# SUCCESSOR CEOS

**YARON NILI***

ABSTRACT

*Recent years have seen a push towards separating the roles of CEO and chairperson of the board. While many companies still maintain a combined CEO-chair role, investors consistently express their concern that the dual CEO-chair position jeopardizes the independence and effectiveness of the board. Yet, while investors and academic research have focused on one channel for achieving such separation—through the appointment of an independent director as chair—a second has been left relatively unexplored. In fact, in many cases, as this Article documents, the separation of CEO-chair has occurred through the second channel: the current CEO-chair steps down as CEO while remaining as the chair of the board, and a new CEO is appointed. This process is what this Article terms the "successor CEO" phenomenon.*

*Acknowledging the significant number of companies with such a structure in corporate America raises several policy questions. What are the corporate governance and operational benefits and drawbacks that the successor CEO route presents? How should investors treat companies that have separated the the roles of CEO and chair, but have done so through the successor CEO route? This Article explores these questions, providing detailed data regarding these companies and the chairs of their boards.*

*This Article finds that companies with a successor CEO structure often avoid the appointment of a lead independent director, and in some cases even declare their ex-CEO-chair as independent. In addition, their ex-CEO-chairs are longer tenured and older compared to other chairs, and companies often appoint their successors from within. Recognizing that companies with a successor CEO structure may pose specific governance concerns based on key findings regarding such a structure, this Article then offers several policy recommendations.*

* Assistant Professor of Law, University of Wisconsin Law School. I would like to thank the participants at the *Boston University Law Review*'s symposium, Institutional Investor Activism in the 21st Century: Responses to a Changing Landscape; and the University of Wisconsin Law School Faculty Workshop for their helpful comments. Will Conley, Mike Decrescenzo, Katie Gresham, Rebecca Hart, Christopher Kardatzke, and James Kardatzke provided excellent research assistance. Finally, I am grateful to the editors of the *Boston University Law Review* for exceptional editorial work. Support for this research was provided by the Office of the Vice Chancellor for Research and Graduate Education at the University of Wisconsin–Madison with funding from the Wisconsin Alumni Research Foundation.

CONTENTS

INTRODUCTION .......... 789
I. COMPANY LEADERSHIP AND CORPORATE GOVERNANCE .......... 794
  A. *The Board of Directors's Role in the Governance of the Corporation* .......... 796
  B. *The Lead Independent Director* .......... 800
  C. *Disclosure* .......... 803
II. CEO-CHAIR SEPARATION AND SUCCESSOR CEOS .......... 804
  A. *Benefits and Drawbacks to Splitting the Roles of CEO and Chair of the Board* .......... 810
    1. Benefits .......... 810
    2. Drawbacks .......... 813
  B. *The Case of Successor CEOs* .......... 816
    1. The Benefits of Successor CEOs .......... 817
      *a. Knowledge and Institutional Memory* .......... 817
      *b. Providing an Outlet for CEO Refreshment* .......... 818
      *c. Better Monitoring and Reduced CEO Power* .......... 818
    2. The Costs of Successor CEOs .......... 819
      *a. Reduction in Board Independence* .......... 819
      *b. Camouflage Effect Regarding Chair Separation* .......... 819
      *c. Constraining the Lead Independent Director* .......... 820
      *d. Reduction in the Successor CEO's Autonomy* .......... 820
      *e. Murky Leadership* .......... 821
III. SUCCESSOR CEOS: EMPIRICAL FINDINGS .......... 821
  A. *The Prevalence of Companies with Successor CEO Structure* .......... 821
  B. *Term Lengths and Tenure* .......... 824
  C. *Gender and Age* .......... 825
  D. *Compensation, Equity, Shareholdings, and Tenure* .......... 826
  E. *Designation of Independence and Appointment of Lead Independent Director* .......... 828
IV. POLICY IMPLICATIONS .......... 829
  A. *Tenure and Board Capture* .......... 829
  B. *Camouflage Effect* .......... 830
  C. *The Lead Independent Director* .......... 831
  D. *Addressing the Successor CEO Structure* .......... 831
    1. Independence Definitions Regarding Ex-CEO Chairs .......... 831
    2. Reforming Lead Independent Directors' Powers .......... 833
    3. Institutional Investors and Proxy Advisors .......... 833
CONCLUSION .......... 834

## INTRODUCTION

In 2013, for the second consecutive time in his seven years leading JPMorgan Chase as Chair of the Board and Chief Executive Officer, Jamie Dimon faced a shareholder vote on a measure that, if passed, would have forced him to surrender his chairman title.[1] In light of the "London Whale" trading failure that resulted in a six billion dollar loss and launched a series of legal and regulatory investigations into the bank,[2] this proposal to split the roles of chair and CEO came from a group of investors that collectively held about $820 million in JPMorgan shares.[3]

Proxy advisory firms Institutional Shareholder Services ("ISS") and Glass Lewis supported the proposal, mounting the pressure to separate the positions.[4] ISS remarked that "shareholders would benefit from the strongest form of independent board oversight which an independent chairman could provide."[5] Yet, despite the strong support from the advisory firms, Dimon managed to survive the challenge with 68% of the shareholder vote in his favor at the shareholder annual meeting in 2013.[6]

Jamie Dimon is not the only prominent CEO-chair to have faced such pressure from shareholders: Elon Musk, then CEO-Chairman of Tesla, Inc., faced a shareholder proposal to split the roles of chairman and CEO in 2018.[7] The

---

[1] ASSOCIATED PRESS, *JPMorgan Chase Investors Seek to Split CEO, Chairman*, CBS NEWS (Feb. 20, 2013, 7:02 PM), https://www.cbsnews.com/news/jpmorgan-chase-investors-seek-to-split-ceo-chairman/ [https://perma.cc/ZWK2-3LWZ]. The firm had also faced a proposal to separate the positions years before, which only received twelve percent of shareholder vote. *Id.* In 2014, the firm avoided a vote on whether to separate the CEO and chairman positions when Dimon eventually resigns. Tom Braithwaite, *JPMorgan Avoids Third Showdown over Dimon Role*, FIN. TIMES (Feb. 20, 2014), https://www.ft.com/content/aea20e7e-9a8e-11e3-8e06-00144feab7de.

[2] *See* Tom Braithwaite, *Dimon Victory Despite Investor Backlash*, FIN. TIMES (May 21, 2013), https://www.ft.com/content/51ce0cb2-c21b-11e2-ab66-00144feab7de; Tom Braithwaite & Dan McCrum, *JPMorgan Investors Take Heat off Dimon*, FIN. TIMES (May 14, 2013), https://www.ft.com/content/153d8a7a-bcbc-11e2-9519-00144feab7de.

[3] This group of investors includes: AFSCME Employees Pension Plan, the Connecticut Retirement Plans and Trust Funds, Hermes Equity Ownership Services, and the NYC Pension Funds. *JPMorgan Investors Urge Split of Chairman, CEO Roles in Letter*, REUTERS (Apr. 15, 2013, 8:40 AM), https://www.reuters.com/article/jpmorgan-ceosplit-idUSL2N0D20FP20130415 [https://perma.cc/7QTJ-6LDG].

[4] Neha Dimri & Amrutha Gayathri, *Proxy Firms Recommend JPMorgan Shareholders Vote Against Pay Plan*, REUTERS (May 6, 2015, 12:58 PM), https://www.reuters.com/article/us-jpmorgan-pay/proxy-firms-recommend-jpmorgan-shareholders-vote-against-pay-plan-idUSKBN0NR1XY20150506 [https://perma.cc/293X-WPUX].

[5] *Id.*

[6] Braithwaite, *supra* note 2.

[7] Peter Holley, *Elon Musk Overcomes Vote to Remove Him as Tesla Chairman*, WASH. POST, June 6, 2018, at A14. While that proposal failed, the positions at Tesla are now

proposal questioned whether Musk was able to give Tesla the attention it needed in light of Musk's leadership roles in several other companies.[8] The proponent of the proposal wrote that "in this much more highly competitive and rapidly changing technology industry, it is more and more difficult to oversee Tesla's business and senior management (especially to minimize any potential conflicts) that may result from combining the positions of CEO and Chairman."[9]

Amplifying the pressure on Musk, ISS supported the proposal, noting in a report that "[s]hareholders would benefit from the strongest form of independent board oversight in the form of an independent chair," and that "it is important that the board of directors take steps to ensure that management remains focused on resolving the manufacturing challenges, and that the CEO and other executives do not get distracted by outside business interests or Twitter fights."[10] Activist group Change to Win ("CtW") Investment Group, a major investor in Tesla,[11] supported ISS's recommendation, saying that "the board needs to refresh to effectively oversee manufacturing, human capital management and regulatory changes."[12] Despite the pressure he faced from shareholders, investment groups, and proxy advisory firms, like Dimon, Musk survived the challenge with 83.3% of shareholders rejecting the proposal.[13]

Ironically, a few months later, in September 2018, Musk declared on Twitter that he had secured funding for a massive buyout of Tesla;[14] these claims led to

separated as a result of a settlement with the Securities and Exchange Commission ("SEC") over fraud charges. *See infra* notes 14-16 and accompanying text.

[8] *See* Holley, *supra* note 7.

[9] *Id.*

[10] Dana Hull, *Tesla Shareholders Urged to Separate Chairman's Role From Musk*, BLOOMBERG (May 19, 2018, 11:38 AM), https://www.bloomberg.com/news/articles/2018-05-19/tesla-shareholders-urged-to-separate-chairman-s-role-from-musk.

[11] *See* Letter from Michael Garland, Assistant Comptroller Corp. Governance and Responsible Inv., Office of N.Y.C. Comptroller, Tim Goodman, Dir., Hermes Equity Ownership Servs., Mary Guinan, Assistant Treasurer for Policy, Conn. Ret. Plans & Tr. Funds, Anne Sheehan, Dir. of Corp. Governance, Cal. State Teachers' Ret. Sys., Dieter Waizenegger, Exec. Dir., CtW Inv. Grp., to Antonio Gracias, Lead Independent Dir., Tesla, Inc. (Apr. 10, 2017), http://ctwinvestmentgroup.com/wp-content/uploads/2017/04/Investor-Letter-to-Tesla-4-10-2017.pdf [https://perma.cc/4P8J-LPR5].

[12] Dana Hull, *Tesla Shareholders Urged to Remove Musk from Chairman's Role*, AUTOMOTIVE NEWS (May 21, 2018, 1:00 AM), https://www.autonews.com/article/2018 0521/OEM02/180529955/tesla-shareholders-urged-to-remove-musk-from-chairman-s-role [https://perma.cc/53HE-CGHK].

[13] Joseph Kieffer, *Separation of CEO-Chair Roles Rejected by Shareholders*, EQUILAR (July 6, 2018), https://www.equilar.com/blogs/388-separation-of-ceo-chair-roles-rejected-by-shareholders.html [https://perma.cc/5CJL-6L4Q].

[14] *See* Press Release, Sec. Exch. Comm'n, Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge (Sept. 29, 2018), https://www.sec.gov/news/press-release/2018-226 [https://perma.cc/43Q3-939Q] ("According to the SEC's complaint against him, Musk tweeted on August 7, 2018 that he could take Tesla private at $420 per share—a substantial premium to its trading price at the time—that funding for the

a Securities and Exchange Commission ("SEC") investigation and subsequently a settlement agreement stipulating that, among other penalties, Elon Musk would relinquish his chairman title to an independent chairperson for at least three years.[15] The SEC indicated that these requirements "are specifically designed to . . . strengthen[] Tesla's corporate governance and oversight in order to protect investors."[16]

The Tesla and JPMorgan shareholder campaigns, coupled with the SEC's focus on Musk's chair position, are indicative of two larger developments. First, shareholder pressure to separate the roles of CEO and chair has accelerated in recent years.[17] Institutional investors have adopted voting policies that support proposals for separation,[18] and ISS and Glass Lewis have advocated for such structures as well.[19] Glass Lewis reported in its 2018 Proxy Paper Guidelines that splitting the positions produces a "better governance structure," and allows the chairperson to "better oversee executives and set a pro-shareholder agenda without management conflicts that a CEO and other executive insiders often face."[20] Additionally, Glass Lewis reported that improved oversight allows for a "more proactive and effective board of directors that is better able to look out for the interests of shareholders."[21] Similarly, ISS generally recommends that shareholders "vote for . . . proposals requiring that the chairman's position be filled by an independent director . . . ."[22]

---

transaction had been secured, and that the only remaining uncertainty was a shareholder vote.").

[15] *Id.* This settlement has been approved by the United States District Court for the Southern District of New York. Sec. Exch. Comm'n v. Tesla, Inc., No. 1:18-cv-08947-AJN (S.D.N.Y. Oct. 16, 2018), ECF No. 14.

[16] *Id*.

[17] Lisa M. Fairfax, *Separation Anxiety: A Cautious Endorsement of the Independent Board Chair*, 47 IND. L. REV. 237, 243 (2014) (noting that shareholder support for CEO-chair separation proposals "can be considered relatively strong").

[18] *See* Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855, 875-76 (2014) (listing CII, CalSTRS, CalPERS, and TIAA-CREF as institutional investors that commonly support separation proposals); HOLLY J. GREGORY, SIDLEY AUSTIN LLP, BOARD LEADERSHIP AND THE ROLE OF THE INDEPENDENT LEAD DIRECTOR, THOMSON REUTERS PRAC. L., Westlaw W-013-3518 (Mar. 1, 2018) (noting that separation proposals are often supported by major institutional investors).

[19] *See, e.g.*, GREGORY, *supra* note 18 ("ISS has historically favored shareholder proposals calling for independent chairs."); GLASS LEWIS, GUIDELINES: AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE 5 (2018), https://www.glasslewis.com/wp-content/uploads/2017/11/US_Guidelines_2018.pdf [https://perma.cc/B38D-8MKC].

[20] GLASS LEWIS, *supra* note 19, at 5-6.

[21] *Id.* at 6.

[22] INSTITUTIONAL S'HOLDER SERVS., U.S. PROXY VOTING GUIDELINES 19 (2018), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/7N72-RCA8].

Second, some companies are ferociously pushing back on efforts to separate the roles of CEO and chair. Despite public pressure, JPMorgan and Tesla (pre-SEC settlement)[23] are among many companies that refuse to separate the CEO-chair roles and whose CEO-chairs, at least initially, survived proposals to separate the two roles. In 2017, thirty-eight Equilar 500 Companies[24] faced such proposals, all of which were ultimately rejected by shareholders.[25] Like JPMorgan, many of these companies (including Chevron, Exxon Mobil, and Walmart) had faced similar proposals in previous years.[26] Yet, while many recent shareholder proposals have not garnered adequate support, the number of companies that have separate CEO and chair roles has increased dramatically to 61% of the S&P 1500, up from approximately 43% in 2009.[27]

Although many of the proposals to separate the CEO and chair roles seek to install an independent chair while retaining the current CEO, a CEO who gives away her chair position is indicative of only *one* way in which the separation of the CEO-chair roles can occur. Less explored in the current discourse is a *second* means of separating these roles: one where the CEO-chair leaves her CEO role but remains as chair and brings on a new CEO to take her place. This is what this Article terms the "successor CEOs" phenomenon.

Take, for example, the case of Chipotle Mexican Grill. The founder and former CEO of the company, Steven Ells, had served as Chairman-CEO from 2009 through 2016 but stepped away from the CEO role in late 2017 due to investor pressure; former Taco Bell chief executive, Brian Niccol, was named his successor.[28] While Ells is no longer the CEO, he remains the executive chairman of the board.[29] Notably, Steven Ells is not the only company founder to hold on to his company in this manner. Using comprehensive data on all

[23] *See supra* text accompanying notes 14-16.

[24] Equilar 500 companies are the 500 largest companies by revenue trading on one of the major U.S. stock exchanges. *Equilar 500*, EQUILAR, https://www.equilar.com/equilar500.html [https://perma.cc/B9NQ-JMGE] (last visited Apr. 3, 2019).

[25] Kieffer, *supra* note 13.

