行政院及所屬各機關出國報告
（出國類別：專題研究）

美國公司治理與上市公司之管理

服務機關：行政院經濟建設委員會
出國人職稱：專　員
姓　　名：陳美菊
出國地區：美國
出國期間：92 年 5 月 28 日至 9 月 26 日
報告日期：92 年 10 月 15 日

公務出國報告審核表

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出國計畫主辦機關名稱： 行政院經濟建設委員會	
出國人姓名/職稱/服務單位： 陳美菊/專員/行政院經濟建設委員會	
出國計畫主辦機關審核意見	☑1. 依限繳交出國報告 ☑2. 格式完整 ☐3. 內容充實完備 ☐4. 建議具參考價值 ☐5. 送本機關參考或研辦 ☐6. 送上級機關參考 ☐7. 退回補正，原因：☐☐不符原核定出國計畫 ☐☐以外文撰寫或僅以所蒐集外文資料為內容 ☐☐內容空洞簡略 ☐☐未依行政院所屬各機關出國報告規格辦理 ☐☐未於資訊網登錄提要資料及傳送出國報告電子檔 ☐8. 其他處理意見：
層轉機關審核意見	☐同意主辦機關審核意見 ☐全部 ☐部分_____（填寫審核意見編號） ☐退回補正，原因：_____（填寫審核意見編號） ☐其他處理意見：

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一、出國計畫主辦機關即層轉機關時，不需填寫「層轉機關審核意見」。

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三、審核作業應於出國報告提出後二個月內完成。

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主辦機關:

行政院經濟建設委員會

聯絡人／電話:

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出國人員:

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出國類別: 研究

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關鍵詞:　公司治理,代理問題,併購

內容摘要: 公司治理制度的健全與否，除直接影響企業的經營績效外，更攸關社會資源配置、產業競爭力及國家長遠發展。鑒於美國的證券市場係全球主要的資本市場之一，在全球化下美國對上市公司所採行之新公司治理標準將左右全球跨國企業的公司治理。本專題研究介紹美國公司治理架構的三大主軸、上市公司之管理方式，比較美國、日本以及歐洲大陸的公司治理模式之差異，同時分析1980年以來美國公司治理之重大變革以及安隆事件爆發後美國政府所採行之改革措施以及從美國公司治理改革經驗可供台灣借鏡之處。

本文電子檔已上傳至出國報告資訊網

行政院及所屬各機關出國報告提要　　系統識別號 c09105408

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出國計畫主辦機關/聯絡人/電話　行政院經建會、徐金河、23165592

出國人員姓名/服務機關/單位/職稱/電話

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關鍵詞：　公司治理、代理問題、併購

內容摘要：公司治理制度的健全與否，除直接影響企業的經營績效外，更攸關社會資源配置、產業競爭力及國家長遠發展。鑒於美國的證券市場係全球主要的資本市場之一，在全球化下美國對上市公司所採行之新公司治理標準將左右全球跨國企業的公司治理。本專題研究介紹美國公司治理架構的三大主軸、上市公司之管理方式，比較美國、日本以及歐洲大陸的公司治理模式之差異，同時分析 1980 年以來美國公司治理之重大變革以及安隆事件爆發後美國政府所採行之改革措施以及從美國公司治理改革經驗可供台灣借鏡之處。

美國公司治理與上市公司之管理

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壹、前言

公司治理(Corporate Governance)的觀念起源美國，惟近二十年幾來才受重視，歐洲則比美國晚了近十幾年，但是近年來日益受到重視。公司治理涵蓋的領域廣泛、影響層面大，除了影響公司經營績效及個人投資收益外，對一個國家之資本市場以及經濟發展均有深遠之影響。公司治理制度的健全與否，除直接影響企業的經營績效外，更攸關社會資源配置、產業競爭力及國家長遠發展。

美國擁有全球最令人稱許的證券市場，健全發展之資本市場以及企業良好的公司治理吸引大量外來資金投入美國股市。美國有效的公司治理係建立嚴格的法規體系、健全的內部公司治理以及外部市場的監督機制等三大基礎上。1980 年代興起併購風潮、1990 年代資訊科技的創新所引發的科技泡沫對美國公司治理產生深遠的影響；2000 年代初，美國經濟成長減緩，美國企業重新公佈財務報表的案件層出不窮，加上 2002 年底美國最大能源公司安隆宣布破產，以及一連串知名企業的財報醜聞，使一向享有良好公司治理的美國上市公司蒙上陰影，為重振投資大眾的信心，美國政府採行許多改革措施來加強公司治理，此外，美國紐約證券交易所以及 NASDAQ 的董事會亦通過較嚴格的上市公司公司治理準則。

本專題研究共分為七個章節第一章為前言、第二章為美國公司治理之架構以及對上市公司之管理、第三章比較美國、日本以及歐洲大陸的公司治理模式、第四章討論美國公司治理之變革、第五章分析安隆事件爆發後美國政府所採行之改革措施，第六章為美國公司治理改革可供台灣借鏡之處，第七章為結論。

貳、美國公司治理架構以及對上市公司之管理

一、美國公司治理之架構

美國公司治理是建立在傳統的自由市場經濟的基礎上，亦即以市場內建的紀律為主，以法規架構和內部監理為輔的外部監督模式。法規架構、市場力量以及內部監理體系成為美國有效公司治理的三大主

軸。以下僅簡述美國公司治理的三大主軸。

(一)市場內建的紀律-外部治理機制

外部市場的自由競爭壓力不但可迫使經理人的行為符合股東的利益，同時可以使經理人發展新經營策略來降低所有權以及控制權分離的代理成本。市場的力量主要來自三方面，一是公司控制權轉移，其次是勞動市場以及產品市場的競爭壓力。併購、接管或其他方式的控制權轉移使公司的經營效率大為提升，1980 年代興起的敵意或友善收購不但有助消耗過度產能，更可藉由汰換以及調配經理人的方式來提高公司經營績效的方式。換句話說，公司經理人的勞動市場因併購風潮而更具競爭性，研究顯示公司執行長常因經營績效不佳而遭汰換。此外，產品市場的競爭使公司經理人不敢忽視消費者的力量。

（二）內部治理機制

在內部監理體系部分，係屬補助性之規定使經理人的行為與股東利益一致。在公司內部控管部分是採美國經營與監督合一之「單軌制」董事會制度，但因股權過於分散、股權結構不穩定，一般股東不可能聯合起來對公司實施有效的影響，使股東對高級經理人員的監控度大為降低，形成了“弱股東、強管理層”的現象。為彌補上述缺失，美國的內部治理機制有以下特色：首先，是建立一個由外部董事和獨立董事為主的董事會來代表股東監督經理層，在董事會下設立獨立董事為多數領導的審計、薪酬和提名委員會；其次是退休金、相互基金以及保險公司等機構投資者使分散的股權得以相對集中，因此對公司治理有舉足輕重之影響能力；第三是對管理層實行股票選擇權，使經理層的利益和公司長遠利益緊密聯繫，達到降低委託－代理成本的目的；第四是活絡的資本市場吸引創投基金之投入並成為高科技新興產業的主要資金來源，創投基金因此成了新興科技產業的大股東，在其內部治理扮演重要的地位。

（三）法規制度

健全以及執行徹底的法律制度是建立美國良好公司治理的根本，健全可信賴的法規制度有雙全好處；一是可提供爭端解決之途

徑，特別是股東訴訟制度，如集團訴訟和衍生訴訟制度，使股東權益受到侵害時能夠伸張並獲得補償。其次是可有效規範市場秩序。美國有關公司治理的主要規定於公司法，惟美國公司法屬各州的立法權限，公司註冊在那一州，將受到該州公司法的制約，要依據該州的公司法制訂該公司的公司章程，依據公司章程來貫徹公司治理的架構。

