

SAY ON PAY IN THE DODD-FRANK ACT: IMPLICATIONS OF THE RESULTS IN THE UNITED KINGDOM

I. INTRODUCTION

The financial crisis in the United States that began in 2008¹ spurred public outcry over what was perceived to be excessive executive compensation at a time when the economy was performing poorly.² Special interest was paid to the poor performance of firms in the banking and financial services industries that were believed to be largely responsible for the crisis.³ In response, Congress drafted legislation to heighten regulation of the financial services industry and increase reporting requirements for public corporations. The product of their work, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), was signed into law by President Obama on July 21, 2010.⁴ In addition to heightened regulation of the finance industry,⁵ the Dodd-Frank Act included corporate governance provisions requiring all public companies to adopt so-called “say on pay” provisions.⁶ These say on pay provisions require public corporations listed on U.S. stock exchanges to allow shareholders to cast a nonbinding vote indicating their approval or disapproval of the executive compensation plan at least once every three years.⁷

Corporate governance issues within the United States, especially regarding executive compensation, have long been subjects of interest for

1. Phil Mattingly & Patrick O'Connor, *Financial Overhaul Is Law, Now Comes Battle Over Its Rules*, BLOOMBERG (July 21, 2010, 11:17 AM), <http://www.bloomberg.com/news/2010-07-21/obama-signs-biggest-overhaul-of-financial-rules-since-the-great-depression.html>.

2. Ben Protess, *In Split Vote, S.E.C. Adopts Rules on Corporate Pay*, N.Y. TIMES, Jan. 26, 2011, at B4 (“Lawmakers are hoping to discourage companies from awarding lucrative packages that encourage risky behavior—a chief criticism of firms like Lehman Brothers and American International Group that collapsed during the financial crisis.”).

3. Jim Puzzanghera, *Senate Passes Sweeping Financial Overhaul Legislation*, L.A. TIMES, July 16, 2010, at B1.

4. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 1376-2223 (2010) (codified in scattered sections of the code with the relevant section is at 15 U.S.C. § 78n-1 (2010)).

5. *Id.*

6. *Id.* § 951.

7. *Id.*

scholars, the media, and the public at large.⁸ Advocates for say on pay around the world have historically argued that it would help curb excessive executive compensation during times of poor company performance and increase dialogue between shareholders and the board of directors. In particular, it would suggest the appropriate level of executive compensation from a shareholder's perspective given company performance.⁹ Say on pay provisions are growing in popularity internationally and types of say on pay provisions similar to the Dodd-Frank Act have been instituted in a number of countries around the globe.¹⁰ In the United Kingdom, similar say on pay provisions have been in place since 2002.¹¹

This Note analyzes the say on pay provisions in the Dodd-Frank Act and offers opinions as to whether it will be effective. Part II lays out the history of say on pay in the United Kingdom, the specific terms of the regulations, and the effect of the U.K. regulatory scheme following its enactment. Part III discusses the say on pay regulations enacted in the United States under the Dodd-Frank Act, compares the terms of the United States' regulations to the U.K. regulations, and addresses the projected effectiveness of the Dodd-Frank Act in the United States. Part IV concludes that the Dodd-Frank Act say on pay regulations appear to meet the goal of allowing for increased accountability of executive

8. See, e.g., Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation*, 17.4 J. OF APPLIED CORP. FIN. 8 (2004) (critiquing corporate current corporate governance practices and subsequent executive compensation while arguing for more independence by boards of directors as a solution to executive compensation problem); John Core, Wayne Guay & David F. Larcker, *The Power of the Pen and Executive Compensation* 1 (May 23, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=838347> (compiling research data on the high prevalence of major media sources coverage of executive compensation from 1994 to 2002, but finding negative coverage to have little influence on executive compensation).

9. See Stephen M. Davis, *Does 'Say On Pay' Work? Lessons on Making CEO Compensation Accountable* (The Millstein Center for Corporate Governance and Performance, Policy Briefing No. 1 (2007), <http://millstein.som.yale.edu/sites/millstein.som.yale.edu/files/Policy%20Briefing%20No%201%20'Say%20on%20Pay'.pdf>) (detailing a history of the United Kingdom say on pay provisions and describing the resulting benefits).

10. In 2004, Australia passed Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 which required that all companies allow their shareholders to vote on the remunerations report at the Annual General Meeting. *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) sch 5 (Austl.); Sandeep Gopalan, *Say on Pay and the SEC Disclosure Rules: Expressive Law and CEO Compensation*, 35 PEPP. L. REV. 207, 235 (2008). Other countries also have legislation concerning say on pay. See *id.* at 235–36 (discussing the similar legislation requiring nonbinding or advisory votes in United Kingdom and Norway and a binding vote in the Netherlands).

11. See Directors' Remuneration Report Regulations 2002, 2002, S.I. 2002/1986 (U.K.); see also Davis, *supra* note 9, at 9 ("When calls on companies voluntarily to introduce such measures failed to take hold, the government introduced legislation in parliament in August 2002. 'Say on pay' came into effect in 2003.")

compensation via shareholder engagement, though only time will tell if the application of the regulations fulfills its promise.

II. SAY ON PAY IN THE UNITED KINGDOM

The United Kingdom provides a helpful comparison to the U.S. regulatory scheme for say on pay. This Part explores the history, terms, and results of the U.K. say on pay regulations.

A. History

In the United Kingdom in the 1990s, national attention focused on stories of newly privatized utility companies granting executives significantly increased salaries for performing the same job duties as before the privatization.¹² The press also focused on executives' receipt of increased salaries in other industries.¹³ What made the increased salaries especially newsworthy was that they happened at a time when significant layoffs were also occurring.¹⁴

In response to the public outcry, the United Kingdom passed the Combined Code on Corporate Governance ("Combined Code") in 1998.¹⁵ The Combined Code required public companies¹⁶ to comply with the Combined Code or explain noncompliance with its requirements. The Combined Code also required companies to consider and record their decision to seek shareholder approval of the company's remuneration policies on an annual basis.¹⁷

The Combined Code, however, had limited effect,¹⁸ and changes were necessary. Because of salary escalation, economic troubles, and golden parachute payments to dismissed CEOs during the late 1990s and early 2000s, in 2002 the United Kingdom drafted an amendment to the U.K. Companies Act, the Directors Remuneration Report Regulations ("DRR

12. See Jeffrey N. Gordon, "Say on Pay": *Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-in*, 46 HARV. J. ON LEGIS. 323, 341 (2009).

