Introduction

In the spring of 2001, Enron was riding high. Its stock was trading north of $80 per share, and according to *Fortune* magazine, it was America's most innovative company for the sixth year running. Chairman Kenneth Lay had built Enron from an old-school pipeline company into the seventh largest business in the United States, with more than $100 billion in revenues and over 20,000 employees around the world. Six months later, Enron was bankrupt. The empire Lay built turned out to be as fleeting as that of Ozymandias, king of kings.[1] Within a few years, Lay was dead, and his chief deputies Jeff Skilling and Andy Fastow were in prison. (Skilling will be incarcerated until 2019.) The 20,000 employees were out of work, many with their retirement accounts (put in Enron stock) worthless. Enron's collapse also rippled through the larger economy, helping to lead America into its worst recession in decades. What happened?

Congress held hearings. The Senate subcommittee investigating Enron's collapse put the blame on Enron's board of directors:

> [T]he Enron Board of Directors failed to safeguard Enron shareholders and contributed to the collapse of the seventh largest public company in the United States, by allowing Enron to engage in high risk accounting, inappropriate conflict of interest transactions, extensive undisclosed off-the-books activities, and excessive executive compensation.[2]

The short answer from Congress: the board of directors failed.

The legislation that came out of these hearings – the Sarbanes-Oxley Act (SOX) of 2002 – flowed directly from these findings. It made the biggest changes to corporate governance in the United States since the Great Depression. Under SOX, boards are required, among other things, to be more independent and to change the composition of key committees. Directors are now personally liable for the accuracy of financial statements.

The focus on the board as the source of Enron's failure and as the place to reduce corporate fraud was reasonable. State law provides that businesses are to be run by a board of directors, acting as agents of shareholders and other corporate stakeholders. If the board runs the company as the law requires, then when the company is run badly, the board is to blame. *Quod erat demonstrandum*.

But in the Enron case, there was something strange about blaming the board. Just before the collapse, *Chief Executive* magazine declared the Enron board one of the five best in corporate America.[3] This was a widely shared view, and rightly so. Enron's board was stacked with luminaries from business, academia, and government. The board had seven CEOs or former CEOs across a variety of industries, as well as the former dean of the Stanford Business School and the former chair of the Commodities Trading Futures Commission. These were not yes-men or cronies of the CEO. The board was independent of management and had all the committees a good board is supposed to have. Board members showed up, by all accounts took their work seriously, and engaged the best consultants, accountants, and lawyers money could buy. It was in many ways a model of modern corporate governance wisdom and best practices. In fact, an article in the Harvard Business Review, written after Enron's collapse, cheered the composition of Enron's board, concluding "no corporation could have had more appropriate financial competencies and experience on its board."[4]

Maybe the Enron board just blew it. Perhaps. But the legal response in SOX (and elsewhere) presumed that boards were generally underperforming, and that new legal rules could help them.

After all, the Enron example is not an outlier. Corporate governance failures are a familiar part of modern capitalism in the United States and abroad today. The names are familiar: WorldCom, Adelphia Communications, HealthSouth, Parmalat, Bear Stearns, Lehman Brothers, and on and on. Many of these boards were more or less doing what boards everywhere were doing and according to the best practices of the time. And yet, each failure begat a new solution, usually focused on the board. There are hundreds of academic books, thousands of articles in the academic literature and popular press, and countless proposals to make boards better. More independence! More diversity! More meetings! More shareholder power! More managerial power!

But, like the TSA requirement that everyone take off their shoes after Richard Reid put a bomb in his shoe on a Christmas day flight to Detroit, one gets the sense that the solutions are fighting the last battle or just slogans to make everyone feel like something is being done. The people demand action, this is action, therefore this must be good.

