Venturing into the Belly of the Beast: The Ontological Question

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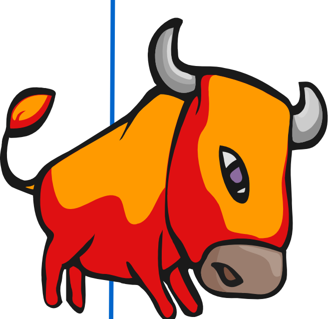
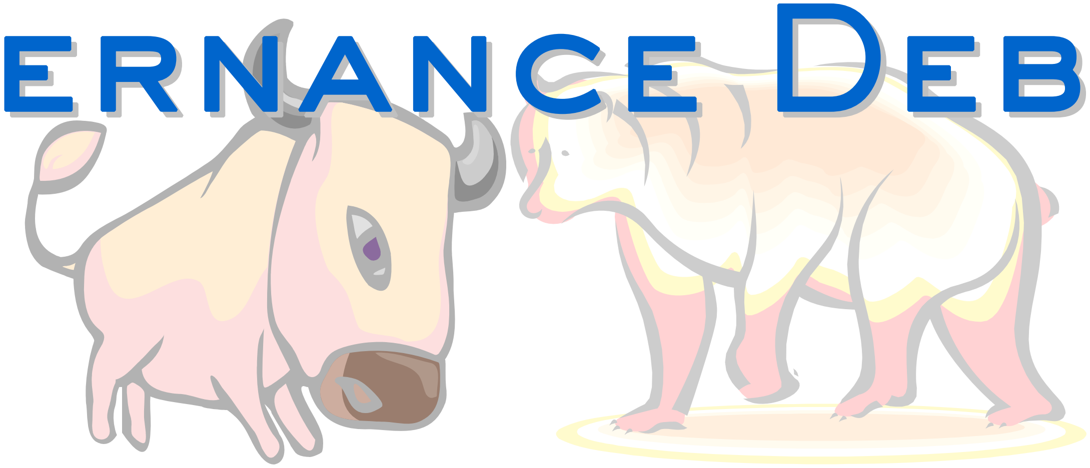


Harvard Law School
January 9, 2012

Back to the Future:

The Current and Former Status of the Great Corporate Governance Debate



Back to the Future: Post-Crisis Corporate Governance Regulatory and Legislative Landscape

- *"The current economic crisis has led many investors to raise serious concerns about the accountability and responsiveness of some companies and boards of directors to the interests of shareholders, and has resulted in a loss of investor confidence."*
  – SEC Chair Mary Schapiro, Proposed Rules on Proxy Access

- *"During this recession, the leadership at some of the nation's most renowned companies took too many risks and too much in salary, while their shareholders had too little say. This legislation will give stockholders the ability to apply the emergency brakes the next time the company management appears to be heading off a cliff."* ***– Senator Charles Schumer, introducing the Shareholder Bill of Rights Act of 2009***

- *"…among the central causes of the financial and economic crisis that the United States faces today has been a widespread failure of corporate governance."*
  – Shareholder Bill of Rights Act of 2009

- *"By creating a large public demand for reforms, the current crisis offers another opportunity to improve governance arrangements. This opportunity should not be missed."* ***– Prof. Lucian Bebchuk***

Causes and Cures

- Lack of "accountability" of boards/management – to shareholders?
- Compensation levels and incentives?
- Risk management controls?
- "Short-termism" pressures?
- Stated goal of the Shareholder Bill of Rights Act of 2009:
  - "to prioritize the <u>long-term</u> health of firms and their shareholders"
  - to create "more <u>long-term</u> stability and profitability within the corporations that are so vital to the health, well-being, and prosperity of the American people and our economy"

- Is there a disconnect between the stated goals of current legislative/regulatory initiatives and the reality of what they represent – a wish list for governance "reformers" (aka "***GOVERNISTAS***") that is being opportunistically pressed by hijacking a financial crisis?

Causes and Cures *(cont'd.)*

- *"<u>Excessive stockholder power</u> is precisely what caused the short-term fixation that led to the current financial crisis. ...The real investors are mostly professional money managers who are focused on the short term. "It is these shareholders who pushed companies to generate returns at levels that were not sustainable. ...The pressure to produce unrealistic profit fueled increased risk-taking. And as the government relaxed checks on excessive risk-taking (or, at a minimum, didn't respond with increased prudential regulation), stockholder demands for ever higher returns grew still further. It was a vicious cycle. "Thoughtful observers of corporate governance have recognized <u>the direct causal relationship between the financial meltdown and the short-term focus that drove reckless risk-taking</u>."*

  – Martin Lipton, Jay W. Lorsch and Theodore N. Mirvis, <u>Schumer's Shareholder Bill Misses the Mark</u>, Wall St. Journal, May 12, 2009.