美國公司治理相當重視股東之保護，惟公司法僅是原則性之規定而已，對股東權益的保護相當薄弱，有關投資人保護之相關法規為證券法規由美國證券管理局(SEC)負責執行。美國主要的證券相關法規是 1933 證券法（Securities Act of 1933）以及 1934 年證券交易法(Securities Exchange Act of 1934)。此外，美國國會責成 SEC 規範相關組織如紐約股票交易所等有關上市標準中針對公司治理之要求，上述自願性標準契約或自律規章(Voluntary Standard contacts and self-regulation)亦需接受 SEC 的監督。SEC 同時負責 Financial Accounting Standards Boards 對會計準則之研擬及修訂。回應 2002 年的企業財報醜聞，美國國會於 2002 年 7 月通過「二〇〇二年薩本斯-歐克斯理法案」(Sarbanes-Oxley Act of 2002)，該法案係自 1934 年美國證管會成立以來美國公司治理最大的改革，其內容首重資訊真實性及可取得性、審計獨立以及經理人責任三大部分。

美國的公司治理在市場紀律以及法規兼重下以讓經理者的行為符合股東利益以確保投資者之權益。另外，企業圓桌協會(The Business Roundtable)、機構投資人協會(Council of Institutional Investors)以及紐約經濟諮詢委員會(Conference Board)等企業及學術的週邊組織均公布公司治理最佳實務準則以協助公司建立良好的公司治理，上述所形成的社會規範及重誠信理念的美國企業文化對美國公司治理之推行均有相當大的影響。

二、上市公司之管理

依據美國證券法規，美國 SEC 執掌上市公司之管理與監督，惟美國 SEC 對上市公司之管理僅是原則性的規定。在上市方面，美國 SEC 對公司上市採審批式，凡是符合法律規定，美國 SEC 都會批准上市。SEC 不會因為公司的資產的多少而提出反對，其功能是保證申

請上市的公司按一定的募集資金的量，有不同程度的公司揭露，從而保障投資者的利益。

有關上市公司之管理主要仰賴交易所或櫃台中心如紐約證券交易所(NYSE)以及NASDAQ等之自律組織（self-regulatory organization）。紐約證券交易所以及那斯達克證券市場針對上市的公司的審核訂有上市標準（Listed Company Compliance Standards）。紐約證券交易所或那斯達克針對上市公司之要求原則以保護投資大眾為前提，故上述審核標準除財務狀況在股票數目、市場價值、收入、有形淨資產及股票價格方面達到特定標準外，同時要求上市公司的公司治理需符合“上市公司手冊”(Listed Company Manual)中有關公司治理的相關規定。交易所或櫃台中心在SEC之監督下負責規範及監督上市公司是否違反交易所相關交易規定及聯邦證券法規。

參、美國、日本以及歐洲大陸公司治理模式之比較

公司治理對企業而言，不僅影響企業的經營績效和反映企業在資本市場之籌資能力；對整體經濟而言，好的公司治理有助於資本市場的健全發展，增加資源配置效率，提高生產力以及經濟成長率。因此，產品市場之競爭程度、資本市場和勞動市場之結構以及一個國家的法規制度和經濟制度等均是決定公司治理良窳之重要原因。

公司治理源自於公司的所有權與經營權分離所產生之代理問題，各國政府為克服代理問題因市場資訊不對稱的市場失靈問題，採行不同之政策，進而形成不同公司治理制度。由於金融體系的不同，進而產生兩大不同的公司治理模式，一般而言依股權集中度以及大股東之認定可歸類外部治理模式(outsider system)和內部治理模式(insider system)。外部治理模式(outsider system)，其特色為股權分散，以美國以及英國的公司為代表；內部治理模式(insider system)，其特色為公司股票透過交叉持股或控股公司集中於個人、家族、集團或金融機構等，以歐洲大陸及日本的公司為代表。

一、外部治理模式(outsider system)

以美國為代表的外部治理模式其主要特色為股權分散以及經理人

汰換率高。外部治理模式的資本市場較為健全且流動性高又稱為市場導向模式（market-based model）。外部治理模式強調提供投資大眾可靠、及時的資訊來保護小股東，故法規上對資訊公布之要求特別嚴格，對股東之保護也較周延。惟由於股權分散故對經理人的監理相對薄弱，故非常重視董事會之獨立性，在法規架構要求董事會以及經理人應對股東負責。然而實際上，董事會的監督能力相當薄弱。

由於董事會監督機制較不能發揮，故外部治理模式特別仰賴市場力量所提供的內建紀律來規範，美國企業併購相當活絡、破產法規健全以及競爭激烈的產品市場，雖有助於提升經理人經營效率，惟過於頻繁的併購使經理人更加審慎評估及篩選投資計畫，反而不利特定投資（firm-specific investments）及基礎研發之進行。於是特別的資本市場如 Nasdaq 取代傳統的金融機構成為外部治理模式融通長期及高風險投資計畫的主要融資管道。此外，自 1980 年代興起的併購風潮，大大提高了機構投資者在公司治理的地位。

由於重視股東之保護，故股票市場較活絡，因此公司多以發行股票及公司債的方式來籌措長期資金，利用銀行進行短期的債務融通，故負債比率較低。另一方面，由於股票市場活絡，有助於創新、企業家精神以及中小企業之發展，然而由於股權分散，故對經理人之監督亦相對較薄弱。

二、內部治理模式(insider system)

內部監督模式以歐洲大陸以及日本的公司為代表，股權集中、家族控制、與銀行關係密切、交叉持股以及金字塔結構均是內部治理模式的主要特色。在內部治理模式下的利益衝突主要來自強大控制的大股東以及少數的小股東。

由於整個金融體系以銀行為主[1]，故向銀行融資成為公司主要資金來源。金融機構在公司治理上扮演重要之角色，銀行透過交叉持股等方式持有公司股票及控制權，因此公司股權集中於金融機構與銀行

[1] 日本及德國銀行資產占 GDP 的比重達 100%，美國銀行資產占 GDP 的比重僅 60%。

[2]，並與銀行建立良好長久關係，不但減少資金成本同時降低資訊不對稱，但同時也導致公司負債比重偏高。因此，在內部監督模式為主的國家其資本市場之流動性較低、規模也較小，不利於創投資金之募集以及中小企業之發展。就資訊揭露而言，由於銀行即公司的大股東，資訊取得容易，對資訊揭露的要求較低。另外，由於內部監督模式的公司治理重視長期關係之投資雖可降低交易成本，惟複雜的交叉持股關係如日本的系列制度(Keiretsu)使公司之透明度不足，大大降低公司面對全球化以及環境變遷之調適能力。

1990 年代初期，德國及日本之經濟表現優異，故內部治理模式倍受推崇，同時暴露英美兩國外部治理之缺失。然而，隨著德、日經濟減緩，特別是 1997 年金融危機爆發後，內部治理模式飽受批評。2001 至 2002 年間美國經濟成長減緩，企業獲利不佳，財報醜聞層出不窮，使美國公司治理受到質疑。然而，隨著資本市場的全球化以及貿易之自由化，為了吸引外來投資或在外國股票市場掛牌上市，跨國企業紛紛採用最佳的公司治理準則來提高經營效率，使全球各國公司治理制度的差異已日趨變小。如美國及英國因機構投資人以及退休基金持股的比重增加，使外部治理模式下大股東在公司治理扮演的角色加重；美國 1999 年公布的 Gamm-Leach-Biley Act 放寬禁止銀行持有公司股票的限制，使銀行兼具債權人及股東的身份參與公司治理。另一方面，在日本取消股票選擇權的稅負，鼓勵採行發放股票之薪酬制度，同時外資加入經營，使公司資訊的透明度大增；歐洲於 1990 年代末期興起敵意性併購風潮；德國於 1998 年 5 月施行公司控制及透明化法案(Control and Transparency of Enterprises,KonTraG)，該法案強化股東地位、強化公司資訊透明度以及提高審計品質，同時限制交叉持股投票權之使用，以吸引外資。

肆、美國公司治理之沿革及挑戰

一、美國公司治理之沿革

1980 年代以及 1990 年代美國的公司治理產生很大的變革，而近二

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[2] 日本銀行持有公司股票的比重達 20%，德國雖無相關之數字惟根據相關的研究顯示約為 10%，但美國銀行持有公司股票的比重僅 2%。

十年來美國的公司治理之變革與1980年代以來的美國公司之併購行為有相當重要之關係。在1980年代以前美國的經理人在公司治理上扮演相當活躍的角色，美國公司經理人只對公司負責，股東代位訴訟成功的機會很少，董事會與經理人的關係密切，發揮不了監理的功能，在1980年只有20%的經理人的薪資與股票價值有關，經理相當重視公司長期表現。