Complaints about boards are hardly new, of course. In the 1970s, Ralph Nader complained that directors resemble "cuckolds" who are "often the last to know when [their] dominant partner – management – has done something illicit."[5] In the 1930s, the late US Supreme Court Justice William O. Douglas dismissed directors as "business colonels of the honorary type – honorary colonels who are ornamental in parade but fairly useless in battle."[6] Indeed, as far back as the 1770s, Adam Smith observed that one could not expect that the directors of a joint stock company, "being the managers rather of other people's money than of their own, … should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own."[7] Corporate governance failures were as much a part of Adam Smith's day as our own.

To be sure, there have been significant improvements in recent years. Modern boards of directors typically are smaller than their antecedents, meet more often, are more independent from management, own more stock, and have better access to information. These are probably good developments. (Although we can't be sure, since there is no way to measure good governance empirically. Governance is impossible to separate from operational performance, although the two may be independent. We return to this in the chapters that follow.)

It'd be surprising if some such improvements hadn't occurred, given that corporate governance reform has been a front burner agenda item for the last several decades and almost every reform proposal put forward focused on the board of directors. Reformers have debated whether boards have too much control over corporate affairs, too little, or just the right amount. Subsidiary debates have raged over such issues as whether board members should be independent, who should appoint them, how they should be elected, how they should be compensated, how long their terms should be, what the standards for their conduct and liability should be, what the optimal board size is, and so forth. At bottom, however, all of these debates come back to the problem of optimizing the board's governance role.[8]

While these debates have generated numerous reforms, too many boards are still broken. Consider the following assessment from a 2014 survey of nearly 800 board members by the consultancy McKinsey & Company:

> Boards aren't working. It's been more than a decade since the first wave of post-Enron regulatory reforms … [but] most boards aren't delivering on their core mission: providing strong oversight and strategic support for management's efforts to create long-term value.[9]

Unbelievably, just 34 percent of the directors in the survey agreed that their boards understood their companies' strategies! Read that sentence again. One third *of directors* think the people responsible for managing the firm understand the firm. Is it any wonder there are countless proposals to reform the board?

Board failures are leaving a lot of money on the table that ought to be going to corporations and their shareholders. In emerging markets, for example, it is estimated that investors would pay a premium of 20 to 40 percent for companies with stronger boards.[10] The potential for significant gains is confirmed by a study of South Korean and Indonesian corporations whose board effectiveness ratings rose from the median to the top quartile. Those firms' market value rose 13 to 15 percent.[11]

How can this be? How can corporate boards continue to "fall short," to use the language from the McKinsey report, despite the countless best practice documents, corporate gurus offering advice, and legal reforms offered up over the last fifty-plus years?

We think an answer can be found by asking a seemingly simple question: what do all US corporations – and those in almost all other countries – have in common? They are composed exclusively of human beings.[i] We believe most board dysfunction could be substantially cured if that changed.

We don't have in mind a board consisting of chimps sitting around a table hand signing or Hal 9000-like supercomputers blinking at one another.

Instead, we have in mind outsourcing the board of directors' functions to a separate entity. We call the separate entities that would offer other firms board services "board service providers" (BSPs). To be clear, we do not have in mind individual board members forming professional corporations to get the protection of limited liability, but rather all director services for a given corporation being provided by a single business specializing in providing board services. We want to enable companies to outsource the board. After all, many other services businesses need to succeed are provided by other businesses, not by groups of individuals. For example, companies like General Motors and Google hire accounting *firms* to provide their external audit, not a group of individual accountants. BSPs would work the same way.

Thus instead of Boeing hiring thirteen unaffiliated individuals – Robert Bradway, CEO of Amgen; David Calhoun, Managing Partner, Blackstone Group; Arthur Collins, former CEO, Medtronic; Kenneth Duberstein, former White House Chief of Staff; Admiral Edmund Giambastani, former Vice

[i] In a number of countries, perhaps most notably the UK, the law permits the use of BSP-like entities. Yet, by all reports, few companies avail themselves of this option. We evaluate why that is the case and propose ways in which those countries could tweak their rules and norms to facilitate greater use of BSPs.

