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# WHO SITS ON TEXAS CORPORATE BOARDS? TEXAS CORPORATE DIRECTORS: WHO THEY ARE AND WHAT THEY DO

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TEXAS CORPORATE DIRECTORS: WHO THEY ARE & WHAT THEY DO

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**Abstract**

Corporate directors play an important role in governing American business, in the capital formation process, and are fundamental to the stewardship of economic growth. Texas businesses play a disproportionately important role among the states in aggregate U.S. job creation, responsible for 37% of all net new American jobs since the post 2008-2009 recovery began. It is the job of the board of directors to govern the corporation. The duties and responsibilities of a corporate director include: the duty of care; duty of

loyalty; and duty of good faith. This paper results from the author's previously assembled biographical data for most of the approximately 20,000 for-profit corporate directors serving on the boards of Texas companies.

Corporate directors are among the most influential and affluent individuals in our society. Many present or former chief executive officers are sought to serve on corporate boards due to their expertise and experience overseeing corporations. The average age of Texas directors of for-profit entities is fifty-seven years old; and only about six percent of corporate directors in Texas are women. Texas corporate directors are highly educated: over ninety-nine percent are college graduates: eighty percent hold advanced college degrees; twenty-eight percent have law degrees; and twenty percent of Texas corporate directors hold an MBA degree. Most Texas corporate directors serve the banking and finance sector (thirty-nine percent), next largest is the energy sector (at eighteen percent), and technology companies account for nine percent.

Most boards look to recruit someone who understands their business and former CEOs are preferable. Every public company board must now have an audit committee of entirely independent directors, and each publicly-traded company is required to have at least one qualified "financial expert" on its audit committee. Therefore, public company auditing experience, along with a growing recognition that every board needs expertise to govern the enterprises' information technology – have become "must have" skills represented on every board.

Keywords: Boards, Committees, Corporate Governance, Director Demographics, Director Selection, Diversity, Entrepreneurship, Executive Search, Texas Corporate Directors

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WHO SITS ON TEXAS CORPORATE BOARDS?  
TEXAS CORPORATE DIRECTORS: WHO THEY ARE & WHAT THEY DO

I. TEXAS CORPORATE DIRECTORS

Corporate directors play an important role in governing American business, in the capital formation process, and are fundamental to the stewardship of economic growth. Accordingly, corporate directors as a group play an important role in the creation of Texas jobs. This paper results from the author’s assembled biographical data for most of the approximately 20,000 for-profit corporate directors serving on the boards of Texas companies. For larger companies, the author collected details about standing committee composition, leadership and data regarding membership for such standing committees as: audit, compensation, finance, executive, nominating and governance, and strategic planning.

This study provides important insights into the demographics of corporate governance in Texas,<sup>1</sup> indicating that Texas’ boardrooms tend to be male and middle-aged. Corporate Directors in Texas represent society's entrepreneurs and captains of industry – they are highly educated and extraordinarily affluent, having an average personal household income of \$327,000 and an average household net worth approximating \$13.7 million. This data is produced from public documents and estimates by the author based primarily on disclosure documents in the public domain and information provided directly by corporate directors. This paper begins with a brief discussion about the legal duties and responsibilities of corporate directors in Texas.

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<sup>1</sup> Lawrence J. Trautman, results of work compiled in a proprietary data base (on file with author).

Second, is a description of the typical committee structure of boards. Next, the demographics of directorship are explored, including: affluence; age; gender; education; industry representation; size of company (employee count); and sales revenues. Relevant experience and director skills in highest demand are then presented. The importance of director continuing education follows. Discussion of not-for-profit directorship is beyond the scope of this paper. However, many of the same individuals populate the boards of most of our important non-profit civic organizations.

### Importance of the Texas Economy

Texas business plays a disproportionately important role among the states in aggregate U.S. job creation. Texas Comptroller Glenn Hegar reports that “Job growth, sales tax collections and building permits all signal that the Texas economy continues to outpace the national economy.”<sup>2</sup> As reported during September 2015, “Pre-recession Texas employment peaked at 10,638,100 in August 2008, a level that was surpassed in November 2011, and by July 2015 Texas added an additional 1,188,400 jobs. The U.S. recovered all recession-hit jobs by May 2014 and by July 2015 added an additional 3,706,000 jobs.”<sup>3</sup> Indeed, over the preceding year, “Texas added jobs in 9 of the 11 major industries, including professional and business services, trade, transportation and utilities, leisure and hospitality, education and health services, construction, government, financial activities, information, and other services.”<sup>4</sup> Luis Torres reports that Texas “went from being highly concentrated in the oil industry during the 1970s and 1980s to a

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<sup>2</sup> Glenn Hegar, *Comptroller's Weekly Economic Outlook*, Economic Outlook: The Texas Economy (Sept. 2, 2015), available at <http://thetexasconomy.org/economic-outlook/> (last viewed Sept. 12, 2015) (on file with author).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

more diversified economy in manufacturing and services today... in 1986, oil prices collapsed, causing a statewide recession and a significant fall in employment.”<sup>5</sup> By 2013, Texas was “the largest single producer of both oil and gas in the country, with crude oil and natural gas production representing 30.5 percent and 28.6 percent of national output, respectively.”<sup>6</sup>

Which industries are responsible for the most employment growth? Exhibit One illustrates the employment growth rate for various Texas industries for the year ended July 2015, and shows that the “leisure and hospitality” industry ranked first in job creation, followed by “education and health services,” and “professional and business services.” This result is in sharp contrast to the prior year where the “mining and logging industry” ranked first in job creation with over 10 percent growth from the prior year.<sup>7</sup> By July 2015, the “mining and logging” (oil and gas) category had contracted more than any other of the 12 sectors reporting, registering a decline of 4.62 percent, year-over-year.<sup>8</sup> During the years 2010 thru 2014, the nation and Texas resumed economic growth. “In calendar 2014, Texas real gross domestic product grew by 5.2 percent, compared with 2.39 percent for the U.S.”<sup>9</sup> As of July 2015, the most Texas jobs are located in the “Houston-Sugar Land-Baytown metro area... followed by Dallas-Plano-Irving, Fort

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<sup>5</sup> Luis Torres, *Texas Industrial Structure: How Much Does Texas Rely on Energy*, Tech Rpt. 2030, Real Estate Center, Texas A&M University (June 2013), available at <http://recenter.tamu.edu/pdf/2030.pdf> (last viewed Sept. 12, 2015).

<sup>6</sup> *Id.*

<sup>7</sup> See Ali Anari & Mark G. Dotzour, *Monthly Review of the Texas Economy – August 2015*, Texas A&M University, Real Estate Center, Report No. 1862, 3 (Aug. 2015), available at <http://recenter.tamu.edu/econ/> (last viewed Sept. 12, 2015)(on file with author).

<sup>8</sup> See Ali Anari & Mark G. Dotzour, *Monthly Review of the Texas Economy – October 2014*, Texas A&M University, Real Estate Center, Report No. 1862, 1 (Oct. 2014), available at <http://recenter.tamu.edu/econ/> (last viewed Oct. 26, 2014)(on file with author).

<sup>9</sup> See Glenn Hegar, *Comptroller’s Weekly Economic Outlook*, Economic Outlook: The Texas Economy (Sept. 2, 2015), available at <http://thetexasconomy.org/economic-outlook/> (last viewed Sept. 12, 2015) (on file with author).

Worth-Arlington, San Antonio-New Braunfels, Austin-Round Rock-San Marcos, El Paso and McAllen-Edinburg-Mission.”<sup>10</sup>

Exhibit One<sup>11</sup>  
Texas Industries and Government Sector Ranked by Employment Growth Rate  
From July 2014 to July 2015

Rank	Industry	July 2015	July 2014	Change	%Change
1	Leisure and Hospitality	1,287,100	1,214,000	73,100	6.02
2	Education and Health Services	1,577,000	1,512,400	64,600	4.27
3	Professional and Business Services	1,602,900	1,548,600	54,300	3.51
4	Transportation, Warehousing, Utilities	492,400	475,800	16,600	3.49
5	Construction	677,200	656,300	20,900	3.18
6	Trade	1,885,600	1,830,800	54,800	2.99
7	Other Services	421,400	414,000	7,400	1.79
8	Financial Activities	711,300	703,200	8,100	1.15
9	Information	206,800	204,800	2,000	0.98
10	Government	1,780,400	1,764,800	15,600	0.88
11	Manufacturing	869,800	888,800	-19,000	-2.14
12	Mining and Logging	297,000	311,400	-14,400	-4.62

Sources: Texas Workforce Commission and Real Estate Center at Texas A&M University

Following the 2007-08 U.S. financial meltdown,<sup>12</sup> During 2011, Richard Fisher, for many years president of the Federal Reserve Bank of Dallas has observed that “37% of all net new American jobs since the recovery began were created in Texas.”<sup>13</sup> Mr.

Fisher notes that

Using Bureau of Labor Statistics (BLS) data, Dallas Fed economists looked at state-by-state employment changes since June 2009, when the recession ended. Texas added 265,300 net jobs, out of the 722,200 nationwide, and by far outpaced every other state. Using straight nonfarm payroll employment, Texas accounts for 45% of net U.S. job creation... Professional and business services accounted for 22.9% of the total jobs added, health care for 30.5% and trade and energy for 10.6%.<sup>14</sup>

<sup>10</sup> See Anari & Dotzour, *supra* note 7 at 6.

<sup>11</sup> See Anari & Dotzour, *supra* note 7 at 3.

<sup>12</sup> See Lawrence J. Trautman, Personal Ethics and the U.S. Financial Collapse of 2008-09, (forthcoming), available at <http://ssrn.com/abstract=2502124>.

<sup>13</sup> Editorial, *The Lone Star Jobs Surge*, WALL ST. J., June 10, 2011, at A14.

<sup>14</sup> *Id.*

As shown by Exhibit 2, Ali Anari reports that by the end of 2014, Texas had provided the largest percentage job growth of any state since the end of the 2008-09 great recession.<sup>15</sup>

Exhibit Two<sup>16</sup>  
Regional Labor Market Recovery Since Great Recession

Region	Number of Jobs (Thousands)		Job Gains	
	Dec. 2014	Dec. 2009	Number (Thousands)	Percent Growth
Texas	11,749.5	10,209.7	1,539.8	15.1
California	15,860.7	14,155.9	1,704.8	12.0
Florida	7,965.7	7,128.0	837.7	11.8
Michigan	4,217.6	3,835.7	381.9	10.0
Georgia	4,226.5	3,844.3	382.2	9.9
North Carolina	4,203.1	3,845.8	357.3	9.3
New York	9,156.3	8,489.8	666.5	7.9
Ohio	5,369.9	5,007.9	362.0	7.2
Illinois	5,907.0	5,584.9	322.1	5.8
Pennsylvania	5,825.5	5,583.1	242.4	4.3
Rest of U.S.	66,110.2	61,999.9	4,110.3	6.6
Total U.S.	140,592.0	129,685.0	10,907.0	8.4

Sources: U.S. Bureau of Labor Statistics and Real Estate Center at Texas A&M University

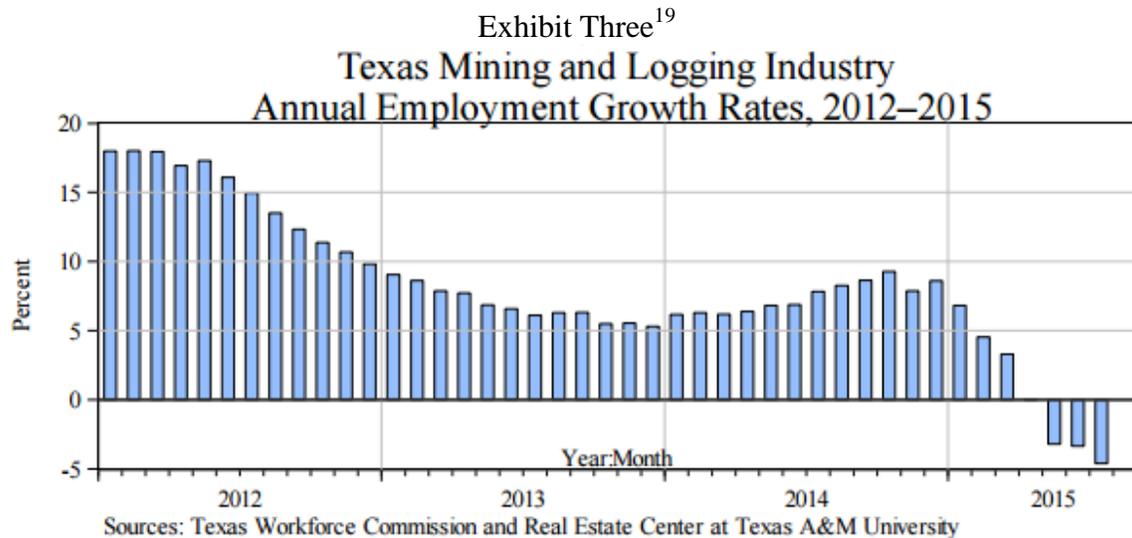
Of particular importance to the number of (and market for) corporate directors in Texas is the relative health of the energy sector. Drilling rig count began growing dramatically in the Barnett Shale (2000), Permian Basin (from 2005), and Eagle Ford (2008).<sup>17</sup> A proxy for the health and growth of the energy industry in Texas is seen in the employment growth rate for the “mining and logging” industry (which includes the extraction of oil and gas. Accordingly, Exhibit Three illustrates the dramatic decline in

<sup>15</sup> Ali Anari, *Texas Job Market Outpaces Nation's*, Real Estate Center, Texas A&M University, Pub. 2104, 2 (June 8, 2015), available at <http://recenter.tamu.edu/pdf/2104.pdf> (last viewed Sept. 13, 2015).

<sup>16</sup> *Id.*

<sup>17</sup> E-mail from David Preng, Founder, Preng & Associates, to Lawrence J. Trautman (Sept. 18, 2015, 20:16 CST) (on file with author). See also Harold D. Hunt, *Crude Awakening: Oil, Gas Jobs in Play*, *Tierra Grande Magazine*, Real Estate Center, Texas A&M University, Pub. 2010 (Oct. 2012), available at <http://www.recenter.tamu.edu/pdf/2010.pdf> (last viewed Sept. 13, 2015).

the employment growth rate for the category including oil and gas exploration and production.<sup>18</sup>



On a global basis, by early 2015 industry consolidation was apparent with “Royal Dutch Shell’s \$70-billion pact to buy British rival BG Group,<sup>20</sup> and the domestic announced acquisition of Rosetta Resources by Noble Energy.<sup>21</sup> Toward the end of 2015, the price of crude oil has declined to around \$40 per barrel.<sup>22</sup> As a result, energy industry consolidation continues as Bain & Company reports that, “Rigs have been idled... as revenue pools decrease, companies create value by building scale and reducing costs... [and] as prices drop, valuations decline, joint ventures dry up and investment

<sup>18</sup> See Anari & Dotzour, *supra* note 7 at 13.