13. *Id.*

14. *See id.*

15. *Id.* at 342.

16. Specifically, the Combined Code required compliance by companies listed on the London Stock Exchange. *Id.*

17. *Id.*

18. Only a very small number of companies actually brought compensation policy questions to shareholders for a vote. *Id.* Thus, though companies were complying with the Combined Code requirements, shareholders were not often given the opportunity to voice their disapproval over compensation policies to effect meaningful compensation changes. *See id.*

Regulations”).¹⁹ The DRR Regulations required an increased level of detail in company disclosure to shareholders as well as a new advisory vote by the shareholders on the Directors’ Remuneration Report (“DRR”).²⁰

B. Regulatory Requirements

The DRR has to include specific disclosure of the types of compensation paid to senior executives in addition to a statement of the company’s overall compensation policy.²¹ The statement must include an analysis of a company’s performance compared to its peers and must be signed by remuneration committee members.²² The remuneration committee is a committee made up of members of the board of directors for the company, and its responsibility is to oversee remuneration issues at the firm, including the DRR.²³ The quantitative compensation elements of the DRR are required to be independently audited.²⁴

There is a mandatory vote on the DRR by shareholders for every public company.²⁵ However, the results of the vote are nonbinding on the actions of the company, meaning the company technically suffers no repercussions or adverse effects if the shareholders vote a disapproval of the DRR.²⁶ Nonetheless, if a board fails to satisfy the requirements mandated under the DRR, its directors are guilty of an offense punishable by a fine.²⁷

19. See Directors’ Remuneration Report Regulations 2002, 2002, S.I. 2002/1986 (U.K.); see also Jonathan Baird & Peter Stowaser, *Executive Compensation and Disclosure Requirements: The German, UK, and US Approaches*, GLOBAL COUNS., Oct. 2002, at 32, available at <http://crossborder.practicallaw.com/4-101-7960> (summarizing recent legislative changes to corporate governance, specifically addressing the new say on pay provisions in the United Kingdom).

20. See Gordon, *supra* note 12, at 341–42.

21. Directors’ Remuneration Report Regulations 2002, 2002, S.I. 2002/1986 § 234(B)(2)-(3) (U.K.).

22. *Id.*

23. *Id.* § 234(B)(2)

24. *Id.* § 234(B)(6)-(13). These quantitative elements subject to audit include emoluments, share options, long-term incentive plans, pensions, compensation, and excess retirement benefits of each director. *Id.*

25. *Id.* § 241(A)(1), (6).

26. Directors’ Remuneration Report Regulations 2002, 2002, S.I. 2002/1986 § 241(A)(1), (6) (U.K.).

27. *Id.* §§ 234(B)(3), (6); 234(c)(4),(6); 241(A)(9)-(10).

C. Say on Pay Results

Proponents of these say on pay measures in the United Kingdom have claimed the disclosure requirements under the DRR to be a success.²⁸ The first successful vote of “no” under DRR occurred at GlaxoSmithKline in the first year of the new regulation requirements.²⁹ In that case, the Chief Executive Officer’s severance package included a very large golden parachute payment that angered the shareholders and led them to vote “no.”³⁰ However, outright rejections of DRRs occurred very rarely following the enactment of the legislation in 2003³¹ until 2009.³² In 2009, following the economic downturn of 2008, five companies received rejections of DRRs and a number of others were close to rejection.³³ In 2010, three companies had their DRRs rejected by shareholders.³⁴

Interestingly, observers partially attribute this low number of rejections of DRRs to the existence of the say on pay legislation itself.³⁵ The

28. See, e.g., Davis, *supra* note 9.

29. See Heather Timmons, *Glaxo Shareholders Revolt Against Pay Plan for Chief*, N.Y. TIMES, May 20, 2003, at W1.

30. *Id.*

31. See Davis, *supra* note 9, at 10 (noting that in the first four years following the enactment of say on pay legislation in the United Kingdom, only eight companies, all of which were small in size, with the exception of GlaxoSmithKline, had say on pay resolutions defeated by shareholder votes on the directors report on remuneration).

32. See *Directors’ Remuneration: An Introduction to the Issues*, OUT-LAW.COM (Feb. 1, 2010), <http://www.out-law.com/page-11141> (“Five companies had their directors’ remuneration reports ‘thrown out’ and several others, BP among them, came close to losing the vote.”).

33. *Id.* In 2009, the Royal Bank of Scotland was rejected when over 90% of shareholders voted in opposition to the DRR. See Deborah Gilshan, *Say on Pay: Six Years On—Lessons from the UK Experience*, RAILPEN INV. & PIRC LTD. 15 (2009), <http://www.cii.org/UserFiles/file/Say%20on%20Pay%20-%20Six%20Years%20On%2009-24-09.pdf>. Royal Dutch Shell had its DRR rejected by almost 60% of its shareholders. *Id.* Bellway PLC and Provident Financial PLC also had their DRRs rejected by shareholders. *Id.*

The significant size of the rejection vote at the Royal Bank of Scotland was due to outrage over a sizeable pension award made to the former chief executive of the Royal Bank of Scotland coming on the heels of taxpayer bailouts given to the Bank in 2009. See *Directors’ Remuneration: An Introduction to the Issues*, *supra* note 32.

Royal Dutch Shell had its DRR rejected because of a decision by the remuneration committee to provide a significant payout under a long-term incentive plan to its executives despite the fact that the company did not meet the minimum performance requirements under the plan to receive a payout. *Id.* The shareholders did not approve of the committee using its discretion to award payouts for underperformance. *Id.*

Bellway PLC had its DRR rejected by shareholders because the company changed the performance measurements used to determine payouts under a compensation plan once the company realized the executives would fail to meet the performance targets required under the initial performance measurements. *Id.*

34. *Looking Back on 2010*, PIRC, <http://www.pirc.co.uk/news/looking-back-on-2010> (last visited Jan. 17, 2011) (noting that in 2010 three companies received a rejection of their DRR by shareholders).

