Introduction

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On March 2, 2012, The George Washington University Law School's Center for Law, Economics & Finance and *The George Washington Law Review* jointly hosted a symposium entitled "Striking the Right Balance: Investor and Consumer Protection in the New Financial Marketplace."[1] The symposium received supporting grants from the Institute for Law and Economic Policy and the Ewing Marion Kauffman Foundation. We are most grateful to both sponsors for their generous support.

The symposium focused on two principal topics. First, participants analyzed the impact of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[2] on investors and consumers in three areas of federal regulation—securities markets, derivatives markets, and consumer financial products. Second, the symposium evaluated the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")[3] on its tenth anniversary and considered whether Sarbanes-Oxley's legacy might offer any lessons as to the potential effectiveness (or lack thereof) of Dodd-Frank's reforms.

The symposium benefited greatly from the perspectives of three senior federal officials—Chairman Gary Gensler of the Commodity Futures Trading Commission ("CFTC"), Acting Chairman Martin J. Gruenberg of the Federal Deposit Insurance Corporation ("FDIC"), and Steven B. Harris, a member of the Public Company Accounting Oversight Board ("PCAOB"). Their responsibilities include implementation of various sections of Dodd-Frank, and all three officials served on the staff of the Senate Committee on Banking, Housing, and Urban Affairs during the Committee's drafting of Sarbanes-

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1 The agenda for the symposium and video clips of the keynote addresses and panel discussions are currently available at http://www.law.gwu.edu/Academics/research_centers/C-LEAF/Pages/PastEvents.aspx.

2 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

3 Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745.

Oxley. Their symposium remarks are posted on their agencies' respective websites.[4]

This issue includes nine articles that grew out of presentations and discussions that occurred during the symposium. As summarized below, the nine articles address a variety of topics related to Dodd-Frank's reforms and Sarbanes-Oxley's legacy.

The first article, by Arthur Duff and David Zaring, provides a concise overview of Dodd-Frank's new regime for regulating derivatives markets.[5] As they point out, Dodd-Frank marks a fundamental change in approach from the Commodity Futures Modernization Act of 2000 ("CFMA").[6] The CFMA was a deregulatory statute that "effectively eliminat[ed] federal regulation of off-exchange derivatives trading."[7] The volume of over-the-counter ("OTC") derivatives "exploded in the wake of the CFMA," rising from an aggregate notional value of about $88 trillion in 1999 to over $670 trillion in 2008.[8] The financial crisis—including AIG's collapse after writing huge amounts of credit default swaps—impelled Congress to enact Title VII of Dodd-Frank, which brings derivatives markets under comprehensive federal oversight.[9]

Duff and Zaring explain that Title VII "overhauls the pre-crisis approach by requiring *reporting* of swap transactions, . . . *clearing* of many swaps to remove counterparty credit risk and hopefully reduce systemic risk, *oversight* of the important participants in the derivatives market, and *prudential regulation* to deal with systemic risk posed by [derivatives] markets."[10] Title VII divides regulatory responsibility for this new regime between the Securities and Exchange Commission ("SEC"), which regulates security-based swaps, and the CFTC, which

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4 *See* Gary Gensler, Chairman, Commodity Futures Trading Comm'n, Remarks on Dodd-Frank Financial Reform at George Washington University Law School (Mar. 2, 2012), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-106; Martin J. Gruenberg, Acting Chairman, Fed. Deposit Ins. Corp., Remarks by FDIC Acting Chairman Martin J. Gruenberg to George Washington University Law School (Mar. 2, 2012), *available at* http://www.fdic.gov/news/news/speeches/archives/2012/spmar0212.html; Steven B. Harris, Board Member, Pub. Co. Accounting Oversight Bd., The Legacy of Sarbanes-Oxley and Its Implications for Dodd-Frank (Mar. 2, 2012), *available at* http://pcaobus.org/News/Speech/Pages/03022012_HarrisGWU.aspx.

5 Arthur W.S. Duff & David Zaring, *New Paradigms and Familiar Tools in the New Derivatives Regulation*, 81 GEO. WASH. L. REV. 677 (2013).