<sup>19</sup> *Id.*

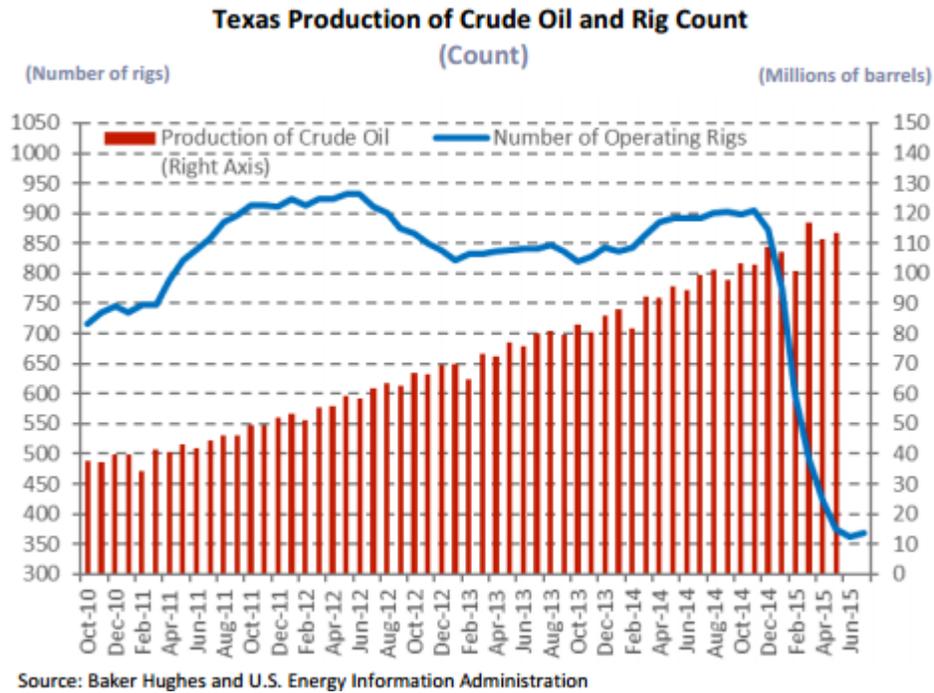
<sup>20</sup> Tiffany Hsu, *Shell-BG Deal Could Fuel More Oil and Gas Industry Consolidation*, LA TIMES, Apr. 8, 2015, available at <http://www.latimes.com/business/la-fi-shell-bg-deal-20150409-story.html> (last viewed Sept. 13, 2015).

<sup>21</sup> Mella McEwen, *Expected Round of Consolidation Hits Permian Basin*, MIDLAND REPORTER-TELEGRAM, May 14, 2015, available at [http://www.mrt.com/business/oil/article\\_60304428-fa86-11e4-804a-b746f5fa681b.html](http://www.mrt.com/business/oil/article_60304428-fa86-11e4-804a-b746f5fa681b.html) (last viewed Sept. 13, 2015).

<sup>22</sup> Nicole Friedman & Benoit Faucon, *Oil-Price Slump Could Force U.S., Non-Opec Suppliers to Make Deep Cuts*, WALL ST. J., Sept. 11, 2015, available at <http://www.wsj.com/articles/oil-price-slump-could-force-u-s-non-opec-suppliers-to-make-deep-cuts-1441959208> (last viewed Sept. 13, 2015).

distribution models become less sustainable with high investment distribution rights requirements.”<sup>23</sup> Exhibit Four depicts Texas production of crude oil and drilling rig counts for the period October 2010 thru June 2015.<sup>24</sup>

Exhibit Four<sup>25</sup>



<sup>23</sup> See Riccardo Bertocco, Whit Keuer & Mile Milisavljevic, *Preparing for the Coming Wave of Consolidation in Midstream Oil and Gas*, Bain & Company, Bain Brief (Mar. 25, 2015), available at <http://www.wsj.com/articles/oil-price-slump-could-force-u-s-non-opecc-suppliers-to-make-deep-cuts-1441959208> (last viewed Sept. 13, 2015).

<sup>24</sup> Luis Torres, Mark Dotzour & Wayne Day, *Outlook for the Texas Economy*, Real Estate Center, Texas A&M University, Pub. 2046 at 20 (Aug. 2015), available at <http://recenter.tamu.edu/pdf/2046.pdf> (last viewed Sept. 13, 2015).

<sup>25</sup> *Id.*

## II. DIRECTORS: DUTIES AND RESPONSIBILITIES

### What Directors Do

It is the job of the board of directors to govern the corporation.<sup>26</sup> After all, “corporations are created by state-granted charters, their governance dictated by state law, with corporate directors responsible for managing the affairs of the corporation.”<sup>27</sup> SEC Commissioner Luis A. Aguilar observes that this model of board governance “arises from a central tenet of the modern corporation – the separation of ownership and control of the corporation. Under this structure, those who manage a corporation must answer to the true owners of the company – the shareholders.”<sup>28</sup> The State of Delaware has granted charters to more than half of all publicly-owned United States corporations.<sup>29</sup> Many corporations having their headquarters or principal places of business in Texas are actually chartered under the laws of the State of Delaware, often to take advantage of the large and robust Delaware body of law. Corporate governance is important work. It has now been approximately fifteen years since the failure of effective corporate, accounting

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<sup>26</sup> See generally Lucian A. Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783 (2009); available at <http://ssrn.com/abstract=593423>; Lucian A. Bebchuk & Michael S. Weisbach, *The State of Corporate Governance Research*, 23 REV. FIN. STUD. 939 (2010), available at <http://ssrn.com/abstract=1508146>.

<sup>27</sup> Lawrence J. Trautman & Kara Altenbaumer-Price, *The Board’s Responsibility for Information Technology Governance*, 28 J. MARSHALL J. COMPUTER & INFO. L., 313 (2011), at 322 citing DEL. CODE ANN. tit. 8, § 141(a) (1991) (“The business and affairs of a corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”).

<sup>28</sup> Luis A. Aguilar, Commissioner, U.S. Securities and Exchange Commission, Address at the New York Stock Exchange: Cyber Risks and the Boardroom Conference, New York, NY (June 10, 2014).

<sup>29</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 322 citing Bradley R. Aronstam, *The Interplay of Blasius and Unocal—A Compelling Problem Justifying the Call for Substantial Change*, 81 OR. L. REV. 429-30 n.4 (2002) (discussing why corporations prefer Delaware as their choice for incorporation); Ronald J. Gilson & Reinier Kraakman, *Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 248 (Feb. 1989) (“Delaware corporate law... governs the largest proportion of the largest business transactions in history”). See also Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553 (2002), available at <http://ssrn.com/abstract=325520>.

and regulatory oversight resulted in the failure of Houston-based Enron. The resulting devastation to the investment portfolios of thousands of Enron investors, the failure and loss of jobs at accounting firm Arthur Andersen, and the catastrophic impact on the retirement accounts of thousands of Enron employees has not been forgotten.<sup>30</sup>

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<sup>30</sup> See generally, Nicholas J. Wagoner, *Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in Skilling v. United States*, 51 S. TEX. L. REV. 1087 (2010), available at <http://ssrn.com/abstract=1734551>; Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons From Enron*, 55 VAND. L. REV. (2002), available at <http://ssrn.com/abstract=358442>; Lawrence A. Cunningham, *Sharing Accounting's Burden: Business Lawyers in Enron's Dark Shadows*, BUS. LAW. 1, (2002), available at <http://ssrn.com/abstract=307978>; Neal F. Newman, *Enron and the Special Purpose Entities- Use or Abuse?— The Real Problem – The Real Focus*, 13 SMU L. & BUS. REV. AMERICAS 97 (2007), available at <http://ssrn.com/abstract=2509566>; Troy A. Paredes, *Corporate Governance and Economic Development*, 28 Reg. 34 (2005), available at <http://ssrn.com/abstract=710821>; Emeka Duruigbo, *Tackling Shareholder Short-Termism and Managerial Myopia*, 100 KY. L.J. 531 (2012), available at <http://ssrn.com/abstract=1802840>; Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 ST. THOMAS L.J. 909 (2004), available at <http://ssrn.com/abstract=429304>; Margaret M. Blair, *Directors' Duties in a Post-Enron World: Why Language Matters*, 38 WAKE FOREST L. REV. 885 (2003), available at <http://ssrn.com/abstract=416602>; Jacqueline Lang Weaver, *Can Energy Markets be Trusted? The Effect of the Rise and Fall of Enron on Energy Markets*, 4 HOUS. BUS. & TAX L.J. 1 (2004), available at <http://ssrn.com/abstract=471942>; Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233 (2002), available at <http://ssrn.com/abstract=305343>; John C. Coffee, *What Caused Enron?: A Capsule Social and Economic History of the 1990's*, 89 CORNELL L. REV. 269 (2004), available at <http://ssrn.com/abstract=373581>; Krishna Palepu & Paul M. Healy, *The Fall of Enron*, 17 J. ECON. PERSPECTIVES 3 (2003), available at <http://ssrn.com/abstract=417840>; William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002), available at <http://ssrn.com/abstract=301475>; Arthur E. Wilmarth, *Conflicts of Interest and Corporate Governance Failures at Universal Banks During the Stock Market Boom of the 1990s: The Cases of Enron and Worldcom*, GWU Legal Studies Research Paper No. 234; CORPORATE GOVERNANCE IN BANKING: A GLOBAL PERSPECTIVE (Benton E. Gup, ed., Edward Elgar Publishing Ltd. 2007), available at <http://ssrn.com/abstract=952486>; Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise is the Received Wisdom?*, 95 GEO. L.J. 1843 (2007), available at <http://ssrn.com/abstract=945796>; Byron F. Egan, *The Sarbanes-Oxley Act and Its Expanding Reach*, 40 TEX. J. BUS. L. 305 (2005); Donald C. Langevoort, *Managing the 'Expectations Gap' in Investor Protection: The SEC and the Post-Enron Reform Agenda*, 48 VILL. L. REV. 1139 (2003), available at <http://ssrn.com/abstract=328080>.

## Law of Corporate Governance

A number of duties required of corporate directors have been found by the Delaware and Texas courts.<sup>31</sup> These have previously been summarized by Trautman and Alterbaumer-Price as follows:<sup>32</sup>

### Business Judgment Rule

Delaware courts have held the Business Judgment Rule “to be a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”<sup>33</sup> Under Delaware law, directors owe their corporation and shareholders fiduciary duties of care and loyalty.<sup>34</sup>

### Duty of Care

The duty of care for directors “arises in both the discrete decision-making context and in the oversight and monitoring areas.”<sup>35</sup> Before the 1985 landmark decision in *Smith v. Van Gorkom*,<sup>36</sup> except when

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<sup>31</sup> See generally, Byron F. Egan, *How Recent Fiduciary Duty Cases Affect Advice to Directors and Officers of Delaware and Texas Corporations*, IN BYRON F. EGAN, HOW RECENT FIDUCIARY DUTY CASES AFFECT ADVICE TO DIRECTORS AND OFFICERS OF DELAWARE AND TEXAS CORPORATIONS, 36th Annual Conference on Securities Regulation and Business Law (Dallas, Tex., Feb. 14, 2014), available at <http://ssrn.com/abstract=2408036>; Byron F. Egan, *Fiduciary Duties of Corporate Directors in Texas*, 43 TEX. J. BUS. L. 45 (2009); Byron F. Egan, *Major Themes of the Sarbanes-Oxley Act*, 42 TEX. J. BUS. L. 339 (2008); Byron F. Egan, *Responsibilities of Officers and Directors Under Texas and Delaware Law*, 26 CORP. COUNS. REV. 1 (2007); Byron F. Egan & Curtis W. Huff, *Choice of State of Incorporation – Texas Versus Delaware: Is It Now Time to Rethink Traditional Notions*, 54 SMU L. REV. 249 (2001).

<sup>32</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 322.

<sup>33</sup> *Id.* citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (quoting *Aronson v. Lewis*, 473 A.2d 75 (Del. 1992)).

<sup>34</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 322 citing *Smith v. Van Gorkom*, 488 A.2d 858 (Del. Super. Ct. 1985).

<sup>35</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 322 citing Lyman P.Q. Johnson and Mark A. Sides, *Corporate Governance and the Sarbanes-Oxley Act: The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1197 (2004) (citing *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989)); *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) (“Due care in the decision making context is process due care only.”).

<sup>36</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 323 citing *Smith v. Van Gorkom*, 488 A.2d 858 (Del. Supr. 1985). The Delaware Supreme Court found that the experienced and sophisticated directors of Trans Union Corporation were not entitled to the protection of the business judgment rule and had breached their fiduciary duty to their shareholders “(1) by their failure to inform themselves of all information reasonably available to them and relevant to their decision to recommend the Pritzker merger; and (2) by their failure to disclose all material information such as a reasonable shareholder would consider important in deciding whether to approve the Pritzker offer.” *Id.* at 888; see also *See Peter V. Letsou, Cases and Materials on Corporate Mergers and*

accompanying disloyal acts are present, “courts had rarely found individual directors liable for breaching their duty of care.”<sup>37</sup> One explanation of why the experienced and sophisticated directors in *Van Gorkom* were not entitled to business judgment rule protection states:

the duty of care specifies the manner in which directors must discharge their legal responsibilities... includ[ing] electing, evaluating, and compensating corporate officers; reviewing and approving corporate strategy, budgets, and capital expenditures; monitoring internal financial information systems and financial reporting obligations, and complying with legal requirements; making distributions to shareholders; approving transactions not in the ordinary course of business; appointing members to committees and discharging committee assignments, including the important audit, compensation and nominating committees; and initiating changes to the certificate of incorporation and bylaws.<sup>38</sup>

### Duty of Loyalty

The duty of loyalty in Delaware requires “that there shall be no conflict between duty and self-interest.”<sup>39</sup> The core concept of the fiduciary “duty of loyalty” has been described as:

[t]he requirement that a director favor the corporation’s interests over her own whenever those interests conflict. As with the duty of care, there is a duty of candor aspect to the duty of loyalty. Thus, whenever a director

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*Acquisitions* n21 at 643 (2006) (observing “Trans Union’s five ‘inside’ directors had backgrounds in law and accounting, 116 years of collective employment by the company and 68 years of combined experience on its Board. Trans Union’s five ‘outside’ directors included four chief executives of major corporations and an economist who was a former dean of a major school of business and chancellor of a university. The ‘outside’ directors had 78 years of combined experience as chief executive officers of major corporations and 50 years of cumulative experience of Trans Union. Thus, defendants argue that the Board was eminently qualified to reach an informed judgment on the proposed ‘sale’ of Trans Union notwithstanding their lack of any advance notice on the proposal, the shortness of their deliberation, and their determination not to consult with their investment banker or to obtain a fairness opinion.”).

<sup>37</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 323 citing Jacqueline M. Veneziani, *Note & Comment: Causation and Injury in Corporate Control Transactions: Cede & Co. v. Technicolor, Inc.*, 69 WASH. L. REV. 1167, 1194 n.3 (1994) (“Before *Van Gorkom* was decided, one commentator had stated that ‘[t]he search for cases in which directors... have been held liable in derivative suits for negligence uncomplicated by selfdealing is a search for a very small number of needles in a very large haystack.’ Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1099 (1968).

<sup>38</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 323 citing Lyman P.Q. Johnson and Mark A. Sides, *Corporate Governance and the Sarbanes-Oxley Act: The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1197 (2004) citing *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989); *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) (“Due care in the decisionmaking context is process due care only.”).