35. In addition to the benefit of providing a vote to shareholders, the DRR has provided

existence of the legislation has increased dialogue between corporate boards and management and large shareholders, as corporations do not wish to have the increased public scrutiny of a successful “no” vote.³⁶ Because of companies’ aversion to receiving “no” votes, they are more receptive to discussing compensation plans with shareholders before and after changes are made.³⁷

As an additional effect, the influence of institutional investor associations³⁸ has greatly increased. Institutional investor associations have introduced guidelines which provide a recommendation to shareholders for how they should vote based on a company’s adherence to the guidelines.³⁹ The guidelines have become widely used.⁴⁰ In essence, shareholders are taking their cues on whether to vote “yes” or “no” directly from the institutional investor association’s comments on how well the company is conforming to the guidelines created by the institutional investor association.⁴¹

companies an opportunity to more fully explain their compensation philosophy and generate goodwill from shareholders for having remuneration programs that do not provide egregious payments to executives. *See* Gilshan, *supra* note 33, at 14 (“It is worth noting that most firms do not have egregious pay practices and have a good story to tell in terms of their remuneration practices. For these companies the vote has become an opportunity to gain shareholder endorsement of their pay practices.”).

36. *See* Davis, *supra* note 9, at 10 (noting that after the defeat of GlaxoSmithKline’s DRR and the subsequent bad publicity that GlaxoSmithKline’s failure generated, large institutional investors and investor advisory groups received a substantive increase in requests to discuss executive compensation pay packages from managers and directors of corporations in order to help ensure that the executive compensation pay package would receive an approval vote).

37. *Id.* However, while evidence exists that companies have increased dialogue with shareholders to prevent rejections of DRRs, companies have also used the process of consultation with shareholders to their advantage. *See* Gilshan, *supra* note 33, at 14. In such instances, a company will offer an initial proposal it expects the shareholders to reject, but the ultimate goal is to gain approval for a subsequent proposal the company actually preferred to the original. *Id.*

Additionally, shareholder dialogue has caused some companies to be disabused of the notion that simply consulting with shareholders will provide automatic approval of whatever compensation plan is proposed. *Id.*

38. An institutional investor, as defined by Black’s Law Dictionary, is: “[O]ne who trades large volumes of securities, usu[ally] by investing other people’s money into large managed funds. Institutional investors are often pension funds, investment companies, trust managers, or insurance companies.” BLACK’S LAW DICTIONARY 904 (9th ed. 2009).

39. The National Association of Pension Funds (“NAPF”) and the Association of British Insurers (“ABI”) represent the leading associations of institutional investors in the United Kingdom and, as large shareholders, have the ability to exert the most influence over pay regulations in the United Kingdom because they have large numbers of votes. *See* Gordon, *supra* note 12, at 343–44.

40. *Id.*

41. *Id.* (explaining that the ABI and NAPF have exerted their influence by creating a set of compensation guidelines for executive compensation built upon the “best practices” for executive compensation included in the Combined Code that they often use as a basis for determining whether to recommend approval of a company’s DRR).

Moreover, the prevalence of long-term guaranteed contracts for executives has decreased, likely because companies do not want to appear to “pay for failure.” In such cases, although company performance has been poor, an executive receives large amounts of compensation because the employment contract guaranteed the amount of compensation for multiple years regardless of company performance.⁴² Companies have also decreased the amount of stock options awarded to executives and increased the amount of long-term incentive plan awards.⁴³

Additionally, the U.K. government views the say on pay provisions as providing a competitive advantage to their capital markets for two reasons.⁴⁴ First, from a public relations standpoint, such measures serve as a message that the government wants to deter excessive executive compensation.⁴⁵ Second, international investors are attracted to their capital markets because of the increased influence over a company that say on pay provides to investors.⁴⁶

While there has been substantial anecdotal information and opinion surveys gathered regarding the success of the legislation,⁴⁷ the empirical evidence tells a somewhat different story. The empirical studies offer evidence that the institution of say on pay has decreased “pay for failure” instances,⁴⁸ but the actual rate of pay for executives has continued to

42. *Id.* at 344 (noting that few companies in the United Kingdom presently offer contracts to senior managers for more than one year nor do they tend to offer an acceleration of options for senior managers upon a change in control, the latter representing the U.K. version of the U.S. golden parachute).

43. In 2001, greater than 60% of shares awarded were in the form of stock options and less than 30% of shares were long-term incentive plan shares, but by 2008, less than 20% of shares awarded were in the form of stock options and greater than 70% of shares were long-term incentive plan shares. *See Gilshan, supra* note 33, at 22.

One reason for this change in pay mix from stock options to long-term share awards is that starting in 2003, because of decreased stock prices in 2002, most executives options were underwater and, thus, had no value. *Id.*

Another reason for the change in pay mix is that longterm incentive plans offered a more innovative method of compensation better tied to company performance and thus became normal market practice. *Id.*

44. *See Davis, supra* note 9, at 14.

45. U.K. government officials saw the say on pay provision as a public relations preventive measure to deter the types of corporate scandals over excessive pay that had made headlines prior to enacting the legislation. *See id.*

46. The United Kingdom believed investors would be interested in putting capital into the market where they, as shareholders, would have more influence due to the ability to exercise control over the company by voting on the executive compensation arrangement, especially in comparison to the capital markets in the United States that, at the time, did not allow for such voting by shareholders on executive compensation. *See id.*

47. *See, e.g., Davis, supra* note 9.

48. *See Fabrizio Ferri & David Maber, Say on Pay Vote and CEO Compensation: Evidence from the U.K.* (Oct. 15, 2010), <http://ssrn.com/abstract=1420394>. The study indicates that companies that

increase steadily, even after the implementation of say on pay measures by the United Kingdom.⁴⁹

Ultimately, while there have been some unexpected developments as a result of say on pay, such as increased institutional investor influence and a relatively low number of shareholder rejections, the effects of the legislation have been largely positive.

III. SAY ON PAY IN THE UNITED STATES

In the United States, the Dodd-Frank Act has created a requirement for a nonbinding shareholder vote on executive compensation for public corporations similar to the DRR in the United Kingdom.⁵⁰ Interest in say on pay in the United States existed before the passage of the Dodd-Frank Act, with a number of companies voluntarily adopting say on pay provisions prior to the passage of Dodd-Frank Act.⁵¹ Additionally, say on pay provisions already existed for firms receiving federal aid under the Troubled Asset Relief Program (“TARP”) implemented by the government in the wake of the financial crisis.⁵² However, the Dodd-Frank Act was the first piece of legislation to require regular nonbinding say on pay votes for all publicly traded companies listed on U.S. stock exchanges.⁵³

have been performing poorly or that have had pay practices that do not adhere to the guidelines recommended by institutional investor advisory associations are the ones most likely to receive higher percentages of “no” votes and, therefore, change compensation practices to better adhere to the guidelines provided by the institutional investor advisory associations. *Id.* See also Gilshan, *supra* note 33, at 25 (“The reduction in service contract lengths for executive directors has significantly reduced the risk of so-called ‘rewards for failure.’”).

