modifications to address a number of points that commenters raised.").

63. *See* Hamilton, *supra* note 45, at 5.

64. *See supra* note 41 and accompanying text.

65. *See generally* 1 Charles K. Rowley, Public Choice Theory (1993).

that the regulated community will comply better with the new reform scheme. Ultimately, a regulation's effectiveness depends on compliance. One hopes that regulated entities choose to follow the rules so that separate enforcement actions against violators are largely unnecessary. If one understands and has resources to comply with the regulation, it will be easier to follow. Thus, as the SEC seeks to define better who it means to regulate—corporate policy makers—companies are more likely to report properly about those individuals. By considering issues such as potentially limiting the rules to large accelerated filers who have additional resources and might be more capable of keeping track of information required for the disclosures, the SEC's potential to foster compliance with any of its additionally adopted rules increases.

In addition to encouraging regulated entities to comply with new rules, the notice and comment process also may help investors to accept the rules meant to benefit them. A review of the comments illustrates that individuals, in addition to larger entities, took interest in the disclosure rules.[66] Regardless of whether these individuals favor the SEC's chosen path for reform, by understanding why the Commission moved forward with some reforms and not others in light of a cost-benefit analysis and by seeing the Commission address lines of comment, they may be more likely to accept the resulting rules. In addition, the SEC's request for additional comments reflects a commitment to at least consider moving forward with further compensation disclosures and the Katie Couric Clause in some form, even if such disclosures might no longer apply to individuals like Couric.[67] The SEC's continued commitment to investors' interests is critical to maintaining investor confidence and to encouraging individuals to provide capital for U.S. businesses.

These observations are not meant to suggest that the SEC is the perfect regulator. Interestingly, in addition to delaying action on the Katie Couric Clause, the Commission's August release also failed to settle other issues with finality. More specifically, the SEC chose in December 2006 to further revise its compensation disclosure rules with an interim final rule.[68] Some of the proposals contained therein arguably lacked the benefit of a full vetting by an extended notice and comment process. The Commission ultimately decided that action was required at that time; however, it may not have reaped all of the benefits of the process described above by taking action that some considered an unpleasant December surprise.[69]

66. *See* SEC, Comments on Proposed Rule: Executive Compensation and Related Party Disclosure, http://www.sec.gov/rules/proposed/s70306.shtml (last visited Mar. 27, 2008) (listing individuals as well as entities commenting on the rules).

67. *See* Executive Compensation Disclosure, 71 Fed. Reg. 53,267.

68. *See* Executive Compensation Disclosure, Securities Act Release No. 8765, Exchange Act Release No. 55009, 71 Fed. Reg. 78,338 (Dec. 29, 2006).

69. *See CII Objects to Hasty Revision of Rules on Executive Comp Disclosure*, 39 Sec. Reg. & L. Rep. (BNA) 173 (Feb. 5, 2007); Siobhan Hughes, *SEC Reversal Irks a Committee Boss*, Wall St. J., Dec. 28, 2006, at A2.

However, the Commission's commitment to the rules initially promulgated and, more generally, to greater transparency for executive compensation is obvious. Illustrating this fact are the Commission's vigorous efforts to enforce the newly enacted rules.[70] Moreover, the Commission continues to explore additional ways to make information about executive pay more relevant to investors.[71] Yet, notwithstanding the Commission's continuing efforts to transform the nation's understanding of executive compensation and to police against irregularities associated with compensation, other public actors chose to pursue their own executive compensation reform efforts.

II. COMPETING CONGRESSIONAL REFORM

Having explored the Commission's process for adopting initial executive compensation reforms, one can proceed to study the congressional response to the crisis in confidence resulting from high compensation levels for corporate executives. That response reflects possible shortcomings with the current nature of congressional participation in corporate reforms. The following exploration of congressional efforts on executive compensation reform is not meant to constitute final judgment on the contents of congressional reform. Rather, it raises issues about how Congress pursues reform when other regulators also are attempting to address corporate scandals.

A. *The New Congress and the Shareholders Vote on Executive Compensation Act*

The year 2006 saw not only major SEC executive compensation reform, but also a shift of power on Capitol Hill. In the November 2006 election, Democrats took control of both houses of Congress.[72] The newly elected Democrat-controlled legislature arrived in Washington early in 2007.

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70. *See* Jeremy Grant, *SEC's Red-Letter Day for Top Pay Miscreants*, Fin. Times, Sept. 4, 2007, at 20. SEC review of actual filings with executive compensation disclosures permits a more detailed dialogue on ways to improve those disclosures. *See, e.g.*, Richard Hill, *Performance Targets Drew Most Comment in SEC Review of Statements, Attorney Says*, 39 Sec. Reg. & L. Rep. (BNA) 1826 (Dec. 3, 2007) (quoting an SEC staff member regarding the use of comments to issuers by staff "to 'test our understanding of what we think the disclosure is communicating'"); Mary Hughes, *SEC Staff Finds Room for Improvement in Its Initial Review of Compensation Disclosures*, 39 Sec. Reg. & L. Rep. (BNA) 1578 (Oct. 15, 2007) (noting that the Division of Corporation Finance revealed the possibility for improved disclosures by better organizing technical materials and by focusing the Compensation Discussion and Analysis). After the Commission critiqued company disclosures of top executives' pay during the summer and fall of 2007, the SEC followed up with additional letters to many of the targeted companies. *See* Kara Scannell & Joann S. Lublin, *SEC Unhappy with Answer on Executive Pay*, Wall St. J., Jan. 29, 2008, at B1.

71. *See* Press Release, SEC, Chairman Cox Unveils New Internet Tool With Instant Comparisons of Executive Pay (Dec. 21, 2007), http://www.sec.gov/news/press/2007/2007-268.htm (noting the launch of an "online tool that enables investors to easily and instantly compare what 500 of the largest American companies are paying their top executives").

72. Mike Dorning, *Democrats Savor Senate Win*, Chi. Trib., Nov. 10, 2006, at 1.

Members of both the Senate and the House of Representatives quickly set their sights on executive compensation. On March 1, 2007, Representative Barney Frank, chairman of the House Financial Services Committee,[73] introduced House Bill 1257, the Shareholder Vote on Executive Compensation Act, which sought shareholder votes related to compensation at certain American companies.[74] On April 20, 2007, Senator Barack Obama introduced Senate Bill 1181, a bill aimed at similar ends.[75]

These bills both contained two principal provisions. First, the bills required separate shareholder votes to approve executive compensation disclosed pursuant to the SEC's rules.[76] Second, the bills mandated shareholder votes to approve certain golden-parachute-style agreements[77] with executives in relation to certain mergers, acquisitions, and other transactions.[78] The shareholder votes would not be binding on a corporation or its board.[79]

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73. *See* House Committee on Financial Services, Congressman Barney Frank, Chairman, http://financialservices.house.gov/ (last visited Mar. 11, 2008).

