Contents

Part I: The System and How It Came To Be — 1

Chapter 1: How Our Governance System Began — 3
The First Limited Liability Corporation — 3
  Amsterdam Stock Exchange Established to List VOC Securities — 4
  VOC Completes Initial Public Offering, Possibly World’s First — 4
  The Governance of VOC Establishes the Model — 5
  The Lords Seventeen Governance Structure Drawn from Guild System — 5
  VOC Confronts a Large Activist Shareholder — 6
  . . . And a Bear Syndicate — 6
  The Corporate Form Advances and Spreads—And with It, the Board — 7
  Corporations Arrived in the New World — 8
  And Bubbles Burst — 9

Chapter 2: The Emergence of the Corporation in United States — 11
New York Pioneers Simple Incorporation Procedure — 11
  Boston Manufacturing Company is First Private Corporation in United States — 12
  Corporations Gain Power Under State Control — 13
  Economic Opportunity Expands; Farmers and Artisans Suffer Disruption — 14
  Corporate Control is Concentrated — 15
  How J.D. Rockefeller Went from Rags to Riches — 15
  The Government Fights Back, Kind Of — 16
  Early Days of the New York Stock Exchange — 17
  Teddy Busts the Trusts — 19
  Government Power Takes on Commercial Power: Teddy v J.P. — 19
  Unintended Consequences Lead to More Antitrust Laws — 20

Chapter 3: Post–World War I Developments — 23
The Stock Market Crashes — 23
  The Great Depression and FDR’s New Deal — 23
  Safety Net for Banks Created — 24
  Regulation of Securities and Securities Markets Takes Root — 25
  Safety Net Extended to Citizens as Social Security is Born — 25

DOI 10.1515/9781547400270-206
Chapter 6: Post 2000 Intensification of Focus on the Board —— 49
Corruption Eruption Leads to Sarbanes Oxley and Growing Focus on
Board —— 50
The Functioning of the Board of Directors Gains Attention —— 52
Sarbanes-Oxley Act —— 54

Part II: The Players and Capital Market Forces —— 59

Chapter 7: The Rise of Independent/Disinterested Directors —— 61
Considering Independent Director Effectiveness —— 61
Dueling Definitions —— 62
New York Stock Exchange Listing Requirements Stress Independence of
Directors —— 62
Independent Directors Fill a Structural and Legal Need —— 66

Chapter 8: The Rise of Institutional Investors —— 69
Mutual Fund Development —— 69
Comments from Mutual Fund Leader John C. Bogle —— 71
The Growth of Passive Investing —— 74
The Defined Benefit Pension Plan Grows —— 75
Employee Retirement Income Security Act of 1974 (ERISA) Strengthens
Pension Rules —— 76
The Defined Benefit Pension Plan Declines —— 77
Retirement Assets Shift into Mutual Funds —— 78
Public Sector Pension Plans —— 78
The Growing Pension Crisis —— 79
Investing by Public and Private Plan Fiduciaries —— 80
Shifting Patterns of Share Ownership in United States —— 82
The Perils and Possibilities of Concentrated Share Ownership —— 83
The Rise of Proxy Advisor Power —— 84
Proxy Advisors Helped Interpret High Volume of Information —— 85
Responsible Voting of Proxies in Best Interests of Clients
Required —— 85
Proxy Advisors Take Heed: Physician, Heal Thyself —— 86

Chapter 9: The Impact of The Great Inflation —— 89
The Seeds of the Great Inflation Are Sown by the Fateful Phillips
Curve —— 89
Our Economy Fights Another War, on Several Fronts —— 91
Corporate Titans Are Shaken by an Upstart —— 119
The Government Fights Back—For Real —— 119
Giuliani Plays Hardball with RICO Threat —— 120
Milken Pleads, and NOT to Engaging in Insider Trading —— 121
And Drexel Fails —— 122
And Restructures Its Own Board of Directors —— 122
Lasting Impact of Milken and Drexel Burnham —— 123
Private Equity Goes Public —— 123