[26] *Id.* Walmart, for example, has rejected shareholder proposals to split the CEO and chairman roles for the past five years. *Id.*

[27] KOSMAS PAPADOPOULOS ET AL., INSTITUTIONAL S'HOLDER SERVS., U.S. BOARD STUDY: BOARD ACCOUNTABILITY PRACTICES REVIEW 11 (Apr. 17, 2018), https://www.issgovernance.com/file/publications/board-accountability-practices-review-2018.pdf [https://perma.cc/GQ6Q-WBWD].

[28] Lisa Baertlein & Svea Herbst-Bayliss, *Chipotle Founder Out as CEO as Investor Patience Expires*, REUTERS (Nov. 29, 2017, 8:14 AM), https://www.reuters.com/article/us-chipotle-move-ceo/chipotle-founder-out-as-ceo-as-investor-patience-expires-idUSKBN1DT1UI [https://perma.cc/V3U5-VHJE]; Maggie McGrath, *Chipotle Taps Taco Bell Chief Brian Niccol as its Next CEO*, FORBES (Feb. 13, 2018, 5:40 PM), https://www.forbes.com/sites/maggiemcgrath/2018/02/13/chipotle-taps-taco-bell-chief-brian-niccol-as-its-next-ceo/#17e10763693f [https://perma.cc/M7UU-58CG].

[29] Baertlein & Herbst-Bayliss, *supra* note 28 (stating Ells will remain executive chairman once new CEO was selected).

companies in the S&P 1500 for the years 2010 through 2016, this Article reveals that a significant number of companies have a similar successor CEO structure. In 2016, for example, there were 217 companies in the S&P 1500 with a chairperson who had also served as the CEO of the company in the past but no longer does so.[30]

This second channel of CEO-chair separation, one that does not involve the insertion of an independent chair, but rather focuses on the CEO-chair relinquishing her CEO role while maintaining her chair title, has important corporate governance ramifications. Should investors view these companies similarly to those that transitioned to having an independent chair? Is the new CEO really free to run the company as she sees fit, or is she effectively controlled by, and operating under, the influence and clout of the CEO-turned-chair? More generally, what benefits and concerns does this structure pose from business and corporate governance perspectives?

This Article tackles these issues both empirically and normatively. First, it explores the potential normative implications of the successor CEO channel, both from a traditional management structure prism as well as against the backdrop of the corporate governance case for separation as an attempt to improve board independence vis-à-vis management. Second, this Article presents the empirical findings regarding the prevalence of the successor CEO phenomenon, its development over time, and some of the characteristics of the companies that tend to have such a structure in place, as well as the attributes of the chairpersons who relinquish their CEO hats. The empirical findings reveal that successor CEOs are a relatively prevalent form of CEO-chair separation, and that in many cases the transition is not a temporary one, but rather a long-term governance structure preference.

After establishing the prevalence of the successor CEO phenomenon, this Article underscores the tradeoff that a successor CEO structure provides to companies, especially where the former CEO is also a controlling shareholder. On the one hand, allowing the former CEO to retain power through the chair role provides a significant outlet that may encourage the CEO-chair to "pass the baton" to a new management team more qualified to take the company into the future. It also installs as chair a person with vast knowledge of the company, which would allow her to both contribute as a trusted advisor and, when needed, scrutinize management decisions more effectively. On the other hand, questions arise as to the ability of the successor CEO to act independently, and whether the CEO-now-chair may actually still control the company but in a more obscure, less optimal manner.

Similarly, from a corporate governance lens, while the successor CEO separation channel may reduce the authority that the incoming CEO has over the board's work, in many ways, it introduces an equally problematic concern—the possibility that the chair may maintain her control over the company. The

[30] *See infra* Section III.A (discussing empirical findings about successor CEOs).

successor CEO channel also provokes questions regarding the ability of a lead independent director to mitigate these issues.[31]

The rest of the Article proceeds as follows: Part I provides an overview of the board leadership structure in the United States. Part II then describes the push towards separation of the CEO and chair roles, the benefits and concerns that such separation presents, as well as the specific case of successor CEOs. Part III provides empirical data regarding the successor CEO phenomenon. Finally, Part IV outlines, in light of these findings, some of the policy considerations that the successor CEO movement presents and prescribes initial policy recommendations.

## I. COMPANY LEADERSHIP AND CORPORATE GOVERNANCE

The managerial centric model of U.S. corporations reflects an ongoing tension between the benefits of a widely-dispersed ownership structure and the costs of safeguarding the interests of investors and shareholders.[32] The widely-dispersed ownership structure presents an agency cost between management and shareholders.[33] Investors who diversify their holdings have little, if any, incentive to exert effort and spend resources on monitoring management.[34] This lack of meaningful oversight may incentivize managers to prioritize their own interests over those of the shareholders.

Recent years have revealed two important trends that have helped reduce the concern of this agency conflict. First, shareholders, both passive and active, have become noticeably more involved in corporate governance,[35] holding companies

---

[31] *See infra* Section II.B (discussing concept of lead independent director).

[32] *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 6 (1934) (characterizing management control as structure in which directors become self-perpetuating body); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Capital Structure*, 3 J. FIN. ECON. 305, 307 (1976) (noting prevalence of managerial behavior in large corporations).

[33] Agency cost can be defined as including the "costs of structuring, monitoring, and bonding a set of contracts among agents with conflicting interests." Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 304 (1983); *see also* STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 155 (2008) (providing overview of how corporate law manages agency costs and reduces transaction costs); Anita Anand, Frank Milne & Lynnette Purda, *Monitoring to Reduce Agency Costs: Examining the Behavior of Independent and Non-Independent Boards*, 33 SEATTLE U. L. REV. 809, 811-13 (2010) (discussing how shareholders have neither power nor incentive to monitor management behavior).

[34] William T. Allen & William R. Berkley, Opinion, *In Defense of the CEO Chair*, HARV. BUS. REV., Sept. 2003, at 24, 24 ("Investors with diversified holdings have little incentive to spend resources on monitoring management . . . .").

[35] *See generally* Ian R. Appel, Todd A. Gormley & Donald B. Keim, *Passive Investors, Not Passive Owners*, 121 J. FIN. ECON. 111 (2016) (finding that presence of increased ownership by passive investors results in more independent directors, removal of takeover defenses, and more equal voting rights, as well as better long-term performance); Lucian A.

and management accountable for their actions.[36] Second, a focus on corporate boards as the first line of defense in representing shareholder interests has emerged.[37] A common thread running through these efforts involves a focus on board independence that has ranged from new federal legislation, following the Sarbanes-Oxley and Dodd-Frank Acts,[38] to investors'[39] and scholars' focus on

Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89 (2017) (describing rise of index investing and its impact on corporate governance); Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987 (2010) (noting rise of proxy advisor firms coupled with institutional investors, hedge funds, and mutual funds' more substantial involvement in activism has contributed to shift in power between CEOs, boards, and shareholders in last decade); Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018) (discussing harmful consequences of passive shareholder voting); Ian R. Appel, Todd A. Gormley & Donald B. Keim, *Standing on the Shoulders of Giants: The Effect of Passive Investors on Activism* (Nat'l Bureau of Econ. Research, Working Paper No. 22707, 2018) (documenting connection between passive investors and hedge fund activism); Jill E. Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, U. PA. L. REV (forthcoming 2019) (discussing incentives of passive institutional investors).

36 *See, e.g.*, Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43, 44 (2003) (arguing that increased shareholder access to ballots could moderately improve corporate value and performance); Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1087 (2015) (highlighting recent increase in shareholder activism); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1024 (2007) ("Hedge funds have become critical players in both corporate governance and corporate control."); Yaron Nili, *The "New Insiders": Rethinking Independent Directors' Tenure*, 68 HASTINGS L.J. 97, 106-07 (2016) (explaining potential impact of shareholder franchise on corporate governance).

37 Sydney Finkelstein & Richard A. D'Aveni, *CEO Duality as a Double-Edged Sword: How Boards of Directors Balance Entrenchment Avoidance and Unity of Command*, 37 ACAD. MGMT. J. 1079, 1081 (1994) ("Agency theorists have identified boards of directors as a primary monitoring device protecting shareholder interests."); *see also* Lucian A. Bebchuk, Essay, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 679 (2007) ("The members of the board have a fiduciary duty to the corporation and are expected to serve as the shareholders' guardians."); Nili, *supra* note 36, at 106-07 (noting shift in perception from board of directors as advisory institution for management to watchdog defending shareholder interests). Furthermore, the passage of the Sarbanes-Oxley Act ("SOX") signaled a shift toward increasing board responsibilities, cementing its primary role as a monitor, not an advisor. For example, SOX mandated the creation of an audit committee of the board that has greater powers and many more responsibilities than ever before, such as working with external auditors of internal controls. *See* Melissa Maleske, *8 Ways SOX Changed Corporate Governance*, LAW.COM (Jan. 1, 2012, 12:00 AM), https://www.law.com/almID/4ef21def160ba06e2f000188/.

38 THOMSON REUTERS, CHAIRMAN AND CEO SPLIT: UNDERSTANDING THE PROS AND CONS, THOMSON REUTERS PRAC. L., Westlaw 3-518-0297 (noting that Sarbanes-Oxley and Dodd-Frank led to calls for increased board independence).

39 *See Commonsense Principles 2.0*, GOVERNANCE PRINCIPLES, http://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf

board independence,[40] as well as the increasing reliance on approval of conflicted transactions by independent directors in Delaware courts.[41]

Recently, shareholders have pushed to separate the CEO and chairperson of the board positions in favor of an "independent" chair as a method to improve board independence. In connection with such a push, companies have also been expected to appoint a lead independent director where such separation is lacking.[42] This Part describes the role of the board of directors in the governance of the corporation, emphasizing the importance of the chair's role to the board and the corporation itself. It then discusses, in detail, the potential benefits and drawbacks to splitting the roles of the CEO and the chair.

### A. *The Board of Directors' Role in the Governance of the Corporation*

As the core organ of the modern corporation,[43] the board of directors is responsible for several important roles in the governance of the corporation. First, the board is an active participant in making the corporation's important business decisions, including decisions about mergers, stock issuance, and change of company governance documents.[44] In turn, the board often delegates most of the day-to-day operational decision making to management.[45] Second, the board serves as a critical resource to management. Management often looks to the board for insight and advice, and the board provides networking benefits

[https://perma.cc/7QCV-YRQT] (last visited Apr. 3, 2019) (outlining series of corporate governance principles for public companies, endorsed by numerous major corporations and investors).

[40] *See* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1472-99 (2007) (exploring history and mechanisms leading to rise of independent directors); Nili, *supra* note 36, at 108-12 (discussing shift in board structure towards independent directors post SOX and Dodd-Frank).

[41] Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1275 (2017) (noting that Delaware courts rely substantially on independent directors' decisions in derivative actions).

[42] *See* Eli DuBosar, *Separate CEO and Chairman Roles: A Biennial Determination Shareholders Should Be Empowered to Make*, 13 FLA. ST. U. BUS. REV. 157, 166 (2014) ("The appointment of a lead director has emerged as a possible alternative to splitting the CEO and chairman positions in many corporations."); Gordon, *supra* note 40, at 1495 (explaining emergence of role of independent lead director); Thuy-Nga T. Vo, *To Be or Not To Be Both CEO and Board Chair*, 76 BROOK. L. REV. 65, 75 (2010) (noting that lead directors are used "to address conflicts of interest and agency-cost concerns that are inherent in duality").

[43] Melvin Aron Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 CALIF. L. REV. 375, 376 (1975) (referring to board of directors as middle level of pyramidal corporate operating form).

[44] *See* STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 40 (2012).

[45] *See id.* at 41 (observing that boards have authority to "delegate virtually all management functions to senior corporate officers").

and facilitates the firm's access to various resources.[46] Third, the board is charged with a monitoring role.[47] As a fiduciary to the corporation's shareholders,[48] the board is entrusted with representing shareholders' interests vis-à-vis management,[49] and therefore is meant to constrain the agency costs associated with the managerial-centric corporation model.[50]

While the board as a whole accomplishes these goals to various degrees, the role of the chair, as the leader of the board, cannot be understated. Though the specific responsibilities of the chair can vary by company,[51] they generally involve serving as the liaison between the board and the C-suite, facilitating clear communication and clean transfer of information between the two leadership groups.[52] Other responsibilities include presiding over board meetings, setting the board's agenda, approving or disapproving financial transactions, consulting on policy matters, determining executive salaries, and facilitating the succession of management.[53] The chair is also often responsible for communicating with the shareholders on behalf of the board as necessary.[54] Additionally, the chair carries significant clout in the boardroom, enabling her to exert influence during board deliberations and prior to important votes.[55]

[46] *See id*. at 44 ("A core service provided by boards of directors . . . is providing advice and counsel to the CEO.); *cf.* Adam B. Badawi, *Influence Costs and the Scope of Board Authority*, 39 J. CORP. L. 675, 678 (2014) (arguing that boards experience "influence costs," which affect board's decision to exert authority).

[47] *See* BAINBRIDGE, *supra* note 33, at 160-62 (2008) (detailing role of the board in monitoring management); BERLE, JR. & MEANS, *supra* note 32, at 6 (discussing management control); JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 50 (2008) (listing major corporate governance mechanisms for U.S. public companies); Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 268-72 (1997) (discussing development of modern monitoring board).

[48] Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 MINN. L. REV. 541, 583 (2010).

[49] *See* BAINBRIDGE, *supra* note 44, 41-44 (detailing board's role and its importance in governance of the firm).

[50] *See* JEREMY BACON & JAMES K. BROWN, CORPORATE DIRECTORSHIP PRACTICES: ROLE SELECTION AND LEGAL STATUS OF THE BOARD 7 (1975); BAINBRIDGE, *supra* note 33, at 190.

[51] In fact, one chief executive describes the role of chairman in the following way: "[T]here are no established functions of a Chairman." JOHN CALHOUN BAKER, DIRECTORS AND THEIR FUNCTIONS: A PRELIMINARY STUDY 120 (Arno Press 1973).

[52] *See id.* at 123-25.

[53] *See* JEREMY BACON & JAMES K. BROWN, THE BOARD OF DIRECTORS: PERSPECTIVES AND PRACTICES IN NINE COUNTRIES 102 (1977); BAKER, *supra* note 51, at 123-25.

[54] BACON & BROWN, *supra* note 53, at 102 ("[The chair] communicates to stockholders on behalf of the board as necessary.").

[55] DuBosar, *supra* note 42, at 165-66 ("[The chair] leads the board and board meetings, giving the position significant influence despite not being per se in charge of fellow directors.").

Therefore, in formal and informal ways,[56] the chair leads the board in its decision-making, advising, and monitoring.

Importantly, while each board of directors is tasked with the three primary roles of decision-maker, advisor, and monitor, the core expectation of the board in the governance of the corporation has shifted over the last few decades; specifically, the advisory role has taken a backseat to its monitoring role.[57] In fact, it is not unusual for the board to delegate much of its management authority to the corporation's officers.[58] While the officers are primarily responsible for managing the corporation's day-to-day activities, the board is primarily responsible for monitoring management and ensuring that the executives are not advancing their own priorities over those of the shareholders.[59] This "monitoring board structure" has become the predominant model for boards in the United States.[60] Simply put, boards of directors are tasked with protecting shareholders' interests, and have been described as "the shareholders' first line of defense against incompetent management."[61]

The shift of emphasis to the monitoring role of the board has sparked a robust debate surrounding the proper composition of the board.[62] Now, more so than ever, the presence of directors perceived by the corporation and the public to be "independent" has become a norm.[63] Shareholders today value the ability, or at

[56] BACON & BROWN, *supra* note 53, at 102.

[57] Yaron Nili, *Out of Sight, Out of Mind: The Case for Improving Director Independence Disclosure*, 43 J. CORP. L. 35, 43-44 (2017).

[58] Vo, *supra* note 42, at 68-69.

[59] *See id.* at 68.

[60] *See* BAINBRIDGE, *supra* note 33, at 160 (detailing emergence of monitoring structure over the last few decades); MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 139-41 (1976).

[61] Finkelstein & D'Aveni, *supra* note 37, at 1081.

[62] *See, e.g.*, Sanjai Bhagat & Bernard S. Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 921-24 (1999) (discussing changing roles and composition of corporate boards and management); Gordon, *supra* note 40, *passim* (exploring ramifications of rise of independent directors as it relates to the maximization of shareholder value); Claire Hill & Brett McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporation Law*, 4 VA. L. & BUS. REV. 333, 337 (2009) (noting that Delaware case law has helped promote monitoring role of board, but arguing that corporate law is not the most effective means for combating structural bias in executive pay).

