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COMMENT: A VIEW FROM THE BOARD ROOM: THE SUCCESS OF CORPORATE GOVERNANCE

Bonnie Hill[†]

One of the great virtues of an academic symposium like this is that it is a step removed from the hurly-burley of Wall Street and Washington, D.C. Getting a little distance from the day-in and day-out pace of business—and of the political maneuvering in Washington—helps to give us some added perspective. In an academic setting like this we can focus on finding what really works: defining which pathways are promising to follow and which ones are just “blind alleys.”

The good news is that all of Corporate America is not broken and that the spirit of reform has been broadly welcomed among many corporate board members. The reforms of the recent years were well thought-out in theory and they have largely proven to be workable in practice. And, if some provisions of Sarbanes-Oxley have led to unintended consequences, those provisions can be refined as we move forward.

Over time, the process of absorbing and adapting the new laws will be beneficial to companies and to the marketplace as a whole. The important thing is that far from being adversaries, corporate board members, the SEC, and other stakeholders need to recognize that we are all allies.

There are constructive voices on corporate boards who appreciate the diligent work of the SEC. And there are serious minded pragmatists within the SEC who want to frame workable rules to help board

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members fulfill their vital oversight role. While chairing the Consumer Affairs Advisory Committee for the SEC under former SEC Chairman Arthur Levitt, I had the opportunity to work with a number of competent and committed staff members. A number of them are still there, working hard to find regulatory balance.

Corporate board members, the Commission—and Congress as it framed Sarbanes-Oxley—have all put a renewed emphasis on what has always been the board's primary duty: upholding the interests of shareholders. Sadly, some people within Corporate America—a relative few—lost sight of that duty in the 1990s, leading to situations that shocked us all. But the spirit of reform has been widely accepted, and the Sarbanes-Oxley Era has brought a new recognition of what is essential: increasing shareholder value.

It would be unfortunate if the confrontational atmosphere of Wall Street and Washington seeped into the academic debate as well. I am glad to see, for an example, that there is a question mark following our theme today, “Corporate Governance: Directors vs. Shareholders?”—it is a very well-placed question mark. There is truly no need to be confrontational. It is my belief that directors are focused, perhaps more intensely than they were before Enron, on their central role of working for the benefit of shareholders. Fulfillment of this role can only be accomplished by working with the SEC, other regulators, and corporate-governance reformers.

There is also an assertion in the announcement for this conference: that “much of Corporate America objects that SOX has increased costs with little or no benefit and that the SEC’s proposals would diminish the effectiveness of corporate boards by provoking friction.”

So, I am pleased to bring you some news from the front lines of the battle, that most of Corporate America has overcome its initial hesitation about Sarbanes-Oxley.

According to a newly released study of senior managers at global corporations—a study performed by the Economist Intelligence Unit (EIU) and the public affairs firm of Hill and Knowlton—there is broad acceptance of Sarbanes-Oxley within major corporations.¹ The study reports that the recent reforms of corporate governance standards are now broadly accepted by senior managers of international business who have overcome their initial misgivings about the potential administrative and financial burdens of complying with the requirements of Sarbanes-Oxley. “[E]ight percent of senior executives surveyed believe that the task of complying with the new financial

¹ HILL & KNOWLTON, INC. & ECONOMY INTELLIGENCE UNIT, CORPORATE REPUTATION WATCH 2004 (Sept. 2004), available at <http://www.hillandknowlton.com/crw/index>.

disclosure and corporate governance standards poses a real challenge to running a competitive business.”² “[A]most half (45 percent) say the compliance burden is ‘heavy’ but manageable.’ Expressing no misgivings about the compliance requirements, 48 percent say that the burden is ‘reasonable’.”³

My personal experience is consistent with the findings of the study. There is general consensus that corporate governance reform is here to stay. In the boardroom we discuss ways to make the changes meaningful and enduring; we do not spend time talking about the “good old days.” The reason is, that for most of us, good corporate governance is not a new concept. The duty of care and our obligation to shareholders did not begin post Enron. Directors have always been responsible for the decisions they make and the consequences of those decisions. Most directors understand their role and responsibility to act on behalf of shareholders. Most directors also understand the importance of reliable financial data, transparent disclosure, and strong corporate governance principles. And, they understand the importance of being independent in order to make objective and rational decisions.

