

Cambridge University Press

978-0-521-45877-1 - Perspectives on Corporate Governance

Edited by F. Scott Kieff and Troy A. Paredes

Frontmatter

[More information](#)

PERSPECTIVES ON CORPORATE GOVERNANCE

The events at Enron, WorldCom, Tyco, Adelphia, and elsewhere taught us a key lesson: corporate governance matters. The financial crisis of 2008 taught us that corporate governance can matter a great deal. But while it is now widely acknowledged that good corporate governance is a linchpin of good corporate performance, a significant debate remains over exactly how to improve corporate governance and its impact on corporate and overall economic performance. *Perspectives on Corporate Governance* offers a uniquely diverse and forward-looking set of approaches from leading experts, covering the major areas of corporate governance reform and analyzing the full range of issues and concerns, to offer a host of innovative and original suggestions for how corporate governance can continue to improve. Written to be both theoretically rigorous and grounded in the real world, the book is well suited for practicing lawyers, managers, lawmakers, and analysts, as well as academics conducting research or teaching in a range of courses in law schools, business schools, and in economics departments, at either the undergraduate or graduate level.

This volume is one of several collaborations between F. Scott Kieff and Troy A. Paredes through the Hoover Project on Commercializing Innovation, which studies the law, economics, and politics of innovation, including entrepreneurship, corporate governance, finance, economic development, intellectual property, antitrust, and bankruptcy, and is available on the Web at www.innovation.hoover.org.

F. Scott Kieff is a professor at the George Washington University Law School in Washington, DC, and also Ray and Louise Knowles Senior Fellow at Stanford University's Hoover Institution in Stanford, CA. He previously was Professor at the Washington University School of Law in Saint Louis, MO, and has also been a visiting professor in the law schools at Northwestern, Chicago, and Stanford. Having trained in law at the University of Pennsylvania and in science and economics at the Massachusetts Institute of Technology, he practiced law for several years for firms in New York and Chicago. He regularly serves as a testifying and consulting expert, mediator, and arbitrator to law firms, businesses, government agencies, and courts, and on a range of government panels relating to the business and technology sectors.

Troy A. Paredes is a professor at the Washington University School of Law in Saint Louis, MO, with a courtesy appointment at Washington University's Olin Business School, and has been a visiting professor in the law schools at the University of California in Los Angeles and Georgetown University. Having trained in law at Yale University and in economics at the University of California at Berkeley, he practiced law for several years for firms in Los Angeles and San Francisco. He is a co-author (beginning with the fourth edition) of a multi-volume securities regulation treatise with Louis Loss and Joel Seligman entitled "Securities Regulation," and is presently on leave from his academic appointments, having been appointed by President George W. Bush to the U.S. Securities and Exchange Commission, where he was sworn in on August 1, 2008.

Cambridge University Press
978-0-521-45877-1 - Perspectives on Corporate Governance
Edited by F. Scott Kieff and Troy A. Paredes
Frontmatter
[More information](#)

Perspectives on Corporate Governance

Edited by

F. SCOTT KIEFF

George Washington University Law School
Stanford University Hoover Institution

TROY A. PAREDES

Washington University in St. Louis, School of Law



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-0-521-45877-1 - Perspectives on Corporate Governance
Edited by F. Scott Kieff and Troy A. Paredes
Frontmatter
[More information](#)

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9780521458771

© F. Scott Kieff and Troy A. Paredes 2010

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2010

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Perspectives on corporate governance / edited by F. Scott Kieff, Troy A. Paredes.
p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-45877-1

I. Corporate governance – Law and legislation – United States. I. Kieff, F. Scott.
II. Paredes, Troy. III. Title.

KF1422.P47 2010

346.73'0664-dc22 2010000990

ISBN 978-0-521-45877-1 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for
external or third-party Internet Web sites referred to in this publication and does not guarantee
that any content on such Web sites is, or will remain, accurate or appropriate.