49. See Gilshan, *supra* note 33, at 22 (noting that while many benefits have arisen from the implementation of say on pay regulations, overall pay levels for executives continued to increase from 2003 through 2008 in the United Kingdom); Ferri & Maber, *supra* note 48.

50. See 15 U.S.C. § 78n-1 (2010).

51. See e.g. Gretchen Morgenson, *Say-on-Pay Gets Support at Verizon*, N.Y. TIMES, May 19, 2007, at C1, available at http://www.nytimes.com/2007/05/19/technology/19verizon.html?_r=1&scp=2&sq=&st=nyt (noting the approval of an adoption of a nonbinding say on pay shareholder vote at Verizon); Joseph E. Bachtel III, *The “Restoring American Financial Stability Act” and Executive Pay*, N.Y. L.J., June 28, 2010, at 3 (“[A]pproximately 80 companies had adopted some form of Say on Pay as of June 4, 2010 . . .”).

52. See Bachtel, *supra* note 51 (noting that TARP required approximately 650 companies to provide say on pay for their shareholders as a condition of receiving federal aid under TARP).

53. See 15 U.S.C. § 78n-1 (2010).

A. *The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*

The Dodd-Frank Act contains a number of provisions concerning the mechanics for say on pay voting in the United States.⁵⁴ Regarding the timing of when the voting has to occur, the Dodd Frank Act states:

Not less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives⁵⁵

Further, to determine the frequency of this vote by shareholders to approve the executive compensation plan, the Dodd-Frank Act states:

Not less frequently than once every 6 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to determine whether votes on the resolutions required under paragraph (1) will occur every 1, 2, or 3 years.⁵⁶

Additionally, the Dodd-Frank Act requires disclosures in proxy materials for “golden parachute”⁵⁷ agreements used to compensate executives. These disclosures are required when shareholders vote on a proposed acquisition, merger, consolidation or total sale of the company’s assets.⁵⁸ The Act requires disclosure of golden parachutes for any named executive officer of the company, describing the aggregate total of parachute payments that may be paid to such officer.⁵⁹ The company must also provide for a separate vote to approve any parachute payments, unless the related golden parachute agreements were subject to an earlier vote.⁶⁰

54. *Id.*

55. *Id.*

56. *Id.*

57. A golden parachute is “named executive officer compensation relating to a change in control transaction, such as an acquisition, merger, consolidation or sale of all or substantially all of a company’s assets.” See Katayn I. Jaffari & John H. Chung, *The Impact of Dodd-Frank: Will Executive Compensation Change as a Result of “Say on Pay” and “Proxy Access”?*, LEGAL INTELLIGENCER (Philadelphia, P.A.), Sept. 14, 2010.

58. See 15 U.S.C. § 78n-1 (2010).

59. *Id.*

60. *Id.*

The Dodd-Frank Act mandates that votes on executive compensation and golden parachute agreements will be nonbinding.⁶¹ Specifically, the votes may not be construed to overrule a decision by the company or board of directors, to create or change the fiduciary duties of the company or board of directors, or to limit shareholders' ability to make executive compensation proposals to be included in proxy materials.⁶²

Interestingly, the Dodd-Frank Act say on pay provisions allow for an exemption from the say on pay requirements for small issuers who would be unduly burdened by the provisions, within the discretion of the Securities Exchange Commission ("SEC") to make such exemption in the rules.⁶³ However, under the finalized rules adopted by the SEC on January 25, 2011, the only difference in reporting requirements for small issuers regarding shareholder voting on executive compensation is a two-year delay in compliance.⁶⁴

B. Comparison of the U.K. DRR Regulations and the Dodd-Frank Act Requirements for Say on Pay

The most basic similarity between Dodd-Frank and the U.K. DRR Regulations is the non-binding nature of the vote. Thus, shareholders are

61. 15 U.S.C. § 78n-1 (2010).

62. *Id.*

63. "The SEC may, by rule or order, exempt an issuer or class of issuers from the requirements regarding executive compensation and golden parachutes. In determining whether to make an exemption under this subsection, the SEC can take into account, among other considerations, whether the requirements disproportionately burden small issuers." *Id.*

64. The SEC has indicated that all public companies subject to the federal proxy rules would be required to give shareholders a nonbinding say on pay vote and a nonbinding vote on the frequency of the say on pay votes. U.S. SECURITIES AND EXCHANGE COMMISSION, *SEC Adopts Rules for Say-on-Pay and Golden Parachute Compensation as Required Under Dodd-Frank Act*, Press Release 2011-25 (Jan. 25, 2011), <http://www.sec.gov/news/press/2011/2011-25.htm> [hereinafter SEC Press Release]; see also U.S. Securities and Exchange Commission, Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Exchange Act Release No. 33-9178 (Jan. 25, 2011), available at <http://www.sec.gov/rules/final/2011/33-9178.pdf>.

In regard to smaller companies, the SEC defines a smaller company as one that has a public float of less than \$75 million. 17 C.F.R. § 240.12b-2 (2009); SEC Press Release. The final version of the SEC's rules requires smaller companies to have a nonbinding say on pay vote and a nonbinding vote on the frequency of the say on pay vote; however, it does not require smaller companies to comply with these requirements for two full years. U.S. Securities and Exchange Commission, Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Exchange Act Release No. 33-9178 (Jan. 25, 2011), available at <http://www.sec.gov/rules/final/2011/33-9178.pdf>. The SEC's stated purpose for this delay is to allow smaller companies time to observe how larger companies conduct the votes. *Id.*

In addition to the requirements stated under the Dodd-Frank Act, the SEC's finalized rules require that companies disclose both the shareholder vote on the frequency of the shareholder vote on executive compensation and whether the frequency vote is nonbinding. *Id.*

simply able to voice their approval or disapproval of the executive compensation plan. Shareholders votes do not alter the actual payments made to executives.⁶⁵

The United Kingdom has a much more consistent application of when voting will occur. In the United Kingdom the voting is held annually,⁶⁶ whereas in the United States the voting can be annual, biennial, or triennial.⁶⁷ Furthermore, if a shareholder in the United States wishes to change the frequency of the voting for approval or rejection of the executive compensation plan, the vote to determine the timing of the say on pay voting only has to be held at least once every six years.⁶⁸