Causes and Cures *(cont'd.)*

- *"It is true that shareholders sometimes encourage companies, including investment banks, to ramp up short-term returns through leverage." "Institutional shareholders should recognize their responsibility to generate long term value on behalf of their beneficiaries, the savers and pensioners for whom they are ultimately working."*

  – International Corporate Governance Network (ICGN), Statement on the Global Financial Crisis (Nov. 10, 2008).

Causes and Cures *(cont'd.)*

- *"Shareholders, boards and [management] and those involved in legislative and regulatory reform initiatives should give special consideration to the long-term nature of corporate wealth-generating activity and strive to avoid undue short-term focus and pressures that may impede the capacity of the corporation for long-term investments and decisions necessary for sustainable wealth creation."*

  – ABA Task Force Section of Business Law Corporate Governance Committee on Delineation of Governance Roles & Responsibilities, Aug. 1, 2009.

- Recommends that boards: "Acknowledge that at times, the company's long-term goals and objectives may not conform to the desires of some shareholders....

Causes and Cures *(cont'd.)*

- *"[I]n recent years, boards, managers, <u>shareholders with varying agendas</u>, and regulators, all, to one degree or another, have allowed <u>short-term</u> considerations to overwhelm the desirable <u>long-term growth and sustainable profit</u> objectives of the corporation. . . .Restoring that faith [in corporations being the foundation of the American free enterprise system] critically requires restoring a <u>long-term</u> focus for boards, managers, and <u>most particularly, shareholders</u>—if not voluntarily, then by appropriate regulation."*

- *"Encouraging investors and intermediaries representing investors to adopt a long-term perspective will ultimately encourage and empower boards of directors to adopt long-term strategies for growth and sustainable earnings, and to rely on long-term, forward-looking metrics in the consideration of compensation and performance incentives."*

- *"The trend toward greater shareholder power as encapsulated in legislative proposals under consideration in the 2009 legislative session should be accompanied by greater investor and intermediary responsibility."*

  - Aspen Institute, <u>Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management</u>, Sept. 9, 2009.

Myth v. Reality—Did "Poor" Corporate Governance Cause the Financial Crisis?

- Of the 15 S&P 500 companies with the worst-performing stocks in 2008:
  - 80% did not have staggered boards
  - 80% did not have a poison pill in place
  - 73% had majority voting or a director resignation policy
- The biggest decliners were *less* likely to have staggered boards than the average S&P 500 company (20% v. 33%) and no more likely to have a poison pill
- "[T]he case is not made for fundamental reform of current corporate governance arrangements."
  — Professor Brian R. Cheffins (Cambridge), Did Corporate Governance "Fail" During the 2008 Stock Market Meltdown? The Case of the S&P 500, Business Lawyer, Nov. 2009.