6 Commodity Futures Modernization Act of 2000, Pub. L. No. 106–554, app. E, 114 Stat. 2763A-365.

7 Duff & Zaring, *supra* note 5, at 685.

8 *Id.* at 685.

9 *Id.* at 687–89, 693.

10 *Id.* at 688 (emphasis added).

regulates all other swaps.[11] Title VII's new regulatory tools—including reporting, clearing, capital, and margin requirements—are derived from private market innovations that futures exchanges have successfully used since the nineteenth century.[12]

Thus, in providing new regulatory powers to the SEC and CFTC, "Dodd-Frank draws heavily from the private market mechanisms that characterized early derivatives markets."[13] Duff and Zaring also suggest that "Title VII is meant to work as a thematic shift in derivatives regulation towards a safety-and-soundness paradigm" similar to the "European vision of banks serving as utilities for the rest of the economy."[14] Notwithstanding the favorable aspects of Title VII's reforms, Duff and Zaring warn that Title VII's heavy reliance on clearinghouses for derivatives may have the unintended consequence of creating new centers of systemic risk in our financial markets.[15]

Michael Greenberger's article presents the case for stronger "position limits" that would prevent "excessive speculation" in commodities futures and related swap markets.[16] Speculators play an important role in commodities markets by providing liquidity for hedging and by assisting in price discovery.[17] As Greenberger points out, however, a primary purpose of the Commodity Exchange Act[18] was to prevent "excessive speculation" that would injure producers and consumers of commodities by driving market prices either far above or far below the prices warranted by market fundamentals.[19]

In 1991, the CFTC issued rulings allowing large banks and other institutional investors to use commodities swaps to make speculative bets on commodities prices while avoiding the position limits applicable to futures markets.[20] The CFTC's "swaps loophole" has enabled institutional investors to bet on commodities prices without owning any of the subject commodities or investing in their production.[21] By

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11 *Id.* at 689.

12 *See id.* at 688, 702.

13 *Id.* at 702.

14 *Id.* at 701.

15 *Id.* at 705–06.

16 Michael Greenberger, *Closing Wall Street's Commodity and Swaps Betting Parlors: Legal Remedies to Combat Needlessly Gambling up the Price of Crude Oil Beyond What Market Fundamentals Dictate*, 81 GEO. WASH. L. REV. 707, 710–11 (2013).

17 *See id.* at 714.

18 Commodity Exchange Act, Pub. L. No. 74-675, ch. 545, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1–27f (2006)).

19 Greenberger, *supra* note 16, at 714–15.

20 *Id.* at 716.

21 *Id.*

means of this off-exchange speculation, "[p]aper contracts are thereby created that call for the making or taking of delivery of commodities that are far in excess of the world inventory of those products."[22] Greenberger contends that "excessive speculation in the physical derivatives markets has caused unnecessary price volatility in crude oil prices since 2008," which "has led to unnecessary and substantial increases in the prices that consumers pay for . . . gasoline and many other energy and food staples."[23]

Section 737 of Dodd-Frank authorizes the CFTC to establish position limits to prevent excessive speculation in "not just classic futures markets, but all derivatives markets."[24] In October 2011, the CFTC adopted a final rule establishing position limits for twenty-eight commodity futures contracts related to oil prices.[25] However, two months later, "Wall Street-dominated trade associations challenged the CFTC's final position limits rule in federal district court," where the district judge invalidated the rule as not mandated by Congress under Dodd-Frank.[26] In view of continuing doubts about the CFTC's authority to issue its position limits rule, Greenberger advocates new federal legislation that would ban the use of what he believes to be the "most damaging" investment vehicles in commodity staples derivatives markets—commodity index swaps and exchange traded funds.[27]

Greenberger also urges the CFTC to use its new authority under Dodd-Frank to bring enforcement actions to stop market manipulation in commodities prices.[28] However, the financial industry's allies in Congress have significantly constrained the CFTC's ability to prosecute such cases by blocking increases in the CFTC's budget.[29] Greenberger therefore supports further legislative and regulatory steps to "limit the scope of placing bets for gambling's sake on upward price movements of energy and food staples worldwide."[30]

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22 *Id.* at 719.

23 *Id.* at 721.

24 *Id.* at 720.

25 *Id.* at 736.