Chairman of the US Joint Chiefs of Staff; Lynn Good, CEO, Duke Energy; Lawrence Kellner, former CEO, Continental Airlines; Edward Libby, former CEO, Allstate; Dennis Muilenburg, CEO, Boeing; Susan Schwab, former US Trade Representative; Randall Stephenson, CEO, AT&T; Ronald Williams, former CEO, Aetna; and Mike Zafirovski, former CEO, Nortel – to provide board services in their individual capacity, Boeing would contract with another business to provide these services. The board-of-directors function would be outsourced to a professional services company, a BSP. Call it Boards-R-Us, Inc. Boards-R-Us would still act through individual agents, of course, and perhaps even hire these thirteen individuals to do the job, but the legal responsibility for managing Boeing would be that of Boards-R-Us the entity.

This may seem like a preposterous idea. In the pages that follow, we hope to convince you that it is not. In fact, we think that when you close the back cover, you'll wonder why we haven't already let companies experiment with this idea.

Consider how many corporate functions are already outsourced. As noted earlier, all public corporations outsource their external audit function to independent accounting firms. Most corporations outsource the vast majority of their legal work to law firms. Many outsource human relations, bookkeeping, payroll, and other functions as well.

The reasons for this are straightforward. Outsourcing happens when other business entities can do the work at lower total cost for a given quality. Consider Apple. If you have an Apple device, turn it over. On the back it says, "Designed by Apple in California. Assembled in China." It doesn't say that it is assembled by Foxconn, a separate entity that has a contract with Apple to build the devices. Why does Foxconn build the devices instead of Apple? Simple: it can do it at lower cost while producing an equivalent quality product. The same rationale can lead businesses to hire other businesses to provide board services, whatever those might be.

But the outsourcing we have in mind is not just hiring someone else to do a given task, but also allowing the task to be done by a formal and legally recognized association of individuals, rather than a group of unaffiliated individuals. Individuals form businesses to share risks, to achieve efficiencies that come from collaboration within a hierarchy, and to increase their individual reputations. We will look at this more closely, but the point is obvious. The reason Boeing hires a law firm for a particular deal or law suit instead of hiring a bunch of individual lawyers working as sole proprietors is because it can get the work done at lower cost for a given quality by hiring a *firm*. Cravath, Swain & Moore or Kirkland & Ellis, legal entities, can do the work better and more efficiently than if the very same lawyers were doing the work on their own. After all, there would be no Cravath and no Kirkland if this weren't the case.

Our proposal to allow businesses to outsource the board is also already used in some places. Outsourcing managerial functions is well established in other types of business associations, excluding corporations. Many limited partnerships, for example, have corporations serving as their general partner. Joint ventures between two or more corporations are common. Some manager-managed limited liability companies have incorporated managers. So why not allow an outsourced board for the business corporation?[i]

In this book, we consider various details of what an outsourced board might look like, and examine the costs and benefits of the BSP approach as compared with the current model. To help you grasp the basics of the BSP model, we propose no other significant changes to corporate governance. In other words, except for the minor changes needed to make the BSP system lawful and function, we hold the current election, role, and liability regimes of boards constant. (We will, however, offer views on how these might be tweaked or implicated if there is widespread adoption of our proposal.) Almost all of the current rules of federal and state law, as well as stock exchange listing standards, governing the nomination and election of directors would apply in a BSP-friendly world, just as they do now. Essentially, all that would change is that instead of multiple individuals, only a single entity would be selected to be the board.

Unlike many current corporate governance reform proposals, our BSP proposal has no ideological bent. To be sure, we think corporations are generally engines for social good. Indeed, it has been well said that the corporation is "the basis of the prosperity of the West and the best hope for the future of the rest of the world."[12] In turn, we believe that corporate boards of directors are one of the most important institutions in our capitalist system. Understanding, explaining, justifying, and improving them has been a key focus of our professional lives.