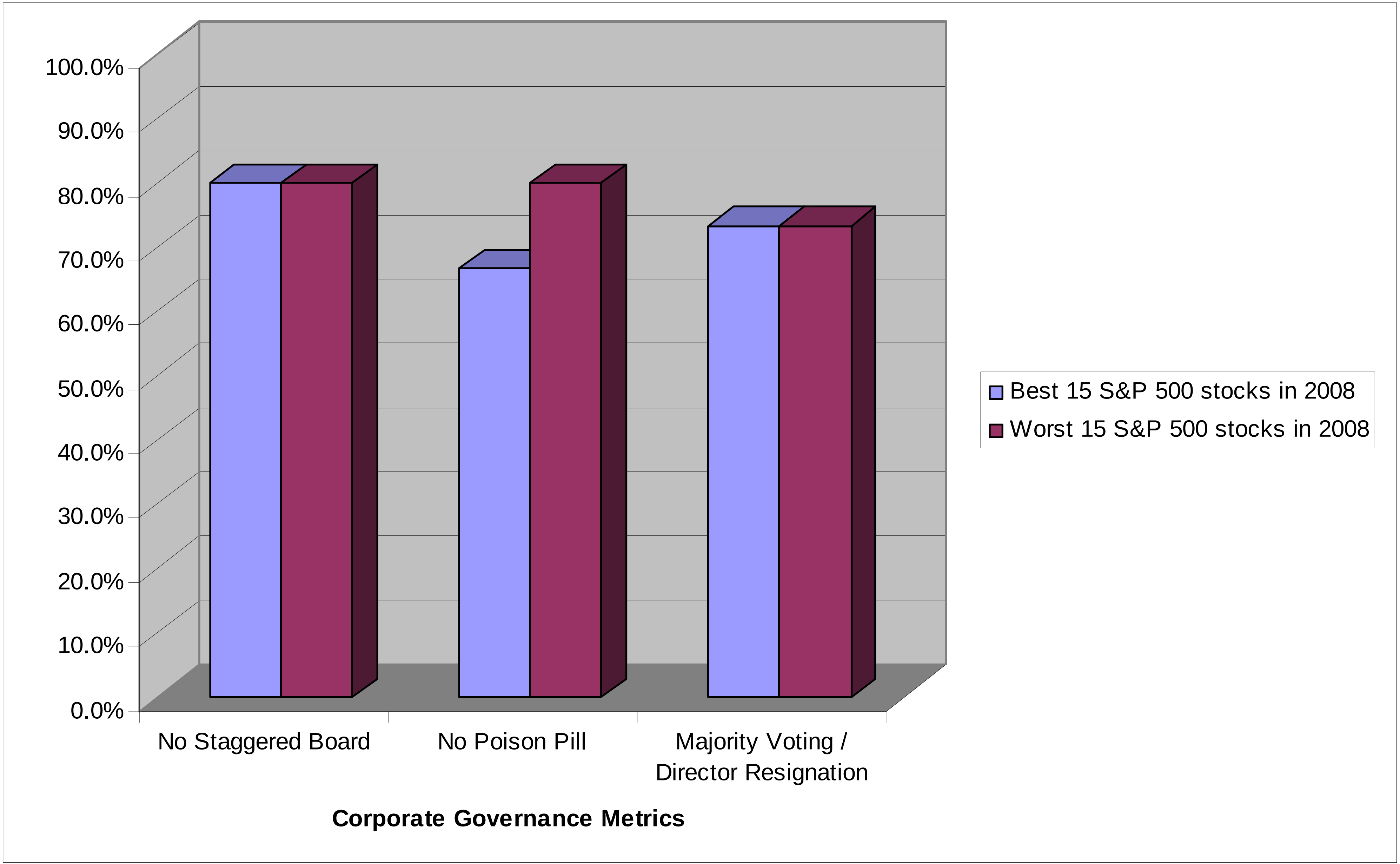
S&P 500 Worst Performing Stocks: 2008

Name	Current Ticker	% Change
Lehman Brothers	*Delisted*	-99.96
Washington Mutual	*Delisted*	-99.84
Fannie Mae	FNM	-98.10
Freddie Mac	FRE	-97.86
AIG	AIG	-97.31
Circuit City	*Delisted*	-96.90
General Growth Properties	GGP	-96.87
EW Scripps	SSP	-95.09
Ambac Financial	ABK	-94.96
XL Capital	XL	-92.65
American Capital	ACAS	-90.17
Bear Stearns	*Merger*	-89.43
National City	NCC	-89.00
Genworth Financial	GNW	-88.88
Developers Diversified	DDR	-87.26

S&P 500 Best Performing Stocks: 2008

Name	Current Ticker	% Change
Wrigley	*Acquired*	36.58
Family Dollar	FDO	35.57
Anheuser-Busch	*Acquired*	31.03
UST	UST	26.61
Amgen	AMGN	24.35
Barr Pharma.	*Acquired*	23.92
Safeco	*Acquired*	22.50
H&R Block	HRB	22.35
Electronic Data	*Acquired*	20.41
Celgene	CELG	19.63
Wal-Mart	WMT	17.95
Rohm and Haas	ROH	16.43
Autozone	AZO	16.31
Hasbro	HAS	14.03
Gilead Sciences	GILD	11.15

Myth v. Reality—Did "Poor" Corporate Governance Cause the Financial Crisis? *(cont'd.)*



Selected Quotations from "*One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*" Leo E. Strine, Nov. 2010

- "[T]his central problem: why should we expect corporations to chart a sound long-term course of economic growth, if the so-called investors who determine the fate of their managers do not themselves act or think with the long term in mind?" *(pp. 1-2)*

- "Stockholders are not granted the protections of the corporate shield as a societal end in itself. Rather, limited liability encourages stockholders to entrust their capital to corporations, which will engage in risky, but potentially profitable, endeavors. The hoped-for outcome of this risk taking, in the aggregate, is an increase in societal wealth, and not simply through the generation of profits. Rather, to generate profits, corporations have an incentive to employ workers and develop innovative products and services, and to engage in other activities that increase societal wealth." *(p.2)*

Selected Quotations from "*One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*" Leo E. Strine, Nov. 2010 (*cont'd.*)

- "The ability of central management to innovate and pursue risky strategies has been protected by corporate law's adoption of a republican, rather than direct, model of corporate democracy. Although stockholders have a regular opportunity to elect a new board, during the board's term, the board has the power, subject to its fiduciary duties, to pursue its vision of what is best for the corporation and its stockholders." *(pp. 3-4)*

Selected Quotations from "*One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*" Leo E. Strine, Nov. 2010 (*cont'd.*)

- "If adopted, these corporate governance changes (e.g., changes to the corporation's board structure or election system) and business strategies (e.g., the reduction of capital expenditures in order to fund a stock buyback program) will often have a long-term effect on the corporation's performance. Yet, many activist investors hold their stock for a very short period of time and may have the potential to reap profits based on short-term trading strategies that arbitrage corporate policies. Indeed, it is possible for stockholders to engage in activism while holding a net short position, in which they stand to profit if the corporation's profits decline.