26 *Id.* at 739. In a 3-2 vote, the commissioners of the CFTC voted to move forward with an appeal of the federal district court's decision vacating the position limits rule. Press Release, Commodity Futures Trading Comm'n, CFTC Approves Position Limit Appeal (Nov. 15, 2012), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6413-12.

27 Greenberger, *supra* note 16, at 739–40.

28 *Id.* at 745.

29 *Id.* at 747.

30 *Id.* at 748.

Jeffrey Manns' article addresses Dodd-Frank's attempt to reform the regulation of credit ratings agencies ("CRAs").[31] As Manns points out, CRAs "faced a firestorm of blame for their role in fueling the financial crisis. [CRAs] not only failed to identify credit risks but also legitimized reckless risk taking through inflated ratings."[32] Unfortunately, Dodd-Frank's reforms for CRAs include three contradictory approaches. First, an "abolitionist" approach seeks to "marginalize" CRAs by removing requirements for credit ratings from federal statutes regulating investments by banks, insurance companies, pension funds, and other institutional investors.[33] The "abolitionist" approach is undermined, however, by the fact that "no viable alternative proxy for credit risk exists" and credit ratings "continue to be a de facto requirement for most debt issues."[34] As a result, "the removal of [regulatory] requirements for ratings has failed to have a significant impact in the short run."[35]

Second, a "private accountability" approach tries to improve the reliability of credit ratings by imposing stronger governance and disclosure requirements on CRAs.[36] Dodd-Frank also increases the ability of investors to bring lawsuits against CRAs.[37] When the SEC attempted to impose expert liability on CRAs under the Securities Act of 1933,[38] however, CRAs "refused to allow the inclusion of their ratings in registration statements"—a response that "threatened to freeze asset-backed securities markets."[39] Faced with the CRAs' unified opposition, the SEC backed down and indefinitely suspended any expert liability for CRAs, thereby creating "a gaping hole in terms of private accountability."[40]

Third, a "regulated industry" approach gives the SEC greater powers to regulate CRAs.[41] However, the SEC's new powers "skirt the deeper issues" related to the conflicts of interest created by the

31 Jeffrey Manns, *Downgrading Rating Agency Reform*, 81 GEO. WASH. L. REV. 749 (2013).

32 *Id.* at 752.

33 *Id.* at 763–65.

34 *Id.* at 768, 770.

35 *Id.* at 771.

36 *Id.* at 771–72.

37 *Id.* at 773.

38 Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15. U.S.C. §§ 77a–77aa (2006)).

39 Manns, *supra* note 31, at 774.

40 *Id.* at 774.

41 *Id.* at 763–64, 776.

present "issuer pays" system for buying credit ratings.[42] In contrast, the Franken Amendment to Dodd-Frank requires the SEC—based on studies performed by the. Government Accountability Office ("GAO")—to consider potential alternatives to the "issuer pays" system.[43]

Manns reviews and critiques several alternatives studied by the GAO. He notes that proposals for government-owned or investor-owned rating agencies would involve their own conflicts of interest because governments and investors are hardly disinterested with regard to credit ratings for debt securities.[44] Proposals for random assignment or automatic rotation of CRAs for debt issues are flawed because they would not "create incentives for [improvements in] rating agency accuracy."[45] Other proposals "in which rating agencies compete and are compensated based on their performance" suffer from the crucial shortcoming that "no clear consensus exists on what performance-based standards to use to assess rating agencies."[46] Moreover, any attempt by the SEC to establish performance standards for CRAs would probably increase "already strong herding effects" among CRAs by giving them "even greater incentives to walk in lockstep with one another."[47]

Given the shortcomings of the various approaches studied by the GAO, Manns proposes two new policy options to improve the performance of CRAs. First, the SEC should encourage a breakup of the leading CRAs by mandating that only specialist firms may issue credit ratings for asset-backed securities and other designated types of debt securities.[48] Such a mandate would undermine the current "rating agency oligopoly" by giving the leading rating agencies the "choice of vacating segments of the market or spinning off parts of their business into freestanding companies."[49]

Second, Congress should increase the accountability of CRAs to investors by establishing a gross negligence standard of liability for CRAs together with a statutory cap on damages (based on a specified

42 *Id.* at 763, 778.