Chapter 13: The Rise of Hedge Funds and Emergence of Aggressive Activism —— 125
Hedge Funds Remain Largely Opaque and Unregulated —— 125
Hedge Funds Emerge as Activists —— 126
Traditional Institutional Investors Join the Fray —— 127
The Current Impact of Activism —— 128
Voting Results on Shareholder Proposals —— 129

Chapter 14: The Evolution of the New York Stock Exchange —— 131

Part III: The Role of The Board —— 133

Chapter 15: Clarifying the Rights and Roles of the Board and the Shareholders —— 137
The Board Serves the Corporation as Its Agent —— 138
The Powers of the Board —— 139
Public Company Ownership —— 140
Functional Principles of the Board —— 141
Accountability of the Board —— 143
Defining Board Success —— 143
The Purpose of the Corporation Project —— 145
Short Termism Really Is a Problem —— 146

Chapter 16: Assessing the Proliferating Policies and Principles —— 149
OECD Encourages Adoption of National Codes of Governance —— 150
Other Voices Join in —— 150

Chapter 17: Considering the Proposed New Paradigm —— 153
Summary Roadmap for the New Paradigm —— 153
The New Paradigm Attempts a Synthesis of Good Corporate Governance
Contents

Concepts —— 155
Proposed Investor Behavior —— 158
New Paradigm Proposes Integrated Long-Term Investment Approach —— 159
Proposed Integration of Citizenship Matters into Investment Strategy —— 159
And Now Comes CIRCA, Council for Investor Rights and Corporate Accountability —— 161
Activist Playbook —— 162
Proxy Fights and Shareholder Candidates —— 163
The Bower and Paine Analysis of Maximizing Shareholder Value as Corporate Goal —— 163
The Dangers of Agency Theory —— 165

Part IV: Doing the Job —— 169
Boards Must Protect Corporation Regardless of Conflicting Agendas —— 169

Chapter 18: Review Issues for Boards to Address Highlighted by NYSE —— 171
Executing the Work of the Board —— 173

Chapter 19: Establish the Appropriate “Tone at the Top” —— 175
Relentless Focus on Ethical Behavior and Discerning the Right Thing to Do —— 178
Training as to What Ethical Behavior Means is Important in Our Changing World —— 179
Ensure Reports on Compliance are Made Directly to the Board Periodically —— 179

Chapter 20: Choose the CEO Wisely and Actively Plan for Succession —— 181
Keep the Emergency Succession Plan Current —— 181
Build a Future View of Company Needs into Longer Term Succession Planning —— 182
Setting Criteria and Developing Possible Candidates —— 182
Work with the Incumbent —— 183
Know Your Senior Management Team —— 184