Unlike in the United Kingdom, the United States provides a government administrative agency, the SEC, with the discretion to exempt a corporation that would otherwise be required to conform to the Dodd-Frank Act say on pay requirements.⁶⁹ However, the criteria the SEC may use to determine which companies qualify for exemption from the Dodd-Frank say on pay voting requirements is not clearly explained in the text of the Act itself.⁷⁰ The SEC's final rules regarding the say on pay voting requirements provide that no companies, even smaller companies, will be exempt from the voting requirement, but that does not negate the language in the Dodd-Frank Act giving the SEC discretion to do so in the future.⁷¹

Additionally, the United Kingdom specifies a punishment for noncompliance with the DRR Regulations—directors who fail to comply with the statute will be guilty of a crime and liable for a fine.⁷² The United States does not specify the potential punishments for non-compliance with the say on pay requirements under the Dodd-Frank Act.⁷³

Also of note is the difference of types of investors in the United Kingdom from those in the United States. In the United Kingdom, the predominant type of shareholder is a single type of institutional shareholder.⁷⁴ In the United States, in addition to a sizeable amount of

65. See 15 U.S.C. § 78n-1 (2010); Directors' Remuneration Report Regulations 2002, 2002, S.I. 2002/1986, § 241A(8) (U.K.).

66. See Directors' Remuneration Report Regulations 2002, 2002, S.I. 2002/1986, § 241A(6) (U.K.).

67. See 15 U.S.C. § 78n-1(a)(1) (2010).

68. *Id.*

69. 15 U.S.C. § 78n-1 (2010); Directors' Remuneration Report Regulations 2002, 2002, S.I. 2002/1986 (U.K.).

70. See 15 U.S.C. § 78n-1 (2010).

71. *Id.*; see also Exchange Act Release No. 33-9178, *supra* note 64.

72. See Directors' Remuneration Report Regulations 2002, 2002, S.I. 2002/1986, § 241A(9)-(10) (U.K.).

73. See 15 U.S.C. § 78n-1 (2010).

74. See Gordon, *supra* note 12, at 349–51 (comparing the profile of the capital markets in the

institutional investors,⁷⁵ retail investors⁷⁶ account for a considerable amount of shareholders in the market.⁷⁷ Because of the diversity in types of shareholders in the U.S. market coupled with regulations discouraging institutional investors to coordinate their resources,⁷⁸ it is not as likely that one type of shareholder will wield as much power in the United States as the institutional shareholders do in the United Kingdom.⁷⁹

C. Reaction to the Dodd-Frank Act in the United States

The initial reactions to the say on pay provisions in the Dodd-Frank Act have been generally positive.⁸⁰ Some commentators believe say on pay will provide shareholders a way to voice their displeasure and effectuate change.⁸¹ Other commentators think that say on pay provisions will have little to no effect.⁸²

However, Dodd-Frank's say on pay provision is not without its critics. A number of commentators have argued that the regulations are not strict enough to create meaningful change.⁸³ Others even argue the regulations

United Kingdom and the United States and describing the predominant type of shareholder for each country).

75. See BLACK'S LAW DICTIONARY, *supra* note 38.

76. Retail investors are individuals who use their own capital to invest for themselves, as opposed to institutional investors, which invest capital provided to them by others.

77. See Gordon, *supra* note 12, at 349–51.

78. *Id.*

79. *Id.*

80. Most commentary has voiced general approval for the implementation of say on pay as a way to increase governance of executive compensation by shareholders. See, e.g., David Nicklaus, *New Law Has Effect on Executive Pay: Shareholders Now Have a Voice in the Process*, ST. LOUIS POST-DISPATCH, Jan. 7, 2011, at B1, available at http://www.stltoday.com/business/columns/david-nicklaus/article_2ef7ab6c-dc54-5bc4-9512-2d8b61e8d36e.html (“[Say on pay votes] give shareholders a powerful new way to express their discontent with top brass.”); Patrick May, *Apple Execs Richly Rewarded for Banner Year*, SAN JOSE MERCURY NEWS, Jan. 8, 2011 (“The practice of allowing shareholders to voice their opinion on compensation packages—known as ‘say on pay’—has been gaining popularity, thanks in part to rising disgust with the nosebleed salaries and bonuses being paid to corporate hotshots.”).

81. *Id.*

82. One expert believes that the Dodd-Frank say on pay regulations will have “no effect whatsoever.” *Say on Pay: Will U.S. Shareholders Give Executives the Thumbs Up on Compensation?*, KNOWLEDGE@WHARTON (Dec. 8, 2010), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2649>.

83. Some have argued that because the result of the say on pay vote is nonbinding, the legislation does not provide enough substance to create the regulations needed to address the growing problem of increasing executive compensation in the face of poor company performance. See, e.g., William D. Cohan, Op.-Ed., *Make Wall Street Risk It All*, N.Y. TIMES (Oct. 7, 2010), <http://opinionator.blogs.nytimes.com/2010/10/07/make-wall-street-risk-it-all> (“And how would Dodd-Frank change this dynamic? It would give shareholders a nonbinding ‘say on pay’ regarding the compensation of executives of public corporations. And even if a majority of shareholders expressed their displeasure,

leave too much discretion in the hands of federal regulators⁸⁴ who may not adequately enforce strong regulations in a manner consistent with the purpose of the Dodd-Frank Act.⁸⁵

As an additional criticism, some experts have argued that an unintended consequence of the Dodd-Frank say on pay provision could be an increase in focus by the board of directors on avoiding the potential liability associated with a negative vote for the executive compensation package.⁸⁶ This concern could cause boards to move away from their intended function of determining how best to appropriately compensate the executives into a more conservative, potentially even harmful approach to executive compensation.⁸⁷

Other experts have expressed a belief that a “no” vote by shareholders is a powerful tool.⁸⁸ As such, shareholders should consider alternatives to a simple “no” vote to provide more clarity in communicating with the

the companies would be free to ignore them. Yawn.”); Editorial, *Taking Aim at Executive Pay*, CONN. L. TRIB. (Nov. 22, 2010), <http://www.ctlawtribune.com/printarticle.aspx?ID=38917> [hereinafter Editorial] (“Dodd-Frank largely lacks teeth . . .”).

84. The SEC is given discretion to exempt companies from the Dodd-Frank Act say on pay reporting requirements. *See infra* Part III.C.