74. *See* Shareholder Vote on Executive Compensation Act, H.R. 1257, 110th Cong. (as introduced Mar. 1, 2007).

75. *See* Shareholder Vote on Executive Compensation Act, S. 1181, 110th Cong. (2007).

76. *See supra* notes 74–75. The version of the bill passed by the House amended section 14 of the Securities Exchange Act of 1934 to add a new subsection, "(i) Annual Shareholder Approval of Executive Compensation," which provides,

> (1) Annual vote.—Any proxy or consent or authorization for an annual meeting of the shareholders (or a special meeting in lieu of the annual meeting) occurring on or after January 1, 2009, shall provide for a separate shareholder vote to approve the compensation of executives as disclosed pursuant to the Commission's compensation disclosure rules (which disclosure shall include the compensation discussion and analysis, the compensation tables, and any related material). The shareholder vote shall not be binding on the corporation or the board of directors and shall not be construed as overruling a decision by such board, nor to create or imply any additional fiduciary duty by such board, nor shall such vote be construed to restrict or limit the ability of shareholders to make proposals for inclusion in such proxy materials related to executive compensation.

See Shareholder Vote on Executive Compensation Act, H.R. 1257, 110th Cong. (as passed by House, Apr. 20, 2007) (internal quotation mark omitted).

77. A golden parachute denotes a package of special compensation awarded to executives upon the occurrence of events, such as the takeover of a company. *See* Franklin A. Gevurtz, Disney *in a Comparative Light*, 55 Am. J. Comp. L. 453, 464 n.22 (2007).

78. *See supra* notes 74–75. Under the bill passed by the House, subsection 14(i) added to the Securities Exchange Act of 1934 also provides,

> (2) Shareholder approval of golden parachute compensation.—
>
> > (A) Disclosure.—In any proxy solicitation material for an annual meeting of the shareholders (or a special meeting in lieu of the annual meeting) occurring on or after January 1, 2009, that concerns an acquisition, merger, consolidation, or proposed sale or other disposition of substantially all the assets of an issuer, the person making such solicitation shall disclose in the proxy solicitation material, in a clear and simple form in accordance with regulations of the Commission, any agreements or understandings that such person has with any principal executive officers of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer) concerning any type of compensation (whether present, deferred, or contingent) that are based on or otherwise relate to the acquisition, merger, consolidation, sale, or other

The House legislation ultimately moved quickly to passage. Within a week of its introduction, the House Committee on Financial Services held hearings on the bill on March 8, 2007.[80] After the committee marked up the legislation, it voted on March 28, 2007, to report the bill, as amended, on a split vote with thirty-seven supporting and twenty-nine opposing the action.[81] Within a few more weeks, on April 17, 2007, the House Rules Committee approved House Resolution 301, calling for House consideration of Bill 1257 and one hour of general debate.[82] The House adopted the rule the following day. Debate on the bill ensued,[83] and on April 20, 2007, the House approved the bill with a vote of 269 to 134.[84] According to legislative procedures, the House-approved bill was referred to the Senate.[85]

B. *Issues Raised by House Action*

The House of Representatives action on Bill 1257 is revealing. The House's adoption of the bill illustrates significant issues with congressional action on corporate reform in the modern era of scandal. In exploring these issues, it is not my intent to settle definitively whether shareholder advisory votes on compensation and golden parachute packages are meritorious. Rather, I focus on whether the legislative process that yielded those reforms called for by the bill was likely to lead to optimal results.

Initial observation reveals that the process that led to House passage of Bill 1257 appears quite rushed, especially in light of other ongoing reform efforts at the SEC. Moving, within a week, from a bill's introduction to the only significant hearings on that bill that feature outside witnesses seems questionable. Completing committee consideration of the bill in less than a month and completing the entire process of House passage in less than two months seems curious. By contrast, the SEC's reform efforts included a

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> disposition, and that have not been subject to a shareholder vote under paragraph (1).
>
> (B) Shareholder approval.—The proxy solicitation material containing the disclosure required by subparagraph (A) shall provide for a separate shareholder vote to approve such agreements or understandings. A vote by the shareholders shall not be binding on the corporation or the board of directors and shall not be construed as overruling a decision by such board, nor to create or imply any additional fiduciary duty by such board, nor shall such vote be construed to restrict or limit the ability of shareholders to make proposals for inclusion in such proxy materials related to executive compensation.

Shareholder Vote on Executive Compensation Act, H.R. 1257, 110th Cong. § 2 (as passed by House, Apr. 20, 2007) (internal quotation marks omitted).

79. *See supra* notes 74–75.

80. *See* H.R. Rep. No. 110-88, at 5 (2007).

81. *See id.*

82. *See* Library of Congress, H.R. 1257, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01257:@@@X (last visited Mar. 11, 2008).

83. *See* 153 Cong. Rec. H3530, H3530–50 (2007).

84. *See* Library of Congress, *supra* note 82.

85. *See id.*

longer notice and comment period and arguably a more significant adjustment of the rules to address concerns raised as the rulemaking process moved toward completion. Instituting such major SEC reform within a year was admirably efficient. However, the speed of House Bill 1257's passage makes the SEC's efforts seem snail-like in comparison. Of course, true crises might require more rapid action.

However, one should not confuse the presence of significant media coverage with a need for immediate, ill-considered action. Although perhaps politically expedient, such action may create more problems than it solves. At the time of the House's actions, executive compensation was an issue of the moment as executive pay and alleged officer shenanigans were highly publicized.[86] However, it is questionable that a new problem in March 2007 required immediate passage. In fact, during the legislative process, the bill's proponents noted that some companies already were authorizing such shareholder advisory votes.[87] The possibility of voluntary action,[88] if truly desired by shareholders, along with the rapid

86. *See supra* notes 1–3 and accompanying text.

87. *See* 153 Cong. Rec. H3530, H3530 (2007) (statement of Rep. Frank); *id.* at H3535 (statement of Rep. Scott). Interestingly, some shareholders, when given the chance to address executive compensation, chose not to act. *See id.* at H3531 (statement of Rep. Roskam).