43 *Id.* at 784.

44 *Id.* at 788–89.

45 *Id.* at 790.

46 *Id.*

47 *Id.* at 794.

48 *Id.* at 801.

49 *Id.* at 803. An alternative approach would be to create an independent selection board that would give preferences to smaller CRAs in allocating ratings business. *Id.* at 805.

multiple of a CRA's annual fees).[50] A gross negligence standard would encourage greater private monitoring through investor lawsuits, while capped damages would prevent such litigation from bankrupting CRAs.[51] In view of Dodd-Frank's incomplete and contradictory reforms, Manns contends that his proposals are needed to "foster greater competition and accountability" for CRAs.[52]

Adam Levitin's article considers Dodd-Frank's "skin-in-the-game" provision, which requires originators of securitized loans to "retain 5% of the risk in the assets they securitize."[53] As Levitin points out, the skin-in-the-game requirement is based on the assumption that "if the parties engaged in securitization are required to retain some credit risk on the securitized loans, they will be incentivized to ensure that the securitized loans are of higher quality."[54] He questions whether that assumption is accurate, based on his analysis of credit card securitizations.[55]

Levitin observes that originators of securitized credit card loans had strong incentives for "rate-jacking" (i.e., imposing sudden increases in interest rates or fees on outstanding credit card loans) until Congress imposed tight restrictions on that practice in 2009.[56] Due to the special terms of credit card securitizations, which included the originators' retention of four percent to seven percent of the credit risk, originators could capture "the entire potential upside" of rate-jacking and were "exposed to only a fraction of the losses" from any increase in borrower defaults that rate-jacking might cause.[57] Levitin asks why, in view of these apparently lopsided and perverse incentives, originators of credit card loans engaged in only a limited amount of rate-jacking.[58] He explains that the originators' business model depended on their ability to obtain continuous funding from investors.[59] Originators therefore provided "implicit recourse," in the form of additional discretionary financial support, to ensure the performance of outstanding issues of securities backed by credit card loans.[60] Because

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50 *Id.* at 809.

51 *Id.*

52 *Id.* at 812.

53 Adam J. Levitin, *Skin-in-the-Game: Risk Retention Lessons from Credit Card Securitizations*, 81 GEO. WASH. L. REV. 813, 815 (2013) (discussing Section 941 of Dodd-Frank).

54 *Id.* at 816 (citation and internal quotation marks omitted).

55 *Id.*

56 *Id.* at 816–17.

57 *Id.* at 817, 844.

58 *Id.* at 817.

59 *Id.* at 826.

60 *Id.* at 847.

of implicit recourse, originators were more exposed to the risk of borrower defaults than their formal retention of credit risk indicated.[61] Accordingly, they had much weaker incentives to engage in opportunistic rate-jacking behavior that would increase borrower defaults and thereby injure investors.[62]

The disciplining role played by implicit recourse in credit card securitizations does not necessarily apply to securitizations of mortgages because mortgage-backed securities do not rely as heavily on continuous funding by investors.[63] Levitin is therefore concerned that Dodd-Frank's "solution to moral hazard" may not work for mortgage-backed securities because a skin-in-the-game requirement is probably not sufficient by itself to provide adequate protection for investors.[64]

Todd Zywicki's article presents a strong challenge to the new Consumer Financial Protection Bureau ("CFPB"), established by Title X of Dodd-Frank.[65] Zywicki contends that the CFPB's design represents "the return of a discredited view of agency design" that was abandoned after the early 1970s.[66] In his view, the CFPB is an "unaccountable agenc[y]" with "extreme independence"[67] because of: (1) its single-director leadership model and the protection of its director from removal except for cause;[68] (2) the insulation of the CFPB's budget from the congressional appropriations process, due to the CFPB's guaranteed funding from the Federal Reserve System;[69] (3) the fact that the CFPB's decisions can be overturned only by a two-thirds vote of the Financial Stability Oversight Council and only if those rules "would seriously threaten the safety and soundness of the United States banking system or put the stability of the financial system of the United States at risk;"[70] and (4) the deference that courts are statutorily required give to the CFPB "regarding the meaning or interpretation of any provision of a Federal consumer financial law."[71]

61 *Id.*

62 *Id.* at 847–48.