85. Some believe the amount of discretion given to the SEC to create rules and enforce them will result in a weaker set of regulations than intended. *See, e.g.*, Editorial, *supra* note 83 (“And, as with other compensation related rules, standing alone, it lacks the depth to meaningfully influence the behavior of boards in providing more justifiable compensation to its executives. That so much has been left to the rule-making authority of the SEC and ‘appropriate federal regulators’ does not engender much optimism.”).

The lack of action taken by the SEC in regard to Sarbanes-Oxley is offered as an example of another instance in which the SEC was given discretion to regulate executive compensation and did not fully capitalize on the opportunity. *Id.* (“Sarbanes Oxley . . . contained provisions to claw-back executive compensation, when the misconduct of employees results in the material restatement of a company’s financial statements. Yet, the SEC has failed to promulgate rules to provide corporate america [sic] with a clear set of parameters on the application of the law and has failed to aggressively pursue bad acts under this tool.”). *Id.*

86. Mike Verespej, *Experts Weigh in on Financial Reform Bill*, PLASTICSNEWS, Sept. 6, 2010, at 7 (Sept. 9, 2010), <http://plasticsnews.com/headlines2.html?id=10090600701&q=Experts+weigh+in+on+financial+reform+bill>. Some experts have stated that boards of directors will change their focus from responsibly overseeing management to simply avoiding a “no” vote. *Id.* One expert has remarked: “You will effectively emasculate the board and reduce compensation committees to being a paper tiger. That doesn’t get you anywhere toward improving compensation policies and plans. Ultimately, pay will just creep up.” *Id.*

87. *Id.* (“There is the danger that companies and boards will be so busy adopting a compliance mentality for the SEC that they will forget that their true audience is investor.”).

88. *Id.* (“[Dodd-Frank] is going to let shareholders and the market put a brake on a lot of the decisions that boards have made in the past to jack up pay. I think that is a great direction to go in. You don’t need the government to come into the boardroom and take control.”); *see also* Paul Hodgson, Greg Ruel & Michelle Lamb, *Wall Street Pay: Size, Structure and Significance for Shareowners*, 2010 COUNCIL OF INSTITUTIONAL INVESTORS 20, available at <http://www.cii.org/UserFiles/file/CI%20White%20Paper%20-%20Wall%20Street%20Pay%20FINAL%20Nov%202010.pdf> (“[A] high say-on-pay ‘against’ vote is a blunt instrument.”).

company, such as a letter directed to the board of directors explaining the vote.⁸⁹ Additionally, shareholders could request an in-person meeting to discuss voting behavior.⁹⁰ Shareholders could also vote against the reelection of compensation committee members.⁹¹ Alternatively, the shareholder might try to file a shareholder resolution⁹² to address the pay practices of which the shareholder does not approve.⁹³

In terms of reactions by companies affected by Dodd-Frank, recently collected data suggests that companies will vary in their frequency of say on pay voting. A survey taken in December of 2010 projected that most companies would have an annual say on pay vote.⁹⁴ Interestingly, the two most common factors for deciding the frequency of voting were accountability to shareholders and a desire to minimize administrative burdens.⁹⁵ Additionally, many companies indicated they were going to make changes to their pay-setting processes and pay programs as a result of say on pay requirements.⁹⁶

Data collected following the actual release of proxy materials and subsequent shareholder voting in 2011 supports these projections.⁹⁷ Of the companies in the Russell 3000 reporting voting results as of June 30, 2011, the shareholders at a majority of companies supported an annual vote.⁹⁸ The next most popular frequency for voting was on a triennial

89. *Id.* at 20–21.

90. *Id.*

91. *Id.*

92. A shareholder resolution, as defined by Black's Law Dictionary, is: "A resolution by shareholders, usu[ually] to ratify the actions of the board of directors." BLACK'S LAW DICTIONARY 1426 (9th ed. 2009). However, the shareholder resolution can be a proposal put forward by the shareholder rather than the board of directors.

93. *See* Hodgson, *supra* note 88, at 21.

94. *U.S. Companies Divided on Say-on-Pay Frequency, Towers Watson Poll Finds*, TOWERS WATSON (Jan. 5, 2011), <http://www.towerswatson.com/united-states/press/3501> [hereinafter TOWERS WATSON]. Towers Watson conducted an online poll in mid-December of 135 public companies regarding their planned timeframe for say on pay votes: 51% indicated they expect to conduct annual say on pay votes, 39% indicated they expect to conduct triennial say on pay votes, and 10% indicated they expect to conduct biennial say on pay votes. *Id.*

95. *Id.* Roughly forty percent of respondents said accountability to shareholders and a desire to minimize administrative burdens were the factors with the greatest influence on their vote-frequency recommendation. *Id.* Slightly less than forty percent said "shareholder preferences, proxy advisor policies and providing shareholders with an avenue to express concern about executive pay without casting negative votes on other matters [were] key factors." *Id.*

96. *Id.* "The survey also found that nearly half (48%) of surveyed companies are making some adjustments to their executive pay-setting process in preparing for the upcoming proxy season." *Id.*

97. Ted Allen et al., *Preliminary 2011 Postseason Report*, 2011 POSTSEASON REPORT 4 (Aug. 8, 2011), <http://www.issgovernance.com/docs/2011USSSeasonPreview>.

98. *Id.* The majority of shareholders at 1792 companies in the Russell 3000 index voted in favor of annual votes. *Id.* at 4. The Russell 3000 index represents an index of the 3000 largest publicly traded U.S. companies based on market share.

basis, and only a small number of companies had a majority of shareholders voting for biennial voting.⁹⁹

IV. FUTURE ISSUES AND POTENTIAL EFFECTS OF THE DODD-FRANK ACT

The Dodd-Frank Act creates a new regulatory environment for executive compensation. Consequently, there are a number of potentially positive and negative effects that may result from its passage.