In addition, much of the intellectual foundation for shareholder action arguably is found in the work of Professor Lucian Bebchuk. *See* H.R. Rep. No. 110-88, at 3 (2007); *see also* Slater, *supra* note 2, at 40; Lucian Bebchuk & Jesse Fried, Pay Without Performance (2004). Indeed, Professor Bebchuk was one of only six individuals testifying at the hearing the week after the introduction of House Bill 1257. *See* H.R. Rep. No. 110-88, at 5. Regardless of whether one agrees with all of his conclusions, Professor Bebchuk admirably has inspired a rich debate over compensation and other corporate governance issues that is strong and long-standing. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 Harv. L. Rev. 1735 (2006); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 Va. L. Rev. 733 (2007); Jonathan R. Macey, *Too Many Notes and Not Enough Votes: Lucian Bebchuk and Emperor Joseph II Kvetch About Contested Director Elections and Mozart's* Seraglio, 93 Va. L. Rev. 759 (2007); John F. Olson, *Professor Bebchuk's Brave New World: A Reply to "The Myth of the Shareholder Franchise,"* 93 Va. L. Rev. 773 (2007); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 Va. L. Rev. 789 (2007); E. Norman Veasey, *The Stockholder Franchise Is Not a Myth: A Response to Professor Bebchuk*, 93 Va. L. Rev. 811 (2007). It is unclear why the wealth of dialogue inspired by Professor Bebchuk and the spirit of those discussions was not brought more to bear on the passage of House Bill 1257 in a more deliberative, considered process of enactment through the holding of additional hearings.

88. *See* 153 Cong. Rec., H3530, H3536 (2007) (statement of Rep. Bachus) ("A shareholder can ask for such a vote on executive compensation."). Shareholders increasingly seem emboldened to call for shareholder advisory votes on compensation matters. *See* George Anders, *'Say on Pay' Gets a Push, but Will Boards Listen?*, Wall St. J., Feb. 27, 2008, at A2; *see also* Joann S. Lublin, *Say on the Boss's Pay*, Wall St. J., Mar. 7, 2008, at B1 (noting Aflac Inc.'s vote on compensation). Moreover, the SEC staff has refused on multiple occasions to limit shareholder efforts related to compensation. *See, e.g.*, *Proposal for Advisory Vote on Pay Not Excludable, Staff Tells Allegheny Energy*, 40 Sec. Reg. & L. Rep. (BNA) 303 (Feb. 25, 2008) (noting that the SEC staff rejected the omission from proxy materials of the shareholder proposal for advisory resolutions on some executive pay at annual meetings); *GE May Not Omit Proposal to Recoup 'Unearned' Bonuses to Senior Executives*, 40 Sec. Reg. & L. Rep. (BNA) 106 (Jan. 21, 2008) (noting that the SEC staff

implementation of other SEC compensation disclosure reforms rendered the need for immediate passage of House Bill 1257 especially dubious.

Equally significant as the fact that rapid passage may have been unnecessary is that the rapidity of passage creates its own hazards, namely, potential lack of consideration of important concerns and promulgation of flawed rules. As I have previously intimated, scandal may not be the best of crucibles in which to craft reform.[89] Unfortunately, it is the vessel that seems to be increasingly used in a time of extensive media coverage of corporate scandals. Accordingly, it is useful to understand better some of the costs of the House of Representatives' reform path.

1. Imposed, Untailored Solutions

If initial SEC attention to executive compensation was prompt, House consideration and action occurred at breakneck speed. One could question whether the six witnesses testifying at the Committee on Financial Services hearing on House Bill 1257 only days after the bill's introduction represented the full range of interests implicated by the legislation. And, in any event, it is unclear how the time frame of the bill's passage allowed for a full dialogue on executive compensation reform efforts undertaken by other government authorities[90] prior to the bill's introduction or on all of the possible pitfalls associated with the bill.[91] This is unfortunate, for if the SEC's reforms constituted the most significant executive compensation reform of a generation, the House bill qualitatively broached even more basic questions about corporate governance in the United States and the respective roles of shareholders, boards, and officers in running American companies. Whereas the SEC sought to provide shareholders with additional information for use when those shareholders utilized existing voting mechanisms in overseeing their companies—mechanisms under which those shareholders may decide to elect new board members or to

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rejected the omission from proxy materials of a proposal to allow the business to recoup certain bonuses of executives who did not meet performance targets).

89. *See supra* note 7 and accompanying text.

90. Although I focus on such efforts by the SEC in this paper, it would be prudent for legislators to study fully the efforts of others, such as state law enforcement officials, to see if they already were able to address adequately any problems. *See* Crawford, *supra* note 4 (discussing the Eliot Spitzer litigation against Richard Grasso).

91. The staff of the House Financial Services Committee seemingly attempts to minimize costs and effects of the bill in a document on the committee's web site. *See* Staff of the House Fin. Servs. Comm., The Facts on H.R. 1257, The Shareholder Vote on Executive Compensation Act (n.d.), *available at* http://financialservices.house.gov/pdf/FactsOnHR1257.pdf. For example, the document emphasizes that the Congressional Budget Office only expected costs "to cover 'any additional programming, paper, printing, postage and tabulation allow[ed] for the shareholder vote' and concluded that a total of these *costs would 'fall well below* the annual threshold for private sector mandates' (i.e. below $131 million in 2007 for the entire country)." *Id.* Moreover, the document notes that, since the SEC adopted its disclosure rules, "[t]he annual vote requirement simply requires that companies (1) *add a line* to that disclosure permitting shareholders to approve or disapprove and (2) *tally the votes*." *Id.* However, if the bill did so little, it is unclear why it needed to be passed so quickly.

offer advice through the proxy voting process—House Bill 1257 mandates that shareholders must use this information every year to voice an opinion on executive compensation.[92]

Traditionally, ownership and control of corporations are largely separated, with shareholders exercising only limited authority in directing a corporation's activities.[93] A board of directors, elected by shareholders, generally oversees the management that runs the corporation.[94] The separation of roles may be viewed as a means to encourage efficient decision making and adaptability by the corporation to changed circumstances.[95] Greater shareholder participation in corporate decision making may be advisable. However, one should engage cautiously in such significant change. This is especially true when reform may not only fundamentally redistribute power between actors within the corporation, but also may redistribute regulatory authority between states and the federal government. Although federal regulation already reached certain issues related to proxy voting by shareholders prior to House Bill 1257,[96] this bill certainly advances a trend to move additional corporate regulation from state law, the traditional province on many corporate law issues,[97] to federal law.

In addition to larger issues about proper allocation of corporate regulatory efforts between the federal and state governments and about the best way to distribute power between shareholders and other corporate actors, adoption of House Bill 1257 raises very practical concerns. Even if the shareholder voting is necessary, the bill did not foster sufficient dialogue to cause the House to tailor greatly the application of these new provisions.[98] In comparison to the SEC's efforts to more precisely define its compensation disclosure requirements to address the special needs of different types of parties affected by its new regulations, House Bill 1257

92. As already noted, House Bill 1257 puts forward a rule that a company's disclosed compensation scheme must appear on the ballot for shareholders. *See supra* note 76.

93. *See* Rosen, *supra* note 7, at 1162–63. Rather than directly running the company on a daily basis, shareholders, for example, can participate in annual meetings and proxy contests. *See id.* at 1163; *see also* Robert Charles Clark, Corporate Law 93–105 (1986).