  "The rights given to stockholders to make proposals and vote on corporate business are premised on the theory that stockholders have an interest in increasing the sustainable profitability of the firm. But in corporate polities, unlike nation-states, the citizenry can easily depart and not "eat their own cooking." As a result, there is a danger that activist stockholders will make proposals motivated by interests other than maximizing the long-term, sustainable profitability of the corporation." *(pp. 7-8)*

Selected Quotations from "*One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*" Leo E. Strine, Nov. 2010 (*cont'd.*)

- "For a variety of reasons, these institutional investors often have a myopic concern for short-term performance. Responsible commentators estimate hedge fund turnover 29 at around 300 percent annually. What is even more disturbing than hedge fund turnover is the gerbil-like trading activity of the mutual fund industry which is the primary investor of Americans' 401(k) contributions. The average portfolio turnover at actively managed mutual funds, for example, is approximately 100 percent a year. Median turnover is in the 65 percent range. Sadly, there appears to be a basis to believe that pension funds also engage in turnover of their equity investments at a similar rate. Given that institutions dominate ownership, these trends now consistently result in annualized turnover of stocks traded on the New York Stock Exchange of well over 100 percent, with turnover approaching 138 percent in 2008.

  "And, a rough calculation using transaction activity and market capitalization data from the U.S. Statistical Abstract reveals that turnover across all U.S. exchanges reached approximately 311 percent in 2008.

  "***This kind of churning renders the institutions more short-term speculators than committed, long-term investors***." *(pp. 10-11)*

Selected Quotations from "*One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*" Leo E. Strine, Nov. 2010 (*cont'd.*)

- " The focus of many of these institutions on quarterly earnings and other short-term metrics is fundamentally inconsistent with the objectives of most of their end-user investors, people saving primarily for two purposes, to put their kids through college and to fund their own retirements. These end-user investors do not care about quarterly earnings or short-term gimmicks. These end-user investors want corporations to produce sustainable wealth that will be there when they need it.

  "Indeed, it is increasingly the case that the agenda setters in corporate policy discussions are highly leveraged hedge funds, with no long-term commitment to the corporations in which they invest." *(p. 12)*

Selected Quotations from "*Does Changing Corporate Governance Alone Result in Better Firm Performance?*" N. K. Chidambaran, Darius Palia, and Yudan Zheng (2010)

- "An important public policy issue actively debated in the financial economics literature is whether firms can increase their value *solely* by changing one or more corporate governance mechanisms. In this paper, we directly examine whether changing governance leads to future firm performance. Specifically, we analyze a sample of firms that instituted governance changes and sort them based on the direction of their governance change for thirteen different governance measures. We focus on firms that make large governance changes to enhance the power of our tests. We find no significant difference in future performance between firms that have a large increase in governance measures and firms that have a large decrease in governance measures. We also find that the governance changes are driven by movement towards mean industry governance levels, merger pressures, as well as to changes in the firm's observable characteristics." (*Abstract*)

Selected Quotations from "*Does Changing Corporate Governance Alone Result in Better Firm Performance?*" N. K. Chidambaran, Darius Palia, and Yudan Zheng (2010)*(cont'd.)*

- "We interpret our results to imply that firms optimize on a Coasian envelope across various governance measures. Our results are also consistent with prior work that has found each of the governance mechanisms to be endogenously related to firm characteristics (see, for example, Demsetz and Lehn 1985, Smith and Watts 1992, Himmelberg, Hubbard, and Palia 1999, and Wintoki, Linck, and Netter 2010). We add to this literature in that our findings *directly* show that simply prescribing a particular change in any governance measure cannot generate value-increasing effects for all the firms. Our results also offer evidence in favor of firms being in equilibrium with respect to their governance structure. In addition, we note that our study is over an 11-year period (1992-2002) that is significantly larger than most previous studies. Further, we have concurrently examined a broad set of governance measures rather than focusing on just one or two governance measures as in the prior literature." *(p. 3)*

Selected Quotations from "*Does Changing Corporate Governance Alone Result in Better Firm Performance?*" N. K. Chidambaran, Darius Palia, and Yudan Zheng (2010)*(cont'd.)*

- "Very dissimilar changes in governance can lead to similar performance results, suggesting that unobservable firm characteristics such as corporate culture and management philosophy play a role in determining the impact of governance reform. While these results indicate that firms should, and do, try to optimize their governance structure, it is best perhaps to encourage firms to audit their governance choices rather than use one-size-fits all externally imposed mandates that can prove to be ineffective." *(p. 29)*