The critical ideological divide in corporate governance today, however, is not the importance of the corporation or the board – on which all agree – but the relative allocation of corporate power between the board, the top

[i] Our idea is consistent with management guru Peter Drucker's view of outsourcing. Drucker argued that business activities that did not provide "a career ladder up to senior management" should be outsourced. Drucker Institute, Farming Out the Directors (Aug. 26, 2013).

> "To get productivity, you have to outsource activities that have their own senior management," Drucker said in an interview that appears in Managing in a Time of Great Change. "Believe me, the trend toward outsourcing has very little to do with economizing and a great deal to do with quality."

Ibid. In our view, however, outsourcing the board function should provide higher quality decision-making and economize on decision-making costs.

management team, and the shareholders. The rise of activist investors, especially since the emergence of hedge funds as activists, has generated great controversy and much spilled ink. We have been players in that debate in the past and doubtless will be again in the future.

Here and now, however, we are neutrals in the Corporate Wars. We believe that BSPs make sense whether you favor board-centric governance, in which the board has most power and shareholder power is limited, or shareholder-centric governance, in which shareholders hold ultimate sway.

Accordingly, if shareholder access to the corporate voting proxy with the goal of more competition for board seats is desired, our proposal can achieve this more directly, at lower cost, and with less downside than the current model. On the other hand, if what would maximize shareholder value is greater managerial control and a longer-term view for board decision making, our proposal could be adapted to this goal as well. In short, corporate governance experts like both Lucian Bebchuk (shareholder power) and Martin Lipton (managerial power) should see the value in our proposed board model. We are trying to reconceptualize the board, not move it in a particular ideological direction.

We emphatically do not suggest that all firms should adopt the BSP approach, any more than we would require all businesses to hire law firms or accounting firms. Sometimes hiring a business to do a job makes sense, and sometimes an individual can do the outsourced work better. Instead, we simply urge that the law and capital markets permit those firms for whom the BSP seems appropriate to adopt it. At present, state corporate law and federal securities law, as well as various stock exchange listing standards, require directors to be “natural persons.” Boards must be composed of multiple, unaffiliated human beings. As far as we can discern, there is no jurisdiction in the United States in which a BSP would presently be lawful.

This restriction strikes us as both foolish on its own merits and as inconsistent with the general thrust of both state and federal law governing business associations. Corporate law is generally permissive about how companies structure their governance, providing merely a set of default rules that can be altered by contract. Mandatory rules are very rare, and the case for them is weakened when there are significant benefits, as here, that can flow from freedom of choice. In addition, there are many cases in which entities, like our imagined BSPs, are already serving as boards or in board-like capacities. As already noted, unincorporated entities – such as partnerships, limited liability companies (LLCs), and the like – are typically permitted to have business associations serve in the management role played by a corporate board of directors for corporate entities. In addition, several federal statutes, including the Investment Company Act of 1940, permit directors to be incorporated entities, and the Supreme Court has construed portions of the securities laws broadly to include corporations acting as directors when the policy justifications for that result are strong.

Instead of proposing a new one-size-fits-all BSP regime, our goal is simply to replace the current regime, in which various laws and regulations effectively forbid firms from hiring BSPs, with one that removes this categorical bar. We think it is hard to come up with persuasive objections to such an enabling approach. Imagine, for example, there were a state law requiring legal services to be provided by individual sole proprietorships. Such a law might be motivated by a belief that lawyers would be more careful acting alone or that conflicts of interest arising from pooling legal resources outweigh the gains. But whatever the reason, such a rule would generate widespread opposition from lawyers arguing that by pooling their resources they could offer better services to their clients. Clients would object too. While some clients might prefer to hire lawyers unaffiliated with a large firm, others might prefer the costs and benefits of hiring a firm instead of a group of individual lawyers. The same is true for corporate governance. It is unlikely that one size fits all, suggesting that a ban on plausible options must be based on an overwhelming case. This case has not been made with respect to BSPs. On the contrary, we think the case for BSPs is quite strong.

WHY A BSP?