94. *See* Rosen, *supra* note 7, at 1163; Franklin A. Gevurtz, Corporation Law 195 (2000).

95. *See generally* Charles R.T. O'Kelley & Robert B. Thompson, Corporations and Other Business Associations 141–46 (5th ed. 2006).

96. *See* 15 U.S.C. § 78n (2000); Solicitation of Proxies, 17 C.F.R. §§ 240.14a-1 to -104 (2006); *see also* Jill E. Fisch, *The New Federal Regulation of Corporate Governance*, 28 Harv. J.L. & Pub. Pol'y 39 (2004) (discussing the federal and state law divide). However, in the past, the SEC's federal regulatory authority under section 14, referring to proxies, has been far from unbounded. *See, e.g.*, Bus. Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) (refusing to find SEC authority to promulgate a rule under section 14).

97. *See* Gevurtz, *supra* note 94, at 1–2 (noting that corporations are creations of state law); Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 Am. U. L. Rev. 81 (1999) (examining the state law origins of corporate law); *see also* Rosen, *supra* note 7, at 1166.

98. The engrossed version of the House bill did contain some amendments, but those appear to focus more on technical issues and to attempt to negate implications, for instance, about the creation of new fiduciary liability. *See* H.R. 1257, 110th Cong. § 2 (as passed by House, Apr. 20, 2007).

seems to offer a one-size-fits-all solution. All designated disclosure plans are subject to an automatic vote, regardless of the circumstances of the companies that disclose those plans.

This is especially troubling as House Bill 1257 follows a trend for other corporate scandal-driven legislation. In recent times, Congress appears intent to require additional SEC regulations with specified contents while decreasing Commission authority to tailor these hastily promulgated rules.[99] Some provisions of the Sarbanes-Oxley Act illustrate this point, such as the Act's well-known section related to the SEC's regulation of lawyers. Section 307 of the Sarbanes-Oxley Act did not merely grant the SEC authority to promulgate attorney responsibility rules; the statute *required* that the SEC institute these rules *and* specified rule contents regarding attorneys' reporting obligations.[100] While requiring such rules might appear uncontroversial at first, Professor Jill Fisch and I noted numerous drawbacks of section 307's specifically mandated approach to corporate governance reform.[101] Unfortunately, section 307 is not the only recent provision hamstringing the Commission. Section 404 of the Sarbanes-Oxley Act famously mandated Commission rules requiring reports of a company's internal controls.[102] This provision also raised questions about the Commission's ability to grant relief to some entities from regulatory requirements called for by the statute.[103]

In addition to decreasing SEC flexibility to adjust reforms that prove impractical or problematic, this legislative trend sends mixed messages to the investing public. To the uninformed, the legislation might appear to empower the SEC to address issues targeted by the legislation. This might raise the expectations of investors already weary of one corporate scandal after another. However, the narrow, mandated form of rulemaking might prevent the SEC from properly addressing problems and cause further disappointments and loss of investor confidence.

These legislative mandates contrast with congressional action in previous eras. In the wake of past crises, Congress provided the SEC with additional rulemaking authority without prescribing specific content for the rules.[104] Past Congresses also empowered the Commission to grant exemptions to regulated persons and entities when necessary. Rulemaking and exemptive

99. *See* Rosen, *supra* note 7, at 1166–67.

100. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (2002) (codified at 15 U.S.C. § 7245 (Supp. V 2005)).

101. *See generally* Fisch & Rosen, *supra* note 9.

102. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 404, 116 Stat. 745, 789 (2002) (codified at 15 U.S.C. § 7262 (Supp. V 2005)).

103. *See* Rosen, *supra* note 7, at 1167 n.69; *cf.* Joseph A. Grundfest & Steven E. Bochner, *Fixing 404*, 105 Mich. L. Rev. 1643 (2007) (suggesting that section 404 is problematic enough that the SEC and the Public Company Accounting Oversight Board should at least try to redraft the rules implementing section 404).

104. For instance, after various problems with the markets in the late 1960s and early 1970s, Congress enacted the 1975 amendments to the Securities Exchange Act. The Commission continues to use that rulemaking authority to create and enhance a national market system. *See* Rosen, *supra* note 7, at 1166 n.65.

authority as opposed to rulemaking mandates allowed the SEC to determine over time what rules were truly necessary and then to adjust those rules for the greater good.[105]

The hastily enacted House Bill 1257 provides no such similar flexibility. The bill requires that "[n]ot later than 1 year after the date of the enactment . . . the Securities and Exchange Commission shall issue any final rules and regulations required by the amendments . . . ."[106] Once these mandated rules are completed, if disclosure is required, the shareholder advisory vote requirement must be triggered automatically.[107] Of course, one might say that the SEC maintains some minimal authority, since its disclosure form will determine what is actually voted upon by shareholders. It seems somewhat perverse that the House bill is structured so that the principal way the SEC generally might give relief to regulated entities on the voting issue is by requiring *less* disclosure.

2. Failure to Recognize Fully the Role of Reform Synergies

The House's rush to judgment on House Bill 1257 also prevented better consideration of another important issue: regulatory synergies or how different regulations work together. In a world where multiple reformers rush to address scandals concurrently, far more attention should be paid to what might be termed the cumulative and sequencing effects of various regulatory efforts. In other words, where one regulation might be worthwhile, the cumulative costs associated with multiple regulations from different public officials may not justify the marginal benefits. Moreover, for some reforms to be most effective, other reforms already may need to be in place and tested.

Although House Bill 1257 may build on SEC executive compensation reforms in the simplest sense by requiring votes on the information disclosed by those reforms,[108] the consideration of the bill failed to account adequately for the true synergies between the SEC and congressional reforms. A full analysis of such synergies would require detailed study of two issues. First, one would need to determine whether the SEC's reforms were sufficient to address current concerns about executive compensation levels. Second, if the reforms were insufficient on their own, but rather

105. *See id.*

106. H.R. 1257, 110th Cong. § 2 (as passed by House, Apr. 20, 2007).

107. Representative Frank's comments reinforce this point. He noted,

> The SEC has said that it does not have the power to go further and compel corporations to allow the owners to vote. Our bill simply does that. Our bill simply says, you will have on your proxy form, printed anyway, what the compensation figures are. . . . We require, if this bill passes, corporations simply to add to that a box that says "I approve/I disapprove," and you can check it as appropriate.

153 Cong. Rec. H3530, 3530 (2007) (statement of Rep. Frank). Interestingly, these comments do not explain why he chose not to suggest an alternative path—giving the SEC additional authority, at its option, to force votes.

