

CORPORATE GOVERNANCE: HOW IT FAILED US—AND HOW THE CRISIS WILL CHANGE IT

MGT 847

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FALL-2 SEMESTER 2010

TUESDAYS & THURSDAYS, 1:00-2:20PM
ROOM: A-51

The financial crisis was fueled by an unrestrained capital market highly dependent on models based on the efficient market hypothesis and its progeny of other financial theories. Regulation was lax at all levels, on the theory that markets alone would correct any defects. This permissive financial environment paved the way for the development of debt instruments (e.g., mortgage backed securities, collateral debt obligations, credit default swaps) by a host of new market participants who, driven by the lure of profit, and/or poor historical analysis, didn't properly assess the risks involved. The credit rating agencies did not pick up on the risks either, offering generous grades to undeserving investments. The corporate governance of financial sector participants was just as tolerant, short term gains based on share price became widely accepted as the touchstone of corporate strategy and compensation. The non-financial sector followed suit and catered to the short term demands of the capital markets. The financial crisis has clearly exposed the faults of the efficient market hypotheses and its progeny: the lack of regulation which it spawned; and the lack of appropriate corporate governance it fostered.

Corrective action was demanded by the public to which Congress responded with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, whose practical results are, of course, yet to be determined.

The course involves lectures by Professor Millstein, Anne Simpson, Senior Faculty Fellow, and other experts in the field of corporate governance, case study presentations and class discussion.

SECTION I: THE ELEMENTS OF CORPORATE GOVERNANCE

Tuesday, October 26: Inventing the Corporation: History and Structure

Assigned Reading:

1. BY-LAWS OF GENERAL ELECTRIC COMPANY, *available at* http://www.ge.com/pdf/company/governance/by_laws/by_laws08.pdf;
2. CERTIFICATE OF INCORPORATION OF GENERAL ELECTRIC COMPANY, *available at* <http://www.ge.com/company/governance/certification/index.html>
3. W. Klein & J. Coffee, *Corporations*, in BUSINESS ORGANIZATION AND FINANCE LEGAL AND ECONOMIC PRINCIPLES 106-139 (2004).
4. A. Berle & G. Means, *The Inadequacy of Traditional Theory & The New Concept of the Corporation* Book IV, Ch. III & IV 345-357; in THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

Thursday, October 28: Objectives of the Corporation and the Impact of Economic Theory

Assigned Reading:

1. American Law Institute, *The Objective and Conduct of the Business Corporation*, 2.01 55-76 in Volume 1, PRINCIPLES OF CORPORATE GOVERNANCE (1994) (Note: ignore “illustration” sections).
2. P. Gourevitch & J. Shinn, POLITICAL POWER AND CORPORATE CONTROL 1-26, 277-295 (2005).
3. J. Micklethwait & A. Wooldridge, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA xx-xv, xx-xxi, 190-191 (2003).

Tuesday, November 2: Legal and Regulatory Restraints

Guest Lecturer: Ashley Altschuler, Partner, Weil, Gotshal & Manges, LLP

Assigned Reading:

1. L. Strine, Jr., The Role of Delaware in the American Corporate Governance System, and Some Preliminary Musings on the Meltdown’s Implications for Corporate Law, Address at the Molengraaff Institute for Private Law Governance of the Modern Firm Conference, Utrecht University, Utrecht, The Netherlands (Dec. 13, 2008).
2. J. B. Jacobs et al., Best Practices in Delaware Corporate Litigation, Outline for the Florida Bar Young Lawyers Division Panel (Nov. 10, 2008).

Thursday, November 4: The Role and Responsibilities of the Board of Directors

Guest Lecturer: Rebecca C. Grapsas, Associate, Weil, Gotshal & Manges LLP

Assigned Reading:

1. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), OECD PRINCIPLES OF CORPORATE GOVERNANCE 55-66 (Revised ed. 2004).
2. AMERICAN BAR ASSOCIATION, COMMITTEE ON CORPORATE LAWS, CORPORATE DIRECTOR’S GUIDEBOOK 11-35, 105-111 (5th ed. 2007).
3. GENERAL ELECTRIC COMPANY, GOVERNANCE PRINCIPLES (2009).
4. WEIL, GOTSHAL & MANGES LLP, BOARD OF DIRECTOR COMPOSITION AND GOVERNANCE REQUIREMENTS (2010) (for reference purposes only).