1980年代的併購風潮起源於美國企業多角化後導致產能過剩欲藉企業併購進行企業體制重整，加上1981年起雷根政府實施多項解除管制措施，給予企業更多進行企業重整的空間，於是公司興起敵意性併購(hostile take-over)及重整風潮，公司借錢買回公司股票進行重整，投資機構與在職經理人透過融資買回公司股票進行合併即所謂的融資買回（Leveraged buyouts,LBOs），因此公司負債比例大幅上升，甚至超過80%。LBOs 帶給公司治理的重大變革如下:1.LBOs 提供公司經理人大量的股票以提高其工作誘因，降低公司債務，重視股東利益；2.由於LBOs 係以高度融資進行合併，導致合併後公司負債比例大幅上升，經理人於是相當重視公司財務紀律；3.LBOs 或投資者嚴密監督公司。特別是機構投資者之參與，1980年至1996年間機構投資者之比重由30%增加至50%。不但有利併購之進行，更提高其對公司治理之地位。

1990年代由於法規的限制，敵意性收購已大大減少，以公司股票為主的薪酬制度特別是股票選擇權廣泛被應用，經理人及董事之公司持股比重大幅增加。另一方面，為加強董事會之監督能力，外部董事占董事會之比例亦隨之提高。機構投資之持股比重亦持續增加，1980年機構投資人之持股比重少於30%，迄1996年機構投資之持股比重已逾50%，機構投資人在公司內部治理之角色日益加重。另一方面在法規及租稅方面有相當大的變革，1992年美國證管會採行新的股東代表訴訟規定，大幅降低了股東代表訴訟的成本；美國證管會要求上市公司要公布主要經理人的薪資與其和公司績效特別是股價之間的關係。在租稅方面，1993年美國國會通過若公司以經營績效(performance-based)為主要經理人的薪資制度可減稅一百萬美元。

近二十年來美國公司治理的重大變革有三點，首先是廣泛地使用股票選擇權作為薪酬之方式，其次是機構投資者持股比重大幅增加，

在公司治理之地位日益提高，最後是，為增加董事會之監督能力，董事會中獨立以及外部董事的比率大幅提高。此外，自由化、全球化以及資訊通信科技之革新之國際潮流所形成的資本市場力量大大提升股東之參與，於是市場導向以及重視股東價值的公司治理體制成為美國公司治理的最大特色。

二、美國公司治理之問題

2001 年股市科技泡沫破滅後，美國經濟成長減緩，企業重新公佈財務報表的案件大幅增加，知名企業財報醜聞層出不窮，分析上述企業之財報問題可大致可歸為兩類，第一類為公司失敗如安隆（Enron）、世界通訊（WorldCom）、泰可（Tyco）以及國際組合（Global Grossing）等;另一類為不當的會計處理包括 IBM、 微軟（Microsoft）、奎斯特（ Qwest Communications）、必治妥施貴寶（ Bristol-Myers Squibb）以及全錄（Xerox）等。2002 年爆發的財報醜聞，從發生財報問題的企業來看，除利用複雜的業務結構及交易來隱藏業績減緩的事實外，多數企業所使用的會計作帳手法相當粗糙，顯示美國的公司治理在資訊揭露、審計獨立以及公司經理人上發生問題。茲將上述問題分析如下：

(一)、傳統財務性報告公司資訊揭露不足

從美國近來的財報醜聞發現，以紀錄交易為基礎的傳統財務報表所揭露的資訊狹隘、且不具前瞻性，不但無法詳實反映企業營運結果，更難以提供投資人、債權人及政策制訂者有用的資訊。在新經濟時代企業廣泛使用的交叉結盟之營運模式多半在財務報表上被忽略，或以不適當的會計方法呈現，無法提供投資人與債權人充分的資訊，製造了不實表達與舞弊的誘因。如安隆即透過設立 SPE 的子公司，向外募集資金、並將大筆舉債融資，利用 SPE 屬資產負債表外交易不需要編列合併報表的漏洞，隱藏投資虧損的事實。

此外，傳統會計制度著重資產負債與企業經營成果（淨利與現金流量）的表達，往往忽略了企業可能遭遇的風險。近二十年來金融工具的急速創新(例如投機或避險用之衍生性金融商品、債務或資產的證券化、員工股票選擇權等)，企業從事創新金融商品交易，使其面臨風險大為提高。加上美國有關上述交易之會計處理屬於較硬性之規定(Rule-based)，金融創新很容易產生會計漏洞。顯示目前財務報表特別

缺乏的是綜合性風險壓力測試（Risk-related stress-tests）結果。利用該測試結果可顯示投資人在預期利率、匯率、商品價格，或企業從事主要活動地區之經濟狀況發生變動下，盈餘及資產負債有何影響。

(二)、經理人行為不檢

近來二十年股票選擇權已成為美國酬薪的主要方式，依據研究顯示，1980 至 1999 年間美國以股票酬薪制度（equity-based compensation）之廣泛使用，使公司執行長於 1999 年因公司股價上漲所得好處已較 1980 年增加十倍。有些公司高階主管為自身利益，採用許多追求短期股價表現的行為，傷害長期經營目標。特別在景氣下滑、股市表現不佳以及其他非自願性因素的影響下，經理人員或為實現其認股選擇權或為保住其職位，易將盈餘管理變為盈餘操縱，利用灰色之會計方法提高公司之財務績效，或計算擬制性[3](pro forma)財務資訊、作出其他不當的決策（例如擴大投資於非專長營業項目，或利用已經高估股價進行轉換股票購併其他公司，以利盈餘操縱），甚至浮報退休金投資利得或提早認列或虛列營收，並刪去一些利息、折舊、特殊交易等費用，以膨脹獲利，美化財務報表。

美國近來的財報醜聞有一大部分係公司內部人謀不臧，董事會與管理階層涉嫌利益輸送所致，使得投資大眾對公司治理及董事會的獨立性產生質疑。美國公司董事以及執行長大多由提名委員會選出，並以股票支付其薪資，並由透過指定首席董事以及外部董事來監理公司。惟安隆以及世界通訊的事件顯示美國的董事的獨立性以及監理能力仍有待加強。

(三)、會計師獨立性不足，缺乏有效的監督機構

1980 年以來由於企業經營環境日益複雜，企業於是透過會計事務所提供資產鑑價、併購諮詢以及財務資訊系統設計之非審計服務。依美國證管會之資料顯示，大型會計事務所非審計服務公費占其收入之 73%，使會計事務所之獨立性倍受質疑。安隆事件同時暴露會計師簽證獨立及監理的問題。安隆為安達信在美國的第二大客戶，安達信會計事務所為安隆稽核財務長達十七年，2000 年度公費收入達 5,200

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[3] 又稱假設性財務資訊，假設按新原則或新估計數作帳務處理，依其應有之會計資料所編成之財務資訊稱之。其目的為在當期揭露會計變動之影響及便於閱表者作趨勢分析。

萬美元，其中管理諮詢及其他服務公費達2,700萬美元。另外，安隆一些高階主管及主辦會計經理，均來自安達信。此外，會計師往往是由管理階層親自指派與同意續任，而且管理階層對審計公費具有重大的影響力。此外，會計師往往是由管理階層親自指派與同意續任，而且管理階層對審計公費具有重大的影響力。由於會計師對客戶的依存度提高，導致會計師在擔心失去收入的威脅下，容易屈服於客戶的壓力，無法客觀公正表達真正意見，喪失應有之獨立性。

會計師事務所的輪換率極低，經常對同一家公司提供服務長達十到二十年，甚至更久。會計師離開事務所後也能直接進入原受查公司工作，而無旋轉門條款。會計師與受查公司間的關係過於緊密，造成會計師獨立性與高品質審計服務相互衝突。此外，公開公司會計監督委員會（Public Company Accounting Oversight Board ）成立之前美國會計界之監督及管理機制，係透過會計師協會資助成立的公共監督委員會（Public Overview Board）及由會計師事務所所進行的同業評鑑（Peer Review）兩大自律機制。但根據報導，近二十年來美國沒有任何一家五大會計師事務所曾受到同業評鑑制度之懲處，可見會計監理自律機制功能不彰。