<sup>39</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 324 citing *Guth v. Loft*, A.2d 503, 510 (Del. 1939).

confronts a situation that involves a conflict between her personal interests and those of the corporation, courts will carefully scrutinize not only whether she has unfairly favored her personal interest in that transaction, but also whether she has been completely candid with the corporation and its shareholders.<sup>40</sup>

Conflicts of interest “do not per se result in a breach of the duty of loyalty. Rather, it is the manner in which an interested director handles a conflict and the processes invoked to ensure fairness to the corporation and its stockholders that will determine the propriety of the director’s conduct...”<sup>41</sup>

### Duty of Good Faith

In order for a director to have the protection of the business judgment rule against a claim for breach of fiduciary duty, a director must be able to demonstrate that she acted in “good faith.”<sup>42</sup> Many factors “define what it means for a corporate director to act in good faith... includ[ing] the judicial application of state corporate law, federal and state legislation, shareholder activism... corporate governance ratings, and the expectations of the public in response to the media’s treatment of current issues in corporate governance.”<sup>43</sup> *Stockbridge v. Gemini Air Cargo, Inc.*, holds that the board of directors of a Delaware corporation is charged with the legal responsibility to manage its business for the benefit of the corporation and its shareholders with “due care, good faith, and loyalty.”<sup>44</sup>

Delaware Chief Justice E. Norman Veasey observes, “Failure to follow the minimum... evolving standards of director conduct... Sarbanes-Oxley... NYSE or NASDAQ Rules ... might likewise raise a good faith issue. There is no definitive answer to that question, but counsel should advise the directors of that possible exposure and encourage the utmost good faith behavior.”<sup>45</sup> Moreover,

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<sup>40</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 324 *citing* Charles R.T. O’Kelley and Robert B. Thompson, *CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS* (Aspen, 5th ed. 2006).

<sup>41</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 324 *citing* Byron Egan, Director Duties: Process and Proof, TexasBarCLE Webcast: Corporate Minutes/ Director Duties (Oct. 23, 2008) (available at [www.jw.com/site/jsp/publicationinfo.jsp?id=1044](http://www.jw.com/site/jsp/publicationinfo.jsp?id=1044)).

<sup>42</sup> *Id.*

<sup>43</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 324 *citing* Janet E. Kerr, *Developments in Corporate Governance: The Duty of Good Faith and Its Impact on Director Conduct*, 13 *GEO. MASON L. REV.* 1038 (2005-06).

<sup>44</sup> *Id.* *citing* *Stockbridge v. Gemini Air Cargo, Inc.*, 611 S.E. 2d at 606 (quoting *Malone v. Brincat*, 722 A. 2d 5, 10 (Del. 1998)).

<sup>45</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 325 *citing* E. Norman Veasey, *Policy and Legal Overview of Best Corporate Governance Principles*, 56 *SMU L. REV.* 2135, 2141 (2003).

The evolving business and judicial expectations of director conduct over the years are part of the common law grist for the fiduciary duty mill. As Chancellor Allen stressed in *Caremark*, the kind of sustained inattention of directors exemplified by the failure to institute law compliance programs contemplated by the federal sentencing guidelines and expected of prudent businesses could be held to be a violation of fiduciary duty of good faith. That standard of conduct – good faith – is key to director conduct, and it must be considered when one looks at the directors’ processes and motivations to be certain that they are honest and not disingenuous or reckless.<sup>46</sup>

### III. HOW BOARDS ARE ORGANIZED: THE BASICS

In the modern corporation, boards usually organize themselves into standing committees consisting of: (1) Audit; (2) Compensation; (3) Executive; and (4) Governance and Nominating.<sup>47</sup> To a lesser degree, standing finance committees and strategic planning committees are observed. The duties and responsibilities of each of these core committees will be specified in the charters drafted and adopted for each standing committee. The names for these standing committees may differ slightly (i.e., the compensation committee may be known as the compensation and benefits committee or the governance and nominating committee may be referred to as the nominating committee. Executive search firm Korn/Ferry reports other standing committees in their

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<sup>46</sup> *Id.*

<sup>47</sup> See AT&T Inc., Schedule 14A (Definitive Proxy Statement filed 03-11-2010), available at <http://www.sec.gov/Archives/edgar/data/732717/000119312510053795/ddef14a.htm>. With board size reduced from 15 to 12 Directors for 2010, AT&T Inc. has the following committees in addition to the core committees of Audit, Corporate Governance and Nominating, Executive and Human Resource [here called Compensation]: *Corporate Development* (Consists of five independent Directors. Reviews mergers, acquisitions, dispositions and similar transactions), *Finance/Pension* (Consists of four independent directors. Assists the board in its oversight of finances, including recommending the payment of dividends and reviewing the management of debt and investment of cash reserves), *Public Policy* (Consists of five independent Directors. Assists the Board in its oversight of policies related to corporate and social responsibility, as well as political and charitable contributions).

KFMC100 publication<sup>48</sup> including: charitable contributions, compliance, corporate development, credit, dividend, energy delivery, equity, finance, generation oversight, human resources, infrastructure, public issues & contributions, real estate, reserves, risk management, science/technology, special programs, and strategy. Some corporations with unique governance issues may often have a committee structure reflective of these specific concerns. Examples include the “nuclear oversight” committee and subcommittee of utility NRG,<sup>49</sup> or energy exploration company Pioneer Natural Resources’ “reserve valuation committee.”<sup>50</sup> Veteran corporate director Charles Ramsey, Lead Director and Chair of Pioneer Natural Resources’ “reserve valuation” committee says

[Our reserve valuation committee] is a standing committee which now has three members, two petroleum engineers and one lawyer, which meets annually with our internal reserves group. We review the reserve and valuation work done by the reserves group, the external reserve and valuation audit, the staffing and expertise of our reserve group, and compliance with SEC reserve reporting regulations. We then report our findings and recommendations to the full board. Our board feels this is critical due to the importance of accuracy in our reserves and projected future income and expense in everything we do.<sup>51</sup>

An examination of responsibilities for each of these standing committees will now be provided, along with a discussion of relevant nominee considerations.

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<sup>48</sup> Korn/Ferry, *The Korn/Ferry Market Cap 100: Board Leadership at America’s Most Valuable Public Companies*, 29 (2010).

<sup>49</sup> NRG:Board of Directors, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=121544&p=irol-govBoard> (last viewed Sept. 14, 2015).

<sup>50</sup> See Generally, Pioneer Natural Resources, Corporate Governance Guidelines (on file with author).

<sup>51</sup> See Lawrence J. Trautman, *The Matrix: The Board’s Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. 75 (2012), available at <http://www.ssrn.com/abstract=1998489>, citing Interview with Charles Ramsey, Lead Director and Chair of Pioneer Natural Resources’ “Reserve Valuation” Committee, Dallas, Texas (Sept. 2, 2011).

## The Audit Committee

The board's audit committee will be a standing committee established to comply with the requirements of Section 3(a)(58)(A) of the Securities Exchange Act of 1934,<sup>52</sup> as amended. All members of the audit committee must be independent under the rules of the NYSE and the board's corporate governance guidelines.<sup>53</sup> All members of the Audit Committee must be determined by the board to be financially literate and have financial management expertise, as the board has interpreted such qualifications in its business judgment. In addition, an individual serving on the Audit Committee must be designated as the "financial expert."<sup>54</sup> While much has been written about the Audit Committee,<sup>55</sup> it is the audit committee of any public corporation that will generally be responsible for initial board oversight of items such as these found in Exhibit Five, the Audit Committee Charter for Whole Foods Market, Inc.

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<sup>52</sup> 15 U.S.C. § 78a (2008).

<sup>53</sup> See *NYSE Euronext Corporate Governance Guidelines*, (Apr. 5, 2007).

<sup>54</sup> Disclosure Required By Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release Nos. 33-8177; 34-47235 (Jan. 24, 2003), available at <http://www.sec.gov/rules/final/33-8177a.htm>. See also Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval to Proposed Rule Change and Amendment No. 1 Thereto Modifying the Exchange's Independent Director and Audit Committee Corporate Governance Standards; See also Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the NASDAQ Listing Rules to Reflect Changes to the Rules of the Commission, Release No. 34-60094.

<sup>55</sup> See generally, David B. Farber, *Restoring Trust After Fraud: Does Corporate Governance Matter?*, (2004), available at <http://ssrn.com/abstract=485403>; Jaime J. Schmidt & Michael S. Wilkins, *Bringing Darkness to Light: The Influence of Auditor Quality and Audit Committee Expertise on the Timeliness of Financial Statement Restatement Disclosures*, 32 *AUDITING: A JOURNAL OF PRACTICE & THEORY* (2013), available at <http://ssrn.com/abstract=1787008>; Huijing Fu & Xiaoyun Yu, *Is Board Structure One-Size-Fits-All? The Unintended Informational Consequence of the Sarbanes-Oxley Act* (2010), available at <http://ssrn.com/abstract=1107676>; John R. Robinson, Yanfeng Xue & May H. Zhang, *Tax Planning and Financial Expertise in the Audit Committee* (2012), available at <http://ssrn.com/abstract=2146003>; Steven J. Kachelmeier, Stephanie J. Rasmussen & Jaime J. Schmidt, *Why Do Ineffective Audit Committee Members Experience Turnover?* \_\_ *CONTEMPORARY ACCOUNTING RESEARCH* (forthcoming), available at <http://onlinelibrary.wiley.com/doi/10.1111/1911-3846.12154/epdf>. ; Joseph F. Brazel, Donald P. Pagach & Jaime J. Schmidt, *Do Auditors and Audit Committees Lower Fraud Risk by Constraining Inconsistencies between Financial and Nonfinancial Measures?*, (2014), available at <http://ssrn.com/abstract=2306104>.

Exhibit Five<sup>56</sup>  
WHOLE FOODS MARKET, INC.  
Audit Committee Charter  
Effective August 24, 2010

**1. Purpose.**

The Audit Committee of the Board of Directors assists the Board of Directors in fulfilling its responsibility for monitoring risks and the Company's control system, oversight of the quality and integrity of the accounting, auditing and reporting practices of the Company and the audits of the Company's financial statements, and other such duties as directed by the Board of Directors. The Committee is expected to maintain free and open communication with the independent auditors, the Director of Internal Audit and the management of the Company. In discharging this oversight role, the Committee is empowered to investigate any matter brought to its attention, with full power to retain outside counsel or other experts for this purpose.

**2. Membership.**

2.1 The Audit Committee shall be comprised of at least three members who meet the independence requirements of the NASDAQ Market Place Rules for directors and audit committee members. In addition, no member of the Committee may have participated in the preparation of the financial statements of the Company or any current subsidiary of the Company at any time during the past three years. Each member of the Committee shall be financially literate and at least one member shall be an "audit committee financial expert," as defined by Securities and Exchange Commission rules.

2.2 The members of the Committee shall be appointed by and serve at the discretion of the Board of Directors. The Board of Directors shall appoint one member of the Audit Committee as Chairperson. He or she shall be responsible for leadership of the Committee, including preparing the agenda and presiding over the meetings. The Chairperson will also maintain regular communications with the CEOs, CFO, Director of Internal Audit and the lead independent audit partner. The Chairperson shall be required to endorse decisions regarding the hiring or termination of the Director of Internal Audit, and should also be appropriately involved in the performance evaluation and compensation decisions related to the Director of Internal Audit.

**3. Responsibilities.** The Audit Committee's primary responsibilities include:

3.1. Being directly responsible, in its capacity as a committee of the Board of Directors, for the appointment, compensation and oversight of the independent auditor. In so doing, the Committee will request from the auditor a written statement delineating all relationships between the

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<sup>56</sup> See Audit Committee Charter, Whole Foods Market, Inc. (Effective Aug. 24, 2010), at [http://www.wholefoodsmarket.com/sites/default/files/media/Global/Company%20Info/PDFs/audit\\_committee\\_charter.pdf](http://www.wholefoodsmarket.com/sites/default/files/media/Global/Company%20Info/PDFs/audit_committee_charter.pdf) (last viewed Sept. 14, 2015).

auditor and the Company, and any other relationships that may impact independence, shall discuss with the auditor any relationships that may impact the auditor's independence, and shall take such actions as are necessary to oversee the auditor's independence. The Committee shall have the sole authority to retain (subject to ratification by the Company's shareholders), terminate when appropriate, and approve the engagement terms of and fees paid to, the independent auditor, which shall report directly to the Committee.

3.2. Approving in advance all audit and permissible non-audit services to be provided by the independent auditor, and establishing policies for the pre-approval of audit and permissible non-audit services to be provided by the independent auditor.

3.3. Overseeing the independent auditor relationship by discussing with the auditor the scope and results of the annual audit, and the audit process including coordination with internal audit, receiving and reviewing audit reports, and providing the auditor full access to the Committee (and the Board of Directors) to report on any and all appropriate matters.

3.4. Reviewing the audited financial statements and discussing them with management and the independent auditor. These discussions shall include consideration of the quality of the Company's accounting principles as applied in its financial reporting, including review of estimates, reserves and accruals, review of areas of judgment, review of audit adjustments whether or not recorded, difficulties encountered in performing the audit and such other inquiries as may be appropriate. Based on the review, the Committee shall make its recommendation to the Board of Directors as to the inclusion of the Company's audited financial statements in the Company's annual report on Form 10-K.

3.5. Reviewing with management and the independent auditor the quarterly financial information prior to the Company's announcement of quarterly results and filing of Form 10-Q and reviewing earnings press releases.

3.6. Reviewing and discussing the adequacy and effectiveness of the Company's internal control over financial reporting, including reviewing management's assessment of the effectiveness of internal control over financial reporting as of the end of the most recent fiscal year and the independent auditor's report on management's assessment, and reviewing and discussing the adequacy and effectiveness of the Company's disclosure controls and procedures.

3.7. Reviewing the Company's compliance systems with respect to legal and regulatory requirements and reviewing the Company's code of conduct and programs to monitor compliance with such code. The Committee shall receive corporate attorneys' reports of evidence of a material violation of securities laws or breaches of fiduciary duty.

3.8. Overseeing the structuring of the internal audit function in a manner that achieves organizational independence and permits full and unrestricted access to top management, the audit committee, and the Board

of Directors. The Director of Internal Audit reports functionally to the audit committee.

3.9. Reviewing the internal audit function's charter and overseeing unrestricted access by internal auditors to records, personnel, and physical properties relevant to the performance of engagements.

3.10. Reviewing and approving the annual internal audit plan and budget and assessing the appropriateness of resources allocated to internal auditing.

3.11. Reviewing summary internal audit reports as appropriate throughout the year.

3.12. Issuing annually a report to be included in the proxy 3.12. Issuing annually a report to be included in the proxy statement (including appropriate oversight conclusions) for submission to the shareholders.

3.13. Discussing the Company's policies with respect to risk assessment and risk management, including the risk of fraud. The Committee shall also discuss the Company's major financial risk exposures and the steps management has taken to monitor and control such exposures.

3.14. Establishing procedures for receipt, retention and treatment of complaints regarding accounting, internal accounting controls and auditing matters, including procedures for the confidential and anonymous submission of concerns by employees regarding questionable accounting or auditing matters.

3.15. Reviewing and reassessing the adequacy of this charter at least annually and performing an evaluation of the Committee's performance at least annually to assess whether it is functioning effectively.

#### **4. Meetings.**

The Audit Committee shall meet at least quarterly, and all Committee members are expected to be present at all meetings. The Committee shall meet separately and periodically with management, the personnel responsible for the internal audit function, and the independent auditor. The Committee shall report regularly to the Board of Directors with respect to its activities.