[63] Gordon, *supra* note 40, at 1468 ("The move to independent directors . . . has become in some respects a mandatory element of corporate law."); *see also* BAINBRIDGE, *supra* note 33, at 2 (noting that boards are increasingly independent from management and are becoming less deferential); Stephen M. Bainbridge, *Independent Directors and the ALI Corporate Governance Project*, 61 GEO. WASH. L. REV. 1034, 1037 (1993) (noting that first draft of ALI Corporate Governance Project would have required "independent directors [to] comprise a majority of the board of directors of a large publicly held company"); Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487, 522-23 (noting that directors' and officers'

least the perception of the ability,[64] to effectively scrutinize management through independent boards over the ability of the board to provide networking, business advice, and insight.[65] It has been suggested that "[o]ne of the most glaring deficiencies attributed to the corporate board by its critics is its failure to monitor and evaluate the performance of the chief executive in a concrete way."[66] Shareholders want the board to serve as the ultimate check on management, which controls the firm's day-to-day operations and often has interests adverse to those of the shareholders.[67]

The importance of board independence also stems from the increased reliance on independent directors under Delaware law. With over 66% of the Fortune 500 companies incorporated in Delaware,[68] Delaware has long dominated and is frequently used as a benchmark in American corporate law.[69] Delaware courts utilize independence assessments when evaluating shareholder derivative actions[70] meant to "encourage companies to appoint independent directors and assign them a meaningful role."[71] Under Delaware law, independent status is determined on a case-by-case basis under a factual analysis.[72] When a challenge to a director's independence arises, Delaware courts examine "whether the director's decision is based on the corporate merits of the subject before the

liability insurers, as financiers of shareholder litigation, take into account board independence in underwriting coverage).

[64] Kahan & Rock, *supra* note 35, at 1023-33 (discussing increased nominal independence on boards but questioning reality of increased independence); Nili, *supra* note 57, at 44 ("[T]he ability to, or at the very least the perception of an ability to, effectively scrutinize management has become increasingly important.").

[65] *See* BAINBRIDGE, *supra* note 33, at 173-87; EISENBERG, *supra* note 60, at 139-41; Nili, *supra* note 57, at 43.

[66] BACON & BROWN, *supra* note 50, at 21.

[67] *See id.* at 19-20.

[68] *Annual Report Statistics: A Message from Secretary of State – Jeffrey W. Bullock*, DEL. DIV. OF CORPS. (2017), https://corp.delaware.gov/stats/ [https://perma.cc/7TKY-SLSY].

[69] Michal Barzuza, *Self-Selection and Heterogeneity in Firms' Choice of Corporate Law*, 16 THEORETICAL INQUIRES L. 295, 299-304 (2015) (discussing reasons for Delaware's rise to dominance in corporate law); Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 966 (1995) ("Since the 1920s, Delaware has dominated all other states in [the] competition for corporate charters.").

[70] Bebchuk & Hamdani, *supra* note 41, at 1275 ("For example, Delaware courts substantially rely on independent directors to make decisions regarding derivative actions against the controller.").

[71] *Id.* at 1281.

[72] Maureen S. Brundage & Oliver C. Brahmst, *Director Independence: Alive and Well Under Delaware Law*, *in* GLOBAL CORPORATE GOVERNANCE GUIDE (2004), http://www.globalcorporategovernance.com/n_namericas/116_120.htm [https://perma.cc/CK8Y-5AAF] (supporting Delaware's approach); Nili, *supra* note 57, at 39 (noting that Delaware law treats the issue of independence on a factual, case-by-case basis).

board, rather than extraneous considerations or influences."[73] The Delaware Supreme Court recently issued a decision in *Sandys ex rel. Zynga Inc. v. Pincus*,[74] which incorporated NASDAQ independence standards as well as personal and professional relationships into the court's determination that three of Zynga, Inc.'s board members were not independent.[75] Prior to this case, Delaware courts were wary to consider personal friendships alone as disqualifying a director from independent status.[76] This heightened level of scrutiny on director independence is connected to the increased utilization of independent directors as a "cleansing" mechanism by Delaware courts.[77]

### B. *The Lead Independent Director*

To increase board independence, or at least the perception of it, some companies have started appointing a lead independent director in conjunction with a CEO-chair to counterbalance a non-independent chairperson. Appointing a lead independent director has become best practice for companies that have maintained a combined CEO-chair role.[78] This is partly the result of a New York Stock Exchange listing requirement that companies have non-management

[73] Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1049 (Del. 2004).

[74] 152 A.3d 124 (Del. 2016).

[75] *Id.* at 126.

[76] *See Stewart*, 845 A.2d at 1050 (emphasizing that evidence regarding social, professional, or outside business relationships would normally be insufficient to discredit director's independence); Litt v. Wycoff, No. 19083-NC, 2003 WL 1794724, at *4 (Del. Ch. Mar. 28, 2003) (noting that even longstanding personal friendships would not impede director's independence); Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963, 980-81 (Del. Ch. 2000) (stating that fifteen-year personal relationship is insufficient to impact independence inquiry); *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 352 (Del. Ch. 1998) (reasoning that twenty-five year friendship between CEO and President did not impact CEO's ability to be deemed independent for purposes of assessing derivative action against President); *cf.* Del. Cty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1023 (Del. 2015) (holding that decades-long friendship combined with professional ties sufficient to question director independence at pleadings stage).

[77] Gail Weinstein, Robert C. Schwenkel & Steven J. Steinman, Fried Frank, Harris, Shriver & Jacobson LLP, *Controlling Shareholder Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 26, 2018), https://corpgov.law.harvard.edu/2018/04/26/controlling-shareholder-transactions/ [https://perma.cc/U49A-CJK3] ("If a conflicted controller merger, from the outset, is subject to the conditions of approval by *both* a special committee of independent directors (that is fully authorized and functions effectively) *and* a majority of the unaffiliated stockholders (in a fully informed and uncoerced vote), then . . . entire fairness would not apply and the deferential business judgment standard would apply instead.").

[78] Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283, 1289 n.22 (1998) (noting that "various best practices documents exhibit consensus as to the importance of director independence").

directors hold regularly scheduled executive sessions without management, overseen by a "presiding" director.[79]

The lead director role has grown in both popularity and power, as more and more firms elect to designate a lead independent director and have tailored the position's responsibilities to the unique needs of the firm.[80] Proxy advisor Glass Lewis has noted that declining support for proposals calling for independent chairpersons (which decreased from 31.5% in 2014 to 28.9% in 2016) could be tied to the creation or the strengthening of lead independent director roles.[81] Indeed, in 2017, only 11% of companies in the S&P 1500 had neither a lead independent director nor an independent chair, which is marked improvement over 2009 where 33% of the companies lacked either position.[82] Moreover, lead independent directors account for a large percentage of these companies, with 54% of companies having a lead independent director and only 35% having an independent chair.[83] Additionally, S&P 500 firms favor the lead independent director approach as opposed to instituting an independent chair, with 59% of such firms reporting a lead independent director in 2018.[84]

The lead independent director generally performs three primary tasks. First, she serves as an additional point of contact for shareholders, who may hear from the chair of the board as little as once per year.[85] Second, the lead independent

---

[79] N.Y. STOCK EXCH., LISTED COMPANY MANUAL § 303A.03 cmt. (2013), http://wallstreet.cch.com/LCMTools/PlatformViewer.asp?selectednode=chp_1_4_3_6&manual=%2Flcm%2Fsections%2Flcm-sections%2F [http://perma.cc/778H-BLGF] ("To promote open discussion among the non-management directors, companies must schedule regular executive sessions in which those directors meet without management participation."); THOMSON REUTERS, LEAD DIRECTOR: UNDERSTANDING AND FILLING THE ROLE, THOMSON REUTERS PRAC. L., Westlaw 5-519-6933 (noting that NYSE listing requirements require companies to have regular meetings of non-management directors).

[80] THOMSON REUTERS, *supra* note 79 (highlighting various responsibilities of lead independent director).

[81] Amy Lee Rosen, *Support for Independent Chairmen Waning, Proxy Firm Finds*, CQ ROLL CALL WASH. CORP. GOVERNANCE BRIEFING (June 20, 2016), 2016 WL 3382203 (suggesting decreased support for independent chairpersons because companies have either created or strengthened the lead independent director's responsibilities).

[82] PAPADOPOULOS ET AL., *supra* note 27, at 10 (noting institutional investors' independence proposals are gaining traction after having long encouraged boards to appoint independent board leaders).

[83] *Id.* at 10-11.

[84] Steve Klemash, Jamie C. Smith & Kellie C. Huennekens, EY Ctr. for Bd. Matters, *Today's Independent Board Leadership Landscape*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Nov. 20, 2018), https://corpgov.law.harvard.edu/2018/11/20/todays-independent-board-leadership-landscape/ [https://perma.cc/ZE59-YAAN].

[85] Marion Plouhinec Legal & Gen. Inv. Mgmt. Ltd., *The Role of the Lead Independent Director*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Nov. 25, 2018), https://corpgov.law.harvard.edu/2018/11/25/the-role-of-the-lead-independent-director/#more-112844 [https://perma.cc/DSL2-ZPJX] ("The LID provides an important point of contact for principal shareholders to raise issues and concerns . . . .").

director supports other directors by serving as an alternative avenue for communication on the board, mediating any disputes that arise among board members.[86] Third, and perhaps most importantly, the lead independent director supports and monitors the chair of the board, serving as a check on the chair on behalf of shareholders (similar to the check the chair is meant to perform on the CEO and executive management).[87] The lead independent director also oversees the relationship between the CEO and chairperson, ensuring they do not become too "dependent" on one another.[88] Therefore, this role becomes even more critical where the CEO and chair are the same person, or so intertwined that the chairperson's evaluation of management may be insufficiently independent. Under this last role of supporter and monitor, the lead independent director is also tasked with leading the performance evaluation of the chair and, when necessary, leading the search for a new chairperson.[89]

In addition to these general roles, the specific responsibilities of a lead independent director vary by company,[90] but she "essentially serves as an independent chief for the board and provides an alternative to splitting the chairman and CEO roles."[91] One CEO went as far as to say that "there is little difference between the role of lead [independent] director and the non-executive chair."[92] While the lead independent director may not carry the same clout in the boardroom as does the chairperson, she does retain more responsibility than does a presiding director.[93] Indeed, many companies have used the lead independent director as a bargaining chip with activist investors to avoid having to bring a proposal to split the CEO and chair roles to a vote at all.[94]

---

[86] *Id.* (noting alternative avenue of communication is especially useful when board members "have concerns which they believe have not been properly considered by the chair or board as a whole").

[87] *Id.* ("As the board chair is to the CEO, so the [independent director] is to the board chair.").

[88] *Id.* (asserting independent director should ensure that chairperson-CEO relationship is well-functioning without becoming "too close or powerful").

[89] *Id.*

[90] *Independent Board Leadership*, COUNCIL OF INSTITUTIONAL INV., https://www.cii.org/independent_board [https://perma.cc/8J6Q-NUY8] (last visited Apr. 3, 2019).

[91] Lisa Baertlein & Aishwarya Venugopal, *Chipotle Shareholders Pull Vote to Split CEO, Chairman Jobs*, REUTERS (Mar. 30, 2017), https://www.reuters.com/article/us-chipotle-board-idUSKBN17131F [https://perma.cc/B4YT-3HU5].

[92] Deborah Scally, *How Sweet It Is! One-on-One with Jim Nevels*, *in* NYSE CORPORATE GOVERNANCE GUIDE 61, 64 (2014).

[93] Klemash, Smith & Huennekens, *supra* note 84 (noting independent director's role is "more robust than that of a presiding director").

[94] *See* Eric D. Roiter, *Disentangling Mutual Fund Governance from Corporate Governance*, 6 HARV. BUS. L. REV. 1, 45 n.168 (2016) (explaining that certain companies create independent director role instead of nominating independent director to be chair).

For instance, investment bank Goldman Sachs agreed to enhance the roles and responsibilities of then lead independent director, James Schiro, by "allowing him to write directly to shareholders, set the board agenda and hold more board meetings for only outside directors."[95] In exchange, institutional investor CtW withdrew its motion to separate the CEO and chairperson roles. Dieter Waizenegger, executive director of CtW, assured that "[CtW] gained really enough comfort that at this point the lead director can be a check to the chief executive's role on the board."[96]

CtW, along with investor Amalgamated Bank, struck a similar deal with Chipotle Mexican Grill Inc. in early 2017, prior to Chipotle separating the roles later that year.[97] Chipotle agreed to strengthen its lead director position by, among other things, making it customary for its lead independent director, Neil Flanzraich, to write an annual letter to the shareholders, in addition to the letter shareholders received from Chipotle's chairman.[98] In fact, communication to shareholders through a written letter is quite customary among lead independent directors,[99] and serves as an effective tool for signifying the importance and authority of the lead independent director, which subsequently builds trust of the board among shareholders.[100]

### C. *Disclosure*

The push towards director independence, and the importance of an independent leader in the boardroom, has also led to regulatory amendments to the disclosure requirements of public companies. The SEC published a host of new disclosure requirements following the 2008 financial crisis and several large corporate scandals, aiming to "improve the disclosure around risk, compensation, and corporate governance . . . increasing accountability and directly benefiting investors."[101] These requirements compel corporations to disclose certain information about their board composition.[102] Therefore, as of February 2010, corporations must disclose their board leadership structure and

---

[95] Tom Braithwaite, *Blankfein Avoids Vote but Dimon on the Hook*, FIN. TIMES (Apr. 10, 2013), https://www.ft.com/content/48f702ba-a204-11e2-8971-00144feabdc0.

[96] *Id.*

[97] Baertlein & Venugopal, *supra* note 91.

[98] *Id.*

[99] Klemash, Smith & Huennekens, *supra* note 84 ("In 2018, 15% of S&P 500 companies included a letter to shareholders either from the independent board leader alone or jointly from the independent board leader and the CEO, which is three times the number in 2015.").

[100] *Id.* (asserting that letter from independent lead director "highlights that individual's role and can showcase the strength and authority of that independent position vis-a-vis the CEO").

[101] Press Release, Sec. Exch. Comm'n, SEC Approves Enhanced Disclosure About Risk, Compensation and Corporate Governance (Dec. 16, 2009), https://www.sec.gov/news/press/2009/2009-268.htm [https://perma.cc/WE93-XZTB].

[102] *Id.* (requiring disclosure of each directors' experience, qualifications, attributes, skills, and other held roles).

explain why the corporation believes that structure is most appropriate given the corporation's specific circumstances.[103] Furthermore, corporations must disclose whether they have chosen to combine the roles of CEO and chair, as well as the reasons underlying their decision to either separate or combine the positions.[104] If companies combine the roles, they must disclose whether and why the company has a lead independent director and the specific role the lead independent director plays in the leadership of the company.[105]

However, the SEC has stated that the disclosure requirement is intended to provide clarity for investors, not to influence the company's structure as "different leadership structures may be suitable for different companies."[106] Indeed, in practice, and in line with the SEC's stated intentions, this disclosure requirement on its own did not appear to have a strong effect on companies: in 2013, only 4% of the S&P 500 disclosed an explicit policy of separating the two roles, while the rest of the disclosures merely stated that whether the roles are separated is determined on a "case-by-case basis."[107]

## II. CEO-Chair Separation and Successor CEOs

The role and definition of independent directors has been a hot corporate governance topic in recent years.[108] The focus of this Article, however, is not the

[103] Proxy Disclosure Enhancements, 74 Fed. Reg. 68334, 68365 (Dec. 23, 2009) (amending 17 C.F.R. §§ 229, 239-40, 249, 274) (requiring new disclosure about board's leadership structure and reasons why company believes it is the most appropriate structure at time of filing).

[104] *Id.* at 68345 ("Disclosure of a company's board leadership structure and the reasons the company believes that its board leadership structure is appropriate will increase the transparency for investors as to how the board functions.").

[105] *Id.* at 68365.