伍、美國公司治理之改革

在企業重新公佈財務報表以及財報醜聞案件層出不窮，加上企業經理不法行為接續不斷，引起投資大眾對會計實務及公司財務資訊之揭露產生懷疑，布希總統立即發表演說要求改善公司透明度及加重經理人責任，並在 2002 年 3 月 7 日提出「十點計畫」(Ten-Point Accountability Plan)，要求改善美國上市公司資訊透明度、加重經理人責任，以及發展更嚴格獨立的審計制度。同年 7 月 9 日再以「公司責任」(Corporate Responsibility)為題發表演說，宣示將嚴厲起訴詐欺之公司高階主管，在 2003 年會計年度中增列一億美元的經費並成立公司詐欺任務小組（Company Fraud Task Force），以強化證管會緝辦不法企業的能力。改善投資資訊之揭露方式，保護小額投資大眾及退休金持有者。美國國會於 2002 年 7 月 26 日通過「二〇〇二年薩本斯-歐克斯理法案[4] (Sarbanes-Oxley Act of 2002)」，隨後布希總統簽署通過

[4] 眾議院於 2002 年 4 月間通過「公司及稽查之職責、責任及透明化法案」(Corporate and Auditing

成為法律，該法案係繼美國證管會 1934 年成立以來，美國公司治理最大的改革，其重點主要涵蓋強化財務資訊揭露、加重公司責任以及審計獨立等三大部分。此外，紐約證券交易所及 Nasdaq 同時提出上市公司公司治理之新規定，紐約經濟諮詢委員會亦提出有關強化公司治理的建議。

一、二００二年薩本斯-歐克斯理法案

（一）強化資訊之真實性及取得性

近來公司治理的改革首重提供投資大眾即時可靠的公司財務資訊。「二００二年薩本斯-歐克斯理法案」中有關揭露之新規定方面，要求公司的董事或主管內線交易揭露由原先的十天縮短為兩天，以提供投資大眾即時的公司股權結構和降低公司董事或主管股票之流動性。本法同時要求發行公司於編製的財務報表中包括內部控制報告，以及簽核會計師的內部控制評估報告。並責成 SEC 公布高階財務主管之道德規範及審計委員會中有關財務專家資訊之揭露。

在法案中要求發行公司在其依一般公認會計原則所編製的財務報表中應反映所有重大之更正調整，以提高財務報表之正確性。公司若未遵循規定而重編財務報表，經理人應歸還重編財務資訊前自公司所獲之利益或紅利。此外，申報予證管會之年報及季報，應揭露重大資產負債外交易、安排、義務及其他發行公司與非合併個體或個人之關係。責成 SEC 公布資產負債表外交易以及擬制性財務資訊之揭露方式，以及研究 SPE 之處理方式。此外，成立公司詐欺任務小組以及加重犯詐欺罪之刑期由五年增加至二十年，以打擊不法。

（二）經理人責任

「二００二年薩本斯-歐克斯理法案」要求公開發行的公司執行長和財務長對定期會計報表應為其正確性的聲明，藉以加重其對財務報告之編製責任。若會計報表未符合證券法規，企業主管必須繳還因財報不實而實現的利得。如公開發行公司主管明知財務資訊

Accountability and Transparency Act of 2002， H.R. 3763)；參議院 2002 年 7 月 15 日通過「公開公司會計革新及投資者保護法案」(Public Company Accountings Reform and Investor Protection Act of 2002，S.2673)，經兩院協商後通過。參眾兩院協商係以參議院版法案為基礎進行討論，雙方同意將法案名稱改為「2002 年薩本斯-歐克斯理法案(Sarbanes-Oxley Act of 2002)」法案。

不實，仍做出簽證，必須面對十年有期徒刑或是一百萬美元罰款，二者也可併處。若是蓄意違法，可加重罰款到五百萬美元、刑期加重至二十年。

要求每一發行公司成立審計委員會(audit committee)，職司有關會計事務所的選任、審查公費與督導等事務。發行公司審計委員會之每位委員皆應為董事會之董事，且須保持獨立性。本法同時授權證管會訂定證券發行人代表律師之專業執業準則，其目的在於希望透過建立代表各證券發行人之律師，對於證券發行人重大違規事證之通報系統，俾能適時處理及遏止違法事項之發生及保障股東權益，增加其投資信心。本法對舉發公司違反證券及反詐欺條款之員工給予工作免於被公司報復之保護，對任何人企圖報復，或對於提供聯邦犯罪行為或可能犯罪行為之真實資訊予執法官員的人員採取傷害行為，將依法處以罰鍰或 10 年以下之有期徒刑，本條文又稱提出檢舉條款（Whistle blowing）。

（三）審計獨立

成立公開公司會計監督委員會結束會計師自律的時代，SEC 需在本法發佈起 270 天內將現行會計師自律組織公共監督委員會改為隸屬於美國證管會下之獨立、全職的新組織－公開公司會計監督委員會（Public Company Accounting Oversight Board，PCAOB ）。會計事務所須向 PCAOB 辦理註冊登記，成為註冊會計事務所。PCAOB 之執掌為制訂並修改審計及相關簽證準則、品質管制準則與職業道德規範，以強化會計師執業品質。PCAOB 定期或視情況需要覆核註冊會計師事務所所提供之審計服務，並有權調查及針對違反委員會規定、證券法或專業會計標準者予以懲處。

本法為提昇會計師之獨立性，在法中限制註冊會計事務所若為公開發行公司提供查核簽證，則不得對該發行公司提供任何非審計服務，並敘明會計事務所不能提供的八大項非審計服務範疇。會計師所簽證之查核報告需提交公司審計委員會。該法案禁止擔任公開發行公司主查之簽證會計師，或複核其查核結果之會計師，連續逾五年對同一發行公司提供審計服務，也要求美國國會監察機構審計總署 GAO(General Accounting Office)一年內完成會計事務所強制輪替之研究。同時明定旋轉門條款，禁止註冊會計師事務所雇用曾發任發行公司之執行長、審計長、財務長、會計長或其任何相當職

位之人，於查核工作開始之 1 年內參與該發行公司之查核工作。同時對曾在會計事務所服務的職員，若離職後擔任發行公司重要高階職務，則會計事務所於 1 年內不得再對該公司提供查核服務，期能藉由冷卻期的訂定以規避利益衝突的可能。

二、上市公司新公司治理標準

另一方面，為回應投資人要求加強管理上市公司的壓力，紐約證券交易所以及那斯達克董事會自 2002 年 5 月起陸續針對公司治理提出改革措施。2002 年 8 月 1 日紐約證券交易所頒布一套新的上市公司治理標準，新的標準內容在於增加公司董事會的獨立性、明確資訊揭露的責任機制以及加強公司內部審計。根據新標準，所有在紐約證券交易所上市的公司必須接受新行為規則和自律規則。以下僅將 NYSE 及 NASDAQ 的新上市標準綜合簡述如下:

（一）強調董事會的獨立性

1. 獨立董事在董事會中必須佔多數(目前只需要三名獨立董事)。二年內要求所有上市公司獨立董事過半，上市公司必須設立提名委員會、薪酬委員會和審計委員會，每個委員會必須由獨立董事組成（目前只要求審計委員會需由獨立董事組成）。惟從屬公司以及小企業可以不用設立上述委員會，但至少應當成立由至少三名獨立董事組成的審計委員會。(NYSE & Nasdaq)
2. 以公司股票為主的薪酬計畫需經股東大會之同意。(NYSE & Nasdaq)，NYSE 進一步要求經紀人若無客戶之指示不可逕行投票同意上述薪酬計畫。
3. 獨立或非執行業務董事，必須定期召開內部會議，且該會議不能有管理階層列席，上述內部會議的主席需在年度股東會中揭露。(NYSE & Nasdaq)
4. 公司必須揭露利害關係人與非執行業務董事內部會議的首席董事與非執行業務董事小組進行直接交流的方式。(NYSE & Nasdaq)
5. 限制獨立董事的定義：獨立董事與所任之上市公司不能有任何實質性的關聯。董事會應當建立判斷董事獨立性的權威性標