Chapter 21: Develop a Strong Organizational Framework —— 187
<table>
<thead>
<tr>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 22: Tailor Board Work to the Company —— 189</td>
</tr>
<tr>
<td>Board Leadership —— 189</td>
</tr>
<tr>
<td>Committee Structure —— 190</td>
</tr>
<tr>
<td>Audit Committee —— 192</td>
</tr>
<tr>
<td>Compensation Committee —— 194</td>
</tr>
<tr>
<td>Nominating and Corporate Governance Committee —— 195</td>
</tr>
<tr>
<td>Other Committees —— 196</td>
</tr>
<tr>
<td>Special Committees —— 196</td>
</tr>
<tr>
<td>Special Negotiation Committee —— 196</td>
</tr>
<tr>
<td>Special Litigation Committee —— 197</td>
</tr>
<tr>
<td>Special Investigation Committee —— 197</td>
</tr>
<tr>
<td>Board Information —— 198</td>
</tr>
<tr>
<td>Information Security —— 198</td>
</tr>
<tr>
<td>Collegiality —— 199</td>
</tr>
<tr>
<td>Manage Communication Mindfully —— 199</td>
</tr>
<tr>
<td>Executive Session —— 201</td>
</tr>
<tr>
<td>Meeting with Management —— 201</td>
</tr>
<tr>
<td>Setting the Agenda —— 202</td>
</tr>
<tr>
<td>Facilitate Candid Communication and Trusting Relationships —— 202</td>
</tr>
<tr>
<td>In Crisis the Buck Stops with the Board —— 203</td>
</tr>
<tr>
<td>No Time to Resign —— 204</td>
</tr>
<tr>
<td>Chapter 23: Focus Intently on Compensation —— 205</td>
</tr>
<tr>
<td>Executive Compensation —— 205</td>
</tr>
<tr>
<td>Fairly Compensate Directors —— 205</td>
</tr>
<tr>
<td>Chapter 24: Seek Wisdom, Courage and Breadth of Experience in Director Recruitment —— 207</td>
</tr>
<tr>
<td>Get the Right Mix of Directors in the Boardroom —— 208</td>
</tr>
<tr>
<td>Value Tempered Judgment over Technical Expertise —— 2108</td>
</tr>
<tr>
<td>Chapter 25: Actively Evaluate Board Performance to Constantly Improve —— 213</td>
</tr>
<tr>
<td>Developing the Process —— 213</td>
</tr>
<tr>
<td>Chapter 26: Manage Risk Effectively —— 217</td>
</tr>
<tr>
<td>Further Comments on the Board and Cybersecurity —— 220</td>
</tr>
<tr>
<td>Never Underestimate the Impact of Human Error —— 221</td>
</tr>
<tr>
<td>Importance of Plans —— 221</td>
</tr>
</tbody>
</table>
Chapter 27: Independently Evaluate the Impact and Execution of Transactions —— 223

Chapter 28: Communicate Clearly, Consistently and Constantly —— 225

Part V: Hazards and Their Navigation —— 229

Chapter 29: Address Individual Hazards and Personal Fear —— 231
  Liability Concerns —— 231
  Efforts to Insulate Directors —— 232
  Directors and Candidates Should Understand the Protections They Have —— 234
  Beware the Responsible Corporate Officer Doctrine —— 234

Chapter 30: Navigate Corporate Hazards and Distressed Situations —— 237
  Liquidity: What to Do When Cash Runs Low —— 238
  Form a Board Committee to Focus Closely on the Emergency —— 238
    Is This Really a Role for the Board? —— 240
  The Corporation Is Counsel’s Client; The Board Retains Counsel —— 241
  The Next Step: Assess Viability —— 241
  Bringing in Help —— 244
  Assessing Leadership Resources —— 245
  Structuring the Leadership Role —— 245
  Communicate the Plan, and the Progress —— 246
  Just Do It —— 247
  Appreciation of the Effort Put in Goes a Long Way —— 248
  Yes, Virginia, You Did Sign Up for This —— 248
  Becoming the Debtor in Possession —— 248

Chapter 31: Recognize and Rectify Hazards of Board Process —— 251
  Continuing Confusion as to Responsibility and Authority —— 251
  Group Think —— 252
  Faulty Filters —— 252
  Corporate Myths —— 253
  Conformity Pressure —— 253
  The State Dinner —— 254
  Bullying —— 254
Chapter 32: Know that Steady, Purposeful Work is the Antidote —— 255
Reading the Room —— 255
Preparing —— 256
Owning Your Style —— 256
Finding Your Point of View—and Theirs —— 256
Leading with Your Ears —— 257
Addressing Biases —— 257
Overconfidence —— 258
Confirmation Bias —— 258
Survival Bias —— 259
Attribution Bias —— 259
Building a Championship Team —— 260
Dissent is Not Disloyalty —— 261
Building a Portfolio of Roles —— 261

Chapter 33: Survive Success and Relentlessly Build Resilience —— 263

Conclusion: Own the Role and Build the Future —— 267

Index —— 269