[106] *Id.* at 68344 ("In proposing this requirement, we noted that different leadership structures may be suitable for different companies depending on factors such as the size of a company, the nature of a company's business, or internal control considerations, among other things. Irrespective of the type of leadership structure selected by a company, the proposed requirements were intended to provide investors with insights about why the company has chosen that particular leadership structure."); *see also* Charles Tribbett, *Splitting the CEO & Chairman Roles—Yes or No?*, CORP. BOARD, Nov.-Dec. 2012, at 11, 14-18 (highlighting case studies of companies choosing to split or not split the roles, sometimes after shareholder proposals).

[107] Kerry E. Berchem et al., *Split Decision: Whether to Separate the CEO and Board Chair Positions*, AKIN GUMP STRAUSS HAUER & FELD LLP (Dec. 30, 2013), https://www.akingump.com/en/experience/practices/corporate/ag-deal-diary/split-decision-whether-to-separate-the-ceo-and-board-chair.html [https://perma.cc/GW9N-EMU4]; *see also* Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 603 (2013) (arguing that increased disclosure is ineffective in preventing another financial crisis and a mere political solution to deeper problems).

[108] *See generally* NYSE CORPORATE GOVERNANCE GUIDE, *supra* note 92 (providing various articles discussing value of independent chairs and directors); Matteo Tonello, The

independence of *all* directors, but rather the independence of the chair alone. Particularly, this Article discusses independence of the chairperson in cases where the chairperson previously served as the CEO-chair, as well as the unique positon in which the new successor CEO is placed.

To begin, it is important to note that separating the CEO and chair roles was not common in the United States until recently; rather, the vast majority of U.S. corporations had a dual CEO-chair position as late as the end of the financial crisis.[109] This was unique to the United States, because in most of Europe and Canada, the majority practice is to separate the roles.[110] Within the last decade, however, shareholders, institutional investors, and proxy advisory firms have heightened the pressure on U.S. firms to separate the positions and install an independent chair.[111]

Institutional investors that favor independent board leadership include CalPERS, CalSTRS, the New York City Pension Funds, and TIAA.[112] Proxy advisors are similarly supportive of separation. In its 2018 guidelines, Glass Lewis stated that it "believes that separating the roles of CEO (or, more rarely, another executive position) and chair creates a better governance structure than a combined CEO/chair position," noting that they "typically recommend that our clients support separating the roles of chair and CEO whenever that question is posed in a proxy (typically in the form of a shareholder proposal), as we believe that it is in the long-term best interests of the company and its shareholders."[113]

---

Conference Bd., *Separation of Chair and CEO Roles*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 1, 2011), https://corpgov.law.harvard.edu/2011/09/01/separation-of-chair-and-ceo-roles/#2b (asserting formal independence does not equate with independence in the mind of other board members).

[109] Aiyesha Dey, Ellen Engel & Xiaohui Liu, *CEO and Board Chair Roles: To Split or Not to Split?*, 17 J. CORP. FIN. 1595, 1595 (2011) ("Historically, an overwhelming majority of U.S. firms (between 75 and 80%) have chosen to combine the role of CEO and chairman of the board."); *see also* Vo, *supra* note 42, at 73 (stating "duality" of corporate structure is "pervasive" in corporate America).

[110] THOMSON REUTERS, *supra* note 38 (stating separate chairperson and CEO roles "are the norm by a wide margin" in the United Kingdom and Europe).

[111] *See, e.g.*, John Laide, *Issue Focus: Separate Chairman and CEO*, SHARKREPELLENT (Sept. 18, 2015), https://www.sharkrepellent.net/pub/rs_20150918.html [https://perma.cc/7BH7-GHKW] (reporting that shareholder activists have continuously lobbied companies to appoint an independent chairman); *Proxy Firms Recommend JPMorgan Shareholders Vote Against Pay Plan*, REUTERS (May 6, 2015, 12:58 PM), https://www.reuters.com/article/us-jpmorgan-pay/proxy-firms-recommend-jpmorgan-shareholders-vote-against-pay-plan-idUSKBN0NR1XY20150506 [https://perma.cc/YZZ9-9UR4] (reporting that ISS recommended stripping JPMorgan Chase CEO Jamie Dimon from his chairmanship); Tonello, *supra* note 108 (indicating investors more carefully scrutinize governance structures allowing CEO-chairs following financial downturns).

[112] GREGORY, *supra* note 18 (noting major institutional investors and proxy advisors commonly support independent chair proposals).

[113] GLASS LEWIS, *supra* note 19, at 5-6.

ISS, in its 2018 proxy voting guidelines, also recommended voting for independent positions. It stated that it would "[g]enerally vote for shareholder proposals requiring that the chairman's position be filled by an independent director," considering the "scope of the proposal; [t]he company's current board leadership structure; [t]he company's governance structure and practices; [c]ompany performance; and [a]ny other relevant factors that may be applicable."[114]

Indeed, the view of many institutional investors that companies should separate the roles is reflected in the incidence and support rate of proposals to separate the two positions. From 2012 to 2016, shareholder proposals for independent chairmen were the most popular or second most popular among governance-related proposals.[115] In 2017, shareholder proposals requesting an independent chair were the third most frequent shareholder proposal overall.[116] These proposals remained one of the most popular governance proposals in 2018, with forty-six proposals going to a shareholder vote from S&P 1500 companies.[117]

Though no shareholder proposals to separate the positions have passed since 2015,[118] the average shareholder support of these proposals has remained relatively strong since 2012, ranging from 29% to 35%.[119] In 2017, these proposals received an average of 30% of votes, with nine proposals receiving 40% or more of the votes cast.[120] Most recently, support from primary proxy advisors seems to play a role: in 2018, proposals with ISS support received an average of 34% of votes, and independent chair proposals without ISS support

[114] INSTITUTIONAL S'HOLDER SERVS., *supra* note 22, at 19.

[115] Yafit Cohn, *Independent Chair Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE. & FIN. REG. (Aug. 22, 2016) [hereinafter Cohn, *Independent Chair Proposals*], https://corpgov.law.harvard.edu/2016/08/22/independent-chair-proposals-2/ [https://perma.cc/M5KR-MUHZ]; *see also* Yafit Cohn, *Issuers' CEO/Chairman Structure Not Correlated with Firm Performance*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 31, 2017), https://corpgov.law.harvard.edu/2017/07/31/issuers-ceochairman-structure-not-correlated-with-firm-performance [https://perma.cc/557G-2U56].

[116] James R. Copland & Margaret M. O'Keefe, *Proxy Monitor 2017: Season Review*, PROXY MONITOR (Fall 2017), http://www.proxymonitor.org/Forms/pmr_15.aspx [https://perma.cc/KU4V-5AUE].

[117] GEORGESON & PROXY INSIGHT, 2018 ANNUAL CORPORATE GOVERNANCE REVIEW 11 (2018), http://www.georgeson-na.com/acgr/pdf/ACGR2018.pdf [https://perma.cc/AQ45-QULU].

[118] SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW 2 (July 12, 2018), https://www.sullcrom.com/files/upload/SC-Publication-2018-Proxy-Season-Review.pdf [https://perma.cc/JR6R-QJBT] (explaining that proposals for independent chairs remained common but none passed). Between 2012 and 2015, the passage rate of independent chair proposals ranged from 3.2% to 8.3%. *See* Cohn, *Independent Chair Proposals*, *supra* note 115.

[119] Cohn, *Independent Chair Proposals*, *supra* note 115.

[120] GREGORY, *supra* note 18.

received an average of 24% of votes.[121] Overall, in 2018, of the forty-six proposals that went to a shareholder vote, 31.9% of the votes were cast in favor of the separation.[122] This remains consistent with previous years.

Importantly, in today's governance landscape, support levels of 30% or more by investors are considered nearly as significant as those proposals receiving a majority of the votes,[123] and many companies are pressured to adjust their governance or pay practices when shareholders cross the 30% threshold, thereby expressing their shared concern regarding various governance issues.[124]

Looking more closely at the voting patterns of the largest institutional investors, Figure 1 below demonstrates that while many institutional investors are still likely to support management's preference for a combined CEO-chair role, the rate of support for proposals asking for separation has been trending up, reaching a high of 40% of the aggregate votes of the top twenty institutional investors in the most recent proxy season.

And while some of the largest institutional investors like Fidelity and Vanguard have consistently voted against such proposals, Blackrock, BNY Mellon, and State Street have voted in favor of such proposals more frequently in recent years.[125]

[121] *See* SULLIVAN & CROMWELL LLP, *supra* note 118, at 21.

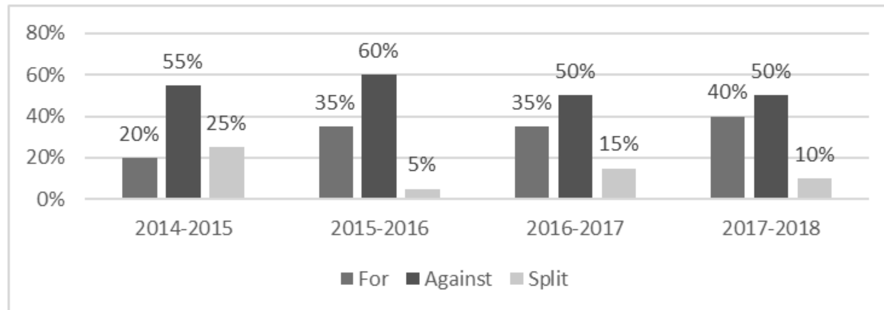
[122] GEORGESON & PROXY INSIGHT, *supra* note 117, at 11.

[123] Sec. Exch. Comm'n, Transcript of SEC Proxy Voting Roundtable 91-92 (Feb. 19, 2015), https://www.sec.gov/spotlight/proxy-voting-roundtable/proxy-voting-roundtable-transcript.txt [https://perma.cc/MA3N-WAD7] (suggesting that 20% to 30% dissenting votes often leads to increased retail investor activity); *see also* Peter Iliev et al., *Shareholder Voting and Corporate Governance Around the World*, 28 REV. FIN. STUD. 2167, 2188-91 (2015) (finding that greater dissent voting is associated with higher director turnover).

[124] Sec. Exh. Comm'n, *supra* note 123, at 102 (reporting comments of attorney Alan Beller stating, "What I think is changing is as some people have said, twenty or thirty is now an important number in terms of things. You didn't have Say on Pay ten years ago, you didn't have vote no campaigns ten years ago and twenty to thirty is the new fifty, and I think what we're seeing some of the developments of encouraging retail to vote more and some of this retail catching on to vote more is a recognition that, if outcome determinative is twenty-five, retail is much more important than if outcome determinative is [fifty-one].").

[125] *Require Independent Board Chairman*, PROXY INSIGHT, www.proxyinsight.com (last visited Apr. 3, 2019).

**Figure 1.** Aggregate Top-20 Institutional Investors Voting Patterns on Independent Chair Proposals.[126]




As a result, over the last decade, the number of corporations that separated the chairperson and CEO role has dramatically increased.[127] While in 2007, 35% of S&P 500 boards had split the role,[128] the number of firms with a separate chairperson and CEO gradually increased to 48% in 2015,[129] 51% in 2017,[130] and 52% in early 2019.[131] Stronger trends can be found in the S&P 400 and S&P 600 where 62% and 68% of boards, respectively, had a separate chairperson in 2017.[132] As many as 60% of S&P 1500 boards have separated the roles in 2018—over twice as many as the 27% in 2000.[133]

---

[126] Graphs comprised based on information of aggregate voting records available at Proxy Insight from 2015 up to October 2018. PROXY INSIGHT, www.proxyinsight.com (last visited Apr. 3, 2019).

[127] Vo, *supra* note 42, at 74 ("According to a study of . . . 1,500 companies . . . during the period from 1996 to 2005, the percentage of companies with a combined CEO-Chair steadily decreased from 76% in 1996 to 69% in 2000 and 60% in 2005.").

[128] Velikonja, *supra* note 18, at 866.

[129] David F. Larcker & Brian Tayan, *Chairman and CEO: The Controversy Over Board Leadership Structure*, STAN. CLOSER LOOK SERIES, June 24, 2016, at 5.

[130] SPENCER STUART, 2017 SPENCER STUART U.S. BOARD INDEX 6 (2017), https://www.spencerstuart.com/~/media/ssbi2017/ssbi_2017_final.pdf [https://perma.cc/93YF-4XWJ].

[131] *Board Leadership Structure*, ERNST & YOUNG, https://www.ey.com/us/en/issues/governance-and-reporting/ey-corporate-governance-by-the-numbers#boardleadership [https://perma.cc/LMC3-57FA] (last visited Apr. 3, 2019).

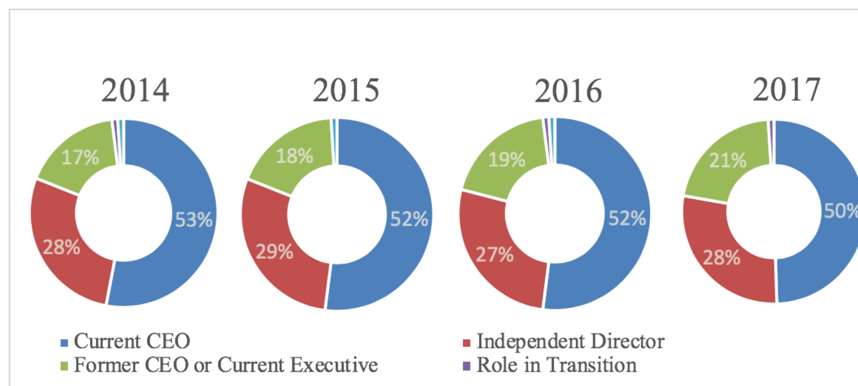
[132] PAPADOPOULOS ET AL., *supra* note 27, at 10-11; *see also* Larcker & Tayan, *supra* note 129, at 5.

[133] Klemash, Smith & Huennekens, *supra* note 84 (reviewing data from S&P 1500 and determining "independent board chairs have been experiencing the fastest increase since 2000").

Corporations that have separated the roles have also been steadily moving toward independent chairs.[134] Twenty-eight percent of S&P 500 boards in 2017 had an independent chair who met the applicable standards for independence,[135] compared to just 13% a decade earlier, and 23% in 2012.[136] This number has increased to 32% in early 2019.[137]

That said, the move towards separation of the roles has not translated solely to an increase in independent chairs. Figure 2 below shows that while S&P 500 companies experienced a slight decrease in the number of CEO-chairs, the number of former or current executives assuming the chair role has steadily increased in recent years.

**Figure 2.** Chair's Relationship with the Company.[138]




An analysis of the one hundred largest and one hundred smallest Fortune 1000 companies in 2016 revealed that most companies tend to separate the CEO and

---

[134] *Id.* (noting that "overall more S&P 1500 companies are appointing independent chairs" than prior years).

[135] SPENCER STUART, *supra* note 130, at 6. As discussed *infra* at Part III, in some cases that independent designation may raise questions.

[136] Fairfax, *supra* note 17, at 239 (defining independent board chairs as those "who are not current or former executives of companies at which they currently serve as chair").

[137] *Board Leadership Structure*, *supra* note 131.

[138] Graphs compiled based on information provided in yearly Spencer Stuart U.S. Board Indexes. *See* SPENCER STUART, *supra* note 130, at 24; SPENCER STUART, 2016 SPENCER STUART U.S. BOARD INDEX 23 (2016), https://www.spencerstuart.com/~/media/pdf%20files/research%20and%20insight%20pdfs/spencer-stuart-us-board-index-2016.pdf [https://perma.cc/GBH2-HDST]; SPENCER STUART, 2015 SPENCER STUART U.S. BOARD INDEX 20 (2015), https://www.spencerstuart.com/~/media/pdf%20files/research%20and%20insight%20pdfs/ssbi-2015_110215-web.pdf [https://perma.cc/U5ND-TWRN]; SPENCER STUART, 2014 SPENCER STUART U.S. BOARD INDEX 23 (2014), https://www.spencerstuart.com/~/media/pdf%20files/research%20and%20insight%20pdfs/ssbi2014web14nov2014.pdf [https://perma.cc/M4RA-9TY9].

chair roles as part of an orderly succession plan and not as a reaction to investor pressure.[139] Nevertheless, over a fifth of recent separations have resulted from one or more of the following events: an abrupt resignation of the CEO, a governance issue, merger, shareholder vote, or a requirement as part of a government bailout.[140] Notably, only 2% of these separations were the direct result of shareholder vote.[141]

Importantly, scholarship and empirical evidence surrounding the effects of splitting the roles on company performance is not definitive.[142] Similarly, investors and commentators disagree as to whether separating the roles enhances or hinders corporate governance.[143] The following Section examines the normative considerations of the move to separate the positions, outlining the benefits and drawbacks of such a decision.