準。在董事符合該標準時，進行一般性公告，在董事不符合該標準時，要特別公告說明。而現行的標準僅僅規定要"現行的定義排除與管理層或公司之間任何可能干擾董事獨立行使職責的關係"。為了保證公司董事或審計委員會成員的獨立性，新規則將現行的三年冷卻期改為五年，即公司員工在離開公司後五年內不得擔任公司獨立董事。如果薪酬委員會的成員中有人與獨立董事在五年內同在一個單位工作，或者是直系親屬關係，其獨立董事地位也不能成立。為了保證董事的獨立性，董事從上市公司取得的報酬只能是公司為作為審計委員會成員董事提供的酬金。(NYSE & Nasdaq)

（二）強化資訊透明度

1. NYSE & Nasdaq 要求上市公司必須採行並揭露公司治理指導原則以及商業行為準則及（或）董事、高級職員與員工之道德準則。NYSE 要求對公司董事或管理層中出現的任何違反準則的行為應當即時披露。
2. NYSE & Nasdaq 要求即時揭露會計師審核意見。
3. 公司應成立審計委員會、薪酬委員會和提名委員會的規程指南。這些指南也在應當公告的文件之列。並要求非執行業務董事必須遵守公司的行政紀律。（NYSE&Nasdaq）
4. 公司執行長每年需向 NYSE 保證未發現任何公司違反 NYSE 公司治理上市標準之情事。針對違反公司治理規定者，NYSE 有權加以處罰。這項保證不僅是一種道德約束，更是一種責任指向。(NYSE)
5. 要求上市公司的外國發起人需揭露在適用的公司治理上市標準下，任何母國的公司治理措施與紐約證券交易所上市規則之間的差異。(NYSE & Nasdaq))
6. 在現行的標準中，紐約證券交易所對違規的上市公司做出的處罰最高是摘牌。新的標準規定，紐約證交所對違規的上市公司除了可以進行摘牌處罰外，還可對其進行公開申訴或向法院起訴。(NYSE)

7. 除需要併購方式或稅務部門核定的員工股份外，股東應當有權對所有認股權計劃進行表決。(NYSE & Nasdaq)

(三)審計獨立，強化公司內部審計(NYSE & Nasdaq)

1. 要求所有上市公司審計委員會負責外部審計人員之選任和監督負責以及非審計服務之提供，並擴大審計委員之獨立性要求並揭示獨立之標準。
2. 審計委員會中需包括至少一位財務專家。
3. 審計委員會有權限參與及決定對於獨立顧問及其他顧問資金之提供。
4. 審計委員會或董事會其他獨立主體須對所有關係人交易進行監督。

三、紐約經濟諮詢委員會之建議

針對 2002 年的財報醜聞紐約經濟諮詢委員會於 2002 年 9 月提出許多最佳公司治理準則之建議，詳如下述：

1. 薪酬委員會應具獨立性。
2. 強力建議董事會採納績效為主的酬薪制度，且績效為主的酬薪制度需與符合公司的長期利益如資金成本、股票獲利、營收成長以及市場占有率、環境保護目標等，並避免與變動的股票市場價值有關。績效為主的酬薪需合理且符合成本效益。
3. 公司的主要經理人及董事必需持有相當比例的股票，以強化其追求公司長期利益的動機，並可避免人為操控股價以執行股票選擇權獲利。
4. 主要經理人薪資之揭露應透明化且會計獨立，股票選擇權應列為費用。

陸、美國公司治理改革可供台灣借鏡

公司治理的改革朝向鼓勵股東參與、有效保護小股東權益、更透明的公司股權結構以及即時可取得的高品質財務資訊。沙氏法案不僅

提昇證管會之權責，且加重發行公司審計委員會與高階主管對投資大眾之社會責任，並強化會計師之獨立性，期望藉由證券相關法案之全面更新與變革達到保護投資人與社會大眾利益之目的。

我國企業在面臨全球化與知識化的挑戰下，更需要從各個層面健全企業體質，提升營運能力，以加強企業的競爭力。建立優良的公司治理機制不僅有助於本土企業體轉型成國際級企業，良好的公司治理更助於資本市場之健全發展，吸引外人投資及健全經濟發展。從美國健全的公司治理制度之推動以及最近所採行之改革措施，有很多值得我國參採與借鏡。

一、致力提升公司財務資訊揭露

根據全球評等機構標準普爾公司(S&P)在 2001 年 11 月的調查報告，在亞太地區中，新加坡與澳洲的企業透明度最高，台灣企業的透明度最低。我國證期會為強化國內企業資訊揭露及公司治理，於 2003 年 3 月修正公布「公開發行公司年報應行記載事項準則」，其中重要的新規定包括強化董事、監察人資訊之揭露、公司股權結構透明度以及有關公司治理、財務及風險管理資訊和員工分紅及董監事酬勞等資訊之揭露。有鑑於外界對透明化冀求之殷切，證券暨期貨市場發展基金會正推動「資訊揭露評鑑系統」，藉由此系統評估企業是否依法定期、不定期，或及時揭露資訊，所揭露之資訊是否透明，足以達到法令規定之要求。此外，我國會計準則就衍生性金融商品、認股權證及不動證券化等部分尚缺完整的公報，有待進一步研究修訂。加強資訊之公開揭露及透明化可平衡公司經營者與股東之間資訊不對稱情形，將可提昇公司於資本市場之評價，並吸引理性投資人對公司進行投資，因為企業治理愈好的公司，方能獲得投資人之肯定。

二、檢討修正「會計師法」，加強會計師管理與監督

目前主管機關正推動會計改革，改革重點在會計師獨立性、會計師持續專業進修以及會計師查核疏失之處罰等三方面，建議加速推動「健全企業會計制度推動改革小組」有關強化會計師管理之各項具體措施。有關「會計師法」之修法方向，建議參照美國明文限制或禁止會計師提供財務報表查核簽證之外的服務項目。同時，為求釜底抽薪、有效防範於未然，建議立法明定「會計師定期轉換」制度、建立雙向旋轉門條款以及加重會計師的簽證財報責任，以降低會計師與公

司經營階層串謀舞弊的可能性。亦應重新檢討現行公司法由董事會委任會計師之規定，以加強會計師之獨立性。

就加強會計師之監督管理機制方面，應強化「會計師懲戒委員會」的功能。美國在新通過的會計改革法規中，成立全職、獨立的公開公司會計監督委員會。我國現行的「會計師懲戒委員會」雖與美國新成立的公開公司會計監督委員會具有類似的功能，但其成員均為兼任而非專任，且對會計師之紀律處分時效冗長，屢遭批評，有待進一步研擬改進措施。

就國內同業評鑑部分，請財政部儘速通過為提升會計師查核簽證品質所擬定之「會計師查核簽證財務報表報告規則」草案，明定會計師參加會計師公會定期舉辦之同業評鑑。

三、落實公司治理

根據葉銀華教授之分析，台灣公司股權結構過於集中，最大股東經常透過金字塔結構和交叉持股來增強控制權，造成控制權和現金流量權偏離；而且最大股東成員參與管理，同時擔任董事與監察人的現象相當普遍，董事會和監察人獨立性亟待加強。

為落實公司治理，建議以加強董監事人的專業及法律知識、建立完整的外部董事制度之相關具體措施及加強公司內部控制制度之成效等三大部分著手。歐美工業先進國家已強制實施外部董事制度。尤其是在亞洲金融風暴發生後，實施外部董事制度，成為不少國家啟動公司治理機制，強化企業內部控制之重要手段。惟美國雖有外部董事制度之設立，仍無法防範安隆事件之發生，且我國企業財務危機與經營者掏空公司資產有關。財政部證期會已於 2002 年 2 月 19 日核准修訂「台灣證券交易所股份有限公司有價證券上市審查準則」之相關規定，要求新上市（櫃）公司應設立獨立（或外部）董監事制度規定擬上市（櫃）之公司至少須延聘獨立董事二人，及獨立監察人一人；而且對於擔任獨立董監事之資格，有著具體之規定。證期會並規劃，半年後將推廣到全體上市（櫃）公司。

