

COMMITTEE ON CAPITAL MARKETS REGULATION

2006 INTERIM REPORT
SCORECARD

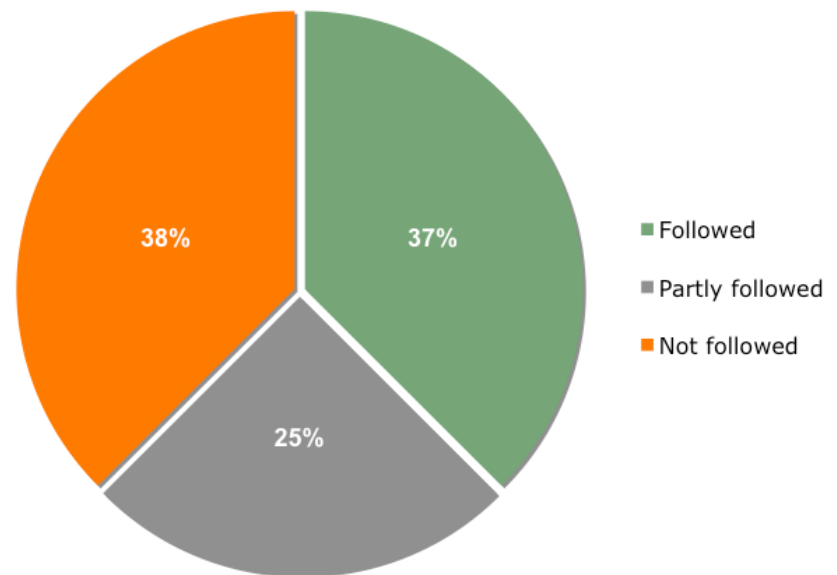
2006 INTERIM REPORT SCORECARD
EXECUTIVE SUMMARY

Important Instances Where CCMR Recommendations Were Followed
<ul style="list-style-type: none"> • Abolish capital controls for foreign issuers • Indict entire firms only in exceptional circumstances • PCAOB reforms on SOX 404 <ul style="list-style-type: none"> - Redefine “material weakness” - Enhance PCAOB/SEC guidance - Increase use of multi-year rotational testing and reliance on others’ auditing - Reshape SOX 404 to exclude small companies • Provide for more data collection and ongoing monitoring of firms

Important Instances Where CCMR Recommendations Not Followed
<ul style="list-style-type: none"> • Allow shareholder choice of dispute resolution process • Prohibit pay-to-play by lawyers

Summary Statistics

- 32 total recommendations, of which:
 - 12 followed
 - 8 partly followed
 - 12 not followed



2006 INTERIM REPORT RECOMMENDATIONS

Key

R: Regulation, L: Laws, D: Done, P: Progress, NP: No Progress

Rec.	Description	R or L	Actions Taken	Status	Citation
1.	Abolish capital controls	R	SEC adopted the rule on foreign company deregistration	D	SEC, Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Mar. 27, 2007, available at http://www.sec.gov/rules/final/2007/34-55540.pdf .
2.	SEC cost-benefit analysis	R	D.C. Circuit requires SEC to apply	P	See, e.g., Chamber of Commerce v. SEC, 412 F.3d 133, 143 (D.C. Cir. 2005) and Chamber of Commerce v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006) (where D.C. Circuit twice struck down an SEC rule requiring mutual funds to have boards comprised of at least 75% independent directors and an independent chairman).
3.	SROs cost-benefit analysis	R		NP	
4.	SEC creation of internal staff group to perform cost-benefit analyses	R	New SEC Division of Risk, Strategy, and Financial Innovation moves in that direction	P	SEC, "SEC Announces New Division of Risk, Strategy, and Financial Innovation," Sept. 16, 2009, available at http://www.sec.gov/news/press/2009/2009-199.htm .
5.	Rules to focus on outcomes rather than mandated processes	R	New SEC Division of Risk, Strategy, and Financial Innovation moves in that direction	P	SEC, "SEC Announces New Division of Risk, Strategy, and Financial Innovation," Sept. 16, 2009, available at http://www.sec.gov/news/press/2009/2009-199.htm .
6.	SEC and SROs to write different rules for institutional and "retail" customers	R		NP	
7.	SEC to adopt more bank-like prudential regulation for securities firms	R	Dodd-Frank minimizes SEC's supervisory role	D	Under Dodd-Frank, Fed in charge of this prudential regulation, subject to recommendations of FSOC. See Dodd-Frank bill sections 115; 165.
8.	Enforcement actions should not be used for ad hoc rule writing	R	Done less in practice but still done, see Cuomo's settlement on credit ratings agencies; SEC has not done since analysts—just said that Cuomo's settlement did not conflict with their policies	P	Cuomo 2008 Press Release on ratings agencies: http://www.ag.ny.gov/media_center/2008/jun/june5a_08.html (using agreement with agencies to exercise de facto regulatory power) Cox statement http://www.sec.gov/news/press/2008/2008-109.htm .
9.	More effective communication and cooperation among federal regulators (incl. SROs)	R	New FSOC may provide	P	Purpose of the FSOC is to ensure better coordination (Dodd-Frank Section 112(a)(2)(E)-(G)). Grant of interagency dispute resolution powers to FSOC is also relevant here, Dodd-Frank Section 119.
10.	Merge NASD and NYSE's regulation organizations	R	Merger announcement, 11-28-06	D	Chairman Cox's announcement of the merger: http://www.sec.gov/news/speech/2006/spch112806cc.htm .
11.	SEC right to approve civil structural remedies with national importance	L		NP	
12.	States to notify Justice Department before indicting nationwide companies	L		NP	