Tuesday, November 9: The New Capital Markets

Assigned Reading:

1. OECD, THE ROLE OF PRIVATE POOLS OF CAPITAL IN CORPORATE GOVERNANCE: SUMMARY AND MAIN FINDINGS ABOUT THE ROLE OF PRIVATE EQUITY FIRMS AND “ACTIVIST” HEDGE FUNDS (2007).
2. I. Millstein, Directors and Boards Amidst Shareholders with Conflicting Values: The Impact of the New Capital Markets, Remarks at the Jonathan Charkham Memorial Lecture (July 9, 2008).
3. R. Clark, *Major Changes Lead US Back to Basics* (A Response to the Symposium on My Treatise), J. CORP. L. 591 (2006).

Thursday, November 11: Corporate Responsibility and “Doing the Right Thing”

Guest Lecturer: David Miller, Director of the Princeton University Faith & Work Initiative

Assigned Reading:

1. TBD

SECTION II: EXAMINATION OF GOVERNANCE FAILURES

Tuesday, November 16: The Current Financial Crisis and How We Got Here

Guest Lecturer: Jim Millstein, Senior Restructuring Executive, U.S. Treasury

Assigned Reading:

1. L. Grafstein & J. Millstein, *Bailing Upward*, THE NEW REPUBLIC (2008).
2. Chairman Ben S. Bernanke, address at the Federal Reserve Bank of Kansas City, Jackson Hole, Wyoming (August 21, 2009).
3. A. Kling, *Not What They Had in Mind: A History of Policies that Produced the Financial Crisis of 2008* (September 2009).

Thursday, November 18: Failure of Incentives: Executive Compensation

Guest Lecturer: Howard Dicker, Partner, Weil Gotshal & Manges LLP

Assigned Reading:

1. TBD

Tuesday, November 23: Failure in Risk Management: The Role of the Board of Directors

Guest Lecturer: Robert J. Kueppers, Deputy Chief Executive Officer of Deolitte LLP

Assigned Reading:

1. TBD

Tuesday, November 30: Failure of Ownership: Rights & Role of Shareholders

Assigned Reading:

1. TBD

Thursday, December 2: Failure of Watchdogs: Regulation

Guest Lecturer: Harvey Goldshmid, Former SEC Commissioner

Assigned Reading:

1. THE DEPARTMENT OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE pgs. 1-22 (2008).
2. [Articles to be distributed.]

Tuesday, December 7: Failure of Watchdogs: Credit Ratings

Guest Lecturer: Jerome Fons, Owner, Fons Risk Solutions; Former Managing Director, Credit Policy, Moody's Investors Service

Assigned Reading:

1. J. Fons, *White Paper on Rating Competition and Structured Finance*, J. STRUCTURED FIN. (Fall 2008).
2. *Turmoil in the U.S. Credit Markets: The Role of the Credit Rating Agencies Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. (2008) (testimony of Professor John C. Coffee, Jr., Adolfe A. Berle Professor of Law, Columbia University Law School).

Thursday, December 9: Making It Work—"Review the Fix"

Assigned Reading:

1. TBD

GRADING/EVALUATION

Grades will be based on the following:

- (1) Reaction Papers/Final Take Home Exam Paper (80%)
- (2) Class Participation (20%)

Evaluation will be based on:

- (1) Class Participation and
- (2) Three Reaction Papers (to be based on any five lectures and accompanying materials) of 4-5 pages each, or Final Take Home Exam Paper of 15-20 pages (dealing with any subject covered by the course).

****Reaction Papers Will Be Due One Week From Lecture Date****