#### **5. Outside Advisors.**

The Audit Committee shall have the authority to retain such outside counsel, accountants, experts and other advisors as it determines appropriate to assist it in the performance of its functions and shall receive appropriate funding, as determined by the Committee, from the Company for payment of compensation to any such advisors.<sup>57</sup>

#### Audit Committee Financial Expert

The audit committee will likely best be chaired by a director who brings many years of independent accounting and auditing experience. Even though the SEC

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<sup>57</sup> *Id.*

regulations provide that someone without actual public accounting and auditing experience may qualify as a “financial expert,” lessons gained from audit experience such as statistical sampling and other audit methodologies and a familiarity with and understanding of highly technical emerging accounting issues is valuable in understanding what your auditors are telling you.<sup>58</sup> In discussing S&P 500 boards, Spencer Stuart observes that

More than a decade ago, the Sarbanes-Oxley Act established a requirement for financial expertise on audit committees. Boards initially met this requirement by recruiting active CEOs to the Board and assigning them to serve as the audit committee chair. In the past 10 years, we have witnessed a dramatic change in this practice. As CEOs have reduced their outside board commitments, boards increasingly are tapping CFOs and other finance executives for audit chair. In 2003, just 7% of audit chairs were financial executives – CFOs, treasurers and public accounting executives – compared with 35% today, a 400% increase in the past decade.<sup>59</sup>

The Board of Directors must determine whether any given director meets the qualification guidelines as an “audit committee financial expert” as such term is defined in Item 407(d)(5)(ii) of Regulation S-K promulgated by the SEC.<sup>60</sup> Accordingly, an “audit committee financial expert” is defined as a person who has the following attributes:

(i) an understanding of generally accepted accounting principles and financial statements; (ii) the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves; (iii) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of

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<sup>58</sup> See generally, Lawrence J. Trautman, *Who Qualifies as an Audit Committee Financial Expert Under SEC Regulations and NYSE Rules?*, 11 DEPAUL BUS. & COMM. L.J. 205 (2013), available at <http://www.ssrn.com/abstract=2137747>.

<sup>59</sup> See 2013 Spencer Stuart Board Index, 5, available at <https://www.spencerstuart.com/research-and-insight/spencer-stuart-us-board-index-2013>.

<sup>60</sup> SEC Releases No. 33-8177; 34-47235, Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002 (January 24, 2003), available at <http://www.sec.gov/rules/final/33-8177.htm>. [Final Rule Release].

accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant's financial statements, or experience actively supervising one or more persons engaged in such activities; (iv) an understanding of internal controls and procedures for financial reporting; and (v) an understanding of audit committee functions.<sup>61</sup>

How then, Under the Final Rules, Might These Attributes Have Been Acquired?

Under the final rules, the Commission states that “a person must have acquired such attributes through any one or more of the following:

- (1) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;
- (2) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;
- (3) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or
- (4) Other relevant experience.<sup>62</sup>

#### The Compensation Committee

For many years, executive compensation has been considered among the most difficult governance issues.<sup>63</sup> The Compensation Committee (sometimes known as the

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See generally*, Christian Laux & Volker Laux, Board Committees, CEO Compensation, and Earnings Management 84 ACCT. REV. (2009), available at <http://ssrn.com/abstract=887492>; Jui-Chin Chang, Huey-Lian Sun & Mi (Meg) Luo, The Impact of Independent and Overlapping Board Structures on CEO Compensation, Pay-Performance Sensitivity and Earnings Management, Q. J. FIN. & ACCT. (201\_), available at <http://ssrn.com/abstract=2018622>; Michael C. Jensen, Kevin J. Murphy & Eric G. Wruck, Remuneration: Where We've Been, How We Got to Here, What are the Problems, and How to Fix Them, Harvard NOM Working Paper No. 04-28; ECGI - Finance Working Paper No. 44/2004 (2004), available at <http://ssrn.com/abstract=561305>; David F. Larcker, Scott A. Richardson, Andrew Seary & A. Irem Tuna, Back Door Links Between

Human Resources Committee) is usually responsible for those issues illustrated in Exhibit Six, the Culture and Compensation Committee Charter for The Container Store Group, Inc.

Exhibit Six  
THE CONTAINER STORE GROUP, INC.  
Culture and Compensation Committee Charter  
(As of October 2013)

**I. Purpose**

The purpose of the Culture and Compensation Committee (the “Committee”) is to oversee the discharge of the responsibilities of the Board relating to compensation of the Company’s executive officers and directors.

**II. Composition**

The Committee must consist of at least two directors, each of whom must satisfy the independence requirements of the New York Stock Exchange (the “NYSE”), except as otherwise permitted by applicable NYSE rules, and meet all other eligibility requirements of applicable laws. Committee members must be appointed and may be removed, with or without cause, by the Board. Unless a Chair is designated by the Board, the Committee may designate a Chair by majority vote of the full Committee membership.

**III. Meetings, Procedures and Authority**

The Committee has the authority to establish its own rules and procedures for notice and conduct of its meetings so long as they are not inconsistent with any provisions of the Company’s bylaws that are applicable to the Committee. The Committee may, in its sole discretion, retain compensation consultants, legal counsel or other advisers (independent or otherwise), provided that, preceding any such retention, the Committee must take into consideration all factors, including any applicable factors under NYSE rules, relevant to the adviser’s independence from management. The Committee will be directly responsible for the appointment, compensation and oversight of such advisers. The Company must provide for appropriate funding, as determined by the Committee, for payment of reasonable compensation to such advisers. In addition to the duties and responsibilities expressly delegated to the Committee in this Charter, the Committee may exercise any other powers and carry out any other responsibilities consistent with this Charter, the purposes of the Committee, the Company’s bylaws and applicable NYSE rules. The

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Directors and Executive Compensation (2005), *available at* <http://ssrn.com/abstract=671063>; Ronald C. Anderson & John M. Bizjak, An Empirical Examination of the Role of the CEO and the Compensation Committee in Structuring Executive Pay (2000), *available at* <http://ssrn.com/abstract=220851>; 2010 Spencer Stuart Board Index, 7, <http://www.spencerstuart.com/practices/boards/publications/1454/>.

Committee has the authority to conduct or authorize investigations into any matters within the scope of its responsibilities as it deems appropriate, including the authority to request any officer, or employee or adviser of the Company to meet with the Committee or any advisers engaged by the Committee.

#### **IV. Duties and Responsibilities**

##### **a. CEO Compensation**

The Committee will review and approve the corporate goals and objectives with respect to compensation of the Chief Executive Officer. The Committee will evaluate the Chief Executive Officer's performance in light of these goals and objectives and, based upon these evaluations (either alone or, if directed by the Board, in conjunction with a majority of the independent directors on the Board), will set the Chief Executive Officer's compensation.

##### **b. Other Executive Officer Compensation**

The Committee will review and will set or make recommendations to the Board regarding the compensation of the executive officers other than the Chief Executive Officer.

##### **c. Director Compensation**

The Committee will review and will make recommendations to the Board regarding director compensation.

##### **d. Incentive and Equity Compensation**

The Committee will review and will approve or make recommendations to the Board regarding the Company's incentive compensation and equity-based plans and arrangements.

##### **e. Compensation Discussion and Analysis**

To the extent that the Company is required to include a "Compensation Discussion and Analysis" required by Item 402(b) of Regulation S-K ("CD&A") in the Company's Annual Report on Form 10-K or annual proxy statement, the Committee will review and discuss with management the Company's CD&A and will consider whether it will recommend to the Board that the Company's CD&A be included in the appropriate filing.

##### **f. Culture and Compensation Committee Report**

The Committee will prepare the annual Culture and Compensation Committee Report required by Item 407(e)(5) of Regulation S-K.

##### **g. Reports to the Board of Directors**

The Committee must report regularly to the Board regarding the activities of the Committee.

##### **h. Committee Self-Evaluation**

The Committee must at least annually perform an evaluation of the performance of the Committee, except as otherwise permitted by applicable NYSE rules.<sup>3</sup>

##### **i. Review of this Charter**

The Committee must periodically review and reassess this Charter and submit any recommended changes to the Board for its consideration.

#### **V. Delegation of Duties**

In fulfilling its responsibilities, the Committee has the authority to delegate any or all of its responsibilities to a subcommittee of the Committee.<sup>64</sup>

### The Executive Committee

The principal function of an executive committee is typically to perform and exercise the powers of the Board to direct the business and affairs of the company between meetings of the Board. In some organizations, composition of this committee might consist of the Chairman of the board and Chairpersons of all standing committees. Availability to serve and the practical ability for members to be in physical proximity on short notice will likely be an important consideration for membership on this committee. Exhibit Seven depicts the Executive Committee Charter for AT&T, Inc.

Exhibit Seven  
AT&T, INC.  
Executive Committee Charter

#### **Purpose**

The Executive Committee (the "Committee") is appointed by the Board of Directors of AT&T Inc. to act on behalf of the Board in the intervals between meetings of the Board. References in this Charter to "AT&T" or the "Company" shall be to AT&T Inc. and its consolidated subsidiaries unless the context requires otherwise.

#### **Committee Membership**

Except as otherwise provided by the Board of Directors, the members of the Committee shall be the Chairman of the Board and the Chairpersons of each of the Audit, Corporate Development and Finance, Corporate Governance and Nominating, Public Policy and Corporate Reputation, and Human Resources Committees. The Chairman of the Board shall also act as the Chairman of the Committee. Upon election as the Chairman of the Board or the Chairperson of any of the foregoing Committees, a Director shall automatically become a member of this Committee (and Chairman of the Committee in the case of the Chairman of the Board) and shall serve until such person no longer holds a qualifying position or the person otherwise resigns or is removed by the Board

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<sup>64</sup> The Container Store Group, Inc., Culture and Compensation Committee Charter (As of Oct. 2013), *available at* [http://investor.containerstore.com/files/doc\\_downloads/Culture%20and%20Compensation%20Committee%20Charter.pdf](http://investor.containerstore.com/files/doc_downloads/Culture%20and%20Compensation%20Committee%20Charter.pdf) (last viewed Sept. 13, 2015).

from his or her position with this Committee. Committee members shall not have a fixed term.

### **Procedures**

The Committee shall meet as often as it determines. The Committee may request any officer or employee of the Company to attend a meeting of the Committee or to meet with any consultant to the Committee. After the Committee meets or otherwise takes action, it shall, as soon as practicable, make a report of its activities at a meeting of the Board. The Committee may form and delegate authority to subcommittees when determined by the Committee to be necessary or appropriate.

### **Committee Responsibilities and Authority**

The Committee shall have the authority to exercise all the power and authority of the Board of Directors, to the extent permitted by law, during the intervals between meetings of the Board, including but not limited to the power and authority to declare a dividend or to authorize the issuance of stock.<sup>65</sup>

### Finance Committee

While less common than the “must have” committees of Audit, Compensation, and Nominating and Governance – many boards find it helpful to have a designated Finance Committee.<sup>66</sup> Exhibit Eight reproduces the Finance Committee Charter for Houston-based Sysco Corporation.

Exhibit Eight  
SYSCO CORPORATION  
Finance Committee Charter  
(Approved May 2013)

The Finance Committee (the “Committee”) of the Board of Directors (the “Board”) of Sysco Corporation (the “Corporation”) provides assistance to the Board in satisfying its fiduciary responsibilities relating to financial performance and financial planning of the Corporation and pursuing its financial objectives. The Committee also provides assistance to the Board in satisfying its oversight responsibility with respect to the investment, funding and risk management objectives for the Corporation’s tax-qualified retirement plans and non-qualified retirement and deferred compensation plans (collectively, the “Plans”). In addition, among other things, the Committee reviews management’s risk assessment and risk management with respect to specified risks for which responsibility for oversight has been assigned to the Committee by the Board.

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<sup>65</sup> AT&T, Executive Committee of the Board of Directors of AT&T Inc., Corporate Governance, available at <http://www.att.com/gen/investor-relations?pid=5603> (last viewed Sept. 13, 2015).

<sup>66</sup> See generally Trautman, *supra* note 51.

## **I. Description of the Committee**

The Committee shall consist of at least three non-management members of the Board. The Committee shall review the financial affairs of the Corporation so as to enhance the effectiveness of the Board in fulfilling its responsibilities in pursuing the financial objectives of the Corporation. The Committee shall see that the Corporation has a planning and review cycle, which will allow the directors to understand the past, current and expected long-term performance of the Corporation. The Committee shall make recommendations to the Board and management regarding financial policies and objectives to promote and maintain superior standards of performance. The Committee shall have oversight responsibility with respect to approving and monitoring the investment and funding objectives for the Plans.

## **II. Duties of the Committee**

The Committee, subject to approval of the Board and as to the extent set forth below, shall:

- A. Review and recommend to the Board policies governing capital structure, debt limits, cash or stock dividends, and liquidity for the Corporation.
- B. Review and recommend to the Board actions regarding the sale or issuance of equity or debt securities.
- C. Review and recommend to the Board actions regarding the repurchase and retirement of debt or equity securities.
- D. Review and recommend to the Board financing alternatives and structures for future acquisitions.
- E. [omitted in original]
- F. Review potential significant acquisitions, including any significant tax structuring decisions with respect to such acquisitions, approve acquisitions in accordance with the authority delegated by the Board to the Committee from time to time and make recommendations to the Board with respect to potential significant acquisitions with a purchase price exceeding the amount as to which authority has been delegated to the Committee.
- G. Periodically review the performance of significant acquisitions and transactions and report such findings to the Board.
- H. Review and recommend to the Board the Corporation's insurance risk management strategies as proposed by management.
- I. Review and approve total debt levels in compliance with the Corporation's Treasury Department Debt and Investment Policy.
- J. Review and monitor compliance with the high-level investment and funding objectives for the Plans as established and recommended by any administrative committees of the Plans.
- K. Review annually the Plans' investment and funding objectives and performance.

- L. In conjunction with the Compensation Committee, review and approve the bylaws or other organizational charter of any administrative committees of the Plans.
- M. Report to the Board of Directors on a periodic basis any information with regard to the funding of Plans that the Committee deems material, and report to the Board on a periodic basis, but no less than annually, such other information regarding the funding of the Plans as the Committee deems appropriate.
- N. Take such other actions as may be necessary or advisable to carry out the investment and funding objectives of the Plans, provided that such actions are consistent with the other provisions of this charter.
- O. Assist the Compensation Committee, by providing, at such times as the Committee deems appropriate or the Compensation Committee may request, recommendations or information to the Compensation Committee with respect to the appropriateness of the appointment or removal of any member of any administrative committee of the Plans.
- P. Assist the Audit Committee in reviewing and overseeing the Corporation's environmental, health, and safety matters and related regulatory compliance, and report regularly, and make recommendations to the Audit Committee, regarding specific actions to be taken in this area at least annually and at such other times as either the Finance Committee or the Audit Committee deems appropriate.
- Q. Review management's risk assessment and risk management policies and procedures with respect to those risks for which responsibility for oversight has been assigned to the Committee by the Board.
- R. Conduct an annual performance evaluation for the Committee and its members.
- S. Annually review this Charter.

### **III. Process**

- A. Committee members shall be appointed by the Board on the recommendation of the Corporate Governance and Nominating Committee and shall serve until the earlier of their resignation or removal.
- B. The Committee meetings shall be led by a chairman appointed by the Board from among the Committee members. In the absence of the Chairman at any duly called meeting of the Committee at which a quorum is present, the Committee, by majority vote of those members present, shall designate one of said members to serve as Acting Chairman for the meeting if not previously designated. A majority of the Committee members shall constitute a quorum for the transaction of business, and the vote of a majority of the Committee members attending a meeting, if a quorum is present, shall constitute the action of the Committee.
- C. In carrying out its duties and responsibilities with regards to the Plans, the Committee may delegate any of its powers with respect to the

Plans to any administrative committee of such Plans or to such officers or employees of the Corporation as the Committee deems appropriate.  
D. All Committee actions shall be promptly reported to the board.