### A. *Benefits and Drawbacks to Splitting the Roles of CEO and Chair of the Board*

#### 1. Benefits

The basic theory behind separating the chair and CEO roles is that separation enhances the board's ability to monitor management.[144] The concern of having a combined position is that the dual CEO-chair may possess excessive power

[139] Larcker & Tayan, *supra* note 129, at 8.

[140] *Id.*

[141] *Id.*

[142] *See, e.g.*, Mohammad Jizi & Rabih Nehme, *Board Monitoring and Audit Fees: The Moderating Role of CEO/Chair Dual Roles*, 33 MANAGERIAL AUDITING J. 217, 236 (2018) (concluding firms with dual CEO-chair role are more likely to pay significant auditing fees); Wm. Gerard Sanders & Mason A. Carpenter, *Internationalization and Firm Governance: The Roles of CEO Compensation, Top Team Composition, and Board Structure*, 41 ACAD. MGMT. J. 158, 169-73 (1998) (stating firms that have more "internationalization," defined by foreign sales, foreign production, and geographic dispersion separate the positions at higher rates); Vo, *supra* note 42, at 100-29 (detailing various studies on relationship between financial performance and CEO-chair duality, stating the "findings suggest that companies that combine the CEO and Chair positions perform worse financially than companies that have an independent Chair"). *But see* B. Ram Baliga, R. Charles Moyer & Ramesh S. Rao, *CEO Duality and Firm Performance: What's the Fuss?*, 17 STRATEGIC MGMT. J. 41, 51 (1996) (concluding there is "no significant difference in the operating performance" between companies with separate and dual CEO and chair roles).

[143] *See, e.g.*, Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 658-59 (1982) (concluding that independent directors do not sufficiently effectuate governance goals to justify their hindering corporate activities); Nili, *supra* note 36, at 119 (noting differences in social science and corporate governance literature regarding independent directors).

[144] Larcker & Tayan, *supra* note 129, at 1 ("In theory, an independent chairman improves the ability of the board of directors to oversee management."); *see also Independent Board Leadership*, *supra* note 90 (asserting independent chairs assist the board's primary duty of monitoring management on shareholder's behalf).

and the combined title would create a conflict of interest between the board and management.[145] This potential conflict is made evident by examining the specific responsibilities of each position. On one hand, the CEO is responsible for the overall management of the company—she oversees and directs the company's day-to-day operations.[146] On the other hand, the chair leads the board in overseeing management and monitoring management's decisions on behalf of the company's shareholders.[147] Theoretically, having the same person occupy both positions could create conflicts of interests in areas such as performance evaluation, executive compensation, succession planning, and recruitment of new directors.[148] An independent chair is more likely to objectively evaluate management's performance, whereas a chair who is also the CEO may be more likely to tailor information to enhance his or her own interests over those of the shareholders.[149]

As one corporate governance commentator explained, a dual CEO-chair is "in effect marking his own exam papers."[150] In this scenario, the chair is evaluating the effectiveness of the very management strategy that he or she set in place as the CEO. For instance, the Sisters of St. Francis of Philadelphia, a group of nuns who have earned the reputation of "using the investments in their retirement fund to become Wall Street's moral minority,"[151] pressured Pfizer to separate the titles, remarking that having both positions consolidated in one person "weakens a corporation's governance structure."[152] The Sisters cited a "potential conflict of interest for a CEO to be her/his own overseer as Chair while managing the business."[153] Splitting the chair and CEO positions is therefore a

---

[145] *See, e.g.*, Larcker & Tayan, *supra* note 129, at 1 ("The roles of CEO and chair of the board have inherent conflicts, which require the two posts to be separate and independent.").

[146] *Cf.* Kahan & Rock, *supra* note 35, at 992-95 (discussing changing nature of CEO power and its potential constraints).

[147] Dey, Engel & Liu, *supra* note 109, at 1595-96 (stating a primary role of the board is to effectively monitor decisions and actions of management); *see also supra* Section I.A (noting board is charged with monitoring role, among other responsibilites).

[148] Larcker & Tayan, *supra* note 129, at 1 (asserting separation theoretically avoids conflicts of interest between CEO and Chair); *see also* Bebchuk, *supra* note 37, at 680 (noting board sets executives' compensation arrangements and thereby shapes their incentives).

[149] *See* Dan R. Dalton & Idalene F. Kesner, *Composition and CEO Duality in Boards of Directors: An International Perspective*, 18 J. INT'L BUS. STUD. 33, 35 (1987) (emphasizing dual role of CEO-chair threatens board's independent judgment); Vo, *supra* note 42, at 88 (asserting separation of CEO and chair roles could reduce agency costs).

[150] Richard W. Stevenson, *Balancing the Power at the Corporate Top, British Style*, N.Y. TIMES, Nov. 15, 1992, § 3, at 4; *see also* Jizi & Nehme, *supra* note 142, at 222 (noting others have argued "the dual role is like an individual grading his or her own homework").

[151] Kevin Roose, *Nuns Who Won't Stop Nudging*, N.Y. TIMES, Nov. 13, 2011, at BU1.

[152] PFIZER, PROXY STATEMENT FOR 2018 ANNUAL MEETING OF SHAREHOLDERS 104 (2018), https://s21.q4cdn.com/317678438/files/doc_financials/Annual/2017/Proxy-2018.pdf [https://perma.cc/55CQ-HBNK].

[153] *Id.*

popular policy reform presented to enhance monitoring and oversight of management, thus reducing the agency costs that may be heightened because of the board's decreased ability to monitor the CEO on behalf of the shareholders.

Furthermore, a company that operates under the leadership of a dual CEO-chair puts its board in the uncomfortable situation of having to evaluate the performance of its own chair.[154] This situation may consequently lead directors to skirt their responsibility to objectively evaluate management.[155] Since management makes significant decisions affecting directors' positions on the board and director advancement,[156] directors may hesitate to interfere with the decisions and actions of their CEO-chair, who is their boss.[157] Decreased oversight and evaluation of management has the undesired effect of CEO-chairs further entrenching their positon and can lead to excessive compensation.[158]

Aside from the reduction of agency costs and better management oversight, other benefits to separating the CEO and chair positions may include enhanced board performance and decision-making. Some scholars suggest that separating the two positions allows the chair and the CEO to better focus on and dedicate time to their respective responsibilities.[159] Separation "allows the CEO to focus exclusively on strategy, operations, and organizational issues while the chairperson focuses on management oversight, board leadership, and governance-related matters."[160] For instance, Caterpillar Inc., a leading manufacturer of construction and mining equipment, cited this reason when it transitioned to a leadership structure with separate CEO and chair positions after a lengthy period of poor performance at the company.[161] The company shared

[154] Vo, *supra* note 42, at 88.

[155] *Id.* at 88-89 (asserting board with CEO-Chair "is not likely to intervene when management's behavior is inconsistent with shareholder interests").

[156] *Id.* at 88 (noting directors rely on the chair for board nominations and committee assignments).

[157] *Id.* at 88-90 (arguing board with CEO-chair structure "lacks the motivation and incentive to objectively evaluate and discipline the dual executive"); *see also* Finkelstein & D'Aveni, *supra* note 37, at 1082 n.4 ("Although insiders tend to have more detailed information about firm operations, they are likely to be reluctant to confront a CEO in a board meeting, inhibiting their potential monitoring effectiveness." (citations omitted)).

[158] DuBosar, *supra* note 42, at 175 (finding that median salary of dual CEO-chair is over $16 million, while the combined salaries of separate individuals filling the roles is only between $9 and $11 million).

[159] Proponents of this view include Reuben Mark, who served as both the CEO and Chairman of Colgate-Palmolive for more than twenty-five years, who stated that he came to realize that the roles should be separated after realizing he devoted less time to his CEO responsibilities due to chairman being "virtually a full-time job." *Id.* at 174; *see also* Larcker & Tayan, *supra* note 129, at 1 (explaining that, despite little research justifying separation of CEO and chairman roles, many activists pressure companies to divide leadership).

[160] Larcker & Tayan, *supra* note 129, at 1.

[161] CATERPILLAR INC., 2017 PROXY STATEMENT AND NOTICE OF ANNUAL MEETING OF SHAREHOLDERS OF CATERPILLAR INC. 13 (2017), http://s7d2.scene7.com/is/content/Cater

that the decision to split the roles was "most appropriate" for the company at the time because it "allow[ed] [CEO] Mr. Umpleby to focus on the day-to-day management of the business and on executing our strategic priorities, while allowing [Chairman] Mr. Calhoun to focus on leading the Board, providing its advice and counsel to Mr. Umpleby, and facilitating the Board's independent oversight of management."[162]

Additionally, if the splitting of the CEO-chair role involves the addition of an outside independent chair, such a chair may bring a unique and fresh perspective to the table, allowing the board to swiftly make positive business changes.[163] Relatedly, having a dual CEO-chair presents a concern regarding the ability to achieve CEO refreshment when needed. Studies have found that boards are less likely to dismiss a CEO who occupies a dual role,[164] and the median tenure of CEOs who serve as board chairs is 6.92 years compared to 2.92 years for those who only hold the CEO role.[165]

2. Drawbacks

Splitting the roles may come with some potential drawbacks. These drawbacks center on the impact of the separation on the *managing role* of the board rather than its *monitoring role*.[166] Critics of separating the CEO and chair positions assert that combining the positions enhances the board's management responsibilities by mitigating information costs, promoting unified leadership, and maintaining consistency in the CEO succession process.[167]

---

pillar/CM20170427-29708-22840 [https://perma.cc/EW2Q-G6Z3]. Caterpillar is facing its fourth straight year of falling sales, the longest decline in its history. Bob Tita, *How Caterpillar's Big Bet Backfired; CEO Doug Oberhelman Invested Heavily in Production of Machinery and Equipment. Then Commodities Began Their Slide*, WALL STREET J. (Oct. 17, 2016), https://www.wsj.com/articles/how-caterpillars-big-bet-backfired-1476639360.

[162] CATERPILLAR INC., *supra* note 161, at 13.

[163] *See* Vo, *supra* note 42, at 83 ("Having a board Chair who is not an executive of the company may bring fresh knowledge and insight to the board's decision-making process.").

[164] *See id.* at 106 ("The consistent finding from studies on CEO turnover is that when the same individual holds both the CEO and Chair positions, the likelihood of the board dismissing the CEO decreases.").

[165] *See id.* at 108 ("The study's findings of higher compensation and longer tenure for the CEO-Chairs may be indicators of managerial entrenchment in the duality governance structure." (citing James A. Brickley, Jeffrey L. Coles & Gregg Jarrell, *Leadership Structure: Separating the CEO and Chairman of the Board*, J. CORP. FIN., June 1997, at 189, 202 (1997))).

[166] *See id.* at 82 ("Arguments in support of duality focus primarily on the potential improvement in the board's management role, without much consideration of the board's other major role—namely, monitoring executive behavior.").

[167] *See* Allen & Berkley, *supra* note 34, at 25 (arguing role separation reduces CEO authority, has potential to create tension and instability, and would subvert the commitment to unitary board); Brickley, Coles & Jarrell, *supra* note 165, at 193-96 (considering costs of a dual leadership structure).

Looking first at the argument that separation of the roles would lead to increased information costs,[168] this line of reasoning posits that a company benefits from having a chair who also possesses the CEO's "unparalleled specialized knowledge regarding the strategic challenges and opportunities facing the firm,"[169] as well as intricate knowledge regarding the company's "operational and financial health."[170] This idea assumes that the CEO will then "use the knowledge and experience that she gains from serving as the company's top executive to contribute to her role as Chair of the board, leading and guiding the board to understand, deliberate, and make fundamental business decisions for the company."[171]

A related concern is that splitting the roles interferes with a company's "unity of command."[172] Unity of command establishes "clear lines of authority to which management (and the board) can respond more effectively,"[173] promoting "strong, directive, stable, and unconfused leadership" which in turn enhances the organizational health of the company.[174] This is important not only for the company's leadership, but also for shareholders; having unambiguous authority consolidated in a single person ensures shareholders know whom to hold accountable.[175] Critics of separation worry, therefore, that bringing in an independent, outside director may introduce unnecessary tension and confusion within the company's leadership, shaking the company's organizational health

---

[168] *See* Brickley, Coles & Jarrell, *supra* note 165, at 194 ("If one accepts the apparently reasonable assumption that the CEO possesses, as a natural byproduct of its firm-specific experience, considerable specialized knowledge valuable to the chairman's job, then separating the CEO and the chairman titles necessitates the costly and generally incomplete transfer of critical information between the CEO and the chairman."); Vo, *supra* note 42, at 80 ("[D]ecisions made by a CEO-Chair may be clearer, timelier, and more consistent than decisions made by a CEO who has to negotiate and consult with a board that is led by a separate Chair.").

[169] Brickley, Coles & Jarrell, *supra* note 165, at 194.

[170] Vo, *supra* note 42, at 78.

[171] *Id*. at 78-79.

[172] *See* Finkelstein & D'Aveni, *supra* note 37, at 1083 (explaining that according to organization theory, "it is necessary for a decision maker to have the clear and unambiguous authority over subordinates that comes from a unity of command"); Vo, *supra* note 42, at 80 ("[A] combined position provides a unified command structure and reduces the company's cost of decision making.").

[173] Tonello, *supra* note 108.

[174] *Id*.

[175] *Id.*; *see also* Brickley, Coles & Jarrell, *supra* note 165, at 195 (citing potential for "rivalry" between the two titles and negative consequences of having "two public spokespersons"); Larcker & Tayan, *supra* note 129, at 1 ("Separation can lead to duplication of leadership, impair decision making, and create internal confusion, particularly in times of crisis.").

and stability.[176] For instance, General Electric's board advised its shareholders to vote against an activist investor's call to separate the roles for this very reason, remarking that separation could "lead to a blurring of the clear lines of accountability and responsibility, without any proven offsetting benefits."[177] In another example, General Motors cited "stability" in its justification of its decision to recombine its chair and CEO roles in 2010.[178]

A third concern addresses the issue of the CEO succession process.[179] Permanent separation of the CEO and chair positions could interfere with the traditional CEO succession process. It is common practice for U.S. corporations to implement a "pass the baton" succession process, which envisions the former CEO, upon stepping down and relinquishing her position to a new CEO, to remain chair of the board during a "probationary period."[180] The former CEO then uses this "probationary period" as a time to monitor and pass along relevant information to the new CEO, essentially to ensure that the new CEO is prepared and adequate to take on the job.[181] Once the "probationary period" ends, assuming the transition has gone well and the board is satisfied, the old CEO-chair resigns fully from the chair position and the new CEO gains the chair title, now holding both positions.[182] Morgan Stanley's and State Street's succession plans provide prominent examples of such a process.[183]

Indeed, this succession process involves the *temporary* separation of the roles to aid the transition and facilitate easy termination of the new CEO should he or she "drop the baton."[184] Forcing a *permanent* split of the CEO and chair positions could interfere with this succession process and add costs to the

---

[176] Allen & Berkley, *supra* note 34, at 25 ("Two centers of authority in a business would create the potential for organizational tension and instability.").

[177] *See* Kieffer, *supra* note 13.

[178] Larcker & Tayan, *supra* note 129, at 3.

[179] Brickley, Coles & Jarrell, *supra* note 165, at 194 (exploring costs to changing CEO succession process).

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] Michael E. Murphy, *Assuring Responsible Risk Management in Banking: The Corporate Governance Dimension*, 36 DEL. J. CORP. L. 121, 147 (2011) (offering Morgan Stanley and State Street as examples of financial corporations where the former CEO served as board chairman for limited period).

[184] *See* Brickley, Coles & Jarrell, *supra* note 165, at 195 ("[T]he transition period, during which time the CEO and chairman titles are separate, is deliberately structured to allow the board to readily oust the new CEO, should he or she 'drop the baton.'"); Murphy, *supra* note 183, at 147 (suggesting that past practice indicates such role separation during CEO transition is "for only a limited period").

transition.[185] Whether or not these costs would exceed the benefits of separating the positions, however, is likely situation-dependent.