Boards of directors of public corporations face a daunting array of tasks, including hiring and firing the chief executive officer (CEO), setting the CEO's compensation, monitoring the CEO's decisions, ensuring compliance with laws, and, above all, representing the interests of shareholders. Yet, the evidence seems clear that they often fail at most or all of these jobs. Why?

There are many reasons boards fail to police managers adequately or make good decisions. Directors are part-timers with weak incentives and limited information. They also are generalists, meaning the average board is unlikely to have all the experts it needs at any given time. CEOs pick directors based on an unknown set of factors, and shareholders have no information about how decisions are made or how individual directors perform.

Hiring a BSP to provide board services instead of a loose group of sole proprietorships will increase board accountability, both from markets and judicial supervision. For instance, BSPs traded in public markets will be disciplined to provide quality services at competitive prices, and courts may be more willing to enforce fiduciary duties against companies than against individuals. We will show why, but the point is simple: Courts may balk at bankrupting a professor serving on a board but not at bankrupting a BSP.

There currently is no market for directors. They find their way onto boards largely through personal connections, often with the CEO, or the opaque headhunter process, and because votes are private and decisions are made collectively, the accountability to shareholders is greatly diminished. Although it is possible for any individual to run for a board seat on any company, the publicity and voting costs are prohibitive. A BSP with a national reputation and the ability to provide all director functions would be able to reduce the cost of winning board seats. For instance, BSPs can use their brand and economies of scale to lower the costs of communicating with and persuading shareholders to hire them.

In addition, BSPs will allow boards to deploy experts as needed to address particular problems as they arise. When board members currently need outside expertise, it all too often comes from outsiders hired by or influenced by the CEO, which creates serious conflict-of-interest problems. In the BSP model, by contrast, we assume that the board-service company would have an internal expert staff backing up the individuals who provide the board functions. Allowing these experts to be under the same roof would reduce this conflict-of-interest problem, as well as transaction costs. BSPs will be able to produce and deploy expertise at lower overall costs. Finally, service firms have reputations that exceed those of individual members, meaning the potential for slack or opportunism is reduced. When an individual acts alone, only one reputation is at stake, but when a firm acts, it is effectively betting the reputation of the firm each time.[i]

* * *

Academics and other corporate observers often imagine that they have the silver bullet that will fix corporate governance, once and for all. These people propose things like eliminating staggered boards or giving shareholders access to the corporate voting machinery or requiring shareholder votes about executive pay. They believe all companies should be required to do what they think is best. We are skeptical that academics have any silver bullets in their guns, and have yet to see a one-size-fits-all approach to governance that we would support as a requirement. Given this, how can we subject you to a book-length corporate governance proposal?

We think our idea to outsource the board is different from the typical proposal in an important way. That is why we call the idea "revolutionary." We believe in markets and that, to quote business-law academics Frank Easterbrook and Daniel Fischel, "[t]he best structure cannot be derived from theory; it must be developed by experience."[13] As such, our proposal is

i Conflict problems arising from BSPs could be handled through rules limiting cross selling of services, just as Sarbanes-Oxley did for accounting and consultancy services.

just that – an idea that law should allow corporations to try. We may be wrong. If so, no businesses will use a BSP, or those that do will find it doesn't deliver the supposed benefits. Those that persist in using it despite this will be ground under by the competition.

But we may be right. And, if we are, then firms that use a BSP may achieve new efficiencies in corporate management, resulting in lower costs of producing economic activity. Corporate transparency about governance will be increased, and there will finally be a market for governance, as distinct from the market for corporate control. We may be able to finally isolate a measure of governance that is distinct from operational performance, thus bringing a market test to the question of optimal corporate governance. After all, the answer as to optimal governance in general or for a particular company is not in the mind of a corporate law scholar or gadfly, but in the thousands of minds that will experiment with new governance arrangements. There may be entrepreneurs with ideas about how to run firms using boards better, but are unwilling or unable to take over those firms or to take on the economic risk. We propose to let those entrepreneurs try.