#### The Governance and Nominating Committee

The Governance and Nominating Committee is generally responsible for making recommendations to the board regarding: the nomination criteria and process for director selection and various committee structures and functions. The Governance and Nominating Committee is usually the committee of the board held responsible for the oversight of corporate governance matters.<sup>67</sup> Exhibit Nine depicts the Nominating and Governance Committee Charter for Dallas-based Kimberly-Clark Corporation.

Exhibit Nine  
KIMBERLY-CLARK CORPORATION  
Nominating and Corporate Governance Committee Charter  
(As amended through November 13, 2013)

#### **Organization**

This charter governs the operations of the Nominating and Corporate Governance Committee. The Nominating and Corporate Governance Committee shall periodically review and reassess the adequacy of this charter and recommend any proposed changes of the charter to the Board for approval. The Nominating and Corporate Governance Committee, in consultation with the Chairman of the Board, shall recommend members for appointment to, and the Chairman of, the Nominating and Corporate Governance Committee to the Board for its approval. The Nominating and Corporate Governance Committee shall be comprised of at least three directors, each of whom is independent of management and the Corporation. The Nominating and Corporate Governance Committee shall maintain minutes of its meetings and report to the Board.

#### **Policy**

The Nominating and Corporate Governance Committee shall (1) oversee the process by which individuals are nominated to become board members; (2) oversee matters of corporate governance, including advising the Board on matters of (A) board organization, membership and function; and (B) committee structure and membership; and (3) oversee matters relating to sustainability, corporate social responsibilities and corporate citizenship. The Nominating and Corporate Governance Committee shall have the authority to retain special legal, accounting or other consultants to advise the Nominating and Corporate Governance Committee and to

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<sup>67</sup> See generally Trautman, *supra* note 51.

assist it identifying suitable potential board nominees. The Nominating and Corporate Governance Committee may request any officer or employee of the Corporation or the Corporation's outside counsel to attend a meeting of the Nominating and Corporate Governance Committee or to meet with any members of, or consultants to, the Nominating and Corporate Governance Committee.

### **Responsibilities and Processes**

In carrying out its responsibilities, the Nominating and Corporate Governance Committee shall:

1. Establish criteria for selection of potential directors, taking into consideration the following desired attributes: leadership; independence; interpersonal skills; financial acumen; business experiences; industry knowledge; and diversity of viewpoints. The Committee will periodically assess the criteria to ensure they are consistent with best practices and the goals of the Corporation.
2. Identify individuals who satisfy the criteria for selection to the Board and, after consultation with the Chairman of the Board, make recommendations to the Board on new candidates for Board membership.
3. Receive and evaluate nominations for Board membership which are recommended by stockholders in accordance with the terms of the Corporation's By-Laws and applicable laws.
4. Oversee the process for conducting background checks on new candidates for Board membership, including the process of validating candidate credentials.
5. Review the qualifications, performance and independence of Board members pursuant to criteria and procedures established by the Committee and make recommendations whether they should stand for re-election.
6. Review related party transactions involving any director or nominee for director, any stockholder owning more than 5% of the Corporation's voting securities, or any of their immediate family members or related firms.
7. Receive from a director who has had a change in job responsibility or status an offer of resignation in accordance with the Corporation's Corporate Governance Policies and, as appropriate, make a recommendation to the Board of Directors on such offer of resignation following an evaluation of the director's performance and continuing qualifications.
8. Recommend to the Board the removal of a director where appropriate.
9. Recommend to the Board, a slate of nominees for the next annual meeting of stockholders.
10. Recruit, in consultation with the Chairman of the Board, those candidates for Board membership that are approved by the Board.
11. Oversee the orientation process for new directors.
12. Establish criteria for membership on the Board committees and, in consultation with the Chairman of the Board, make recommendations to the Board for appointments to and removal from committees.

13. Periodically review the Board's committee structure, committee operations, committee formations, and committee charters and make such recommendations to the Board as are determined to be consistent with best practices and the best interests of the Corporation.

14. Review and recommend policies with respect to composition, organization, processes, and practices of the Board, including policies with respect to the size of the Board; desired qualifications of directors; the types, function, size and membership of the Board committees; meetings of the Board (including executive sessions); and Board retirement and tenure policies.

15. Recommend to the Board standards for determining director independence consistent with the requirements of the NYSE and other applicable guidelines on best practices.

16. Periodically review director independence standards, established by the Board and recommend such changes in the standards as the Committee determines to be appropriate.

17. Develop and recommend to the Board, Corporate Governance Policies that are appropriate for the Corporation and are consistent with best practices and the best interests of the Corporation. The Committee periodically will review the Corporate Governance Policies and make recommendations for changes as in its judgment are appropriate.

18. Oversee the Corporation's positions on and policies in respect to significant stockholder relations issues, including all proposals submitted by stockholders for inclusion in the Corporation's proxy statement.

19. Periodically review the Corporation's Rights Plan Policy and the Corporation's hostile takeover defenses, and make recommendations to the Board for any changes the Committee determines to be appropriate.

20. Establish procedures for receipt of communications from stockholders and, as appropriate, recommend to the Board actions to be taken in response to such communications.

21. Identify and investigate emerging corporate governance issues and trends which may affect the Corporation.

22. Periodically review the Corporation's Board compensation practices and make recommendations for changes in compensation practices as the Committee determines to be appropriate and consistent with the Corporation's Corporate Governance Policies.

23. Review any proposed amendments to the Corporation's Certificate of Incorporation and By-Laws and recommend appropriate action to the Board.

24. To help ensure the continued independence of outside directors, establish processes and guidelines for the review of charitable donations by the Corporation or any foundation controlled by the Corporation to organizations or entities of which any member of the Board of Directors or an executive officer is affiliated.

25. Develop criteria for, and conduct an annual evaluation of the performance and effectiveness of the Nominating and Corporate

Governance Committee and report the results of that evaluation to the Board.

26. Propose criteria for, and communicate the results of, an annual evaluation of the performance and effectiveness of the Board.

27. Review, in consultation with each Committee of the Board, each committee charter and each committee's process for conducting an annual evaluation of the performance and effectiveness of the committee.

28. Provide oversight of the Corporation's sustainability, corporate social responsibility and corporate citizenship matters and receive periodic reports from management on such programs and their effectiveness.

29. Have such other duties and responsibilities as may be assigned to the Nominating and Corporate Governance Committee, from time to time, by the Board and/or the Chairman of the Board.<sup>68</sup>

### Risk Committee

SEC Commissioner Luis Aguilar states that “boards must take seriously their responsibility to ensure that management has implemented effective risk management protocols. Boards of directors are already responsible for overseeing the management of all types of risk, including credit risk, liquidity risk, and operational risk...”<sup>69</sup> And the major new concern for boards during recent years – “there can be little doubt that cyber-risk also must be considered as part of the board's overall risk oversight.”<sup>70</sup>

Historically, questions of enterprise risk may generally have been the domain of the Audit committee. However, during recent years, many boards have deemed it appropriate to create a separate Risk committee of the board. Accordingly, Commissioner Aguilar observes

Although boards have long been responsible for overseeing multiple aspects of management's activities, since the [2007-08] financial crisis, there has been an increased focus on what boards of directors are doing to address risk management. Indeed, many have noted that, leading up to the

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<sup>68</sup> Kimberly-Clark Corporation, Nominating and Corporate Governance Committee Charter (As amended through Nov. 13, 2013), available at [http://www.cms.kimberly-clark.com/umbracoimages/UmbracoFileMedia/NCG\\_Committee\\_Charter-Revised\\_11-13-13\\_umbracoFile.pdf](http://www.cms.kimberly-clark.com/umbracoimages/UmbracoFileMedia/NCG_Committee_Charter-Revised_11-13-13_umbracoFile.pdf) (last viewed Sept. 13, 2015).

<sup>69</sup> See Aguilar, *supra* note 28.

<sup>70</sup> *Id.*

financial crisis, boards of directors may not have been doing enough to oversee risk management within their companies, and that this failure contributed to the unreasonably risky behavior that resulted in the destruction of untold billions in shareholder value and plunged the country and the global economy into recession. Although primary responsibility for risk management has historically belonged to management, the boards are responsible for overseeing that the corporation has established appropriate risk management programs and for overseeing how management implements those programs. The importance of this oversight was highlighted when, in 2009, the Commission amended its rules to require disclosure about, among other things, the board's role in risk oversight, including a description of whether and how the board administers its oversight function, such as through the whole board, a separate risk committee, or the audit committee.<sup>71</sup>

SEC rules, effective February 28, 2010 amended Item 407 of Regulation S-K to require disclosure about the board's role in a company's risk oversight process and its leadership structure.<sup>72</sup> The SEC notes

According to the SEC's final rule release, the new disclosure rules require "companies... to describe how the board administers its risk oversight function, such as through the whole board, or through a separate risk committee or the audit committee, for example."<sup>73</sup> Disclosures should address, for example, "whether the individuals who supervise the day-to-day risk management responsibilities report directly to the board as a whole or to a board committee or how the board or committee otherwise receives information from such individuals."<sup>74</sup> Such disclosures should

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<sup>71</sup> *Id.*

<sup>72</sup> The text of the new rule reads: (h) Board leadership structure and role in risk oversight. Briefly describe the leadership structure of the registrant's board, such as whether the same person serves as both principal executive officer and chairman of the board, or whether two individuals serve in those positions, and, in the case of a registrant that is an investment company, whether the chairman of the board is an "interested person" of the registrant as defined in section 2(a)(19) of the Investment Company Act (15 U.S.C. 80a-2(a)(19)). If one person serves as both principal executive officer and chairman of the board, or if the chairman of the board of a registrant that is an investment company is an "interested person" of the registrant, disclose whether the registrant has a lead independent director and what specific role the lead independent director plays in the leadership of the board. This disclosure should indicate why the registrant has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the registrant. In addition, disclose the extent of the board's role in the risk oversight of the registrant, such as how the board administers its oversight function, and the effect that this has on the board's leadership structure.

<sup>73</sup> SEC Releases No. 33-9089; 34-61175, Proxy Disclosure Enhancements (Dec. 16, 2009), available at <http://sec.gov/rules/final/2009/33-9089.pdf>. [Final Rule Release].

<sup>74</sup> *Id.*

also include an explanation of the board’s leadership structure and the “reasons why the company believes that this board leadership structure is the most appropriate structure for the company.”<sup>75</sup> In companies in which the CEO and Chairman are the same individual, rule “amendments will require disclosure of whether and why the company has a lead independent director, as well as the specific role the lead independent director plays in the leadership of the company.”<sup>76</sup>

The Dodd-Frank Act requires large financial institutions to establish independent risk committees on their boards,<sup>77</sup> with at least one member of the committee required to have risk management experience at a large, complex firm.<sup>78</sup> Exhibit Ten depicts the Charter for the Enterprise Risk Committee of Texas-based Viewpoint Financial Group, Inc. and Viewpoint Bank, N.A.

Exhibit Ten  
VIEWPOINT FINANCIAL GROUP, INC.  
VIEWPOINT BANK, N.A.  
Enterprise Risk Committee Charter

**I. Purpose**

The purpose of the Enterprise Risk Committee (the “Committee”) is to provide oversight of the process of risk management controls of Viewpoint Financial Group, Inc. and its subsidiaries (collectively, the “Company”), including the strategies, policies, and practices established by management to identify, assess, measure, and manage the significant risks. The Committee shall assist the Boards of Directors of the Company (the “Boards”) and its other committees that oversee specific risk-related issues and serve as a resource to management.

**II. Committee Membership**

The Committee shall consist of no fewer than three members, all of whom shall be “independent directors” as defined by NASDAQ rules. The members of the Committee shall be appointed by the Boards from time to time. Committee members are subject to removal at any time by a majority of the Boards. Any vacancy may be filled by the Boards. The Chair of the Committee will be appointed by the Boards. The Committee shall have at least one member with risk management expertise that is commensurate with the company’s capital structure, risk profile, complexity, activities, size, and other appropriate risk related factors.

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> John Lester & John Bovenzi, *The Dodd-Frank Act: What it does, what it means, and what happens next*, OLIVER WYMAN POINT OF VIEW (2010).

<sup>78</sup> *Id. see also*, Scott Landau, et. al. *Dodd-Frank Act Reforms Executive Compensation and Corporate Governance for All Public Companies*, PILLSBURY CLIENT ALERT (July 15, 2010).

### **III. Meetings**

The Committee shall meet as often as it determines necessary, but not less frequently than quarterly. The Committee shall also meet with or hear reports from management on a schedule to be determined, which shall include meetings not less than annually with one or more members of management in executive session. The Committee shall fully document and maintain records of its proceedings.

### **IV. Authority and Responsibilities**

The authorities and responsibilities of the Committee are as follows:

- A. Oversee the Company's risk management infrastructure, including review and approval of the annual Enterprise Risk Management Plan, which such plan shall describe the Company's risk tolerance and strategies for managing risk in the context of the overall business plan.
- B. Receive regular reports from management which (i) enable the Committee to assess the risks involved in the business and how risks are monitored and controlled by management; and (ii) give clear and explicit information on current and forward-looking aspects of risk exposure.
- C. Assess compliance with the Company's risk limit structure and policies and procedures relating to risk governance, practices, and risk controls across the enterprise.
- D. Assess the adequacy of staffing at the Company to ensure the availability of adequate staffing to carry out the objectives of the Enterprise Risk Management Plan.
- E. Consult, as deemed appropriate by the Committee, with external experts to review information on emerging practices and risks.
- F. Assess the Management's success in communicating the Company's risk culture to employees, regulators, and shareholders as appropriate.
- G. Prepare reports to the Boards on the overall risk profile of the Company, the Committee's assessment of Management's programs for managing enterprise risk, and information concerning current and prospective macroeconomic and financial factors that may affect the Company's financial stability.
- H. Retain, at its discretion, outside advisors to consider from time to time other matters which the Committee believes are required of it in keeping with its responsibilities.
- I. Seek such assurance as it may deem appropriate that Company employs a Chief Risk Officer responsible for enterprise risk oversight and management, and which such officer possesses risk management expertise that is commensurate with the Company's capital structure, risk profile, complexity, activities, size, and other risk-related factors that are appropriate, and that the Chief Risk Officer:
  1. participates in the risk management and oversight process at the highest level on an enterprise-wide basis; and
  2. operates independently from individual business units by reporting administratively to the Chief Executive Officer and functionally to the Committee as prescribed by this Charter.
- J. With respect to compliance with laws and regulations:
  1. Designate the Company's Compliance Officer, who shall report functionally to the Committee and administratively to the Chief Risk Officer.
  2. Annually review and approve the Compliance Management Program, which such program shall describe the Company's implementation of,

adherence to and compliance with laws and regulations pertaining to the operation of the Company and the Bank. This includes, at a minimum: compliance with policies and procedures approved by the Board of Directors, effectiveness and efficiency of internal controls and information systems, effectiveness of independent testing and assessment of compliance with applicable laws and regulations, and effectiveness of employee training.