A. Problems

Requiring a say on pay vote at least once every three years¹⁰⁰ may result in an increased focus on the short-term performance of company management to ensure that their performance warrants approval during the vote.¹⁰¹ The short-term focus could incentivize excessive risk in the long term.¹⁰² Prioritization of the short-term performance is blamed, in part, for the financial crisis in the United States that led to the enactment of the Dodd-Frank Act.¹⁰³

Another potential problem with the say on pay proposal is the sheer amount of resources it requires that might be better spent elsewhere. Broadly speaking, the role of management is to lead the company. Conceivably, the resources used to address the possibility or correct the occurrence of shareholder's rejecting an executive compensation plan could be better utilized in the core function of each party's respective role.¹⁰⁴ Thus, say on pay voting requirements could actually hinder

99. *Id.* The majority of shareholders at 412 companies voted in favor of triennial votes; the majority of shareholders at 16 companies voted in favor of biennial votes. *Id.*

Interestingly, shareholders did not always follow management's recommendation on voting frequency, especially when management recommended a triennial vote. *Id.* The management at roughly 54% of companies recommended annual voting, 41% recommended triennial voting, 3% recommended biennial voting, and 3% gave no recommendation. *Id.* Shareholders did not vote in favor of management's recommendation for triennial voting at 564 of 978 companies, and shareholders did not follow management's recommendation for biennial voting at 43 out of 59 companies. *Id.*

100. See 15 U.S.C. § 78n-1(a)(1) (2010).

101. See *Say on Pay: Will U.S. Shareholders Give Executives the Thumbs Up on Compensation?*, *supra* note 82 ("If you want laser-like focus on management pay incentives, you may take the managers' attention away from important long-term objectives.").

102. One study suggests that the reason that similar types of incentive structures, in which long-term repercussions were devalued as compared to short-term success, played a major role in the actions of executives on Wall Street leading up to the financial crisis. See HODGSON, *supra* note 88, at 2 ("In sum, the lack of long-term performance measurement on Wall Street and high absolute levels of compensation likely helped to fuel excessive risk-taking. Large amounts of compensation were delivered without restrictions and based on short-term performance.").

103. *Id.*

104. See *Say on Pay: Will U.S. Shareholders Give Executives the Thumbs Up on Compensation?*,

responsible use of corporate resources in times of poor performance. Resources that should be dedicated to the company might instead be diverted to ensuring the approval of the executive compensation plan.¹⁰⁵

The Dodd-Frank Act only gives the SEC the discretion to exempt companies when the regulation presents an unfair burden on small issuers.¹⁰⁶ Currently, the finalized version of the SEC regulations would apply say on pay requirements to all corporations, regardless of size.¹⁰⁷ While the SEC's current regulations are ostensibly clear in their applicability and not administratively burdensome,¹⁰⁸ changes could be made to the current regulations that would create confusion and substantially increase the administrative burden on disclosing companies. Moreover, it is unclear how much effort the SEC will put into enforcing the new regulations.¹⁰⁹

Like in the United Kingdom,¹¹⁰ institutional investor advisory groups in the United States will now have a more direct influence over the executives within the company.¹¹¹ Corporations are likely to change compensation packages to conform to the guidelines produced by the institutional advisory groups.¹¹² Unfortunately, this could allow for

supra note 82 (“An unrelenting focus on pay for performance may ironically undercut the ability of top executives to lead their companies.”). *Id.* (“If you want laser-like focus on management pay incentives, you may take the managers’ attention away from important long-term objectives.”).

105. *See supra* note 82 and accompanying comments.

106. *Id.*

107. *See* SEC Adopts Rules for Say-on-Pay and Golden Parachute Compensation as Required Under Dodd-Frank Act, *supra* note 64 (stating that the SEC’s finalized regulations for implementing the Dodd-Frank say on pay provisions will require all publicly traded companies to give shareholders a nonbinding say on pay vote and a nonbinding vote on the frequency of the say on pay vote).

108. *See* Shareholder Approval of Executive Compensation and Golden Parachute Compensation, *supra* note 64 (stating that the proposed SEC regulations for administering the Dodd-Frank Act say on pay requirements apply to all companies already required to disclose, regardless of size).

109. *See* Editorial, *supra* note 83 (commenting that the SEC has not always vigorously enforced regulations within its ability on the issue of executive compensation regulation, with the lack of Sarbanes-Oxley enforcement as an example).

110. *See* Gordon, *supra* note 12, at 343–44.

111. The benefits of institutional advisory groups have been described as follows: “These firms analyze and make recommendations on corporate issues for institutional investors that are too busy to do this research themselves. They are not like the credit ratings agencies, which can disrupt markets.” Steven M. Davidoff, *Deal Professor: In One Area, Companies Want More, Not Less, Regulation*, N.Y. TIMES, Dec. 1, 2010, at B7.

112. Some commentators believe that institutional investor advisory groups will yield considerable power because a large number of institutional investors in the U.S. will take their voting cues from the recommendations provided by the institutional advisory groups. *See, e.g.*, Ronald D. Orol, *Dodd-Frank’s ‘Say on Pay’ Could Impact Executive Pay: SEC to Write Rules Giving Institutional Investors a Non-Binding Say on CEO Pay*, MARKETWATCH (Aug. 26, 2010, 8:00 AM), <http://www.marketwatch.com/story/new-say-on-pay-law-could-temper-ceo-pay-2010-08-26?pagenumber=1> (“RiskMetrics and a couple other proxy advisory firms are expected to make

excessive levels of compensation if the company is conforming to institutional guidelines.¹¹³ That result would fly in the face of the goal of the Dodd-Frank Act: to increase corporate governance and curb excessive corporate pay for poor company management.¹¹⁴

Another likely adverse consequence of increased institutional advisory group influence is the possibility that shareholders, by following the voting advice of the institutional advisory group,¹¹⁵ will reject an otherwise acceptable executive compensation plan.¹¹⁶ While the institutional advisory groups assist institutional investors, the groups' standardized approach to compensation could result in an executive compensation package that is inappropriate for the executives at the company.¹¹⁷ In a worst case scenario, shareholders voting "no" could cause a company to change its compensation package for executives to such a degree that it adversely impacts the success of the company.¹¹⁸

Moreover, whereas the United Kingdom requires shareholders to vote on executive compensation plans annually,¹¹⁹ the opportunity for shareholders of a corporation in the United States to vote on executive compensation only once every three years¹²⁰ allows for much less scrutiny than had the vote been required annually.¹²¹ Thus, inappropriate

recommendations to a large chunk of the U.S. institutional investor community about whether to accept a particular pay package.”).

113. The concern is that institutional investor advisory groups will attempt to apply similar compensation standards to all companies, but each company has different needs that may benefit from different executive compensation.. *Id.* (“[P]ay packages in the U.S. will become homogenized and heavily influenced by standards set by institutional investor groups and proxy advisory companies”).

114. *See* 15 U.S.C. § 78n-1 (2010).