### B. *The Case of Successor CEOs*

While current governance discourse has focused its attention on the independent chair and separating the roles of the CEO and the chair as a means by which to promote more independent boards, this is not the only channel through which separation occurs. In many cases the separation of the CEO-chair happens not through the CEO giving up her chair role in favor of an outsider, but rather when the CEO gives up her CEO hat in favor of an incoming CEO while still maintaining her chair hat.[186]

To the extent that the current literature has discussed these cases, it has often treated them as cases of temporary "changing of the guards" as discussed above, after which the incoming CEO would retake the chair positon.[187] Yet, often, as further detailed in Part III, successor CEOs do not retake the chair position; rather, a new board structure is established—one in which the former CEO retains the chair positon and oversees the new CEO.

The case of Alibaba provides a good example of such a trajectory. Former CEO-Chair and founder of the Chinese Internet and e-commerce giant Alibaba Group, Jack Ma, chose to resign from his CEO post after fourteen years of leadership to enable the "next generation of Alibaba people," who are "better equipped to manage an Internet ecosystem like ours," to take the reins.[188] In an email letter to employees, Ma revealed that "at 48 [he is] no longer 'young' for the Internet business,"[189] but that by staying on as Chair he can "focus his attention on setting strategic direction, helping to develop managerial talent within the company's ranks, and strengthening Alibaba's social-responsibility

[185] Brickley, Coles & Jarrell, *supra* note 165, at 195 (explaining that "regulations to separate the titles would force many firms to change their basic succession process" and that "the costs of forcing this change have not been considered in regulatory debates"). Two scholars suggests that splitting the roles would deter qualified candidates for the CEO position—especially if hiring externally—if those candidates expect to receive both the chairman and CEO titles. *See* Larcker & Tayan, *supra* note 129, at 1.

[186] Dey, Engel & Liu, *supra* note 109, at 1600 n.9 (analyzing firms which switched their leadership structure and determining the majority changed only their CEO while maintaining their former CEO as chairman).

[187] *See* Brickley, Coles & Jarrell, *supra* note 165, at 194-95 (discussing "pass the baton" succession process).

[188] Natasha Lomas, *Alibaba CEO Jack Ma to Step Down as CEO on May 10th, Stay On as Chairman of China's Ecommerce Giant*, TECHCRUNCH (Jan. 15, 2013), https://techcrunch.com/2013/01/15/alibaba-ceo-jack-ma-to-step-down-as-ceo-on-may-10th-stay-on-as-chairman-of-chinas-ecommerce-giant/ [https://perma.cc/F2QW-3CKF].

[189] Alizila Staff, *Alibaba's Jack Ma to Step Down as CEO, Remains Chairman*, ALIZILA (Jan. 15, 2013), https://www.alizila.com/alibabas-jack-ma-to-step-down-as-ceo-remains-chairman/ [https://perma.cc/LQ44-35P5] (quoting email Ma sent to employees).

efforts."[190] In another example, in April 2011, former Alphabet Inc. CEO Eric Schmidt stepped down as CEO but maintained his chair title, relinquishing the CEO position to Google co-founder Larry Page in an attempt to "simplify [the company's] management structure" and "speed up decision making."[191]

These examples reflect the intentional choice of some companies to separate the roles of CEO and chairperson not because of a push towards independence, but rather in an effort to provide an improved business structure, or as the result of investor unhappiness with the current CEO-chair. This channel of separation and the resulting governance structure similarly present several benefits and challenges to both companies and investors. These benefits and concerns, while overlapping to an extent with the general discourse regarding CEO-chair separation, also present unique attributes stemming from the successor CEO structure.

#### 1. The Benefits of Successor CEOs

The successor CEO structure presents benefits that are both operational and governance related. Operationally, a chair who has served as CEO can really fulfill the "advising role" of the board to its fullest, bringing an unmatched level of knowledge and intimacy with the company. Second, the successor CEO route provides a well-defined outlet for companies to refresh their CEO position without the need to push the current CEO out. This is particularly important where the current CEO-chair position is filled by the founder or controlling shareholder of the corporation. From a governance perspective, the knowledge of the departing CEO is crucial not only for the advising function of the board but also for the monitoring role. These benefits are discussed below in further detail.

##### a. *Knowledge and Institutional Memory*

First, a successor CEO structure provides the board with a chair who has unparalleled knowledge, not only of the industry in which the company operates but also of the company itself. This intimate knowledge can provide strong value to the advising function of the board. The chair can mentor an incoming CEO in ways that an outsider could not.[192] In fact, in many cases, companies attempt to simulate the successor CEO transition structure in the short term by delaying the departure of the departing CEO (through a consulting contract or by delaying

[190] *Id.*

[191] Bianca Bosker, *Eric Schmidt Steps Down as CEO: Larry Page, Google Co-Founder, To Take Over*, HUFFINGTON POST (Jan. 20, 2011, 4:12 P.M.), https://www.huffingtonpost.com/2011/01/20/eric-schmidt-google-ceo-larry-page_n_811820.html [https://perma.cc/J8G2-EPFP] (stating that Schmidt will act as advisor to Page in his new role as chairman, among various other responsibilities).

[192] *See* Brickley, Cole & Jarrell, *supra* note 165, at 195 (explaining how in her position as chairperson the outgoing CEO advises the incoming CEO).

the "passage of the baton" as described above).[193] In essence, the successor CEO route offers a more permanent structure that maximizes these benefits by giving the CEO and the management team an experienced voice to rely on. Importantly, having the departing CEO serve as chair is not only superior to the appointment of an independent chair; it may also be superior to having the current CEO serve as chair. The knowledge that the departing CEO has gathered over her time as CEO is an invaluable commodity that an incoming CEO cannot replicate.

As one company indicated in regard to its former CEO:

> We believe that having a separate Chairman and Chief Executive Officer is appropriate and is consistent with corporate governance best practices. . . . Because of his previous roles with Nanometrics [as Chief Executive Officer and Chief Strategy Officer], Mr. Rhine is intimately familiar with Nanometrics' business and industry, and very capable of effectively identifying strategic priorities, leading discussions of the Board of Directors and defining Nanometrics' strategic objectives.[194]

b. *Allowing for an Outlet for CEO Refreshment*

The use of a CEO-chair combined role structure also removes a potential important refreshment outlet from a company's succession tool kit. When the board, or investors, determine that a transition to a new CEO is needed, often companies may find it hard to accomplish a smooth succession plan. The current CEO may have a hold on the board, may be the founder of the company, or may hold a significant equity stake in the company. In these cases, companies may not be able to remove the CEO without significant costs, if at all. Such CEOs may be more willing to relinquish their executive post in a permanent governance structure if they can retain the chairperson position.

Importantly, this transition may also allow for a "two for one" deal. In other words, a company would be able to keep the departing CEO in some capacity while also bringing in or promoting a new CEO from within. This would be particularly important in cases where the departing CEO still provides significant value to the company (a founder, for instance), but she may not be the ideal CEO candidate going forward. In creating the outlet of a chair position that is separate from the CEO, the company is able to retain the departing CEO in its leadership team while also refreshing the CEO position.

c. *Better Monitoring and Reduced CEO Power*

The presence of a successor CEO structure may also, in the right circumstances, improve board independence. A chair who has both specific knowledge of the company, as well as independent access to information through her connections to mid- and high-level executives, may promote more stringent and effective monitoring of the CEO by the board. In that sense, if an

[193] *See supra* notes 179-185 and accompanying text.

[194] Nanometrics Inc., Proxy Statement (Form DEF 14A), at 10 (Apr. 4, 2016).

independent chair is meant to serve as a check on the power of a CEO, a former CEO who becomes chair may be an even better tool to reduce the CEO's power, both in driving board resolutions as well as in controlling what is presented to the board.

2. The Costs of Successor CEOs

a. *Reduction in Board Independence*

A counterargument can be made that a board led by the former CEO has the potential to exhibit even less independence and monitoring ability. The departing CEO, now chair, may enjoy a unique power through her position as chair, but she may often lack the motivation to monitor the CEO in a manner that would align with investors' interests.

In many cases the successor CEO is not an outsider that is brought in from the outside but rather a promotion from within.[195] It is likely that in many cases the departing CEO who is moving to the chair position has provided strong input as to who should replace her. In these cases, the CEO and the chair may act in unison—not truly independent of one another, consequently curtailing the ability of the remaining directors to scrutinize the actions of the CEO and the ex-CEO-chair.

b. *Camouflage Effect Regarding Chair Separation*

Interestingly, the successor CEO route of separation may allow companies to camouflage themselves as good governance actors while in reality, their structure lacks the independence that institutional investors aimed to promote.

More specifically, and as described above, the current primary focus of investors on achieving CEO-chair separation stems from the belief that such separation would lead to an independent chair.[196] In reality, many companies that are classified as having separate CEO and chair positions are undeserving of this classification, for transitioning the long-time CEO to the chair role does not yield a truly "independent" CEO.

Putting aside the question of whether the successor CEO structure is efficient (and a strong case can be made that it is), the difference between the separation of the roles and identity of the persons holding those roles may undercut the emphasis of investors on independent chairs.

[195] *See* Usha R. Rodrigues, *Tournament of Managers: Lessons from the Academic Leadership Market*, 43 IOWA J. CORP. L. 537, 539-40 (2018) (seeking to answer question of why publicly traded companies favor promoting internal candidates to the CEO role).

[196] *See supra* Part II.

c. *Constraining the Lead Independent Director*

As discussed in Part I, when the CEO also holds the chair position, investors often expect companies to appoint a lead independent director.[197] Investors expect that appointing a lead independent director would allow for, in addition to better investor engagement,[198] the creation of a counter "figure of clout" in the boardroom.[199] Yet, when the chair is the ex-CEO and she and the CEO serve simultaneously on the board, the power position of a lead independent director may become diluted by having two high powered "insiders" that could control the board dynamics. Furthermore, investors may not even push for the appointment of a lead independent director because of their belief that the chair is "independent."

d. *Reduction in the Successor CEO's Autonomy*

The transition of a former CEO to the chairperson title alone can have an adverse impact on the incoming CEO. According to one study, CEO-to-chairperson transitions can negatively affect replacement CEO performance 60% of the time, with 30% of those cases being "dysfunctional."[200]

Having two leaders who are trying to steer the same ship may lead to inevitable friction and power plays that may result in deteriorating company performance. The fact that the ex-CEO may still hold strong allies within management could further exacerbate this concern. Equally important, in many cases there is a concern that the successor CEO is only an attempt by the departing CEO to appease public pressure, when in reality, the former CEO/now chair has just appointed a "puppet" to carry out the chair's orders. This "puppet-puppeteer" concern is especially problematic if the perceived demand for a

---

[197] *See supra* note 42 and accompanying text.

[198] *See* CYNTHIA M. KRUS, CORPORATE SECRETARY'S ANSWER BOOK § 9:16 (Westlaw 2018) ("Among companies that choose not to appoint non-management board chairmen, many choose to appoint a 'lead director' . . . to enhance the balance of representation of shareholder and management considerations at the board level."); *see also* Baertlein & Venugopal, *supra* note 91 (stating that Chipotle's lead independent director must send a letter to shareholders each year).

[199] WALTER A. EFFROSS, CORPORATE GOVERNANCE: PRINCIPLES AND PRACTICES 159 n.56 (2d ed. 2013) ("[L]ead directors increasingly hold veto power over board agendas, help settle disputes between companies and key institutional investors, challenge executives about risks and even take over the corner office temporarily when CEOs unexpectedly depart." (quoting Joann S. Lublin, *Lead Directors Gain Clout to Counterbalance Strong CEOs*, WALL STREET J., Sept. 13, 2010, at B11)).

[200] Bryan Borzykowski, *What to Do When a CEO Steps Down but Sticks Around*, BBC (Nov. 3, 2014), http://www.bbc.com/capital/story/20130716-beware-the-ceo-turned-chairman [https://perma.cc/UBF5-KW4M] (stating that this arrangement can be uncomfortable for the new CEO and negatively impact performance).

corporate shake-up and reason for an ultimatum from investors was the need for a catalyst for change.[201]

#### e. *Murky Leadership*

In addition, lack of clarity regarding whether the CEO or the chairperson maintains ultimate control could lead to additional operational and governance concerns. First, management and mid-level employees might receive contradicting signals from their old and new bosses, leading to operational dysfunction. Second, from a governance perspective, when it is unclear who is fully in charge, it is also unclear whom to hold fully accountable—the board, the CEO, or the chair.

## III. SUCCESSOR CEOS: EMPIRICAL FINDINGS

Part II appraised the debate regarding CEO-chair separation and the benefits and drawbacks of separating the roles through the successor CEO route. Part III situates the successor CEO trend within the larger CEO-chair separation movement by providing empirical data with respect to successor CEOs.

Examining the S&P 1500 companies for the years 2010 through 2016,[202] this Article identifies companies that have a successor CEO structure in place or that have transitioned to a successor CEO structure during the observed period. To qualify for a successor CEO structure, the current chair: (1) must no longer be the current CEO and (2) must have served as the CEO of the company in the past.

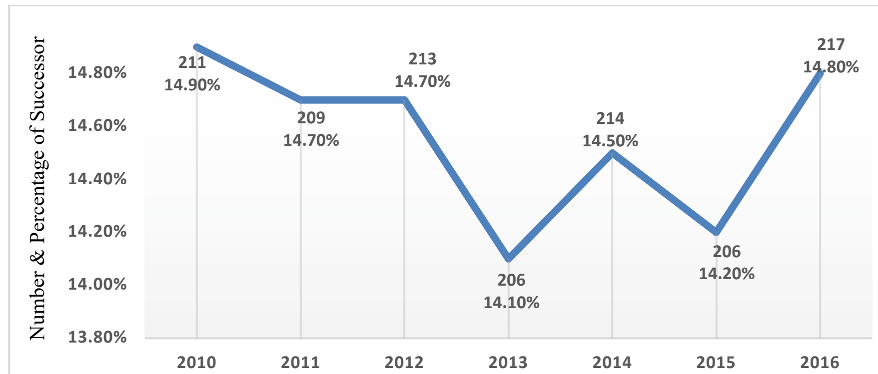
### A. *The Prevalence of Companies with Successor CEO Structure*

The rate and number of companies with a successor CEO structure has remained relatively stable over time with a slight uptick in 2016. Figure 3 charts, for each fiscal year, the number and rate of companies with a successor CEO structure as a proportion of the total chairs per fiscal year. Generally, the proportion of companies with a successor CEO structure out of total chairs has hovered anywhere between 14% and 15%. The year 2016 recorded the largest number of successor CEOs in the seven years observed, at 217.

[201] *See supra* note 98 and accompanying text.

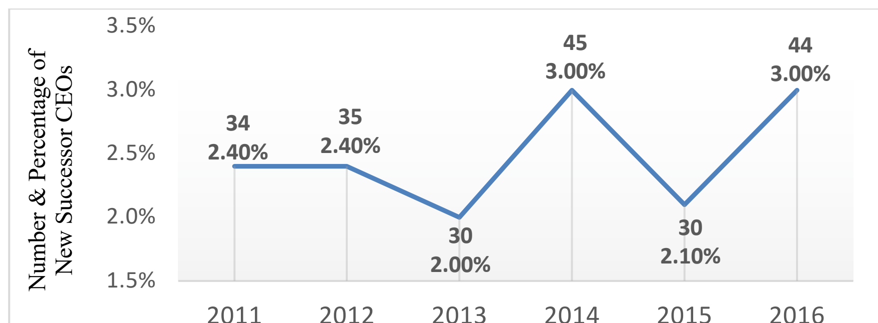
[202] The data for this sample was originally compiled from Equilar's BoardEdge dataset and was subsequently augmented with data from Bloomberg and FactSet. The study looked at the timeframe spanning 2010 to 2016, providing the ability to measure the change of any given variable throughout the study period. Market capitalization was measured in thousands of dollars as reported at the end of the calendar year. The data has both director and company levels with extensive data on the attributes, roles, and financial compensation of each director as well as company specific information.