PLAN OF THE WORK

To make our argument, the book proceeds as follows.

Chapter 1 traces the history of the board of directors. Our goal is to uncover the origin story in the hope of explaining why boards look the way they do, centuries later. As it turns out, the modern board owes much to its ancient ancestors; this is not a good thing. Board are, despite recent improvements, stuck in the past, and it is a past that does not fit with modernity.

In Chapter 2, we turn to the question of what do boards do today? Corporation statutes tell us that the corporation's business and affairs "shall be managed by or under the direction of a board of directors,"[i] but if this statutory command ever reflected real-world practice, it has long since ceased to do so. In order to assess the merits of the BSP model, we therefore need to identify the real-world functions performed by modern boards of directors.

A modern board's job has three components: management, oversight, and service. The balance between them has varied over time and from firm to firm, as we shall briefly demonstrate with a review of the historical development and evolution of the board. As we shall see, however, the long-term trend has been

[i] This language is from Delaware General Corporation Law § 141(a), the most important source of corporate governance law in the United States. Delaware is home to more public corporations than any other state. Other states have similar statutory commands.

to emphasize the board's role as monitors of the top management team. This trend has been given even more power in recent years, with increasing compliance obligations being imposed on boards of directors by both federal securities laws and state corporate law. Boards are more removed from the day-to-day job of running the firm than ever in the history of corporate affairs, and yet law leans on board members more and more.

In Chapter 3, we observe that boards of directors have long had a bad press and explain why that has been the case. From Adam Smith in the 1770s, to William O. Douglas in the 1930s, to the Securities and Exchange Commission (SEC) in 2009, critics have complained about boards. While there is some evidence that many modern boards outperform their predecessors, it would be Pollyannaish to deny that there is still much room for improvement in board performance. The aftermath of the financial crisis of 2007–2008, for example, revealed widespread board failures in areas such as enterprise risk management. Still another widely asserted criticism is that boards have failed to rein in allegedly runaway executive compensation.

Accordingly, Chapter 3 will briefly review the leading criticisms that have been launched at the board of directors as an institution over the years, with special emphasis on recent critiques. We will examine complaints about board performance during the financial crisis, for example, as well as such current arguments as the lack of board diversity.

Chapter 4 asks why boards fail. We argue that boards fail because they devote inadequate time to their jobs, because they misspend the time they do devote to their jobs, and because they have inadequate information, improper skill sets, and insufficient incentives. Many of these problems are longstanding, of course, but we believe that they have been significantly compounded by the increased emphasis in recent decades on director independence. As a result of stock exchange listing standards mandating director independence and pressure from corporate governance reformers, the percentage of board members who are independent has risen dramatically. As a result, boards today are dominated by part-timers, the vast majority of whom have full-time employment elsewhere, which commands the bulk of their attention and provides the bulk of their pecuniary and psychic income.

In Chapter 5, we come (the reader may well say, at last!) to our description of board service providers. Instead of a corporate board composed of a group of individuals acting as independent contractors, we have in mind a business entity, be it a partnership, LLC, corporation, or other association, acting as the board of another company. In our model, the board would be an "it," not a group of "hes" and "shes." Instead of nominating and electing a slate of unrelated individual independent contractors to serve as board members, a BSP would be chosen to provide director services.

We propose that the BSP be selected by the shareholders, but leave it to the market to develop solutions to the problems presented by corporate elections. We also hint here and there about alternatives to standard, annual elections.

Chapter 6 argues that BSPs could deliver, at least in some instances, better corporate governance at lower costs. We demonstrate that claim by mapping the BSP model to the functions played by the modern board: management, service, and monitoring management. In each of these areas, the BSP has the potential to make improvements or at least do no harm.