63 *Id.* at 825–26.

64 *Id.* at 855.

65 Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 857–59 (2013); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat. 1376 (2010) (entitled "Bureau of Consumer Financial Protection").

66 *See* Zywicki, *supra* note 65, at 857.

67 *Id.* at 875.

68 *Id.* at 873–74.

69 *Id.* at 872–73.

70 *Id.* at 874 (internal quotation marks omitted).

71 *Id.* (internal quotation marks omitted).

In view of these structural features, Zywicki describes the CFPB as "a virtual poster child for an agency design that eventually will be likely to manifest the bureaucratic pathologies that led to the disastrous regulatory policies that were abandoned in the 1970s."[72] He warns that the CFPB's "tunnel vision focus" on consumer protection will lead to "overzealous regulation" and will cause the CFPB to place an "undue focus on the Bureau's narrowly defined consumer protection mission while discounting the benefits to consumers of lower prices, greater choice and innovation, and more robust competition."[73]

In this regard, Zywicki points to the CFPB's "misplaced obsession with simplicity over functionality" as reflected by its "initial proposal to create a preferred menu of 'plain vanilla' credit offerings for consumers."[74] He argues that "one cannot simply assume that complex loan products provide a vehicle for lenders to exploit hapless borrowers,"[75] and he cites studies by economists concluding that: (1) most consumers readily understand credit card terms and find it easy to switch between competing credit cards;[76] and (2) "'predatory lending' was not a primary cause of the financial crisis."[77]

In Zywicki's view, "the architects of CFPB seem to be largely unaware of the fact that much of the dysfunction in the consumer protection system that they criticize resulted from excessive regulation and litigation."[78] Zywicki predicts that the CFPB will produce "continued regulatory complexity combined with new substantive limits on loan terms and a resurgence of paternalistic regulation."[79] What is "most threatening," in his view, is the CFPB's "power to regulate unfair, deceptive, or abusive" consumer financial products.[80] Although the terms "unfair" and "deceptive" have acquired established meanings from their longstanding use by the Federal Trade Commission, "abusive" is "an entirely novel term with no forerunners in any prior federal or state statute or regulation."[81] If the CFPB adopts a broad definition of the "abusive" standard, it could expose lenders "to po-

72 *Id.* at 872.

73 *Id.* at 876–77, 880, 882.

74 *Id.* at 903.

75 *Id.* at 904.

76 *Id.* at 903 nn.249–50 and accompanying text.

77 *Id.* at 904.

78 *Id.* at 907.

79 *Id.* at 908.

80 *Id.* at 917–18.

81 *Id.* at 918.

tentially massive liability" while also "chilling innovation of new products with the eventual impact being felt by consumers."[82]

Zywicki also criticizes other provisions of Dodd-Frank, which permit "federal authorities to potentially reach down to regulate the operations of exceedingly local lenders (such as payday lenders)" and authorize "redundant enforcement actions by state and local governments with no coherent division of authority" but only a single purpose "to maximize litigation and enforcement."[83] In his view, the CFPB, along with other provisions of Title X, will likely generate "excessive and unresponsive regulation [that] raises the price of, and reduces access to, high-quality credit, while also harming precisely those that the regulations were purportedly intended to help."[84]

Theresa Gabaldon's article offers a contrasting perspective on the CFPB, as she argues that the CFPB's consumer protection mission provides an opportunity to revisit the characterization of bounded rationality as a problem extrinsic to corporate law.[85] She begins with the important observation that corporate law traditionally not only fails to recognize that there are easily manipulable "bounds" on rationality,[86] but it also overlooks how corporations have been left virtually free to create the very preferences that they seek to satisfy.[87] She then argues that the CFPB provides a vehicle for altering this dynamic. Specifically, the CFPB has "broad regulatory and general education mandates that could justify a variety of reforms" aimed at preventing "unfair, deceptive, or abusive acts or practices directed at financial consumers."[88] Consistent with those mandates, Professor Gabaldon proposes that the CFPB should adopt a procedure to certify providers of financial products "as subscribing to corporate decisionmaking practices designed to be less injurious to consumer interests than the

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82 *Id.* at 920.