108. *See* H.R. Rep. No. 110-88, at 5 (2007).

formed the predicate for newly imposed voting requirements, one would need to ascertain that the SEC's new disclosure requirements were sufficient to inform voters properly before they rendered their advice to the company. The timing of the bill's passage precluded proper consideration of these issues, because both queries require a detailed assessment of the SEC's first round of reforms. It is hard to imagine how that could be done so soon after the SEC rules went into effect.

A separate issue of synergies is raised by broader efforts at corporate governance reforms. House Bill 1257 appears aimed at making those in power think before they approve lavish compensation.[109] One might argue that other ways exist to encourage directors to be cautious before approving compensation. Those might include structural reforms to the operation of compensation committees.[110] Moreover, the one set of hearings on House Bill 1257 apparently revealed to many that more fundamental issues must be addressed for true reforms to be effective—specifically, adjustment of how directors are elected to make them more accountable to shareholders.[111] Inevitably, failing to account for such other types of reforms and how they might be sequenced with shareholder advisory votes on compensation probably doomed House Bill 1257 to the status of an economically second-best solution.[112]

Interestingly, some suggested conducting a study before moving forward with a congressional commitment to a system of shareholder advisory votes.[113] Those efforts were derided as obstructionist.[114] While the bill's sponsors might question the motivation for calls for additional study, it is difficult to imagine how they could argue that without such study their decision was an informed one.

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109. *See* 153 Cong. Rec. E788 (2007) (statement of Rep. Schakowsky) (claiming compensation soared "to the point of absurdity" as it was "determined behind closed boardroom doors").

110. *Cf.* Fisch & Rosen, *supra* note 9, at 1135–37 (suggesting focusing on committee structure and functions as a more preferable path to corporate governance reform).

111. *See* 153 Cong. Rec. H3530, H3532 (2007) (statement of Rep. Castle) ("[A]ll six witnesses agreed that a better way to prevent unmerited pay would be to require that publicly traded corporations adopt majority voting policies for the election of board members.").

112. *See generally* Fisch & Rosen, *supra* note 9, at 1122; R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 Rev. Econ. Stud. 11 (1956).

113. *See* 153 Cong. Rec. H3699, H3703–04 (2007) (statement of Rep. Price on Amendment No. 8).

114. *See id.* at 3706 (statement of Rep. Frank). It is interesting that Representative Frank deemed the SEC's efforts insufficient even before he took the helm of the Financial Services Committee. *See* Letter from Barney Frank, U.S. Representative, to Christopher Cox, Chairman, SEC (Apr. 10, 2006), *available at* http://www.sec.gov/rules/proposed/s70306/bfrank041006.pdf. Ironically, the SEC reforms went a long way toward instituting disclosure reforms from his own earlier version of proposed legislation from a previous Congress. *See* H.R. 4291, 109th Cong. (2005).

3. Hidden Costs and Reform Priorities

Not all of House Bill 1257's costs are readily apparent. Additional unintended consequences stemming from the bill's passage include opportunity costs associated with the bill both at the SEC and in Congress.

At the SEC, these costs involve another unintended consequence of mandating regulation to agencies without discretion. The Commission traditionally does not only use its discretionary authority to craft and to modulate rules. Given limited financial and personnel resources, the SEC also must determine how much time to dedicate to rulemaking versus its other functions, such as the review of regulatory filings, assistance to the regulated community, and enforcement of its rules. Moreover, from year to year, the Commission must select specific subject matter upon which to focus, whether related to market regulation, corporate finance, investment management, or other securities law issues.[115] Congressionally mandated regulatory action means less flexibility to utilize limited resources elsewhere, including to address unforeseen crises. When forced to promulgate rules on tight time frames without the grant of additional resources, the SEC ultimately may need to forgo other regulatory efforts. A more deliberative process prior to adoption of House Bill 1257 might have fostered dialogue over whether more pressing needs existed for Commission resources than implementation of shareholder advisory votes on compensation, especially in light of action already taken on compensation disclosure.

Similarly, the House's shared fascination with the public about the level of executive salaries and the need to expedite House Bill 1257 likely drew its attention away from other significant issues.[116] In a world of mortgage foreclosures, stock market falls, and other financial issues, one should not confuse prioritizing legislation by popularity with proper ordering of legislative goals.[117] Accordingly, one must explore how Congress might better select its instances and methods of reform intervention in the future.

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115. A fascinating view of the SEC's changing priorities in situations of limited resources can be seen in variations of activities cited in its annual reports through the years. *See* SEC, Annual Reports, http://www.sec.gov/about/annrep.shtml (last visited Mar. 11, 2008).

116. When considering the legislation passed by the House, the Senate may take a more deliberative approach and avoid or solve some of the problems fostered by the House's process. However, this should not be an excuse for failing to recognize the problems with the initial House process and trying to discern ways to optimize future legislative processes.

117. *See, e.g.*, Associated Press, *Economists Call Subprime Fallout Biggest Threat*, Mar. 3, 2008, MSNBC.com, http://www.msnbc.msn.com/id/23436696/ (reporting that "34 percent of the members of the National Association for Business Economics ranked the financial market turmoil from . . . loan defaults as the No. 1 threat to the economy over the next two years").

III. TRANSFORMATION OF COMPETING REFORMERS INTO COMPLEMENTARY REFORMERS

In comparing the relative shortcomings of the process that led to House passage of Bill 1257 with the SEC's adoption of executive compensation disclosure rules, I do not intend to suggest that Congress lacks any role in executive compensation or other reform efforts. To the contrary, as the directly elected representatives of the American people, Congress remains a potentially crucial agent of reform. My purpose instead is to suggest when and how Congress might act most effectively in a complex world of concurrent business regulation by multiple public officials. To that end, I offer a framework for determining when congressional regulatory intervention is most appropriate. More specifically, I identify three instances where congressional intervention regarding the regulation of businesses may be essential: to address issues of authority, to provide oversight, and to defeat the recalcitrance of other policy makers.

A. *Addressing Authority*

It is important to remember that administrative agencies such as the SEC owe their existence and powers to Congress, which creates the agencies with the approval of the President. Legislation ultimately defines those agencies' regulatory authority. Accordingly, issues related to the correct bounds of agency authority are properly subject to congressional attention. More specifically, Congress might need to consider issues related to its own retention of authority, supplementation of authority granted to agencies, and coordination where authority is conferred on multiple regulators.

1. Retention of Authority

Where Congress knowingly retains authority over certain business regulatory issues, perhaps because of those issues' special social or economic significance, it certainly can make sense for the legislature actively to consider additional policy making. Legislation related to the federal minimum wage provides a good example. Although states might order higher minimum wages, Congress must act on the federal minimum wage. Prior to 2007, President Bill Clinton in 1997 was the last President to sign such legislation.[118] The new Congress made the minimum wage an early legislative priority,[119] and, in May 2007, the President signed legislation to increase the minimum wage from $5.15 to $7.25 per hour.[120]

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118. *See* Stephen Labaton, *Congress Passes Increase in the Minimum Wage*, N.Y. Times, May 25, 2007, at A12.