In doing so, Chapter 6 identifies a number of ways in which BSPs could help reduce the pathologies of the current board model of corporate governance. A significant advantage of the BSP model is the potential to ameliorate the problems identified in Chapter 5 by taking advantage of the potential economies of scale and scope inherently created when economic activity is brought within an organization rather than conducted by individuals. In addition, BSPs would be more accountable than the group of individuals currently providing board services; indeed, we believe that the accountability of the whole would be greater than the sum of the liabilities of the parts.

Chapter 7 will address issues such as the role of the BSP in the overall team that includes outside legal counsel, independent financial advisors, independent accountants, and other service professionals. It will also consider issues such as how the BSP is compensated by the company and the internal incentives within the BSP.

Chapter 8 explores the legality of BSPs under current law, which admittedly creates numerous obstacles to affecting our proposal, all of which therefore require rethinking. The most obvious hurdle is the requirement – embedded in a surprisingly large number of provisions of state corporation law, stock exchange listing standards, and various federal laws – that directors be "natural persons." Chapter 8 identifies the legal barriers to creating BSPs and argues that they should be eliminated so as to allow BSPs to become an option for corporations hiring board services.

In addition to reviewing US law, Chapter 8 will examine the law of other countries to determine the extent to which they permit the use of BSPs. Particular emphasis will be placed on the UK example, where BSPs are permitted but rarely used.

The final chapters of the text explore where BSPs fit into various current corporate governance topics. Chapter 9, for example, reviews how BSPs can be adapted to the emerging federal corporate governance scheme effected by SOX and the Dodd-Frank Act of 2010. Chapter 10 explores how BSPs could be reconciled with the increasing demand by investors for proxy access. Chapter 11 offers BSPs as an alternative to quinquennial board elections, an idea promoted by two lawyers with long experience in the trenches of the Corporate Wars.

Chapter 12 examines the emergent school of thought contending that shareholder activism is a response to alleged shortcomings of the monitoring model. As the argument goes, businesses have grown exponentially in size and complexity in recent decades, while traditional boards have been unable to adapt to these changes. The problem is compounded by legal changes – such as Sarbanes-Oxley § 404 – that have heaped a series of new duties on boards that distract directors from monitoring aspects of the firm not governed by the various new compliance regimes. Proponents of this line of argument contend that boards need to evolve to a "thickly informed" director model, in which the board would develop deep knowledge about the company and its industry, which would require significant changes in what directors do and how board structure might evolve to support this broader role. In our view, the BSP model is an ideal vehicle for implementing such a post-monitoring board.

Finally, Chapter 13 anticipates and responds to likely objections to our proposal.

A NOTE ON TAKING THE BSP MODEL GLOBAL

Our focus admittedly is focused on the United States. It is the system we know best, after all. At least for the time being, it also remains the largest economy in the world with the vast majority of large corporations. Improved corporate governance, however, increasingly is a matter of global concern. The last several decades have seen numerous official and quasi-official studies of corporate governance offering recommendations for change in many countries, such as the United Kingdom's famous Cadbury Report. In addition, numerous transnational organizations have issued similar surveys and recommendations, such as the Organization for Economic Cooperation and Development's regularly updated Principles of Corporate Governance. Throughout the book, we therefore devote attention to the relevant legal rules and economic situations of both developed countries and emerging markets. The chapter on why boards fail, for example, includes discussion of the reasons boards do so in emerging markets, which turn out to duplicate the problems of US companies while adding unique additional factors into the mix. The chapter on BSPs and the law likewise includes an analysis of the laws in the United Kingdom and a number of other major economies.

Having said that, however, our emphasis is on the unitary board system predominant in common law countries. Although there are many similarities between that system and the dual board system found in many civil law countries – most famously in the German system of codetermination – there are also many critical differences in the duties and roles of boards in the two systems. Even more differences emerge when one broadens one's perspective to include extra-legal considerations such as best practices, social norms, and cultural expectations. In our view, some of those differences – especially with respect to employee representation – loom sufficiently large to justify our focus on countries with a unitary board system (or, at least, a unitary board option).

Notes

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