**Figure 3.** Successor CEO Board Structure in each FY.



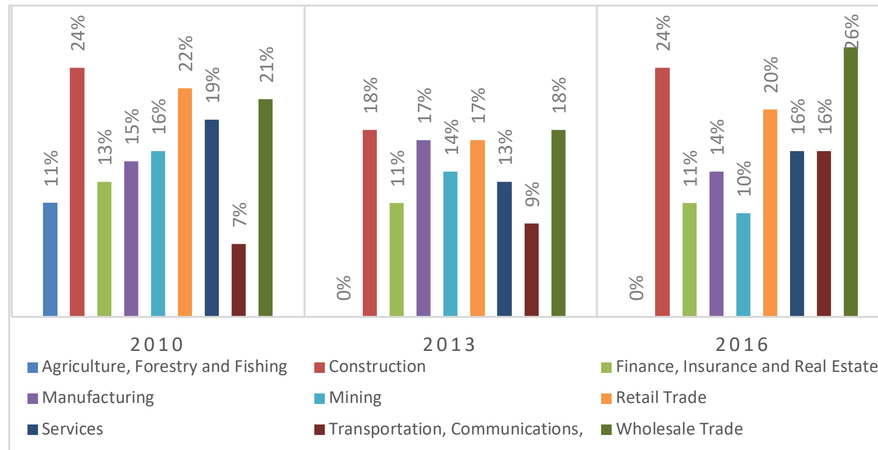

Looking at the rate of companies with a successor CEO structure added each year, Figure 4 shows that the number has traced a similar trend as the rate and number of total companies with a successor CEO structure by fiscal year. The number and rate of companies with a successor CEO structure spiked in both 2014 and 2016 to 3% following a low of thirty new successor CEOs in 2013 and 2015.

**Figure 4.** New Cases of Successor CEOs by FY.



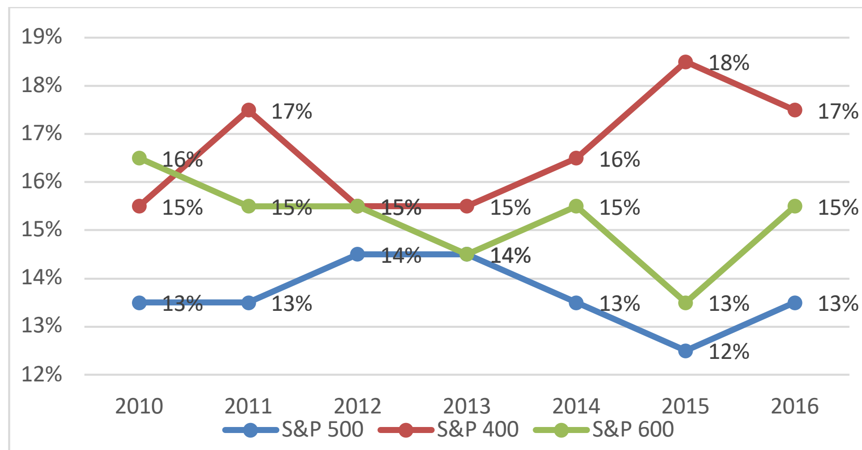

Importantly, some industries have a higher percentage of ex-CEO chairs among their boards of directors. The construction, wholesale trade, and retail trade industries tend to maintain the highest successor CEO structure percentage. The percentage of successor CEO structures in the transportation, communications, electric, gas, and sanitary service industries has steadily increased over the six latest recorded years, while the other industries have experienced more volatility in regards to their percentages of successor CEO structures.

**Figure 5.** Ex-CEO Chairs by Industry.




Tracking the trend by market cap size, it is evident that the successor CEO structure is consistently more prevalent among medium- and smaller-sized firms than among the biggest firms. In each fiscal year since 2011, medium-sized firms have maintained a percentage of ex-CEO chairs equal to or greater than that percentage in the smallest and biggest firms. In 2016, that percentage in medium sized firms hit 17%, while it reached only 15% and 13% in the smallest and biggest firms, respectively.

**Figure 6.** Successor CEO Structures by Market Cap Size.



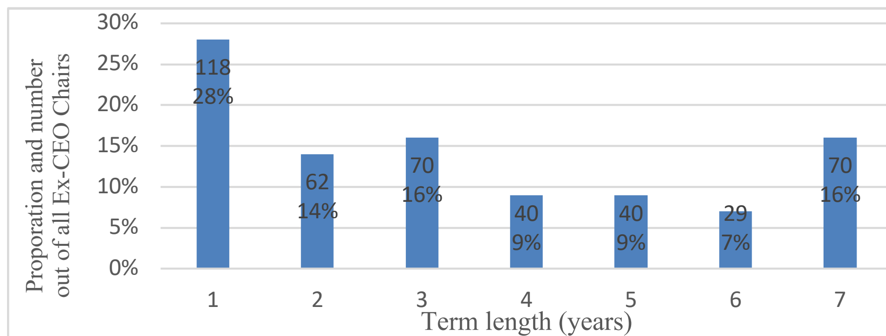

Globally, the successor CEO structure is also quite common. According to one study, in 2012, 29% of CEOs transitioned to be the chairperson of their

company.[203] Japan had the highest rate, with 69% of CEOs becoming chairperson, while in Europe just 15% made the transition.[204]

## B. *Term Lengths and Tenure*

As noted in Part II, companies that implement a policy of separating CEO and chair titles do so for different reasons depending on each company's unique needs and circumstances. The term length of an ex-CEO chair can provide some insight into the purpose of implementing such a policy. For instance, an ex-CEO chair term length of less than a year might suggest that the policy of separate titles served the sole purpose of easing the natural "pass the baton" succession process, as previously discussed.[205] Yet, this does not seem to be the predominant practice. Figure 7 indicates that during the years 2010-2016 only 28% of ex-CEO chairs served for one year or less, whereas 58% served for three or more years. The average term length for a chair in a successor CEO setting is 3.4 years. This suggests that in most cases, the departing CEOs retained their chair positions as part of a more permanent separation policy.

**Figure 7.** Term Length of Ex-CEO Chairs.



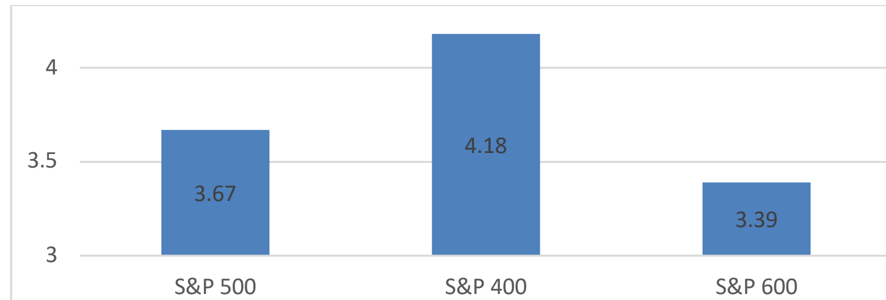

Examining average term lengths by market cap size reveals a similar trend to the one identified regarding the presence of successor CEOs. Not only are successor CEO structures more prevalent in medium sized companies, medium sized companies also have the highest average term length for a successor CEO. For example, as reflected in Figure 8 below, in 2016 the average tenure of a chair in a successor CEO structure stood at 4.18 years while the biggest and smallest market cap size companies had a smaller mean term length for the ex-CEO chairs, at 3.67 years and 3.39 years, respectively.

[203] Borzykowski, *supra* note 200.

[204] *Id.*

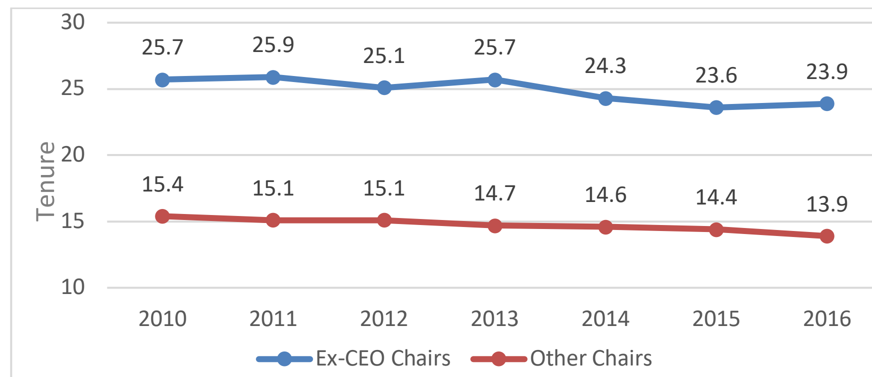
[205] *See supra* notes 179-183 and accompanying text (discussing process commonly used to transition to new CEO).

**Figure 8.** Average Tenure as Ex-CEO Chair.




Moving to examining the overall tenure on the board, the mean board tenure for ex-CEO chairs exceeded that of chairs who were not previously CEOs by roughly ten years between 2010 and 2016. Importantly, average tenure has decreased steadily each year across that time period as well.

**Figure 9.** Chair Tenure on the Board.

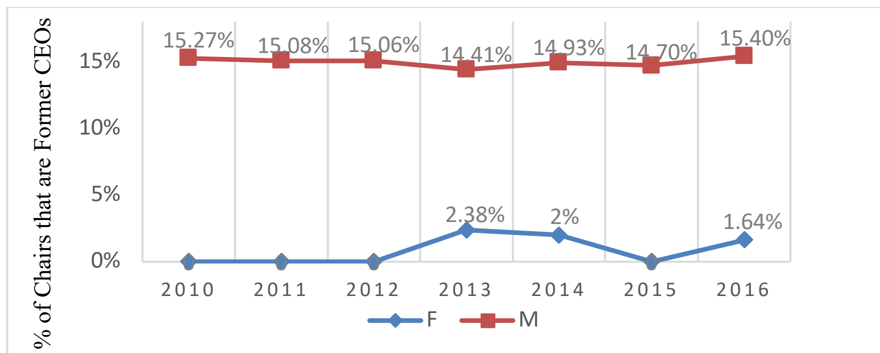



C. *Gender and Age*

Companies that experience a successor CEO structure are heavily led by men. Figure 10 indicates that the percentage of female chairs who were previously CEOs is significantly lower than that of men. This, perhaps, is not all that surprising, considering the low overall number of female CEOs.[206]

[206] Women made up only 5% (total number of twenty-four) of Fortune 500 CEOs in 2018. Valentina Zarya, *The Share of Female CEOs in the Fortune 500 Dropped by 25% in 2018*, FORTUNE (May 21, 2018), http://fortune.com/2018/05/21/women-fortune-500-2018/ [https://perma.cc/2L6K-RRF6] ("After reaching an all-time high of 32 in 2017, the number of female *Fortune* 500 chiefs has slid back down to 24."); *These Are the Women CEOs*

**Figure 10.** Gender.



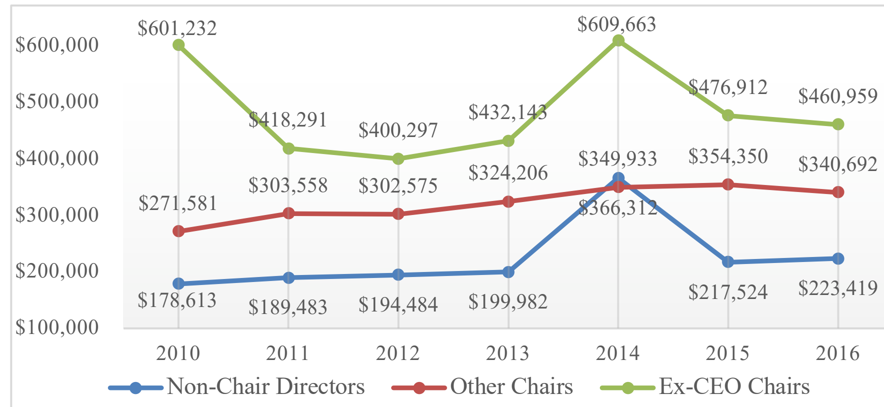

Ex-CEO chairs are also older relative to other chairs. The average age of ex-CEO chairs was sixty-nine while that of non-CEO chairs was sixty-four. In 2016, for instance, eighty-seven ex-CEO chairs were in the oldest quartile of ages, as they accounted for 25% of the chairs aged seventy-one to ninety-six. In comparison, only twenty-seven ex-CEO chairs were in the youngest quartile, accounting for 7% of the chairs in the age group of thirty-three to fifty-nine. This trend has persisted throughout the sample years.

D. *Compensation, Equity, Shareholdings, and Tenure*

As shown in Figure 11, chairs of companies with successor CEOs have consistently enjoyed higher average compensation relative to other chairs. Moreover, regardless of whether the chair is an ex-CEO or not, the chair title has earned greater compensation, on average, than the non-chair director—except in 2014, where chairs who were not CEOs previously earned on average $349,933, while a non-chair director earned on average $366,312. Notably, however, in 2014 the average compensation for ex-CEO chairs increased by more than $150,000, before decreasing again in 2015.

*Leading Fortune 500 Companies*, FORTUNE (June 7, 2017), http://fortune.com/2017/06/07/fortune-500-women-ceos/ [https://perma.cc/8NY6-TUS7] ("As of May 2018, there are 24 female CEOs on the list—or just under 5% of the total list.").

**Figure 11.** Average Compensation.




Average shareholdings of company equity for ex-CEO chairs has also consistently exceeded that of chairs who did not previously serve as CEOs. Both percentages have experienced relatively little movement between 2010 and 2016.

**Figure 12.** Average Shareholdings of Company Equity.

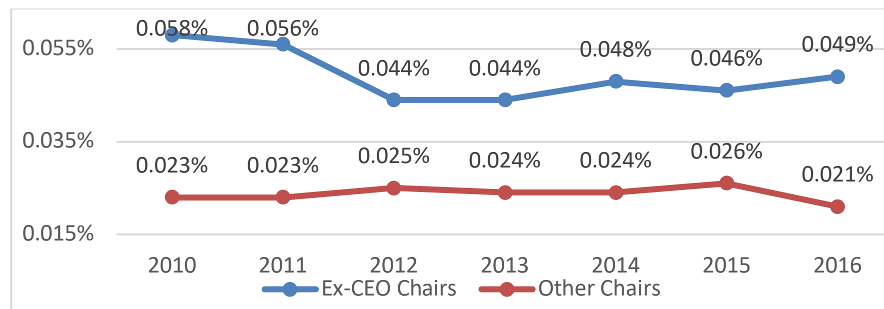



Table 1 below reaffirms the statistical differences between chairs who were previously CEOs and other chairs. As reflected below, ex-CEO chairs are less likely to be women, are longer tenured, earn more, and hold more equity in the company, but receive a smaller percentage of current earnings in equity. Interestingly, as Appendix A details, among the ex-CEO chairs, chairs who have served for longer duration tend to earn more, but also typically hold fewer shares in the company. Additionally, the length of time they served as CEO impacts their current compensation—longer service as CEO correlates with lower current salary, but with higher equity stake in the company.

**Table 1.** Regression Predicting Ex-CEO Chairs.

| | *Ex-CEO Chair* |
|---|---|
| Female | $-1.810^{***}$ |
| | (0.588) |
| Tenure | $0.923^{***}$ |
| | (0.050) |
| Log Compensation | $0.763^{***}$ |
| | (0.078) |
| Log Total Equity | $-0.489^{***}$ |
| | (0.053) |
| Own Holdings | $0.473^{***}$ |
| | (0.076) |
| Constant | $-1.552^{***}$ |
| | (0.047) |
| Observations | 4,373 |
| Log Likelihood | 1,751.967 |
| Akaike Inf. Crit. | 3,515.934 |

*Note:* All variables standardized. Errors clustered by director. **p<0.1; **p<0.05; ***p<0.01*

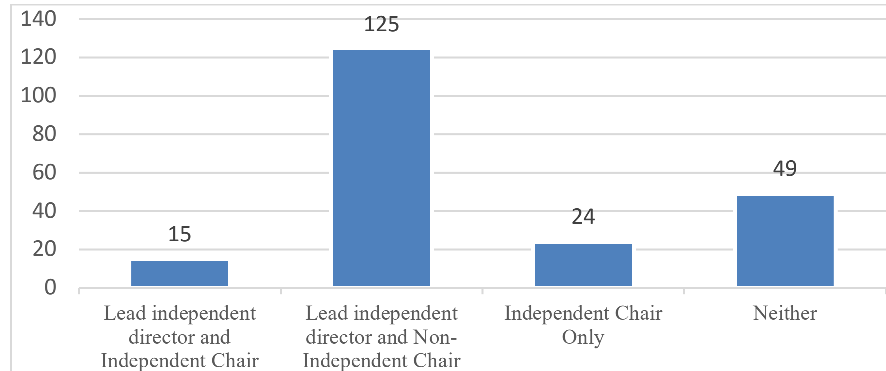
### E. *Designation of Independence and Appointment of Lead Independent Director*

The expectation of many investors is that companies with a combined CEO-chair, or with no independent chair, would appoint a lead independent director.[207] Indeed, only 11% of the companies in the S&P 1500 have neither an independent chair nor lead independent director.