119. *See* Fair Minimum Wage Act of 2007, H.R. 2, 110th Cong. (as introduced Jan. 5, 2007); Fair Minimum Wage Act of 2007, S. 2, 110th Cong. (as introduced Jan. 4, 2007). By January 10, 2007, the House passed the bill. *See* Final Vote Results for Roll Call 18, http://clerk.house.gov/evs/2007/roll018.xml (last visited Mar. 28, 2008). On February 1, 2007, the Senate passed the bill as amended. *See* Record Vote No. 42,

Congressional action in arenas where it retains authority also makes sense because Congress, over time, can become an expert on the relevant regulatory issues. If Congress knows, for instance, that it is the only regulator empowered to change the minimum wage through individual pieces of legislation, interested legislators can engage in a long-term dialogue with those affected by the wage rules and develop expertise that can be applied during the legislative process.

2. Supplementation of Authority

When Congress chooses not to retain authority over an area of business regulation, it still should focus on the scope of authority granted to others and, in particular, on whether such authority needs to be supplemented. It is remarkable that some federal agencies created by Congress, such as the SEC, now have existed for over seven decades. That the Commission continues to operate largely pursuant to statutes enacted in the 1930s and 1940s is a testament to the foresight of the drafters of those laws. Those drafters granted flexibility to the Commission by not defining every term in the statutes, allowing the statutes' application to evolve over time,[121] and by conferring rulemaking authority on the Commission in broad areas without requiring specific content for those rules.[122]

Even when Congress initially grants broad rulemaking authority to an agency, it may need to pass new legislation to confer additional authority on an agency to address new or evolving problems. Congress certainly has supplemented Commission authority over time to great effect.[123] But this is an ongoing process that requires continued congressional attention. Agencies' actions constantly cause reactions. Sometimes those reactions take the form of lawsuits challenging an agency's authority to act.

This scenario played out recently in the area of hedge fund regulation. In 2004, the Commission adopted rules to require some hedge fund advisers to register under the Investor Advisers Act of 1940.[124] The SEC took this

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http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00042 (last visited Mar. 28, 2008).

120. *See* Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, § 8102, 121 Stat. 112, 188 (to be codified at 29 U.S.C. § 206); Labaton, *supra* note 118.

121. For example, the definition of "security" that triggers much of the SEC's jurisdiction over instruments contains a list of items that does not purport to be fully inclusive and includes instruments, such as investment contracts, that are not defined in the statute. *See* 15 U.S.C. § 77b(a)(1) (2000); 15 U.S.C. § 78c(a)(10) (2000); *see also* Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 201–03 (4th ed. 2001) (noting the breadth of the definition of security). Interested parties, including the SEC, could argue before courts to have their understanding of these terms adopted through case law. *Id.* at 216–33 (describing investment contract case law).

122. *See supra* notes 104–05 and accompanying text. *See generally* Joel Seligman, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance (1982) (describing the SEC's history).

123. *See supra* notes 104–05 and accompanying text.

124. Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investor Acts Release No. 2333, 69 Fed. Reg. 72,054 (Dec. 10, 2004).

action in the wake of concerns about the transparency and operations of hedge funds. However, the U.S. Court of Appeals for the D.C. Circuit struck down the Commission's rules.[125] In doing so, the court rejected the Commission's interpretation of the relevant statute, and thus the SEC's view of its authority to regulate these advisers in the desired way.[126] Notwithstanding the rejection of the Commission's rules, hedge funds still draw attention and likely will continue to do so because of their significant participation in U.S. markets and resulting ability to affect the governance of corporations.[127] This implies that a regulatory assessment must be made as to whether remaining SEC tools, such as the Commission's general antifraud authority, permit sufficient oversight over hedge funds.[128] Thus, Congress may usefully explore whether additional authority is necessary to regulate these investment funds. Should Congress feel the need to confer additional authority on the Commission, hopefully that authority will enable the SEC to act flexibly rather than mandate specific rules.

The need for Congress to evaluate regularly whether agencies regulating businesses require additional authority is further reinforced when one examines recent concerns about the quality of products manufactured abroad and imported into the United States. The summer of 2007 saw millions of Chinese manufactured toys recalled.[129] The Consumer Product Safety Commission (CPSC) drew scrutiny for failing to take additional steps to keep problematic toys out of stores.[130] But proposed legislation recognizes that additional authority may be necessary to improve the agency's protection of Americans. The Consumer Product Safety Modernization Act introduced by Senator Dick Durbin would among other things eliminate a quorum requirement for regulatory actions seen as delaying timely recalls and also would permit the agency to avoid certain regulatory requirements when firms are uncooperative and human health is

125. *See* Goldstein v. SEC, 451 F.3d 873, 878–84 (D.C. Cir. 2006).

126. *See id.*

127. *See generally* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. Pa. L. Rev. 1021 (2007).

128. The SEC's enforcement division already has formed a hedge fund working group to examine possible insider trading. *See* Kara Scannell, *SEC Pushes for Hedge-Fund Disclosure*, Wall St. J., Sept. 19, 2007, at C3. Of course, the potential effectiveness of any such efforts must be judged against possible push back from the hedge fund community. After the *Goldstein* decision, members of that community might feel emboldened to challenge SEC actions. *See, e.g.*, Deborah Brewster, *Hedge Fund to Sue SEC over Advertising Ban*, Fin. Times, Mar. 3, 2008, at 21 (noting a possible plan by a hedge fund manager, who thwarted the SEC's hedge fund registration requirements, to sue the Commission over an advertising ban).

129. *See* Press Release, Dick Durbin, U.S. Senator, Durbin Hearing on Toy Safety Focuses on Problems with Chinese Imports (Sept. 12, 2007), http://durbin.senate.gov/showRelease.cfm?releaseId=282707 (claiming that over twenty-five million toys were recalled); *see also* Anne D'Innocenzio, *More Toys by Mattel Recalled*, Chi. Trib., Sept. 5, 2007, § 3, at 1 (noting the recall of toys with lead paint made in China).

130. *See* Jayne O'Donnell, *Toy Woes May Result in More Power for Safety Agency*, USA Today, Sept. 13, 2007, at 3B.

at risk.[131] This episode reveals another item for Congress to focus on when considering supplemental agency authority. To make authority granted to the agency truly effective, the agency may need additional resources to utilize that authority actively and to enforce the law.[132] This raises questions about the declining number of CPSC staff from 978 in 1980 to 401 at present, leaving a single person in charge of testing all toys for the CPSC.[133] This is exactly the kind of issue on which Congress should focus.