83 *Id.* at 924.

84 *Id.* at 927. For differing views, which provide more positive assessments of the CFPB and Dodd Frank's expansion of state authority to protect consumers, see Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881 (2012); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893 (2011).

85 Theresa A Gabaldon, *Half-A-Cup Better than None: A Pragmatic Approach to Preventing the Abuse of Financial Consumers*, 81 GEO. WASH. L. REV. 929 (2013).

86 *Id.* at 931.

87 *See id.* ("[I]f corporations are creating the very preferences they satisfy, the foxes are not only guarding the hen houses, they are running the farms.").

88 *Id.* at 932.

usual shareholder primacy model historically has dictated."[89] In her view, such a proposal properly acknowledges the limits of rationality as well as corporate law's potential exploitation of those limits.[90] At the same time, the disclosure-based nature of her proposal fits neatly into the limited role claimed by the federal government in recent years to improve corporate governance procedures.[91]

In their article, James Cotter, Alan Palmiter, and Randall Thomas provide important insights about the impact of Dodd-Frank's "say-on-pay" provision in altering pay practices at individual companies and—perhaps more importantly—in shifting the relationship between management and shareholders in U.S. companies generally.[92] In response to concerns that executive pay in U.S. public companies had become excessive and may have even created perverse incentives, section 951 of Dodd-Frank requires larger U.S. public companies to give their shareholders the right to an advisory vote on the prior year's pay of the top five executives in the company—a "say on pay."[93] Cotter, Palmiter, and Thomas empirically assess the impact of section 951 by analyzing proxy voting data from Russell 3000 companies[94] during the first year of say-on-pay as well as case studies from the second year of "say-on-pay."[95] While supporters hoped that say-on-pay votes would curb inappropriate pay practices,[96] opponents feared that say-on-pay votes would have a negative impact on compensation practices and upset the balance of authority between boards and shareholders in ways that would prove problematic.[97]

On the one hand, the authors found that in the first year of say-on-pay, shareholders in general broadly supported management pay practices.[98] On average, say-on-pay proposals received approval from more than ninety percent of shareholders casting votes.[99] On the

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89 *Id.* at 933, 953.

90 *See id.* at 952.

91 *See id.* at 933.

92 James F. Cotter, Alan R. Palmiter, and Randall S. Thomas, *The First Year of Say-on-Pay under Dodd-Frank: An Empirical Analysis and Look Forward*, 81 GEO. WASH. L. REV. 967, 967 (2013).

93 *Id.* at 968-69; *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 951, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78n–1 (2012)).

94 *See* Cotter, Palmiter & Thomas, *supra* note 92, at 979 n.68 (defining the Russell 3000 as an index "measuring the performance of the largest 3000 U.S. companies representing approximately 98% of the investable U.S. equity market") (internal quotation marks omitted).

95 *Id.* at 969–70, 979–81.

96 *Id.* at 973–74.

97 *Id.* at 974–75.

98 *Id.* at 979.

99 *Id.*

other hand, not all executive pay packages received strong support, and a few pay packages (approximately 1.3%) were even voted down.[100] The authors found that poorly performing companies with high levels of "excess" executive pay, low total shareholder returns, and negative voting recommendations from third party advisory firms experienced greater percentages of negative shareholder votes.[101] Despite the nonbinding nature of "say-on-pay" votes, the authors found that negative third party recommendations and negative shareholder votes prompted companies to alter their pay practices.[102] Perhaps more importantly, most companies receiving negative recommendations from third party advisory firms or otherwise experiencing low levels of shareholder support undertook additional communications with shareholders.[103] In this regard, say-on-pay votes have caused management to be more responsive to shareholder concerns about executive pay and about corporate governance generally, thereby shifting the dynamics of management-shareholder communication.[104] The authors believe that this shift may be the most important consequence of say-on-pay thus far, and they suggest that it may be viewed as a model of how procedural reforms "can catalyze company-by-company negotiations and reforms."[105]

In her article, Hillary Sale analyzes Sarbanes-Oxley and Dodd-Frank to further develop her theory of "public governance"—the notion that the parties traditionally involved with regulating the corporation (i.e., state lawmakers who have relied heavily on self-governance or private ordering by corporate officers, directors, and shareholders) have expanded to include more external or public actors.[106] Her theory of public governance recognizes that the governance of corporations is shifting from a system based primarily on private ordering to one involving more public decisionmaking.[107]

Sale's article reveals the manner in which Sarbanes-Oxley and Dodd-Frank have contributed significantly to this shift. While federal law has long played a role in the regulation of corporations, it tradi-

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100 *Id.* at 979–80.