Contents

Contributors	<i>page</i> vii
Acknowledgments and Dedication	ix
Introduction	1
<i>F. Scott Kieff and Troy A. Paredes</i>	
PART ONE. THE BOARD OF DIRECTORS AND THE CEO	
1 The Trouble with Boards	17
<i>Lawrence E. Mitchell</i>	
2 Rediscovering Board Expertise: Legal Implications of the Empirical Literature	62
<i>Lawrence A. Cunningham</i>	
3 The CEO and the Board: On CEO Overconfidence and Institutionalizing Dissent in Firms	96
<i>F. Scott Kieff and Troy A. Paredes</i>	
PART TWO. THE WHY, WHEN, HOW, AND HOW MUCH OF EXECUTIVE PAY	
4 Pay Without Performance: Overview of the Issues	117
<i>Lucian A. Bebchuk and Jesse M. Fried</i>	
5 Supersize Pay, Incentive Compatibility, and the Volatile Shareholder Interest	150
<i>William W. Bratton</i>	
6 “Say on Pay”: Cautionary Notes on the U.K. Experience and the Case for Muddling Through	189
<i>Jeffrey N. Gordon</i>	

PART THREE. CONSTRAINING MANAGERS AND DIRECTORS:
 INVESTORS, SECURITIES REGULATION, AND THE MEDIA

- 7 Shareholder Activism in the Obama Era 217
Stephen M. Bainbridge
- 8 After *Dura*: Causation in Fraud-on-the-Market Actions 235
Merritt B. Fox
- 9 From Boardroom to Courtroom to Newsroom: The Media and
 the Corporate Governance Scandals 293
Kathleen F. Brickey

PART FOUR. DELAWARE VERSUS CONGRESS: ON THE
 FEDERALIZATION OF CORPORATE GOVERNANCE

- 10 How Delaware Law Can Support Better Corporate
 Governance 335
James D. Cox
- 11 Federalism versus Federalization: Preserving the
 Division of Responsibility in Corporation Law 351
E. Norman Veasey, Shawn Pompian, and Christine Di Guglielmo

PART FIVE. COMPARATIVE CORPORATE GOVERNANCE

- 12 Regulatory Differences in Bank and Capital Market Regulation ... 399
Hideki Kanda
- 13 European Corporate Governance After Five Years
 with Sarbanes-Oxley 413
Rainer Kulms
- Epilogue: Three Secular Trends of Corporate Law 459
Joel Seligman
- Index 467

Cambridge University Press
978-0-521-45877-1 - Perspectives on Corporate Governance
Edited by F. Scott Kieff and Troy A. Paredes
Frontmatter
[More information](#)

Contributors

Stephen M. Bainbridge, William D. Warren Professor of Law, UCLA School of Law

Lucian A. Bebchuk, William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance and Director of the Program on Corporate Governance, Harvard Law School; Research Associate, National Bureau of Economic Research

William W. Bratton, Peter P. Weidenbruch, Jr., Professor of Business Law, Georgetown University Law Center

Kathleen F. Brickey, James Carr Professor of Criminal Jurisprudence, Washington University in St. Louis, School of Law

James D. Cox, Brainerd Currie Professor of Law, Duke University School of Law

Lawrence A. Cunningham, Professor of Law, The George Washington University Law School

Christine Di Guglielmo, Weil, Gotshal & Manges, LLP

Merritt B. Fox, Michael E. Patterson Professor of Law, Columbia Law School

Jesse M. Fried, Professor of Law, Harvard Law School

Jeffrey N. Gordon, Alfred W. Bressler Professor of Law and Albert E. Cinelli Enterprise Professorship, Columbia Law School

Hideki Kanda, Professor of Law, University of Tokyo

Cambridge University Press
978-0-521-45877-1 - Perspectives on Corporate Governance
Edited by F. Scott Kieff and Troy A. Paredes
Frontmatter
[More information](#)

viii

Contributors

F. Scott Kieff, Professor of Law, The George Washington University Law School, and Ray and Louise Knowles Senior Fellow, Stanford University Hoover Institution on War, Revolution, and Peace