為讓我國企業能儘快建立最佳公司治理制度，財政部證期會已督導證券交易所及櫃台買賣中心於 2002 年 10 月發佈「上市上櫃公司治理實務守則」，包含保障股東權益、強化董事會職能、發揮監察人功能、尊重利害關係人權益及提升資訊透明度等五大原則。初期將以自律、宣導及資訊揭露為主，鼓勵公司依循公司治理實務守則訂定公司

治理制度，並將遵循情形揭露於年報及公開說明書中。

四、落實「證券投資人及期貨交易人保護法」，確保投資大眾之權益

美國機構投資者如加州公務人員退休基金(CalPERS)往往自行設定公司治理的標準來衡量所投資的公司，同時倡導好的公司治理。我國證券市場向來以散戶投資人為主，法人機構投資比重偏低，法人機構多以短期投資為主，故其所發揮之治理功能極為有限。為保護國內投資散戶，「證券投資人及期貨交易人保護法」業於 2002 年 7 月 17 日公布實施，該法案內容包含有設置專責之投資人保護機構及保護基金、賦予保護機構受理申訴與調處之權力，以及設置團體訴訟或團體仲裁制度等多項保護投資人權益之措施。此外，亦可研議規劃股東會通訊投票（含網際網路），便利小股東執行其投票的權利，實現股東行動主義。

柒、心得與建議

美國國會審計總署(GAO)於 2002 年 10 月公布的報告指出，自 1997 年初至 2002 年上半年為止，美國上市公司因會計問題而重新公佈財報，讓股市市值流失約 1,000 億美元，顯示投資人因企業會計不實損失慘重。從美國企業財報醜聞反映惟有良好的公司治理及企業獲利才是支撐股價的支柱，如果任由企業貪婪的脫軌行為在股市繼續發酵，將不利資本市場的發展，長期而言，對於整體經濟也會有不良影響。所以從最近美國股市發展的前車之鑑，台灣對增加企業透明度的財報資訊揭露以及公司治理問題，當應更加重視。惟由股權結構來看，我國的公司治理架構與美國有相當大的差異，故欲採行美國之相關措施時仍需多方考量。

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Corporate Governance in the United States

Meichu Chen

I. Introduction

The good corporate governance systems are not only conducive to firm performance but also to economic growth. In the 1990s, U.S. economy experienced the longest expansion in the history. The U.S. capital markets and U.S. corporate governance have been successful relative to those of other countries over the last 20 years. Despite the recent U.S. successes and the ascendancy of shareholder power, some observers still argue that the U.S. system is flawed. In the early 2000s, the accounting scandals erupted. It revealed the governance problems that have come to light over the past years have thrust the quality of accounting standards, the professionalism of auditors, and governance practices of major companies into the limelight. To respond the pressure of reform, the U.S. congress passed the Sarbanes-Oxley Act and the private sector, i.e. the NYSE and the Nasdaq, undertook a careful reexamination of the governance guidelines.

This paper includes six sections. Section II provides a review of the foundations of corporate governance in the United States; Section III compares U.S. corporate governance system with those of Japan and Europe. Section VI discusses the evolution and challenges of corporate governance in the United States and then summaries the recent revolution of U.S. corporate governance in Section V. The last section is conclusion.

II. The Foundations of Corporate Governance in the United States

Corporate governance is the system of checks and balances that guides the decisions of corporate managers. As such, it affects the strategy, operations, and performance of business firms. It also affects the ability of investors to monitor the quality of management. Strong corporate governance generally involves some form of publicly revealed commitment to whatever checks and balances have been instituted.

In the U.S., managers have a solid foundation. Nationwide markets for capital and for management talent, together with a strong legal system and a long tradition of sound internal corporate governance, provide mangers with incentives to innovate and powerful tools for credible communication with investors. Accordingly, effective

corporate governance in the United States is built on three parts: external market forces, internal governance system and legal institutions..

II.1. Market-imposed discipline: external governance mechanisms

External markets put pressure on managements to perform, bringing their goal more closely into alignment with the shareholders' interest and creating incentives for them to develop new strategic or institutional means of reducing the costs of separating ownership from control.

A. Competition in the market for corporate control

Mergers and other corporate control transactions play a valuable role in redistributing assets among alternative uses. During the 1980s, interest grew in the use of hostile and friendly takeovers as means of disciplining bad management and of helping to reallocate management and other resources among competitive uses.

B. Labor market competition

Research from the late 1980s and early 1990s indicates that CEOs were significantly more likely to lose their jobs following poor performance of their firms than at other times, a reflection of labor market discipline.

C. Products market competition

Product markets can in some instances provide discipline against abuses by corporations against consumers, in addition to the discipline that the courts provide.

II 2. Internal Governance Mechanisms

The internal governance structure of the corporation adds a complementary set of rules and incentives to align management's actions more closely with the shareholder' interests. It is difficult to discern the internal features of corporate governance from outsides external features. The goal is to find some features of internal corporate governance that have the potential to positively affect corporate efficiency.

A. Shareholders: ownership and control

One way for incumbent owner-managers to make a commitment to good governance is to own a significant portfolio of corporate stock. Stock options became an important part of executive pay during the 1900s and have received special attention during recent efforts at corporate governance reform.

B. Suppliers of venture capital

Recent studies indeed call attention to venture capital as a good source of financing for corporations that face difficulty in credibly communicating their businesses' future prospects to potential investors. Venture capital investors play a important role in corporate governance in countries, such as the United States.

C. Institutional investors

In the 1980s, institutions-which include pension funds, mutual funds, and insurance companies-were often seen as passive participants in corporate governance. The

Investment Company Act of 1940 substantially restricts the ability of institutions to discipline corporate management on behalf other investors. Research reveals that institution investors also play a critical role in corporate governance without actual intervention managers recognize the threat of their intervention.

D. Boards of Directors: insiders and outsiders

Boards have tried various procedural solutions in an effort to improve the quality of their commitment to shareholders. One way is to change directors' committee assignments so that more outside directors are appointed to committees that make critical decisions, such as, the setting of CEO compensation and the selection of the corporation's outside auditor. The supply of qualified independent directors is limited, however, and their quality may vary; therefore this strategy is not likely to come without cost.

II 3. Legal and Regulatory Institutions

The legal system provides investors and other participants in the corporation's affairs with a means of impartial dispute resolution. The contribution of legal institutions is seen as twofold. First, solid legal institutions provide a reliable, impartial means of resolving disputes. The second is regulation. Business law contains many important legislative domains for the design of corporate governance. The standard U.S. Business law model is quite weak in proceeding shareholder protection. Shareholder rights have increasingly become the responsibility of the quite powerful Securities and Exchange Commission. Securities regulation in the United States predates the 1930s. Its evolution accelerated rapidly after the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934. Stock Exchanges, such as the New York Stock Exchange (NYSE), operate under SEC oversight as self-regulatory organizations. The SEC has also delegated certain responsibilities for setting and maintaining accounting standards for the Financial Accounting Standards Board. Under the Sarbanes-Oxley Act of 2002, The SEC is overseeing the creation of a new organization, the Public Company Accounting Oversight Board, which will be responsible for developing, maintaining, and enforcing, the standards that guide auditors in their monitoring and certification of corporate financial report.

The existence of both strong markets and a strong legal system explain U.S. corporations' comparative effectiveness in meeting investor demand for assurance. Market solutions and legal solutions can substitute or complement each other. When markets evolve, the effectiveness of legal solutions can change. Similarly, the comparative advantage that markets have in helping managers more closely align their actions with the shareholders' interest and communicating this alignment to investors, also changes.

III. Comparison of U.S. Corporate governance system with those of Japan and Europe

Each country has through time developed a wide variety of mechanisms to overcome the agency problems that arise from the separation of ownership and control. While some systems are characterized by widely dispersed ownership (outsider systems), others tend to be characterized by concentrated ownership or control (insider systems). The notable countries for outsider systems are the US and UK, while the insider systems countries are Continental Europe and Japan.