3. Receive a summary of findings from completed compliance assessments, a progress report on the Compliance Management Program, and a report of outstanding weaknesses from prior assessments.
  4. Annually review developments and changes in the various federal banking rules, regulations and other laws and the status of the Company's compliance record.
  5. Provide sufficient opportunity for the Company's Compliance Officer to meet privately with the members of the Committee in executive session to discuss any findings or other matters they deem relevant.
- K. To engage in an annual self-assessment with the goal of continuing improvement, and to review and reassess the adequacy of this Charter at least annually and recommend any proposed changes to the Boards for approval.
- L. Assessment of the risk management process will involve some quantitative metrics to serve as a way of tracking risk management performance in the implementation of the agreed strategy. Such metrics may include: risk-weighted asset limits, regulatory capital ratios; value at risk; target credit agency ratings; a system of risk or exposure limits; concentrations in risk positions; leverage ratios; economic capital measures and acceptable stress losses; and the results of stress and scenario analysis. The Committee will receive regular management reports on levels and composition of capital as well as related controls established as part of the capital management and planning process, including any limits, targets and thresholds.
- M. To perform any other duties or responsibilities expressly delegated to the Committee by the Boards from time to time.

#### **V. Limitations**

In fulfilling its responsibilities, it is recognized that members of the Committee are not employees and have not within the preceding fiscal year been, an officer or employee of the Company or any affiliate of the Company. The Companies' management is responsible for preparing the reports and executing the strategies, policies and procedures referenced herein. It is not the duty or responsibility of the Committee or its members to conduct auditing or accounting reviews or procedures or to determine that management's reports to the Committee are complete and accurate, which such responsibility reposes with management. Each member of the Committee shall be entitled to rely on the integrity of those persons and organizations within and outside the Company from whom and from which he or she receives information and the accuracy of the financial and other information provided to the Committee by such persons or organizations, absent actual knowledge to the contrary (which shall be promptly reported to the Committee).<sup>79</sup>

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<sup>79</sup> Viewpoint Financial Group, Inc., Viewpoint Bank, N.A., Board of Directors Enterprise Risk Committee Charter, *available at*

### Strategic Planning Committee

Uncertainty about the future is a problem for every chief executive and board of directors. The survival of any enterprise depends on the ability to anticipate future events, predict their possible impact, and take decisive action when faced with changes in assumptions. Every chief executive officer devotes a substantial portion of his time to anticipating the future. In all too many organizations this is an informal process, in many cases never committed to paper. In sophisticated organizations, the discipline of strategic management has grown rapidly during recent years. A systematic approach to identifying strategic factors that impact the enterprise is necessary to assure its long-range viability.<sup>80</sup> PricewaterhouseCoopers finds from its 2012 survey of corporate directors that over 75 percent of directors “want to devote more time to overseeing strategy.”<sup>81</sup>

Many years ago, the board of directors at Texas Instruments formalized strategic planning at the board level with a standing Strategic Planning Committee. This board structure seemed entirely logical since the Texas Instruments board at that time consisted primarily of engineers. However, it is difficult to understand how so few others saw the wisdom of formalizing the process of strategic planning; because a noticeable lack of other strategic planning committees could be found among American boards then; and

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<http://www.snl.com/Cache/1001174813.PDF?Y=&O=PDF&D=&FID=1001174813&T=&IID=4122259> (last viewed Sept. 13, 2015).

<sup>80</sup> See Lawrence J. Trautman, *The Strategic Planning Committee: Focus on the Future*, 4 DIRECTOR'S MONTHLY 2 (Sept. 1980).

<sup>81</sup> PricewaterhouseCoopers, *Insights from the Boardroom 2012, Board Evolution: Progress Made, Yet Challenges Persist*, 3 (2012).

few since.<sup>82</sup> Exhibit Eleven depicts the Strategic Planning Committee Charter for Houston-based Center Point Energy.

Exhibit Eleven  
CENTER POINT ENERGY  
Strategic Planning Committee Charter

**Purpose**

The Strategic Planning Committee (the "Committee") of the Board of Directors shall assist the Board in fulfilling its responsibilities to monitor the development of and ultimately approve the Company's strategies and strategic plan.

**Membership**

The Committee shall consist of at least three members, a majority of whom, including the Committee Chairman, shall not be employees of the Company or any of its subsidiaries. The Board shall appoint one member of the Committee as Chairman. The Committee and its Chairman shall be appointed annually by the Board.

**Meetings and Structure**

The Committee shall meet at such times as are deemed appropriate by the Chairman of the Committee, any two members of the Committee, the Chairman of the Board or the Chief Executive Officer. The Chairman of the Committee shall be responsible for preparing the agenda, presiding over meetings and coordination of reporting to the Board. In the absence of the Chairman of the Committee, the responsibilities of the Chairman may be performed by any other member of the Committee.

**Authority and Responsibilities**

The Committee shall act as a liaison between the Board and management. The Committee shall, from time to time, as requested by the Board or when the Committee considers it appropriate:

- Review with management the process for development, approval and modification of the Company's strategy and strategic plan.
- Review with management the key issues, options and external developments impacting the Company's strategy.
- Report regularly to the Board and facilitate an annual review of the Company's strategy and strategic options.
- Assure that the Board has the opportunity for timely and thorough review of the Company's strategy development and strategic plan.
- Meet with management periodically to monitor the Company's performance and ensure the Board is regularly apprised of the Company's progress with respect to implementation of the approved strategy.

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<sup>82</sup> *Id.* (My thanks to Byron F. Smith, General Director and Member, Corporate Objectives Committee of the Board, Texas Instruments, Incorporated for taking the time many years ago to discuss at length the Texas Instruments experience with strategic planning at their board level).

- Monitor enterprise risks assigned to the Committee by the Board under the Company's Enterprise Risk Management program and report thereon to the Board.

At least annually, the Committee shall assess its own performance and the adequacy of this Charter. The Committee shall report the results of the reviews to the Board and, if considered appropriate, make recommendations to the Board to amend the Charter. The Committee shall perform such other duties and responsibilities as specified by the Board from time to time.

**Authority to Retain Experts**

The Committee shall have the authority, to the extent it deems necessary or appropriate, to retain, dismiss or replace independent advisors to assist it in fulfilling its responsibilities. The Company shall provide for appropriate funding, as determined by the Committee, for payment of compensation to any advisors employed by the Committee.<sup>83</sup>

IV. THE DEMOGRAPHICS OF DIRECTORSHIP

What is the profile of the typical corporate director in Texas? What types of experiences do directors bring to the boardroom? For perspective, presented first is a discussion about the demographics of corporate governance nationally. Next, the characteristics of Texas directors are presented, including: affluence, age, gender, education, industry, company size, and company sales revenues. For the entire United States, the following metrics are available for S&P 500 companies:

- The average age of independent directors... has risen to 63 years from 60 a decade ago and in 2013, for the first time, nearly half of the 339 newly elected directors are retired.
- More retired CEOs, COOs, presidents and chairs than active executives in those roles joined boards in the past year – 79 retired vs. 77 active.
- Boards are raising mandatory retirement ages to allow experienced directors to serve longer; 88 percent of boards with a mandatory retirement age set it at 72 or older, versus 46 percent a decade ago. Nearly one-quarter have a retirement age of 75 or older versus 3 percent a decade ago...
- 53 percent of S&P 500 CEOs serve on no outside corporate boards.

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<sup>83</sup> Center Point Energy, Strategic Planning Committee Charter (on file with author).

- 38 percent of newly elected directors are serving on their first public company board.<sup>84</sup>

National trends among S&P 500 boards noted by the Spencer Stuart survey include an increase over time in board's independence, where "Independent director representation now stands at 85%, compared with 79% a decade ago. On 60% of boards today, the CEO is the only non-independent director, compared with just 35% of boards in 2003."<sup>85</sup> In addition, results from the 2013 survey show that "91% of S&P 500 boards have one-year terms, up from 83% in 2012 and just 40% in 2003."<sup>86</sup> This trend toward increased board change causes Spencer Stuart to observe that "Having the right expertise in the boardroom is paramount, and natural director turnover can provide opportunities to refresh the board with new and needed skills as the economic and competitive landscape changes – and to increase the diversity of perspectives on the board."<sup>87</sup>

Now, based on the author's proprietary database, here is a detailed look at the demographics for Texas corporate directors.

## V. PROFILE OF AFFLUENCE

Corporate directors are among the most influential and affluent in our society. Many present or former chief executive officers are sought to serve on corporate boards due to their expertise and experience overseeing corporations at the highest level. Our data regarding director affluence may appear skewed toward a high bias because of inclusion of high profile billionaires such as Warren Buffet (BNSF), Michael Dell (DELL Computer), and the wealth represented by the Texas petroleum industry (Boone Pickens

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<sup>84</sup> See 2013 Spencer Stuart Board Index, *supra* note 59.

<sup>85</sup> *Id.* at 4.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

and many others). Exhibit Twelve depicts the author's best estimate of household income and net worth for those who serve as directors of Texas corporations.

Exhibit Twelve  
Texas Directors  
Household Income & Net Worth

**Personal Household Income:**

\$ 327,000 Average  
\$ 268,000 Median

**Household Net Worth:**

\$ 13,722,000 Average  
\$ 1,630,000 Median

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Source: Lawrence J. Trautman, Proprietary compiled data base.

VI. AGE

The average age of Texas directors of for-profit entities is fifty-seven years old. Despite the recent publicity surrounding age twenty-something social media entrepreneurs and internet-related start-ups (Google, Facebook, LinkedIn, etc.), less than one-percent of all Texas corporate directors are under the age of thirty. Twenty-two percent of Texas corporate directors fall between the ages of 31 to 45, and twenty-nine percent are between the ages of 46 to 55. The largest age group, at thirty-nine percent, of all Texas directors consists of those between the ages of 56 to 65.

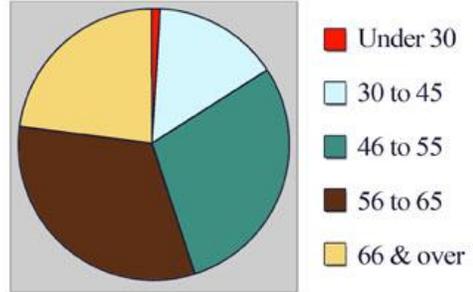
Even with some corporations having mandatory director retirement, fully twenty percent of those serving on Texas corporate boards are 66 years of age or older. A pictorial view of age distribution is presented in Exhibit Thirteen.

Exhibit Thirteen  
Age of Texas Directors

# Age

Under 30:	1%
30 to 45:	15%
46 to 55:	29%
56 to 65:	32%
66 & over:	23%

Average Age = 57 years old



Source: Lawrence J. Trautman, Proprietary compiled data base.

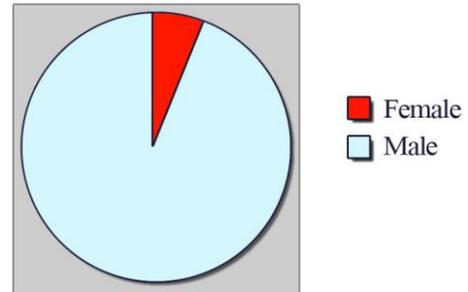
## VII. GENDER

At the very largest of U.S. corporations (S&P 500), women comprise less than eighteen percent of S&P500 board directors.<sup>88</sup> In Texas, as shown in Exhibit Fourteen, only six percent of Texas company corporate directors are women.

Exhibit Fourteen  
Texas Directors By Gender

# Sex

Male:	94%
Female:	6%



Source: Lawrence J. Trautman, Proprietary compiled data base.

<sup>88</sup> *Id.* at 9.

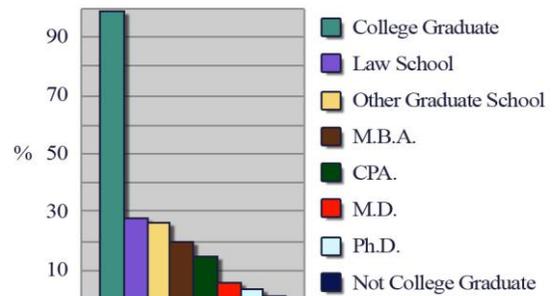
## VIII. EDUCATION

Texas corporate directors are highly educated. Over ninety-nine percent of Texas directors are college graduates. Eighty percent hold advanced college degrees. Twenty-eight percent have law degrees; a surprising result since to me, since many law firms are reluctant to allow their partners to assume director liability by serving on boards. Twenty-six percent of all Texas directors have earned other advanced degrees. Twenty percent of Texas corporate directors hold an MBA degree. Because the Securities and Exchange Commission and exchange rules require every publicly-traded board to have an audit committee consisting solely of independent directors, with at least one director serving on the audit committee who qualifies as a “financial expert,”<sup>89</sup> we would expect to see a large number of directors from the accounting and auditing profession. Fifteen percent of Texas directors hold a CPA designation. Six percent of directors in this survey are medical doctors, having reported an MD designation. Exhibit Fifteen illustrates that three percent hold PhD degrees and only one percent are not college graduates.

Exhibit Fifteen  
Education Statistics of Texas Corporate Directors

### Education: 99% of are College graduates; 80% Have Advanced Degrees

College Graduate:	99%
Law School:	28%
Other Grad School:	26%
M.B.A.:	20%
CPA.:	15%
M.D.:	6%
Ph.D.:	3%
Not College Graduate:	1%



Source: Lawrence J. Trautman, Proprietary compiled data base.

<sup>89</sup> See SEC Releases No. 33-8177; 34-47235, *supra* note 60. See also Trautman, *supra* note 58.

## IX. INDUSTRY

To a considerable extent Texas corporate directors comprise the nation's corporate elite, representing companies engaged in banking and finance, education, electronics / computer technology, energy, entertainment & recreation, government / public administration, healthcare, insurance, manufacturing, materials, professional services, real estate, telecom, transportation, utilities, venture capital, and other industries. Most Texas corporate directors serve the banking and finance sector (thirty-nine percent). More than four out-of-every 10 directors fall into this category if insurance is included. The second most prevalent category of corporate directors is found in the energy sector (at eighteen percent). Technology companies account for the next largest group of directors at nine percent. To contrast directorships with industry employment, during September 2014, Texas reports 11,662,700 nonagricultural jobs – with the Trade industry accounting for the highest percentage of State employment (15.79%), followed by: Government (15.77%); Professional and Business Services (13.29); Education and Health Services (13.24); Leisure and Hospitality (10.26%); Manufacturing (7.60%); Financial Activities (6.09%); Construction (5.61%); Transportation, Warehouse, Utilities (4.30%); Other Services (3.48%); Mining and Logging (2.79%); and Information (1.77%).<sup>90</sup> Exhibit Thirteen shows detailed results for Texas corporate directors by industry. A study by Francis, Hasan and Wu finds that “Directors from academia served on the boards of around 5.5% of S&P 1,500 firms over the 1998-2011 period.”<sup>91</sup> However, by contrast, this study indicates that only about one percent of Texas directors have an academic career path.

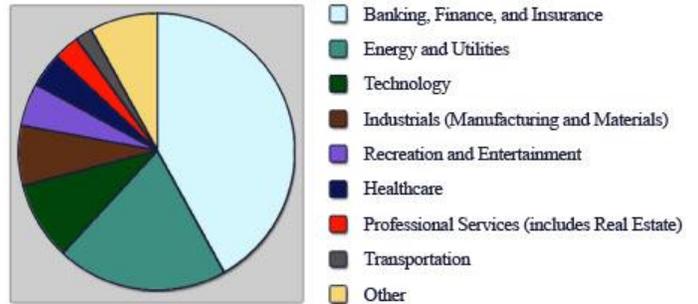
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<sup>90</sup> See Anari & Dotzour, *supra* note 8 at 1.

<sup>91</sup> Bill Francis, Iftexhar Hasan & Qiang Wu, Professors in the Boardroom and Their Impact on Corporate Governance and Firm Performance, 44 FIN. MGMT. 547 (2015).