3. Coordination of Authority

Congress also could beneficially engage on a final authority issue: how multiple regulatory agencies with overlapping authority might more effectively coordinate with each other. This increasingly is a pressing issue in the realm of financial regulation. Congressional efforts in recent years to permit financial entities to broaden operations into new business areas also exposed those entities to the jurisdictions of additional regulators.[134] As the world becomes more complex, the need for regulatory coordination only will grow.[135]

Some mechanisms already exist to facilitate such coordination. For example, President Ronald Reagan created the Working Group on Financial Markets (Working Group) to bring together the secretary of the Treasury, the chairman of the Board of Governors of the Federal Reserve System, the chairman of the SEC, and the chairman of the Commodities Futures Trading Commission (CFTC) to better insure the quality of the nation's financial markets.[136] However, such mechanisms may be limited by their select memberships, which do not include all federal agencies, and by the need for congressional action to implement some of their recommendations.

Congress's ability to help coordinate regulation in conjunction with such groups is illustrated by the passage of the Commodity Futures Modernization Act of 2000 (CFMA).[137] Prior to the CFMA's passage,

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131. *See* Press Release, Dick Durbin, *supra* note 129.

132. Legislation considered by Congress sought to authorize additional Consumer Product Safety Commission staff and to provide millions of dollars in funding to the agency. *See* M.P. McQueen & Christopher Conkey, *Congress Weighs Sweeping Overhaul of Consumer Product Commission*, Wall St. J., Oct. 30, 2007, at A1.

133. *See id.*

134. *See generally* James M. Cain, *The Gramm-Leach-Bliley Act of 1999—A New Regulatory Matrix Develops* (ALI-ABA Course of Study, Feb. 15, 2001), WL SF57 ALI-ABA 539.

135. For example, under the USA Patriot Act, the desire to combat terrorism forced rationalization of anti-money laundering schemes for different types of financial entities, from banks to broker-dealers, typically regulated by separate federal agencies. *See* William J. Sweet, Jr., et al., *The USA Patriot Act of 2001 Impact on Broker-Dealers: Statutory, Regulatory, and Compliance Lessons from Banks' Experience with Bank Secrecy Act and Anti-Money Laundering Enforcement*, 1289 Prac. L. Inst., Corp. L. & Prac. Course Handbook Series 139 (2002).

136. *See* Exec. Order No. 12,631, 53 Fed. Reg. 9421 (Mar. 18, 1988).

137. Pub. L. No. 106-554, 114 Stat. 2763 app. E (West Supp. 2006) (codified in scattered sections of 7 and 15 U.S.C.).

serious questions existed about which federal agency possessed authority to regulate over-the-counter derivatives contracts—contracts whose nominal value was estimated in 1998 to be $80 trillion.[138] At times, the issues became so serious that congressional intervention became necessary.[139] The CFMA represents a more fundamental, long-term effort by Congress to address jurisdictional issues and to implement possible solutions provided by the recommendations of the Working Group in its report *Over-the-Counter Derivatives Markets and the Commodity Exchange Act*.[140] In the CFMA, Congress also moved beyond the Working Group's report to fill in other regulatory gaps in derivatives regulation. For instance, the CFMA provided for joint CFTC and SEC jurisdiction over security futures products[141] and clarified SEC authority to police fraud in conjunction with security-based swap agreements.[142] Issues related to derivatives and other complex financial products, however, are far from settled and may need additional congressional attention.

The need to coordinate regulation sometimes arises in unexpected places. Take recent concerns about subprime lending and markets for mortgages, the readjustment of whose interest rates may lead to serious default rates. At first glance, addressing mortgage problems may appear solely to be the responsibility of regulators of lenders issuing these mortgages. Yet other regulators come into play as well. The SEC, for instance, took interest in the issue. In 2007, it began investigating "hedge funds and collateralized debt obligations, the complicated investment pools filled with mortgage-backed securities, that first ran into trouble."[143] The Commission proceeded to broaden its investigation to others who originally provided money for loans to purchasers of mortgage-backed securities.[144] Because the SEC possesses broad authority to prosecute fraud, it could investigate these entities and individuals for possible violations of disclosure, insider trading, and accounting rules.[145] SEC enforcement actions may not only

138. *See* President's Working Group on Fin. Mkts., Over-the-Counter Derivatives Markets and the Commodity Exchange Act 1–3 (1999).

139. When the Commodities Futures Trading Commission (CFTC) took steps to exercise authority over certain financial instruments, at the behest of the SEC, Treasury, and Federal Reserve Board, Congress passed legislation limiting the CFTC's authority to do so. *See id.* at 12–13.

140. *See generally id.*

141. *See* Commodity Futures Modernization Act of 2000 (CFMA), Pub. L. No. 106-554, §§ 201–210, 251–253, 114 Stat. 2763 app. E (West Supp. 2006) (codified in scattered sections of 7 and 15 U.S.C.).

142. *See id.* §§ 301–304.

143. *See* Dawn Kopecki, *The SEC Wants More Answers*, Bus. Wk., Sept. 17, 2007, at 34, 34.

144. *See id.*

145. *See id.* The SEC's enforcement division created a subprime working group and, by early 2008, the division already had begun dozens of investigations related to the subprime mortgage industry. *See* Lyda Phillips, *In Three Dozen Subprime Investigations SEC Is Asking 'Who Knew What, When,'* 40 Sec. Reg. & L. Rep. (BNA) 243 (Feb. 18, 2008); Jeremy Grant, *SEC Sets Up Enforcement Groups*, Fin. Times, Sept. 12, 2007, at 17.

provide some relief from illegitimate securities practices, but also provide information that can be used to reform the regulation of problematic mortgage instruments.

Congress already is looking at whether additional regulation is necessary.[146] Only time will tell what new laws might be necessary to address gaps in current law.[147] However, at a minimum, Congress should facilitate various regulators' initiatives to redress problems and help to insure that these efforts are complementary rather than at odds with one another.

B. *Providing Oversight*

In addition to addressing authority issues, Congress also is especially well positioned to provide oversight of the agencies that regulate business as they consider reforms. This role is not new. Congress regularly uses authority to hold hearings and to issue subpoenas to study issues significant to its members. And, the institution possesses other tools to further members' concerns about business regulation. The Government Accountability Office stands ready to assist members as "the investigative arm of Congress."[148] And more informal tools exist to permit members to evaluate whether agencies are properly engaged in issues of concern and to put pressure on agencies to act as necessary. As already noted, Representative Frank was a "pen pal" with the SEC, raising the issue of whether that may have influenced the Commission's decision to pursue executive compensation reform that he suggested during the last

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The SEC's interest in mortgage-related matters is not limited to bringing enforcement action. The Commission also must determine whether its current regulations are sufficient as they relate to these matters. For instance, the SEC provides some oversight to credit rating agencies. *See* SEC, Nationally Recognized Statistical Rating Organizations, http://www.sec.gov/divisions/marketreg/ratingagency.htm (last visited Mar. 28, 2008). The operations and regulation of ratings agencies get called into question because of the possible role that ratings agencies played in giving positive ratings to subprime securities. *See* Eoin Callan et al., *Break-Up of Ratings Agencies Suggested*, Fin. Times, Sept. 27, 2007, at 6.