115. *But cf.* Cohan, *supra* note 83 (arguing that because the say on pay vote is nonbinding, the board of directors and management of the company need not take any action, because no adverse consequences result from a nonbinding vote).

116. *See* Orol, *supra* note 112 (noting that many institutional investors, in their role as shareholders, will likely follow the voting advice provided by institutional advisory groups).

117. *Id.* (noting that executives should be concerned that institutional advisory groups' influence on voting could create “a one-size-fits-all approach to pay” that would not be the most effective means of correctly compensating executives at a particular company).

118. This issue is not simply that the compensation is inappropriate for the executives from a competitive standpoint, meaning an executive needs to be paid a competitive wage in order for the company to retain his or her services. Rather, the problem is that the performance measures of the performance-contingent compensation, which could represent a significant portion of executive compensation, could change from being the correct goals that would ensure company success if achieved to incorrect goals that could result in company failure.

119. *See* Directors' Remuneration Report Regulations 2002, *supra* note 19, § 7.

120. *See* 15 U.S.C. § 78n-1(a)(1) (2010).

121. Based on preliminary data, it appears a sizable portion of companies will choose to have their say on pay vote occur only once every three years. *See* TOWERS WATSON, *supra* note 94 (noting that in a recent survey conducted in mid-December of 2010 of 135 companies, 39% indicated that they

compensation plans for executives could be in place for three years before the shareholders are afforded an opportunity to vote under the Dodd-Frank Act.¹²²

B. Benefits

Despite the potential negative effects of the say on pay provision in Dodd-Frank, it creates a number of potential benefits as well. The same benefits observed by the United Kingdom should apply equally to the United States.¹²³ Certainly, the hope is that the say on pay measure implemented by the Dodd-Frank Act will help curb the scandals that occur regarding excessive executive compensation following periods of poor performance.¹²⁴ Additionally, the attractiveness of the capital markets in the United States may increase to investors knowing that they will have more influence over executive compensation than they have had traditionally.¹²⁵ Moreover, because of shareholders' newfound power, substantive dialogue between shareholders and management of the company should increase as well.¹²⁶

Based on the voluntary adoption of say on pay provisions by companies in the United States before the passage of the Dodd-Frank Act¹²⁷ and the rejection by shareholders of executive compensation plans at three companies that voluntarily adopted say on pay provisions before the Dodd-Frank Act,¹²⁸ there is reason to believe that the say on pay provisions under the Dodd-Frank Act will be used more vigorously than the say on pay provisions under the DRR Regulations.¹²⁹ Moreover, as of June 30, 2011, early results of the say on pay votes for 2011 have indicated shareholders' willingness to vote down executive compensation

expected to have a say on pay vote occur once every three years).

122. See 15 U.S.C. § 78n-1(a)(1) (2010).

123. See Davis, *supra* note 9 and accompanying text.

124. *Id.*

125. *Id.*

126. *Id.*

127. See, e.g., Morgenson, *supra* note 51 (noting Verizon shareholders approved a voluntarily adopted nonbinding say on pay provision); see also Bachelder, *supra* note 51 (noting that roughly 80 companies had adopted some form of say on pay provision as of June 4, 2010).

128. Three companies, KeyCorp, Motorola Inc., and Occidental Petroleum Corporation had executive compensation pay packages rejected during the 2010 proxy season. See Jaffari, *supra* note 57.

129. See Davis, *supra* note 9, at 10 (noting that in the first four years following the enactment of say on pay legislation in the United Kingdom, only eight companies, all of which were small in size, with the exception of GlaxoSmithKline, had say on pay resolutions defeated). *But see* PIRC, *supra* note 33 (noting that three companies received a rejection of their DRRs by shareholders in 2010).

plans; 37 of the over 2200 companies reporting voting results in the Russell 3000 had a majority of shareholders give a negative vote to the companies' executive compensation plans.¹³⁰ If the goal of the Dodd-Frank Act's say on pay provision was to give greater power to shareholders to voice their opinions on executive compensation plans, the initial results are encouraging that shareholders will be willing and able to do so.

V. CONCLUSION

The Dodd-Frank Act is a strong step in the right direction towards the goal of increasing corporate governance through executive compensation regulation. As the United Kingdom has demonstrated, though votes by shareholders are nonbinding, companies are cognizant of the voting and adjust their compensation accordingly.¹³¹ Moreover, the United Kingdom has shown that even the possibility of a "no" vote will steer companies towards more appropriate levels of executive compensation.¹³²

However, the Dodd-Frank Act would have had more teeth if the vote had been required on an annual basis, similar to the United Kingdom's requirements.¹³³ Instead, the vote is potentially held only once every three years, with the ability to change the timing occurring only once every six years.¹³⁴ Additionally, although the final SEC regulations to enforce the Dodd-Frank Act's say on pay provision apply to all publicly traded companies,¹³⁵ it is possible the SEC's actual enforcement for all companies could be lacking.¹³⁶ Moreover, had the Dodd-Frank Act been more nuanced in its requirements and given shareholders the ability to provide more direction than simply "yes" or "no," shareholders would have had the opportunity to proactively shape the type of compensation to be given in the future rather than retroactively pass judgment on what has already been paid.

130. Ted Allen et al., *supra* note 97, at 2. Eight S&P 500 companies and twenty-nine Russell 3000 firms received negative votes for their executive compensation plans. *Id.* at 3. Out of the thirty-seven companies receiving less than 50% approval of their executive compensation plan, eleven received less than 40% approval. *Id.* Additionally, forty-one companies only received between 50% and 60% approval for their executive compensation plan. *Id.*

131. *See supra* Part II.C.

132. *Id.*

133. *See* Directors' Remuneration Report Regulations 2002, *supra* note 19, § 7.

134. *See* 15 U.S.C. § 78n-1 (2010).

135. *See* SEC Press Release, *supra* note 64.

136. *See supra* note 109 and accompanying text.

In light of the results of say on pay in the United Kingdom, the Dodd-Frank Act's say on pay provision represents a significant change to corporate governance in the United States. While the long-term results may not prove to be as effective as originally hoped because of the nonbinding nature of the vote and its potential infrequency, the Dodd-Frank Act's say on pay provision is a major step forward in increasing corporate governance of executive compensation.

*Tyler Huddleston**

* J.D. (2012), Washington University in St. Louis School of Law; B.S.C. (2005), DePaul University. The author would like to provide special thanks to Elizabeth Keough, Sabrini Jiwani, and Charlena Aumiller for their contributions to this Note.