III 1. Outsider system

"Outsider" systems, typical of the United States, are characterized by widely dispersed share ownership and high turnover. These systems emphasize the need for reliable and adequate information so that investors are able to make informed investment decisions. Hence, disclosure requirements are fairly stringent and there is a strong emphasis on the protection of shareholder rights, and in particular those of minority investors. In addition, the legal framework that supports the rights of shareholders to control the company make the board and management explicitly accountable to shareholders. In order for boards effectively fulfill their monitoring role they must have some degree of independence from management. While the emphasis in outsider systems is independence, in reality there is the very serious problem that board like management can become entrenched. Because of these problems, there is a widely held perception of boards as relatively weak monitoring devices.

Given the weakness of a board 's disciplining mechanism in the outsider system, the market for corporate control plays a critical role in the governance process. Take-over threats can act as an effective disciplining mechanism and diminish the motivation for managerial opportunism. The US in particular has an active market for corporate control as witnessed by its active market in mergers and acquisitions and its well-developed bankruptcy legislation. In addition, product market competition can to some extent act to reduce the scope of managerial inefficiency and opportunism. However, more competitive markets for financial and corporate control may reduce overall investment because it provides weaker incentives for stakeholders for provide company-specific investments which can lead to tighter monitoring of research activities by company managers, a more careful selection of projects ad strengthened cost control. This in turn can lead to increased efficiency in applied research and undervalue projects with longer-term payoffs, such as basic research. Special financial devices have also developed in outsider systems(e.g. NASDAQ in specialized capital

markets) which may be more effective forms of risk financing for long-term R&D projects than the traditional intermediary institutions in many insider banking systems of corporate governance.

Since strong minority shareholder protection is also associated with an active stock market, corporate governance frameworks in the US promote stock market activity. Commercial institutions in the US have long been restricted by tougher legal and regulatory constraints. Thus, long-term financing through equities and corporate bonds is an important feature of the outsider system. Debt financing by banks tends to be short term and banks tend to maintain arm's length relationships with the corporate sector, accounting for low debt-equity ratios. Since the 1980s, the U.S. has had a sharp rise in the proportion of equity held by financial institutions, coupled with a declining role of individuals in direct ownership. The higher degree of share ownership held by institutional investor and pension funds increases their role in corporate governance.

Another important aspect of an active equity market is that it also encourages innovative activity, entrepreneurship, and the development of a dynamic small and medium-size enterprise sector. On the downside, however, the incentives to monitor management are particularly weak when ownership is dispersed due to "free-rider" problem.

III 2. Insider system

"Insider" systems typical of continental Europe and Japan are characterized by concentrated ownership or voting power and a multiplicity of inter-firm relationships and corporate holdings. Familial control, close relationships with banks, cross-shareholdings (both horizontal and vertical), and pyramidal structures of corporate holdings are dominant features of insider systems. The basic conflict that arises in this system is between controlling owners and outsider minority shareholders i.e. "strong voting blockholders and weak minority owners" or "weak managers, weak minority owners and strong majority owners".

Differences in corporate governance systems are thought to influence the cost of capital, the availability and type of financing available to firms. In insider systems there is a much greater emphasis on banks as providers of external finance with typically higher debt/equity ratios. In Japan and many continental European countries commercial banks play a leading role in the governance of the corporate sector. The benefits of 'bank-based' are that banks supply capital at lost cost, perform important

monitoring and screening functions thereby reducing asymmetric information problems.

With dispersed ownership and concentrated voting power take-overs become impossible. Small investors also do not have enough legal rights to secure a return on their investment. This leads to a lack of liquidity in secondary markets as investors withhold funds due to a lack of opportunities for risk diversification as a consequence of illiquid markets. Capital markets in insider systems therefore tend to be much less well developed than those found in outsider systems. Insider systems, characterized by small and illiquid public capital markets, the absence of venture capital markets and a reliance on debt financing, can impinge upon the development of a vibrant and thriving SME sector.

On the other hands, the focus in insider systems is more on building long term relationships with many of the contractual partners of the firm. Concentrated ownership encourages more long-term relationships and commitment amongst stakeholders. This, in turn, can lead to greater investment in company-specific assets with possible positive implications for profitability in the long run. However, this type of group structure is particularly prone to expropriation and a lack of transparency.

Long-term relationships between firms, cemented by cross-shareholdings, may restrict the possibilities for a transfer of share ownership. As a result, the market for corporate control in insider systems is less developed than in outsider systems. The absence of an effective market for corporate control may impede the development of an international production base and can prevent firms from entering through domestic acquisitions. This suggests that insider systems of corporate governance may need to pay particular attention to strengthening competition policies and entry conditions for newcomers, including conditions for the start-up of new firms.

The increasing globalization of capital markets and the liberalizing of international trade seem to have created an environment in which differences in corporate governance are becoming less severe. In outsider systems, institutional investors and pension funds in the United States are becoming increasingly active participants in the corporate governance of firms in which they have substantial holdings. Venture capital markets and second tier markets such as NASDAQ have also developed to accommodate outside financing for closely held companies. In insider systems the increasing importance of foreign investors as source of capital, for listed companies, is raising the demand for more transparency and minority

shareholder protection. Convergence forces at work in both types of system are primarily a result of globalization of financial markets. However, the extent of the divergences between systems, which are historically contingent and rooted in cultural, historical and legal differences, suggested that complete convergence is unlikely.

IV. The Evolution and Challenges of Corporate Governance in the United States

Corporate governance in the U.S. changed dramatically during the 1980s and again in the 1990s. Before 1980, corporate governance was the mechanisms by which corporations and their managers are governed.. Then, the 1980s ushered in a large wave of takeover and restructuring activity which was carried out by leveraged buyouts(LBOs). The LBOs changed the incentives of managers by providing them with substantial equity stakes in the boughtout company and it also imposed strong financial discipline on company management. In addition, leveraged buyout sponsors or investors, which were predominately institutional investors, such as mutual funds and pension funds, closely monitored and played a more important role in governing the companies they invested. In the 1980s, with the rise in the number of institutional investors the balance the power shifted from corporate stakeholders to shareholders.

In the 1990s, the pattern of corporation governance activity changed again. Leveraged and hostile takeovers declined substantially. Along with the rise of incentive-based compensation, forced recognition of the cost of capital and the fear of hostile takeovers that occurred in the 1980s. In 1992, the SEC substantially reduced the costs to shareholders of mounting proxy contests to challenge management teams. Shareholder activism increased with major institutional investors like CalPERS(California Public Employees' Retirement System). At the same time, the SEC required public companies to provide more detailed disclosure of top executive compensation and how it related to the firm's performance, particularly their stock performance. Congress also passed legislation that capped the tax deductibility of performance-based compensation. Executive stock options and greater involvement of boards of directors and major institutional shareholders began to play a larger role in corporate governance mechanisms. In addition, the deregulation of both the national and international security markets along with the new information and communication technologies in the 1990s became the drivers of the increased dominance of capital markets and the attendant rise of shareholder value.

The past couple of years have been marked by financial upheaval in the United States. The impact of the financial trouble is far reaching affecting investors, public companies, and others, including the accounting community. Much of the attention has been focused on the failure of U.S. corporations, such as, Enron, WorldCom, Global

Grossing, and now HeadSouth. In addition, attention was also focused on the questionable accounting procedures of IBM, Microsoft, Qwest Communications, Bristol-Myers Squibb, Xerox etc. In summary, the corporate failures were largely caused by questionable accounting practices, bad management and weak internal controls.

We witnessed breathtaking failures of corporate governance, shocking malfeasance by corporate leaders, and the complete abdication of responsibility by too many of those charged with providing the checks and balances to the system,- i.e., directors audit committees, outside auditors, legal advisers, analysts, and others. These corporate failures stemmed from lax accounting and corporate governance practices. The resultant corporate greed and malfeasance highlighted the information disclosure process, management accountability and auditor independence as major flaws in U.S. corporate governance.

IV 1. Information Accuracy and Accessibility

Most firms and market participants adhere to sound accounting and meaningful disclosure standards. Some companies however, have not been as forthright in their application of accounting and disclosure standards to specific transactions. In these situations, financial reports have neither reflected nor been consistent with the way the business has actually been run nor to the risks to which the business has actually been exposed.