101 *Id.* at 991–92.

102 *Id.* at 969.

103 *Id.* at 969, 995.

104 *Id.* at 995.

105 *Id.* at 1011.

106 Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1013–14 (2013). Sale refers to this theory as "publicness." *Id.* at 1013.

107 *Id.*

tionally focused primarily on disclosure rather than on substance.[108] However, Sarbanes-Oxley dramatically altered this focus by directly imposing federal-law duties and decisionmaking responsibilities on corporate officers and directors, thereby removing the "privilege of self-regulation from the private actors."[109] Similarly, Dodd-Frank directly intervenes in corporate governance, particularly with respect to its regulations related to executive compensation.[110] After examining the growing "publicness" of corporate law, Sale argues that "corporate failures result in publicness" because those failures highlight shortcomings in lawmakers' choices about private ordering and self-regulation, while at the same time generating pressure for more public governance and reform.[111]

Drawing on lessons gleaned from Sarbanes-Oxley and Dodd-Frank, James Cox's article advances a proposal for strengthening financial reporting by enhancing the auditor's opinion letter.[112] He points out that section 404 of Sarbanes-Oxley responded to concerns about inaccuracies in financial statements by requiring managers of public companies to assess and report on their companies' internal financial controls and by requiring independent auditors to attest annually to managements' internal control assessments.[113] Those twin requirements triggered an immediate backlash from critics who charged Congress with "overreaction and overregulation."[114] In addition, although studies examining the impact of Sarbanes-Oxley revealed that section 404 improved the quality and trustworthiness of financial statements, they also revealed that such improvements involved significant costs.[115]

In response to the backlash against Sarbanes-Oxley, section 989G of Dodd-Frank exempted nearly 6,000 companies from the internal reporting requirements of Sarbanes-Oxley.[116] In addition, the Jumpstart Our Business Startups Act of 2012[117] further reduced the scope

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108 *Id.* at 1017.

109 *Id.* at 1021.

110 *See id.* at 1027–32.

111 *Id.* at 1034–35.

112 James D. Cox, *Strengthening Financial Reporting: An Essay on Expanding the Auditor's Opinion Letter*, 81 GEO. WASH. L. REV. 1036 (2013).

113 *Id.* at 1038; *see* Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, § 404(a)–(b), 116 Stat. 745, 789 (codified at 15 U.S.C. § 7262(a)–(b) (2012)).

114 Cox, *supra* note 112, at 1038.

115 *Id.* at 1043.

116 *Id.* at 1038–39.

117 Jumpstart Our Business Startups ("JOBS") Act, Pub.L.No. 112-106, 126 Stat 306 (2012) (codified in scattered sections of 15 U.S.C.).

of section 404's requirements.[118] In Cox's view, these retrenchments reveal that one byproduct of the last decade has been a growing distrust of regulation, which has led to growing calls for less government involvement in corporate affairs—including the area of investor protection.[119] In an effort to fashion a reform consistent with this climate, Cox focuses on the auditor's opinion letter, and he pinpoints modest steps that could be taken to ensure that the opinion letter provides useful information to investors about the quality of a particular company's accounting reports and reporting system.[120] He also proposes a "more robust response" in which "the PCAOB [would] require mandatory rotation of auditors," and the SEC would mandate enhanced disclosures by management in public company reports about "critical accounting assumptions, estimates, and judgments" as well as "management's going-concern judgments."[121]

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As shown by the nine articles published in this issue, scholars are likely to analyze and debate the impact of Dodd-Frank and the legacy of Sarbanes-Oxley for many years to come. We believe that this issue will make an important contribution to that ongoing dialogue.

L.M.F.

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118 Cox, *supra* note 112, at 1040.

119 *Id.* at 1037–38.

120 *See id.* at 1046.

121 *Id.* at 1061.