Rec.	Description	R or L	Actions Taken	Status	Citation
13.	President's Working Group to focus on coordinating international regulations	R	Emergence of G20 and FSB during financial crisis	P	
14.	Resolve existing uncertainties in Rule 10b-5 liability	R	Mostly not done but Supreme Court in Stoneridge says no scheme liability (partly out of concern for competitiveness, indirectly relying on our work)	P	
15.	No duplication of awards between private and Fair Funds actions	R	Courts seem to try to prevent strict double recovery from private and Fair Funds actions	D	See, e.g., In re NYSE Specialists Securities Litigation, 405 F. Supp. 2d 281, 308-11 (S.D.N.Y. 2005).
16.	Prohibit pay-to-play by lawyers	L	SEC has prohibited by investment advisors	NP	SEC approved these proposals at the end of June; see http://www.sec.gov/news/press/2010/2010-116.htm . I saw no prosecutions yet based on these new rules for investment advisors, though.
17.	Indict entire firms only in exceptional circumstances	R/L	Revisions of DOJ Guidelines (Filip Memorandum) and SEC policy on corporate liability make corporate liability much less likely	D	U.S. Department of Justice, "Principles of Federal Prosecution of Business Organizations," Aug. 28, 2008, available at http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf ; SEC, Statement Concerning Financial Penalties, SEC Release No. 2006-4, Jan., 2006, available at http://www.sec.gov/news/press/2006-4.htm .
18.	Modify Factor 4 in Justice Dept's prosecutorial guidelines relating to attorney client privilege and attorneys fees	R/L	Filip Memorandum	D	New DOJ prosecutorial guidelines base credit for corporate cooperation on disclosure of relevant facts, not on providing privileged information. U.S. Department of Justice, "Principles of Federal Prosecution of Business Organizations," Aug. 28, 2008, available at http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf .
19.	Congressional action to protect auditing firms from catastrophic loss (instead of adoption of auditor caps)	L	Levitt Committee considered but did not do	NP	See final report of the Levitt Committee, http://www.ustreas.gov/offices/domestic-finance/acap/docs/final-report.pdf , at II-6 through II-8; see also this Gibson Dunn memo at p. 6 describing the work of the Levitt Committee http://www.gibsondunn.com/publications/Documents/Dickey-AuditorLiabilityCaps.pdf .
20.	Clarify Section 10A liability	L		NP	
21.	Modify SEC Rule 176 for outside directors	R		NP	
22.	Modify SEC indemnification policy	R		NP	
23.	Shareholder vote on poison pill adoption (Delaware, exchanges, or Congress)	R/L		NP	
24.	Majority vote of shareholders for board of directors elections	Market		D	

Rec.	Description	R or L	Actions Taken	Status	Citation
25.	SEC to clarify ballot access issues	R	SEC outstanding proposals	P	Dodd-Frank explicitly grants SEC this authority in Section 971(a); SEC had already started down this road with a proposed rulemaking in June 2009 (http://www.sec.gov/rules/proposed/2009/33-9046.pdf) which is still open for comment. SEC also issued concept release in July 2010 examining and soliciting comments on numerous aspects of the U.S. proxy system. SEC, Concept Release on the U.S. Proxy System, Jul. 14, 2010, available at http://www.sec.gov/rules/concept/2010/34-62495.pdf .
26.	Shareholder choice of dispute resolution process	R		NP	
27.	Redefine "material weakness" under 404	R	PCAOB and SEC 2007 rules	D	SEC Release No. 33-8809, 72 Fed. Reg. 35310 (June 27, 2007) (rule revision) and PCAOB Release, "Board Approves New Audit Standard for Internal Control over Financial Reporting and, Separately, Recommendations on Inspection Frequency Rule," May 24, 2007. The PCAOB proposal was approved by the SEC Release No. 34-56152, 72 Fed. Reg. 42141 (August 1, 2007).
28.	Develop enhanced PCAOB and SEC guidance	R	PCAOB and SEC 2007 rules	D	SEC Release No. 33-8809, 72 Fed. Reg. 35310 (June 27, 2007) (rule revision) and PCAOB Release, "Board Approves New Audit Standard for Internal Control over Financial Reporting and, Separately, Recommendations on Inspection Frequency Rule," May 24, 2007. The PCAOB proposal was approved by the SEC Release No. 34-56152, 72 Fed. Reg. 42141 (August 1, 2007).
29.	Permit multi-year rotational testing and increased reliance on others' auditing under 404	R	PCAOB and SEC May rules	D	SEC Release No. 33-8809, 72 Fed. Reg. 35310 (June 27, 2007) (rule revision) and PCAOB Release, "Board Approves New Audit Standard for Internal Control over Financial Reporting and, Separately, Recommendations on Inspection Frequency Rule," May 24, 2007. The PCAOB proposal was approved by the SEC Release No. 34-56152, 72 Fed. Reg. 42141 (August 1, 2007).
30.	If necessary, legislative reshape of 404 for small companies, delay application until assess costs	R/L	Dodd-Frank exempts from 404	D	Dodd-Frank Section 989G(a)-(b) (providing for the new small company 404 exemption, and subsequent study of the new rules).
31.	Do not apply 404 to foreign companies with equivalent regulation	R		NP	
32.	Provide for more data collection and ongoing monitoring	R	New office of financial research under Dodd-Frank	D	Dodd-Frank bill § 152.