146. *See* Alison Vekshin & Jesse Westbrook, *Subprime Woes May Spur New Rules*, Seattle Times, Sept. 9, 2007, at D3. Determining the appropriate course of legislative action should include congressional hearings aimed at understanding why mortgage-related problems became so prevalent. In crafting solutions, Congress should understand why red flags may not have triggered a sufficient government response earlier on. *See* Edmund L. Andrews, *Fed and Regulators Shrugged as the Subprime Crisis Spread*, N.Y. Times, Dec. 18, 2007, at A1 (describing possible warnings related to troublesome loans). In addition to serving as the foundation for any necessary legislation, such investigation constitutes part of the important congressional oversight role described in Part III.B.

147. As mortgage problems continue, more radical ways to address those problems naturally move to the forefront of consideration. *See Foreclosures in America: Searching for Plan B*, Economist, Mar. 1, 2008, at 77. Such proposals range from Senator Christopher Dodd's idea to bring back something like the Home Owners' Loan Corporation that refinanced mortgages in the wake of the Great Depression to having institutions such as the Federal Housing Administration facilitate refinancing. *See id.* at 78.

148. *See* U.S. Gov't Accountability Office, http://www.gao.gov/ (last visited Mar. 11, 2008).

Congress.[149] In light of the lessons from the regulatory processes discussed above, some more particularized congressional oversight activities are important to mention.

First, as noted above, the notice and comment rulemaking process permitted the SEC to hear the voices of interested parties and to tailor its regulatory proposals. This is an important step away from the proclivity for one-size-fits-all regulation. However, it also raises other issues. Although one must engage interested parties in rulemaking, one must be cautious not to become captured by them. Thus, while public choice theory and similar theories of agency capture should not dissuade agencies from listening to interested parties,[150] congressional oversight provides additional protection against agency capture. Congress can provide independent analysis of whether agency regulations tailored to the needs of the investor and regulated communities truly further the overall public interest.

Second, even when agency regulations are properly motivated by the public good, they still should be evaluated empirically for effectiveness. Regulating for the sake of regulating is a waste of resources, and a public constantly observing ineffectual regulation may lose confidence in the regulatory system. Thus, congressional oversight again can focus an independent set of eyes on agency reforms to see if they really work or if a new regulatory approach is necessary.

When engaged in such study, it would be useful for Congress to focus on concerns this Article raises about the synergistic effects of regulations from multiple public agencies and officials. Because Congress possesses broader jurisdiction over business issues than any single federal agency, it is especially well positioned to advise agencies on how their rules interact. This could constitute a major step toward smarter regulation.

C. *Defeating Recalcitrance*

Emphasis on the positive role that Congress may play in distributing authority and overseeing agency action does not mean Congress never should intervene in areas within an administrative agency's jurisdiction. Some agencies regulating businesses may be recalcitrant and inappropriately may resist efforts for necessary reform. It is difficult to determine when agency recalcitrance should trigger congressional action.

However, just as it was useful in understanding the SEC's reform process by examining what was not adopted as part of its initial rules, it also is useful to explore what should not constitute recalcitrance necessitating congressional intervention. To wit, failure to act hastily should not justify intervention if the reason for delay is a deliberative process to formulate higher quality reforms. Moreover, an agency adopting initial reform rather than a final reform package offering rules on every issue also should not

149. *See* Protection Against Executive Compensation Abuse Act, H.R. 4291, 109th Cong. (2005) (requiring compensation disclosure).

150. *See supra* note 65 and accompanying text.

automatically trigger congressional intervention. Agencies need to properly sequence reforms and to get the first set of reforms right before proceeding to a second set of reforms reliant on the first.

That is not to say that candidates for congressional intervention are nonexistent. One area for consideration is proxy reform related to nominating and electing company directors. After initially approving some disclosure reforms related to the election process in 2003, the SEC has moved particularly slowly in considering more substantial proxy reforms.[151] When compared to the speed of its executive compensation reform process, the Commission's proxy reform process appears sluggish. Whether the Commission's slow proxy reform efforts justify congressional intervention is open for debate.

Proxy issues did draw a spurt of additional attention during the summer of 2007 when the SEC voted to examine two possible plans; however, some in Congress expressed continued skepticism about the SEC's work on the matter.[152] The Commission ultimately took additional action on proxy issues in the fall of 2007.[153] However, that action failed to alleviate all of the concerns in Congress,[154] and SEC Chairman Christopher Cox already has expressed interest in revisiting the debate over proxy access in 2008 for possible promulgation of new rules for the proxy season in 2009.[155] Were Congress to intervene, it would need to be cautious and to utilize its oversight authority to investigate whether its actions were truly justified.

CONCLUSION

Corporate scandals may indicate a need for reform, but poor, ill-considered reform easily can lead to further frustration for the scandals' victims. In addition to putting forward their own ideas for the contents of reform, the academic and policy-making communities need to spend more time focusing on *how* to achieve optimal reform. This is accomplished only through a better understanding of the processes that lead to reform. Those processes become more complex in a world of concurrent regulators. It has not been my desire to label one reformer as superior to another, but to focus attention on how all reformers might work together more efficiently. The

151. *See* Rosen, *supra* note 7, at 1163 n.54.

152. *See* Judith Burns, *Democrats Voice Concerns over SEC Proxy Proposal*, Wall St. J., Aug. 1, 2007, at A8.

153. *See* Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,914, 72 Fed. Reg. 70,450 (Dec. 11, 2007) (allowing companies to reject shareholder efforts to secure space for shareholder nominees on ballots for corporate director positions).

154. *See* Press Release, Barney Frank, Chairman, House Comm. on Fin. Servs., Frank Statement on SEC Action to Restrict Proxy Access (Nov. 28, 2007), http://www.house.gov/apps/list/press/financialsvcs_dem/press112807.shtml; *cf.* Kara Scannell, *Cox, in Denying Proxy Access, Puts His SEC Legacy on Line*, Wall St. J., Nov. 29, 2007, at C1 (noting opposition and support for the SEC's fall decision).

155. *See* Rachel McTague, *Casey Counsels Great Caution in Efforts Towards Proxy Access Regime*, 40 Sec. Reg. & L. Rep. (BNA) 274 (Feb. 25, 2008); Scannell, *supra* note 154.

approach advocated for determining when Congress might best act to support regulatory efforts by administrative agencies, if nothing else, hopefully will refocus the policy-making dialogue on the need to create more positive synergies among various corporate reforms.