**Exhibit Sixteen**  
**Total Number of Texas Corporate Entities Represented**

Banking and finance	39%
Energy	18%
Electronics/Computer Tech.	9%
Recreation & Entertainment	5%
Healthcare	4%
Manufacturing	4%
Materials	3%
Government/public admin.	2%
Insurance	2%
Professional services	2%
Real Estate	2%
Telecom	2%
Transportation	2%
Utilities	2%
Education	1%
Venture capital	1%
Other industries	2%



Source: Lawrence J. Trautman, Proprietary compiled data base.

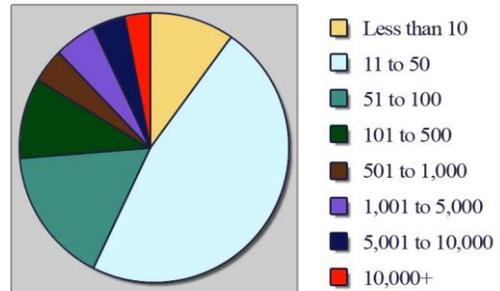
## X. COMPANY SIZE

Most Texas companies for which the author was able to compile information have less than fifty employees. Job creation takes place in small companies. Ten percent of companies located by the author have less than ten employees. Forty-seven percent of Texas directors serve on company boards having eleven to fifty employees; seventeen percent of Texas corporate directors govern companies having one-hundred-one to five hundred employees. Of the larger employers, five percent of Texas corporate directors serve on boards of companies employing from one to five-thousand; four percent of directors have five to ten thousand employees and the largest companies, having more than ten thousand employees are governed by three percent of those corporate directors identified in Texas.

Exhibit Seventeen  
Directors By Number of Company Employees

### Number of Employees

Less than 10:	10%
11 to 50:	47%
51 to 100:	17%
101 to 500:	10%
501 to 1,000:	4%
1,001 to 5,000:	5%
5,001 to 10,000:	4%
10,000+	3%



Source: Lawrence J. Trautman, Proprietary compiled data base.

## XI. SALES / REVENUES

As we have already seen, Texas has led the nation in job creation since the recovery began after the 2008 financial crisis.<sup>92</sup> Many of these start-up companies are (1) bootstrapped by their entrepreneurial founders, or (2) venture capital sponsored pre-revenue or early stage situations. Start-ups and revenue-challenged enterprises need directors and skilled corporate governance, just as those large-scale businesses. This seems to account for the large number of modest revenue companies found in our universe of Texas corporate directors. It is most probable that our statistics vastly undercount these small companies because many are purposefully in stealth-mode and others simply lack visibility.

Exhibit Eighteen  
Company Revenues

### By Sales / Revenue

\$1 billion or more:	6%
\$100 to \$999 million:	9%
\$1 to \$99 million:	17%
Less than \$1 million:	68%



Source: Lawrence J. Trautman, Proprietary compiled data base.

## XII. PARTICULAR SKILLS IN DEMAND

So what director skills and experience are in highest demand?<sup>93</sup> For S&P 500 corporations nationally, the 2013 *Spencer Stuart Board Index* reports that “Minorities,

<sup>92</sup> See, WALL ST. J. *supra* note 13.

<sup>93</sup> See generally, Trautman, *supra* note 51.

women and active CEOs/COOs topped the list... consistent with our own director searches. Other profiles that are in high demand are executives with financial expertise (47%), international experience (44%), specific industry expertise (38%) and retired CEOs/COOs (34%) – or some combination of these backgrounds.”<sup>94</sup> In addition, “Some boards are prioritizing new areas of expertise when recruiting and tapping non-traditional candidates, especially younger, active executives, to bolster the boards’ knowledge in such areas as digital or social media, certain areas of finance and emerging markets or global business.”<sup>95</sup>

To get meaningful answers to the question of what skills and experience are in greatest demand for Texas corporate directors, an attempt was made to survey those considered to be at the top of the director search industry. Tom Simmons is Spencer Stuart's Global Industry Practice Leader and is based in Houston. According to Simmons

Demand for corporate directors in Texas remains steady. More than one-third of the public companies included in our 2014 Houston Board Index recruited new directors. In all, those companies added 44 new independent directors. The profiles in demand in Texas are similar to the S&P 500. Of the 44 new directors, 14 (32%) are current or former CEOs and chairmen. Twelve (27%) are women, the highest percentage of new female directors we have seen. Other in-demand director profiles are chief operating officers and other senior general managers, senior finance leaders and top functional executives.<sup>96</sup>

Stuart Guthrie is experienced in the search and recruitment of corporate directors from his position in the Dallas office of Russell Reynolds Associates. Guthrie says,

Sitting and recently retired CEOs remain in high demand for Boards of Directors, in addition to other senior executives with expertise in markets

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<sup>94</sup> See Spencer Stuart, *supra* note 59 at 4.

<sup>95</sup> *Id.* at 3.

<sup>96</sup> E-mail from Tom Simmons, Global Energy Practice Leader, Spencer Stuart, to Lawrence J. Trautman (Nov. 21, 2014, 11:02 CST) (on file with author).

relevant to the company's business. Boards are also extremely interested in adding qualified financial experts to ensure they are compliant with SEC requirements. While searching for these new Directors, Boards are consistently considering ethnic and gender diversity candidates from these categories.<sup>97</sup>

Houston-based energy search specialist David E. Preng, founder and president of Preng & Associates believes that boards today are doing a very good job of determining what skills are needed to perform their fiduciary duty and the primary characteristics currently desired in director candidates are: “independence, conviction, team player, and financial and business acumen.” Most boards look to recruit someone who understands their business and former CEOs are preferable.”<sup>98</sup> They also look for candidates who have “skills and expertise in *strategy* and *risk management*.” Often boards will require that a new director bring particular expertise such as international experience or accounting skills so that the person can serve on the Audit committee. “It’s much easier to teach someone from your industry corporate governance skills, than to start from scratch and try to teach them your business,” he continues. “Expertise in *compensation* is also valuable, given the considerable increase in the board’s proxy responsibilities--- tying achievement of the articulated strategies to the compensation schematic is an important role for the board,” Mr. Preng observes. With particular reference to the energy business, “if someone presently sits on the board of an exploration & production company, they can’t serve on a competing board due to

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<sup>97</sup> E-mail from Stuart Guthrie, Managing Director and Global Practice Leader, Russell Reynolds Associates to Lawrence J. Trautman (Oct. 27, 2014, 19:48 CST) (on file with author).

<sup>98</sup> Telephone interview with David E. Preng, Founder & President, Preng & Assoc. (June 29, 2011).

conflicts of interest. This does tend to create a supply and demand dynamic for my industry,” he continues.<sup>99</sup>

Robert L. Pearson, Founder and Chief Executive Officer of Dallas-based Pearson Partners International, Inc., says “The top requirement for board searches is to find a sitting CEO closely followed by a request for diversity if a CEO isn’t available.”<sup>100</sup>

“One-third of our board searches are for audit committee financial experts,” says Theodore L. Dysart, Vice Chairman of Chicago-based executive search firm Heidrick & Struggles. “Those who technically qualify are relatively easy to find: every public company CEO; retired major accounting firm senior executives; and most chief financial officers and controllers meet the technical requirements,” he continues.<sup>101</sup>

The challenge is to find those qualified candidates who will make a great board member; those with industry experience at the proper level and also bring the right perspective, stature and presence--- and will be able to meaningfully contribute to the future strategy of the enterprise. Following Sarbanes-Oxley, best practice seems to call for the new financial expert director to serve on the audit committee for a year or two in order to provide for orderly succession planning...

I would characterize the next general category of director searches as focusing on those candidates having industry operating experience. Finally, probably one-quarter of our current searches are for diversity candidates.<sup>102</sup>

#### Audit Committee “Financial Expert”

Every board of directors of a public company must now have an audit committee comprised of entirely independent directors. In addition, each board is required to have at least one qualified “financial expert” on its audit committee.<sup>103</sup> Therefore, these skills

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<sup>99</sup> *Id.*

<sup>100</sup> E-mail from Robert Pearson, Founder and Chief Executive Officer, Pearson Partners International, Inc. to Lawrence J. Trautman (Oct. 27, 2014, 15:31 CST) (on file with author).

<sup>101</sup> Telephone interview with Theodore L. Dysart, Vice Chairman, Heidrick & Struggles (July 14, 2011).

<sup>102</sup> *Id.*

<sup>103</sup> *See generally*, Trautman *supra* note 58.

are no longer optional for every board--- they are “must have” skills (*See* prior discussion). Professor Henry T.C. Hu warns that “Financial innovation is creating objective realities far more complex than in the past, often beyond the capacity of the English language, accounting, visual, risk measurement, and other tools on which depictions rely.”<sup>104</sup>

Professors Robert Prentice and David Spence observe that the empirical evidence overwhelmingly support a finding that “governance provisions from exploitation by insiders benefit capital markets, that more independence on boards of directors and audit committees improves financial reporting, and that requiring... that audit committees be composed entirely of independent directors pays concrete benefits in terms of accurate financial reporting.”<sup>105</sup>

### Information Technology

Given the almost daily disclosure of cybersecurity breaches, every board needs expertise to govern the enterprises’ information technology.<sup>106</sup> A reasonable question

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<sup>104</sup> *See generally* Henry T. C. Hu, *Too Complex to Depict? Innovation, 'Pure Information,' and the SEC Disclosure Paradigm*, 90 TEX. L. REV. 1602 (2012), available at <http://ssrn.com/abstract=2083708>. *See also* Henry T. C. Hu, *Disclosure Universes and Modes of Information: Banks, Innovation, and Divergent Regulatory Quests*, 31 YALE J. REG. 565 (2014), available at <http://ssrn.com/abstract=2442092> (observing that the SEC disclosure focus is directed at protecting investors and promoting market efficiency, while the bank regulatory system is directed at the well-being of the banks and promoting system stability).

<sup>105</sup> *See* Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise is the Received Wisdom*, 95 GEO. L.J. 1843, 1908 (2007).

<sup>106</sup> *See generally* Lawrence J. Trautman & George P. Michaely, *The SEC & The Internet: Regulating the Web of Deceit*, 68 CONSUMER FIN. L.Q. REP. 262 (2015), available at <http://www.ssrn.com/abstract=1951148>; Lawrence J. Trautman, *Cybersecurity: What About U.S. Policy?*, 2015 J. L. TECH. & POL’Y (forthcoming), available at <http://ssrn.com/abstract=2548561>; Lawrence J. Trautman, Jason Triche & James C. Wetherbe, *Corporate Information Governance Under Fire*, 8 JOURNAL OF STRATEGIC & INTERNATIONAL STUDIES 105 (2013), available at <http://ssrn.com/abstract=2314119>; Lawrence J. Trautman, *Managing Cyberthreat*, 31 SANTA CLARA HIGH TECH. L.J. \_\_\_ (forthcoming 2015), available at <http://ssrn.com/abstract=2534119>; Lawrence J. Trautman, *Congressional Cybersecurity Oversight: Who’s Who & How It Works*, (forthcoming), available at <http://ssrn.com/abstract=2638448>; Lawrence J. Trautman, E-

voiced from many boardrooms is “How can I be expected to govern something I know so little about?”<sup>107</sup> To be successful, IT governance requires enterprise commitment at the very top. Boards and executive management need to extend governance, already exercised over the enterprise, to IT by way of an effective IT governance framework that addresses strategic alignment, performance measurement, risk management, value delivery, and resource management.<sup>108</sup> A previous law review article by Trautman and Altenbaumer-Price, observed that IT (information technology) “risks are inherent in a company’s operations, including, for example, risks to third parties in operations, such as the inadvertent disclosure of sensitive customer data either by the company itself or third parties; theft of data by cybercriminals; or exposure of your customers to viruses from hackers.”<sup>109</sup> Moreover, “IT risks also include direct risks to a company such as the infiltration of viruses in internal systems, business interruption due to security breaches or viruses, the costs of restoring damaged or lost data, or the costs of notifying customers when their data has been compromised.”<sup>110</sup>

The Trautman and Alterbaumer-Price article warns that “These risks are being realized in costly private and regulatory lawsuits related to cyber issues. For example, a payment systems processor was sued in a securities fraud class action after

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*Commerce and Electronic Payment System Risks: Lessons from PayPal*, 16 U.C. DAVIS BUS. L.J. (forthcoming 2016), available at <http://www.ssrn.com/abstract=2314119>.

<sup>107</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 313 citing PETER WEILL & JEANNE W. ROSS, IT GOVERNANCE: HOW TOP PERFORMERS MANAGE IT DECISIONS RIGHTS FOR SUPERIOR RESULTS 6 (Harv. Bus. Sch. Press) (2004). Peter Weill, Director of the Center for Information Systems Research ("CISR") and Senior Research Scientist at the Massachusetts Institute of Technology's Sloan School of Management led research during 2001-2003 which studied 256 enterprises in Europe, Asia Pacific and the Americas. During the same general time period parallel studies were conducted by Jeanne Ross and Cynthia Beath (University of Texas).

<sup>108</sup> See Trautman & Altenbaumer-Price, *supra* note 27 at 328.

<sup>109</sup> *Id.* at 332.

<sup>110</sup> *Id.*

cybercriminals stole credit and debit card information.”<sup>111</sup> In another case, a “company was sued after a hacker infiltrated its online job application system and sent phishing e-mails to job applicants asking for additional personal information.”<sup>112</sup> Elsewhere, “A retailer found itself embroiled in multiple lawsuits and a multi-state regulatory probe after hackers stole millions of credit and debit card numbers over a two-year period<sup>113</sup> and an educational institution was sued by its alumni after hackers stole social security numbers.”<sup>114</sup> Trautman and Altenbaumer-Price conclude that “best practice for many will dictate that an audit committee include IT expertise and be composed of a qualified vice chairman, familiar with the company’s particular audit issues by virtue of experience gained from audit committee service.”<sup>115</sup> Should unexpected developments require it, this strategy will “provide an instant replacement for the committee chair... Therefore, every board should have at least two qualified financial experts populating the audit committee and seek IT expertise and experience in director recruitment... [and assist] ongoing vigilance and recognition of the mission critical nature of Information Technology to the enterprise.”<sup>116</sup> An understanding of the role of insurance in mitigating enterprise risk is also important for every director to understand.<sup>117</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* citing Chubb Group of Insurance Companies, *CyberSecurity by Chubb: Insuring Cyber Exposures for Businesses of All Kinds*, available at <http://www.sgdins.com/downloads/CyberSecurity%20by%20Chubb.pdf> (last visited July 20, 2010).

<sup>114</sup> *Id.*

<sup>115</sup> Trautman & Altenbaumer-Price, *supra* note 27 at 320.

<sup>116</sup> *Id.* at 341.

<sup>117</sup> See Trautman & Altenbaumer-Price, *supra* note 27 at 337; Lawrence J. Trautman & Kara Altenbaumer-Price, *D&O Insurance: A Primer*, 1 AM. U. BUS. L. REV. 337 (2012), available at <http://www.ssrn.com/abstract=1998080>; Kara Altenbaumer-Price, Sagacity Newsletter (Oct. 2014), available at [http://storage.coremotivesmarketing.com/library/8a7a436f-8a6b-486a-8c24-06f560276b6e/676/October\\_2014\\_Sagacity.pdf?cm\\_mid=4051350&cm\\_crmid=091f324d-eff1-e111-b5f5-005056b40109&cm\\_medium=email](http://storage.coremotivesmarketing.com/library/8a7a436f-8a6b-486a-8c24-06f560276b6e/676/October_2014_Sagacity.pdf?cm_mid=4051350&cm_crmid=091f324d-eff1-e111-b5f5-005056b40109&cm_medium=email).