Rainer Kulms, Senior Research Fellow, Max Planck Institute for Comparative and Private International Law, and Lecturer-at-Law, University of Hamburg, Germany

Lawrence E. Mitchell, Theodore Rinehart Professor of Business Law, The George Washington University Law School

Troy A. Paredes, Professor of Law, Washington University in St. Louis, School of Law*

Shawn Pompian, Attorney Adviser, Office of the Legal Adviser at the U.S. Department of State

Joel Seligman, President, University of Rochester

E. Norman Veasey, Chief Justice, Delaware Supreme Court (Retired); Senior Partner, Weil, Gotshal & Manges, LLP

* Paredes is presently on leave for government service as a Commissioner at the Securities and Exchange Commission ("SEC"). Paredes worked on this book while working as a Professor of Law at Washington University School of Law before being sworn in and taking office as a Commissioner of the SEC. The views expressed in this book are those of the authors of the various chapters and do not necessarily reflect those of the co-editors. Nor are the views expressed in this book properly attributable to the SEC.

Cambridge University Press

978-0-521-45877-1 - Perspectives on Corporate Governance

Edited by F. Scott Kieff and Troy A. Paredes

Frontmatter

[More information](#)

Acknowledgments and Dedication

The chapters in this book were presented at a conference on “The ‘New’ Corporate Governance” held at the Washington University School of Law in St. Louis. The conference was sponsored and hosted by the Center for Interdisciplinary Studies, along with support from the Whitney R. Harris Institute for Global Legal Studies, both of which are housed at the Washington University School of Law. The conference was held in honor of Joel Seligman – to whom this book is dedicated – and the contributions he has made to the study of securities regulation and corporate governance during his distinguished career. Before becoming the President of the University of Rochester in 2005, Joel Seligman served as the Dean and Ethan A. H. Shepley University Professor at the Washington University School of Law.

This book is part of broader work through the Project on Commercializing Innovation at Stanford University’s Hoover Institution, which studies the law, economics, and politics of the range of legal and business relationships that can be used to bring ideas to market. We thank James E. Daily, who is a Post-doctoral Fellow and Administrative Director of the Project, for his excellent help editing the manuscript. More about the Project is available on the Web at www.innovation.hoover.org.

Let us thank Professor John Drobak, who directs the Washington University School of Law’s Center for Interdisciplinary Studies. Without John’s support, this book would not have been possible. We also recognize Linda McClain for her energetic efforts coordinating the conference behind this book; Tom Ferguson, Lucas Gredell, Rebecca Keyworth, Sarah Lampe, Erin Nave, and Timothy O’Connell for their editorial and research assistance; Sherrie Malone for her help preparing the manuscript; and John Berger, our Cambridge University Press editor, for his efforts and patience. We are particularly grateful to the individuals whose work makes up this book.

Cambridge University Press
978-0-521-45877-1 - Perspectives on Corporate Governance
Edited by F. Scott Kieff and Troy A. Paredes
Frontmatter
[More information](#)

We also must point out that while Paredes is presently on leave for government service as a Commissioner at the Securities and Exchange Commission (“SEC”), he worked on this book while working as a Professor of Law at Washington University School of Law before being sworn in and taking office as a Commissioner of the SEC. The views expressed in this book are those of the authors of the various chapters and do not necessarily reflect those of the co-editors. Nor are the views expressed in this book properly attributable to the SEC.

F. Scott Kieff and Troy A. Paredes

Cambridge University Press

978-0-521-45877-1 - Perspectives on Corporate Governance

Edited by F. Scott Kieff and Troy A. Paredes

Frontmatter

[More information](#)

PERSPECTIVES ON CORPORATE GOVERNANCE