Notably, companies with successor CEOs have seen higher rates of lack of independence than companies without a successor CEO structure. In 2016, there were 217 companies in the S&P 1500 with the past CEO serving as chair. Seventy-three (33.6%) of these companies lacked a lead independent director. Moreover, twenty-four companies out of the 217 reported that their chair is independent despite that chair's past employment as CEO. Fifteen additional companies considered their past CEO as independent but nevertheless appointed a lead independent director.

[207] *See* Millstein & MacAvoy, *supra* note 78, at 1287-88 (explaining role of "lead director" in efforts to make "management accountable to shareholders").

**Figure 13.** Lead Independent Director or Independent Chair in Successor CEO Companies.




*****

In sum, a fairly substantial percentage of S&P 1500 companies separating their CEO-chair role utilize the successor CEO route (approximately 14% to 15%). In 2016, 217 companies had an ex-CEO serve as the chair of the board, and in many cases this structure existed for longer than three years. Considering that roughly 50% of companies maintain a dual CEO-chair position, these companies represent close to 30% of all companies that have separated the roles. The chairs in companies with successor CEOs tend to be longer tenured, receive higher compensation and hold more equity than other chairs. They also, at times, still enjoy an independent chair designation, despite their previous service as CEOs of the companies they now chair. Finally, and perhaps not surprisingly, the successor CEO structure is more prevalent in small- and mid-cap companies, and less common in the larger corporations.

## IV. Policy Implications

Having established that a successor CEO structure provides a common route for companies to accomplish CEO-chair separation, juxtaposing the empirical findings about the successor CEO structure with the larger push for chair independence and more effective board monitoring raises several normative and policy implications. This Part revisits some of the normative concerns regarding the specific case of successor CEOs in light of these empirical findings. It then discusses several policy avenues that could effectively address these concerns.

### A. *Tenure and Board Capture*

The empirical findings reinforce some of the main concerns that a successor CEO structure may present. First, as shown in Part III, in companies that utilize a successor CEO structure, the chair is, on average, significantly longer tenured than in other companies. The benefits of long tenure are notable—but so are the

perils.[208] Therefore, while the chair may be less beholden to the successor CEO, she may be more captured by her long ties to the company and other top ranking management. Second, on average, a chair that previously served as the CEO has a higher salary and equity holdings in the company compared to chairs in other companies and to directors on her own board.[209] She therefore may be more hesitant to take actions that would jeopardize her position, including airing issues that would hurt the company in the short term. Ironically, then, the chair may inhibit the successor CEO from making efficient changes to the company's governance.

Yet, as discussed in Part II, one of the notable benefits that ex-CEOs can provide to companies as chairs is their unmatched knowledge and institutional memory as well as better ability to monitor the current executive team. The empirical findings regarding tenure provide tacit support to this notion as the long tenure of chairs in the successor CEO context provides them with the potential to do so.

## B. *Camouflage Effect*

The findings also reinforce the concern about a camouflage effect regarding chair separation. As demonstrated in Part III, 20% of the successor CEO companies actually declare the past CEO, now chair, as an "independent chair." This designation is technically permissible once three years have passed from the date the former CEO left her position as CEO, according to the stock exchange threshold requirements for a chair to be deemed independent.[210] Yet it is not clear that passage of time after one has served as a CEO of a company can credibly reinstate her independence. In fact, ISS's proxy voting guidelines state that an ex-CEO can never be viewed as an independent director,[211] and Glass Lewis indicated that it would only consider an ex-CEO independent after five years have passed.[212] Therefore, cases where companies report to their investors that an independent chair is in place, while in reality this "independent chair" is the former CEO of the company, raise a concern regarding the true independence of the chair.

---

[208] *See generally* Nili, *supra* note 36 (discussing effects of tenure on director independence).

[209] *See supra* Section III.D (considering salary and equity holdings of former CEO chairs).

[210] N.Y. STOCK EXCH., *supra* note 79, § 303A.02(b) (stating that director is not independent if the director has been an executive officer of the company within last three years); *see also* Jeff Vetter & James Evans, *Should I Serve as a Member of the Board of Directors of a Newly Public Company?*, *in* NYSE CORPORATE GOVERNANCE GUIDE, *supra* note 92, at 108, 109 (summarizing rules disqualifying directors from being considered independent).

[211] INSTITUTIONAL S'HOLDER SERVS., DIRECTOR INDEPENDENCE (U.S.) 1 (2014), https://www.issgovernance.com/file/files/Directorindependence-US.pdf [https://perma.cc/54QT-R39M].

[212] *See* GLASS LEWIS, *supra* note 20, at 5.

## C. *The Lead Independent Director*

Moreover, as demonstrated above,[213] in many cases, companies with successor CEOs do not even appoint a lead independent director. Indeed, in 11% of the companies that had a successor CEO structure in 2016 there was no lead independent director because the company treated the ex-CEO as independent and therefore found no need for a lead independent director. In an additional 23% of the companies, no lead independent director was appointed despite not designating the chair as "independent." Therefore, 34% of the companies with a successor CEO structure had no lead independent director.

Importantly, the nomination of the lead independent director must be conducted as "independently" as possible. A lead independent director appointed directly and exclusively by the chairperson presents an obvious conflict, likely inhibiting the lead independent director's responsibility to objectively monitor and counterbalance the non-independent chair.[214]

Finally, the fact that most successor CEOs come from within the company,[215] often as long-time employees of the company, may reinforce the concern that the ex-CEO handpicks her successor, so that she can continue to pull the strings of the figurative puppet. While many companies establish a succession plan that relies on promotion from within, the concerns that the move of a current CEO to the chair positon raise may be particularly pronounced where the chair can direct the identity of the incoming CEO.

## D. *Addressing the Successor CEO Structure*

Therefore, the successor CEO structure presents both benefits and costs to companies and investors. In many cases, the question of whether a successor CEO structure is beneficial is company-dependent. Notwithstanding, the normative analysis and the empirical findings do provide some cause for concern regarding the drawbacks of the successor CEO structure. The next Section explores the policy implications going forward.

### 1. Independence Definitions Regarding Ex-CEO Chairs

One issue that investors, regulators, and stock exchanges may need to address is the treatment of chairs as independent even if they previously served as CEOs of the companies for which they now serve as chairs. As discussed above,[216] companies have approached the issue of designating chairs as independent in different ways. Some companies treat the chair as non-independent, while some

---

[213] *See supra* Section III.E.

[214] Plouhinec, *supra* note 85 (finding conflict where lead independent director is appointed directly by board chair as director "must be able to ultimately challenge the chair").

[215] Based on hand-collected data, over 70% of successor CEOs are long-time employees of the company.

[216] *See supra* Section III.E (discussing when chairs can be considered "independent").

refer to the stock exchange three-year "cooling off period" and therefore declare the chair as independent once that time has elapsed.[217] Some companies declare the chair as independent but nevertheless acknowledge the need for a lead independent director, while others do not even appoint a lead independent director at all.[218]

Yet, designating a former CEO of the company as an independent director, immediately or even after the cooling off period,[219] undermines the goal behind director independence designations[220] and is particularly concerning when the person declared as independent is the chair of the board.[221] This, in turn, necessitates a reconsideration of the independence requirements for chairs, and consideration by stock exchanges of potentially prohibiting companies from treating past executives of the company as independent chairs.

Importantly, a prohibition on deeming past CEOs of a company independent, even after a cooling off period, is not meant to suggest a normative view regarding the benefits or perils of a successor CEO structure. Rather, it acknowledges the emphasis that investors have placed on the independent chair and on the presence of lead independent directors where such chair is non-independent.[222] Adjusting the independence standards to account for this blurring of the lines when a former CEO becomes chair, and potentially requiring companies to appoint a lead independent director when the chair is an ex-CEO, would provide investors with a better sense of a company's governance, especially when benchmarked on this aspect.

---

[217] *See* R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829, 852-53 n.83 (2003) (explaining exclusion of certain persons from being considered independent as subject to three year "cooling-off period"); *supra* note 210 and accompanying text (discussing NYSE rules regarding independence of directors).

[218] Data file containing a breakdown of the companies is with the author.

[219] Glass Lewis, for instance, encourages an expanded look back period of five years. However, this still seems to discount the case of a CEO serving as chair. *See* GLASS LEWIS, *supra* note 20, at 1 nn.1-2 (2018) (advocating for a five year look back period).

[220] *See* Nili, *supra* note 57, at 39 (suggesting purpose of independent boards "is to ensure that directors are objective and free of conflicts that can impair their judgment when serving as monitors of management").

[221] *See supra* Section III.E.

[222] *See* GLASS LEWIS, PROXY PAPER GUIDELINES: AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE 8 (2019), http://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf [https://perma.cc/S2N7-5Q6E] ("Glass Lewis believes that separating the roles of CEO (or, more rarely, another executive position) and chair creates a better governance structure than a combined CEO/chair position. . . . While many companies have an independent lead or presiding director who performs many of the same functions of an independent chair (e.g., setting the board meeting agenda), we do not believe this alternate form of independent board leadership provides as robust protection for shareholders as an independent chair.").

2. Reforming Lead Independent Directors' Powers

Where a successor CEO structure exists, it is important not only to have a lead independent director, but also to afford such director with sufficient powers to offset the control that the CEO and the chair have over the board. In fact, the case of ex-CEO chair is only an extreme example of the inadequateness of lead independent directors in curtailing the concerns of boards captured by management.[223]

This capture concern, as discussed in Part II,[224] is clearly present, and potentially aggravated, where the CEO and the chair positons are separate but held by company "insiders." Therefore, investors and regulators should revisit the role that lead independent directors should serve in providing investors with a true watchdog in the boardroom, both in the larger landscape of companies with CEO-chairs and especially in companies with a successor CEO structure. Due to the resources available to obtain independent information,[225] as well as other formal powers that could be given to the lead independent director, investors and regulators should re-think the specific functions of the lead independent director role and whether it currently is sufficiently robust to serve the goals for which it has been created. Indeed, some lead independent director positions have greater responsibilities than others, but those responsibilities vary by company, with some allocating much less power to their lead independent directors. Therefore, a more formal and unified approach that is consistent across companies may be needed.[226]

3. Institutional Investors and Proxy Advisors

Many institutional investors,[227] as well as Glass Lewis[228] and ISS,[229] have treated the issue of separation of the CEO and chair roles as a key governance point.

---

[223] *See* Kobi Kastiel & Yaron Nili, *"Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite*, 2017 WIS. L. REV. 19, *passim* (exploring "information capture" by management over boards and methods for mitigation of that phenomenon).

[224] *See supra* Section II.B.2.

[225] *See* Kastiel & Nili, *supra* note 223, at 50-57 (discussing approaches to maximizing board's ability to gather its information and data from independent sources in order to minimize the dependence on management for such information).

[226] *See* Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131, 181 (2018) (challenging conventional position that private ordering creates efficient, particular governance structures and presenting evidence that "the firms that could benefit most from [governance] contraints are frequently the ones least likely to adopt them").

[227] *See supra* text accompanying note 17.

[228] *See* GLASS LEWIS, *supra* note 20, at 5 (stating that separate CEO and chair roles "creates a bettter governance structure than a combined CEO/chair position").

[229] *See* INSTITUTIONAL S'HOLDER SERVS., *supra* note 22, at 19 (recommending shareholders to "vote for shareholder proposals requiring that the chairman's position be filled by an independent director").

The findings of this Article should inform these investors and proxy advisors. Companies may have legitimate reasons for separating the CEO-chair role but also avoiding the appointment of an independent chair. As such, a binary expectation and a push by investors for the installment of an independent chair may lead to sub-optimal results. For instance, specific company characteristics may prove important in assessing a successor CEO structure. Companies that have a founder-CEO may benefit from utilizing this route in order to facilitate CEO refreshment. Similarly, companies that bring in a successor CEO from the outside could benefit from retaining the ex-CEO for the long term through the chair position. On the other hand, where the successor CEO is a long-term company executive, the benefits of keeping the ex-CEO diminish while the concerns regarding the grip the ex-CEO chair may have on the company may increase.

But while it may be the case that transitioning to a non-independent chair is a better structure for some companies, the risks that such a structure presents cannot be ignored. Investors and proxy advisors should therefore engage these companies specifically regarding their CEO-chair relationship and the presence of sufficiently empowered independent directors.

Indeed, a case specific nuanced approach to company structure and chair positions is warranted: one that takes into account not only the company's structure and corporate governance eco-system, but also the individual actors who will be stepping into the roles of successor CEO and ex-CEO chair. Focusing solely on the narrow question of CEO-chair separation misses these nuances. Therefore more transparency and a better understanding regarding the successor CEO phenomenon by investors is needed.

## CONCLUSION

Recent years have seen a push towards CEO-chair separation and a focus on the installment of chair independence. This Article takes the first steps in uncovering the scale of the successor CEO phenomenon and the potential policy implications it may have. Importantly, successor CEO structures are often the product of a company's founder moving away from an active management role. As more and more companies in the United States allow founders to maintain control through dual class structure,[230] the issue of succession planning is expected to take an even bigger role. Indeed, successor CEOs and the chairs of the companies in which such structures exist represent an important governance structure that warrants further future attention.

While this Article provides empirical data that sheds light on companies with successor CEO structures—and provides policy recommendations to address potential concerns raised by this data—important data is still lacking. Future research exploring the impact that these structures have on company performance and on other corporate governance indicators is needed. Similarly,

[230] *See* Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 594-95 (2017).

future research into the persistence of this structure within companies is warranted. To the extent that successor CEO structures improve corporate performance, policy recommendations may incentivize companies to adopt these routes. Similarly, finding that successor CEOs are detrimental to performance or to the governance features of a company could lead to a more stringent approach regarding these structures.

Appendix A

**Regression Predicting Chair Financials**

| | *Dependent variable:* | | |
|---|---|---|---|
| | z(Log Compensation) | z(Log Equity) | z(Pct. Holdings) |
| | (1) | (2) | (3) |
| Successor CEO | 1.440*** | 1.182*** | 0.099 |
| | (0.102) | (0.114) | (0.075) |
| Woman | 0.031 | 0.065 | 0.015 |
| | (0.050) | (0.056) | (0.040) |
| z(Years as CEO) | -4.212*** | -3.188*** | 0.140*** |
| | (0.153) | (0.169) | (0.034) |
| z(Years as Chair) | 0.039*** | 0.050*** | -0.022*** |
| | (0.010) | (0.011) | (0.008) |
| z(Tenure) | 0.035*** | -0.025* | 0.150*** |
| | (0.013) | (0.015) | (0.010) |
| z(Log Mkt Cap) | 0.105*** | 0.115*** | -0.024*** |
| | (0.010) | (0.011) | (0.008) |
| Constant | -3.988*** | -2.934*** | 0.004 |
| | (0.152) | (0.167) | (0.032) |
| Observations | 3,367 | 3,287 | 4,505 |
| $R^2$ | 0.210 | 0.126 | 0.050 |
| Adjusted $R^2$ | 0.209 | 0.125 | 0.048 |
| Residual Std. E | 0.566 (df = 3360) | 0.620 (df = 3280) | 0.538 (df = 4498) |
| F Statistic | 148.848*** (df = 6; 3360) | 78.895*** (df = 6; 3280) | 39.121*** (df = 6; 4498) |
| *Note:* | All variables but SC are standardized. *$p<0.1$; **$p<0.05$; ***$p<0.01$ | | |