The system of periodic disclosure, for example, is old and no longer sufficient. Today, disclosures are made not to inform, but to avoid liability. There is a need to move to a system of "current" disclosure. In addition, the traditional financial report does not disclose the related information about off-balance sheet arrangements like the Special Purpose Entity(SPE) adopted by Enron, unrealized obligations, new operational models, invisible assets and risk exposure. Investors have forced long-needed disclosure reforms to improve the quality and increase the timeliness of disclosure.

IV 2. management accountability

In 1998 in a lecture called "The Numbers Game", Arthur Levitt, pre-chairman of the SEC, focused on the pressure on corporate managers to meet earnings expectations and the games that were being played to meet those goals. He exposed a series of accounting tricks that were worrisome. In the late 1990s, the economy was robust, stock markets were "irrationally exuberant", and short-term profit pressures took over corporate management. Stock options encouraged managers to work hard. They also forced managers to adopt "earnings management" and to develop pro forma financial information that prettified financial reports when the stock prices went down. In the early 2000s, the number of earning and other financial restatements increased substantially.

The corporate failure of the early 2000s also revealed problems of board independence. Steve Cutler, who is Director of the Division of Enforcement at the SEC, said: "Yet too often, boards were disinterested and disengaged...They are dominated by associates and friends of senior management...." Many outside directors lacked expertise in the relevant industry and in accounting and financial reporting issues. Thus, boards were too rarely equipped to uncover and derail the determined efforts of management to cook the company's books. It is not enough for reporting companies simply to have a code of ethics. Companies should enhance the internal governance sytem to enable senior management and boards of directors to commend acts of honesty and ethical behavior.

IV 3. Auditor Independence

During the 1980s and 1990s, as a result of increasing complexity, businesses turned more and more often to their auditors for help with non-audit services, such as asset valuations, merger advice and computer system design and implementation. When an accounting firm provides both audit and extensive consulting services to an audit client, the auditor's independence may well suffer, particularly when the consulting services are significantly more lucrative and more voluminous than the audit services. An auditor who wants to retain an audit client's non-audit business may be less likely to question management, and that is serious problem.

In large US accounting firm, the average percentage revenues attributed to accounting and auditing services fell. Recent data reported to the SEC indicate that on average, non-audit fees of large public accounting firms comprise 73% of total fees; in other words, $2.69 in non-audit fees for every dollar of audit fees. The cross-selling of services added to the independence problem. Seriously exacerbating the overall problem were inadequate professional quality control systems, questionable professional rulemaking processes, and ineffective professional disciplinary processes. In summary, there was a serious failure of professional self-regulation. To improve the discipline and quality control, there need to be a reform of the previous peer review process that avoids firm-on-firm review.

V. The Revolution of U.S. Corporate Governance

In response to the financial frauds at Enron, WorldCom and others and the realization that many of the "gatekeepers" responsible for preventing fraud had fallen down on the job, the President and Congress responded forcefully. In March 2002, the President announced his "Ten-Point Plan", embodying three core principles: accurate and accessible information, management accountability, and auditor independence. The final product of these efforts was the Sarbanes-Oxley Act of 2002, which

President Bush signed into law on July 30, which he characterized as "the most far reaching reforms of American business practices since the time of Franklin Delano Roosevelt." The Act mandated a number of reforms to enhance corporate responsibility, improve financial disclosure and combat corporate and accounting fraud. It also created the Public Company Accounting Oversight Board (PCAOB) to oversee the activities of the auditing profession.

V 1. Enhanced Financial Disclosure

The Act clearly recognized that financial reporting is meaningless if investors lack confidence that the information presented is accurate and reliable. To ensure that investors have access to consistent, accurate and reliable information on which to base their investment decisions, each financial report and financial statement of a public company must be prepared in accordance with generally accepted accounting principles. The Act also requires that corporations make more information available concerning the quality of their internal control structures, including whether they have special rules in place to guide the ethics actions of senior financial officers, and whether their board of directors' audit committee includes any financial experts(and, if not, why not).

Shareholder-related provisions include changes in restrictions on insiders trading regulations and enhanced financial disclosure. Executives now have to report the sale or purchase of company stock within two days rather than 10 days as previously required. This will have the effect of making executives' shares somewhat less liquid and also enable investors to react more quickly to the information disclosure. The Act also requires more detailed disclosure of off-balance-sheet financings, pro forma figures and special purpose entities. This will make it more difficult for companies to manipulate their financial statements in ways that boost the current stock price. In addition, financial analysts and auditors are expressly required to disclose to investors whether any conflicts of interest which might limit their independence. In summary, the act created new rules and institutions designed to shape managers' and auditors' choices concerning the accuracy and timeliness of corporate financial reporting.

V 2. Corporate Responsibility

The Sarbanes-Oxley Act contains a number of provisions to improve accounting and disclosure. Chief executive and financial officers are now required to certify that their financial reports fairly represent the financial condition of the company, not just that the reports comply with generally accepted accounting principles. It also requires that audit committees be composed exclusively of independent directors. In addition, it empowers audit committees with a responsibility for the appointment,

compensation, and oversight of a company's outside auditor, thereby, eliminating the incentive for auditors to rubber-stamp the books to please the chief executive officer. Corporate attorneys are expressly held responsible for reporting any violation of the Act, breaches of duty or other violations to the chief legal counsel, the CEO, the audit committed or to other independent directors.

The criminal penalties for misreporting were also increased. The Act provides for a fourfold increase in the maximum prison terms for criminal fraud-to 20 years, and an even higher maximum term of 25 years for securities fraud. The act also makes it a Federal criminal offense, subject to fines of up to $1 million, to knowingly engage in false certification of corporate reports. In extreme cases where a CEO or CFO knowingly and intentionally provides false certification, the maximum sanction climbs to $5 million. In addition, CEOs and CFOs who falsely certify financial reports are also required to forfeit any bonuses or gains resulting from their certifications. The increased responsibility and criminal penalties have clearly increased the amount of time that executives of all companies must spend on accounting matters.

V 3. Accounting Independence

One of the major provisions of the Act is creation new Public Company Accounting Oversight Board. The PCAOB is responsible for the general oversight of the accounting profession and public company audits. The Board also is charged with establishing standards and rules relating to auditing, quality control, ethics, and independence. The Board will set standards for auditor conduct and independence, discipline auditors if they err, and perform regular quality control reviews to ensure firms are functioning at the highest professional levels. The SEC oversees the PCAOB.

Under the Act, the oversight board will promote the independence of auditors is several ways. To increase the probability of detecting any future misconduct by auditors, each public accounting firm must register with the board and submit to periodic performance reviews. The board has given the authority to act upon any evidence of auditor misconduct by undertaking investigations. Upon registering with the board, each registered public accounting firm agrees to cooperate with the board's investigations Such cooperation includes retaining audit work papers and other documents for a minimum of 7 years and providing those records to the board on request.

The Act also prohibits the public accounting firms from providing the audit client with any non-audit services. Under the new rule, the public accounting firms have to rotate the audit partner performing the audit services for a company every 5 years. The SEC was directed to conduct the study and review of the potential effects of required the mandatory rotation of public accounting firms. In addition, there is 1-year cool-off period for the auditor.

The New York Stock Exchange and NASDAQ boards issued their own proposals, which are currently under consideration at the SEC. Besides adoption the Sabanes-Oxley rules for strengthening the roles of audit committees, these proposals and new rules relating to executive the roles of audit committees, these proposals and new rules relating to executive compensation and board independence. The new rules essentially require that shareholders approve all stock options plans, that independent directors approve CEO compensation, that there be a majority of independent directors on the board, and that the board of directors meet in "executive" sessions without company management. The list of reforms is indeed impressive and encouraging.

VI. Conclusion

U.S. more market-oriented corporate governance has changed substantially in the last 20 years, from the leveraged hostile takeovers and buyouts of the 1980s to the equity-based compensation, activist boards of directors and shareholders of the 1990s. As organizations have grown in size and scope and firms adopted the innovative financing techniques to manage financial risk, Governance problems that have come to light over the past year have thrust the quality of accounting standards, the professionalism of auditors, and governance practices of major companies into the limelight. These issues have triggered a spate of regulatory reforms in the United States. Sarbanes-Oxley attempts to provide the new provision on enhanced financial disclosure, corporate responsibility, and accounting independence. The new rule did well on recover investors' confidence while there also are some studies on the Act to need further reforms in the future.

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