What is interesting to note is that according to a study by Shearman & Sterling LLP, on “Corporate Governance Practices of the 100 Largest U.S. Public Companies,”⁴ many of the Fortune 100 Companies have taken actions beyond the technical requirements of corporate governance reform. For example, forty-six of the Fortune 100 Companies have adopted independence standards that are “more stringent” than the NYSE/Nasdaq/SOX requirements.⁵ On Thirty-five (35) boards of the Fortune 100 Companies, the CEO is the only non-independent member.⁶ With regard to the audit committee requirement for a financial expert, forty-two (42) of the Fortune 100 voluntarily listed more than one financial expert on their board.⁷ The reason many companies have gone beyond the technical requirements of Sarbanes-Oxley is because it makes good business sense.

One need only to see the consequences of poor corporate governance in the *Wall Street Journal* to know it is an experience that she can live without. A director’s greatest nightmare is finding his or her name in the newspapers linked with a major corporate scandal, the

² *Id.* at 14.

³ *Id.*

⁴ SHEARMAN & STERLING LLP, CORPORATE GOVERNANCE PRACTICES OF THE 100 LARGEST U.S. PUBLIC COMPANIES, available at http://www.shearman.com/documents/CG_100_survey_2004.pdf.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

accusation being that the board fell down on the job. And while there are those who say that directors simply sit in the boardroom, have a nice lunch, rubber-stamp the CEO's recommendations, and collect their retainer; I would simply say those directors are taking a big chance and have no idea of the potential consequences.

Today I am considered a veteran director. But as a rookie director, I had my trial by fire with a company whose board I no longer serve on. Shortly after being elected to the board I learned that we would be paying one of the EPA's largest environmental fines. Slightly more than a year or so later we learned that the Company—and the board—were being indicted by a federal grand jury. This came as a complete surprise to the board so you can imagine our reaction. As the new kid on the block, I was elected chair of the committee of independent directors. So, I got my feet wet early on. It was then that I learned the true role and responsibility of independent directors and the importance of being diligent. That was before Enron.

Now, for one quick moment, I would like to talk about board independence and the SEC's proposed Shareholder Access Rule. Commissioner Campos has described some of the SEC's priorities, including issues of director independence and the shareholder access proposal.⁸ I agree that here are a number of unresponsive boards that should be dealt with, but the current proposal for shareholder access may have unintended consequences. Clearly the SEC is well intentioned in its effort to give shareholders greater representation. The manner in which it is trying to accomplish this goal, however, is problematic.

There is currently a very rigorous standard for director independence. If the current standard is going to be effective, then the nominating committee, comprised totally of independent directors, elected by shareholders, should have the opportunity to fulfill its responsibility. That responsibility is to find new directors who are subsequently elected by the shareholders. I am concerned that the proposed rule would give special interest groups the ability to pursue their own agenda at the expense of all shareholders, and that it would be costly to companies as they divert their attention, time, and money from serving the interests of all shareholders to the interests of a few. It is also probable that the proposed rule would result in divided boards rather than collegial boards, which are necessary in order to move companies forward. It is good to have healthy discussions and debates; on my boards this happens often. At the same time however, it

⁸ Roel C. Campos, *Remarks of S.E.C. Commissioner Roel C. Campos*, 55 CASE W. RES. L. REV. 527 (2005).

is important to recognize that what is at stake is the long-term survival of the company, and increasing shareholder value.

I think we can all agree that even one example of corporate wrongdoing is too many. The goal of regulation should be to address wrong-doing without burdening the hundreds of companies that already adhere to good governance principles and standards. Simply put, qualified independent directors nominated by an independent committee and elected by the shareholders should be the ultimate goal.

There are a number of other issues I would like to discuss if time permitted, such as the role of lead directors, extended audit committee oversight and so on, but I will restrain myself and just simply reinforce my earlier statement: all of corporate America is not broken, and corporate governance reform has been, for the most part, successful. Our challenge, as stakeholders in the process, is to mitigate the unintended consequences.