### XIII. BOARD DIVERSITY: NOT MUCH PROGRESS TO DATE

Many scholars suggest that boardroom diversity is desirable.<sup>118</sup> However, not much progress has been made during recent years either on a national basis or in Texas toward achieving greater boardroom diversity.<sup>119</sup> In Texas, it appears that only about six percent of corporate directors are women; ninety-four percent male. Elsewhere, the author observes that

Spencer Stuart reports a large disconnect between the number of boards in their 2013 survey who say they are looking for women directors (54%) and the percentage of new S&P 500 directors who are women (24%). Overall, 7% of S&P 500 boards have no women, down slightly from 9% reported in the 2012 survey.” The number of S&P 500 companies having

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<sup>118</sup> See Jill A. Brown, Ann K. Buchholtz, Marcus Stewart & Bryan Dennis, *Board Diversity as a Camouflage Signal*, 2012 ACAD. MGMT. PROC., Acad. Mgmt. Conf., Boston, MA citing Amy J. Hillman & Tom Dalziel, *Board of Directors and Firm Performance: Integrating Agency and Resource Dependence Perspectives*, 28 ACAD. MGMT. REV. 383 (2003); Amy J. Hillman, Christine Shropshire & Albert A. Cannella, *Organizational Predictors of Women on Corporate Boards*, 50 ACAD. MGMT. J. 941(2007); Jeffrey Pfeffer & Gerald R. Salancik, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE* (New York: Harper & Row 1978); see also David H. Zhu, Wei Shen & Amy J. Hillman, *Recategorization: The Selection of Minority Directors and Their Subsequent Roles on Boards*, citing Christine M. Beckman & Pamela R. Haunschild, *Network Learning: The Effects of Partners' Heterogeneity of Experience on Corporate Acquisitions*, 47 ADMIN. SCI. Q. 92 (2002); Rita D. Kosnik, *Effects of Board Demography and Director Incentives on Corporate Greenmail Decisions*, 33 ACAD. MGMT. J. 129 (1990)(observing ‘advocates for increased board diversity have long assumed that minority directors can potentially help boards consider approaches in strategic decision-making); see also Michael Useem & Jerome Karabel, *Pathways to Corporate Top Management*, 51 AM. SOC. REV. 184-200 (1986); J.D. Westphal & Ithai Stern, *The Other Pathway to the Boardroom: Interpersonal Influence Behavior as a Substitute for Elite Credentials and Majority Status in Obtaining Board Appointments*, 51 ADMIN. SCI. Q. 169 (2006); James D. Westphal & Ithai Stern, *Flattery Will Get You Everywhere (Especially If You Are a Male Caucasian): How Ingratiation, Boardroom Behavior, and Demographic Minority Status Affect Additional Board Appointments at US Companies*, 50 ACAD. MGMT. J. 267 (2007)(weaken social norms for outside directors to defer to the CEO); Keitha L. Dunstan, Trish Keeper, Thu Phuong Truong & Tony Van Zijl, *The Value Relevance of Board Gender Diversity for NZX Listed Firms and Its Association with Growth Options*, (2011), available at <http://ssrn.com/abstract=2028720> (contending that in New Zealand the benefit gained from board gender diversity can be captured with the appointment of one female director).

<sup>119</sup> See generally Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 854 (2011); Trautman, *supra* note 51; Seletha R. Butler, *All On Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA L. & BUS. REV. 62, 85 (2012); Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated With Women of Color*, 79 ST. JOHN’S L. REV. 1105 (2005); Deborah Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, (Rock Center for Corporate Governance at Stanford University Working Paper No. 89, Sept. 2010), available at: <http://ssrn.com/abstract=1685615>.

two or more women on their board reached two-thirds during 2013, up from just 41% of boards a decade ago and 61% during 2012.” The S&P 500 data shows that while nearly 93 percent of boards have at least one female director, women make up only 18 percent of all S&P 500 directors during 2013 compared with 17 percent a year earlier. The average number of women serving on these larger-company boards during 2013 is 1.9, a slight increase from 1.8 during 2012. Please note that the percentage of women serving as directors is much less for companies smaller than the S&P 500.<sup>120</sup>

Why is the participation rate so low for women in Texas? Contrasting this six-percent Texas result with the previously reported just under-eighteen percent results for S&P 500 corporations I believe can be easily explained. First, my data comes from many smaller Texas companies having almost no public interface (think small oil and gas drilling and exploration companies). My conversations with many experienced directors result in speculation that the historical low levels of participation by women in the engineering and energy (oil and gas) industries may account substantially for these results. During recent years, enrollment by women in professional schools (law and medicine) has grown from very little representation to a majority of students graduating. Accordingly, it seems reasonable to assume that participation by women in Texas board rooms will grow during years to come.

During late 2009, the SEC adopted a rule “to assess a company’s commitment to developing and maintaining a diverse board. In summary, public companies are now required to disclose whether diversity is a factor in considering candidates for nomination to the board of directors, and how the company assesses how effective the policy has

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<sup>120</sup> See Lawrence J. Trautman, *Corporate Boardroom Diversity: Why Are We Still Talking About This?*, 17 THE SCHOLAR: ST. MARY’S L. REV. ON RACE & SOCIAL JUSTICE \_\_ (2014), *citing Id.*

been.”<sup>121</sup> SEC Commissioner Luis A. Aguilar puts the case for boardroom diversity this way,

Because of the importance of boards of directors, investors increasingly care about how directors are appointed, and what their background is. This is especially true as American businesses compete in both a global environment, and in a domestic marketplace that is, itself, growing more diverse. In this ever more challenging business environment, the ability to draw on a wide range of viewpoints, backgrounds, skills, and experience is critical to a company’s success.<sup>122</sup>

#### XIV. CONTINUING EDUCATION FOR CORPORATE DIRECTORS

The challenging job of corporate directorship can be both highly fulfilling and intellectually challenging. The multitude of skills required to be a competent and effective director requires a commitment to life-long learning and the recognition that every day brings something new to learn. No directors are born with the vision, understanding and skills necessary to perform their duties and responsibilities with diligence and efficiency. In Texas, several unique resources are available to those seeking to develop and refine their corporate governance skills. In particular, the National Association of Corporate Directors and University of Texas at Dallas Institute for Excellence in Corporate Governance offer excellent educational opportunities. For attorneys, the SMU School of Law in Dallas presents an annual Corporate Counsel

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<sup>121</sup> Luis A. Aguilar, SEC Commissioner, Keynote Speech before the 2011 Hispanic Association of Corporate responsibility, An Update on Diversity and Financial Literacy (April 30, 2011), Available at <http://sec.gov/news/speech/2011/spch043011aa.htm>. See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355.

<sup>122</sup> Luis A. Aguilar, SEC Commissioner, Address before the Stanford Law School, Diversity on Corporate Boards: When Diversity Makes a Difference (Sept. 10, 2009), available at <http://sec.gov/news/speech/2009/spch0910091aa.htm>.

Symposium, which presents prominent members of the judiciary and legal community experts to discuss current and emerging corporate legal issues.<sup>123</sup>

#### National Association of Corporate Directors

The National Association of Corporate Directors (NACD) is a “recognized authority focused on advancing exemplary board leadership and establishing leading boardroom practices. Informed by more than 35 years of experience, NACD delivers insights and resources that more than 14,000 corporate director members rely upon to make sound strategic decisions and confidently confront complex business challenges.”<sup>124</sup> Elsewhere, the author observes that directors “often face complex and difficult tasks, requiring skilled judgment. Monthly NACD chapter meetings provide a convenient, informal opportunity for directors to develop and strengthen relationships while gaining the perspectives of other directors. Developing and nurturing these peer relationships becomes particularly important during times of crisis.”<sup>125</sup>

At both the national and local level, “NACD provides world-class director education programs, national peer exchange forums, and proprietary research to promote director professionalism, ultimately enhancing the economic sustainability of the enterprise and bolstering stakeholder confidence. Fostering collaboration among directors, investors, and governance stakeholders, NACD is shaping the future of board

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<sup>123</sup> SMU Dedman School of Law, Law Review, Announcement for 22<sup>nd</sup> Annual Corporate Counsel Symposium, Friday, Oct. 31, 2014, *available at* <http://smulawreview.law.smu.edu/Symposia/Corporate-Counsel.aspx> (last viewed Sept. 14, 2015).

<sup>124</sup> See National Association of Corporate Directors, About NACD: For directors, by directors, *available at* <http://www.nacdonline.org/AboutUs/?navItemNumber=556> (last viewed Sept. 14, 2015).

<sup>125</sup> See generally, Lawrence J. Trautman, *Present at the Creation: Reflections on the Early Years of the National Association of Corporate Directors*, 17 DUQ. BUS. L.J. (forthcoming 2015), *available at* <http://ssrn.com/abstract=2296427>.

leadership.”<sup>126</sup> In Texas, NACD offers two chapters: the Texas TriCities chapter (Houston, Austin and San Antonio)<sup>127</sup> and the North Texas chapter (based in Dallas).<sup>128</sup> The TriCities NACD chapter states that education programs “provides key insights on emerging issues and is designed to help [directors] shape sounds strategic decisions in an increasingly complex environment.”<sup>129</sup>

One of the major benefits provided by NACD involvement is the informal role of mentoring that takes place in the process of bringing the new director up-to-speed with respect to corporate governance issues. Professors Hamilton and Brabbit observe that “mentors and protégés live out a critical social compact among the generations. The more experienced seek to help the generations who follow to build on what the earlier generations have done; the mentor seeks to help the next generation to do better than the

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<sup>126</sup> *Id.*

<sup>127</sup> See NACDTexas TriCities Chapter, 5847 San Felipe Plaza, Suite 1700, Houston, TX 77057, Phone: 713-821-1403 | Fax: 713-821-1401, Email: [info@nacdttc.org](mailto:info@nacdttc.org), available at <http://texastricities.nacdonline.org/index.cfm> (last viewed Sept. 14, 2015).

<sup>128</sup> See NACD NorthTexas Chapter, 6011 Desco Drive, Dallas, TX 75225, Phone: 214-363-3284 | Fax: 214-692-9013, E-mail: [info@nacdntx.org](mailto:info@nacdntx.org), available at <https://northtexas.nacdonline.org/index.cfm> (last viewed Sept. 14, 2015).

<sup>129</sup> See NACDTexas TriCities Chapter, Resources, Director Education, available at <http://texastricities.nacdonline.org/Resources/national.cfm?ItemNumber=5015&navItemNumber=5010> (last viewed Sept. 14, 2015).

mentor's own generation has done.”<sup>130</sup> Mentoring that takes place during NACD activities is also a highly valuable strategy in efforts to increase boardroom diversity.<sup>131</sup>

Institute for Excellence in Corporate Governance, University of Texas at Dallas

Under the direction of seasoned corporate director Dennis McCuiston, the Institute for Excellence in Corporate Governance describes itself as “a leading global resource in developing and communicating thought leadership on governance issues for boards and C-level executives of public, private, governmental and nonprofit organizations, and positively impact how governance is carried out.”<sup>132</sup> The Institute's stated mission is to

Identify and research important current and emerging governance challenges and develop and communicate effective solutions that enhance the abilities of board members and C-level executives to protect and promote the interests of their stakeholders... by:

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<sup>130</sup> *Id.* (teaching that “Recent scholarship on mentoring observes that mentor relationships also offer substantial intrinsic and extrinsic benefits to mentors. The mentor receives intrinsic benefits in terms of the personal satisfaction of sharing one's experience to help another person. The mentor receives extrinsic benefits in terms of an increase in the mentor's base of loyal support and power, social recognition for skills as a good teacher and adviser, gratitude and confirmation from the protégé, and an increase in mentor learning. Raymond A. Noe, David B. Greenberger, and Sheng Wang, Mentoring: What We Know and Where We Might Go, in 21 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT, 129, 151 (2002); Connie R. Wanberg, Elizabeth T. Welch, and Sarah A. Hezlett, Mentoring Research: A Review and Dynamic Process Model, 22 RESEARCH IN PERS. & HUMAN RES. MGMT. 39, 52-53 (2003); Sharon K. Gibson, Being Mentored: The Experience of Women Faculty, 30 J. CAREER DEV. 173 (2004); Sarah A. Hezlett and Sharon K. Gibson, Mentoring and Human Resources Development: Where We Are and Where We Need to Go, 7 ADVANCES IN DEVELOPING HUM. RESOURCES 446, 453, 457-58 (2005).”

<sup>131</sup> See Lawrence J. Trautman, *Boardroom Diversity: Why Are We Still Talking About This*, 17 THE SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. \_\_\_ (2014), available at <http://ssrn.com/abstract=2047750>; Michael McDonald & James Westphal, *Not Let in on the Secret to Success: How Low Levels of Mentoring from Incumbent Directors Negatively Affect Women and Racial Minority First-time Directors' Appointments to Additional Corporate Boards*, ACAD. MGMT. J. (2013); Cindy A. Schipani, Terry M. Dworkin, Angel Kwolek-Folland & Virginia G. Maurer, *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL'Y. 89 (2009), available at <http://ssrn.com/abstract=1281466>.

<sup>132</sup> See Institute for Excellence in Corporate Governance, Naveen Jindal School of Management, University of Texas at Dallas, available at <http://jindal.utdallas.edu/centers-of-excellence/institute-for-excellence-in-corporate-governance/> (last viewed Sept. 14, 2015).

- Attracting thought leaders and governance professionals who educate our audiences through conferences, seminars, in-house programs and meetings.
- Sponsoring or collaborating with Transformational Roundtables comprised of governance thought leaders, board members and C-level executives who focus on important current and emerging governance issues.
- Seeking input from, sponsoring and/or collaborating with alliance partners, which include thought leaders from a variety of disciplines, as well as organizations focused on governance.
- Identifying how qualitative issues such as communications, behavioral styles, board composition, board focus, and the development of anticipatory organizations may impact execution of “good governance” and strategy in the boardroom.
- Conducting research based on issues raised and communicating the results of research through books, white papers, articles in relevant publications, radio, television and internet, and specific feedback to board members, C-level executives and others who will benefit from this knowledge and research.<sup>133</sup>

## XV. CONCLUSION

Corporate directors play an important role in governing American business, in the capital formation process, and are key stewards to economic growth. Texas businesses play a disproportionately important role among the states in aggregate U.S. job creation, responsible for 37% of all net new American jobs since the recovery began. It is the job of the board of directors to govern the corporation. Director’s duties and responsibilities include: the duty of care; duty of loyalty; and duty of good faith. The author recently gathered data regarding Texas corporate directors, providing biographical data for most of the approximately 20,000 for-profit corporate directors serving on the boards of Texas companies, and provides details about standing committee composition, leadership and membership for audit, compensation, executive, nominating and governance, and strategic planning committees.

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<sup>133</sup> *Id.*

Corporate directors are among the most influential and affluent in our society. Many present or former chief executive officers are sought to serve on corporate boards due to their expertise and experience overseeing corporations at the highest level. The average age of Texas directors of for-profit entities is fifty-seven years old; and only about six percent of corporate directors are women. Texas corporate directors are highly educated: over ninety-nine percent are college graduates; eighty percent hold advanced college degrees; twenty-eight percent have law degrees; and twenty percent of Texas corporate directors hold an MBA degree. Most Texas corporate directors serve the banking and finance sector (thirty-nine percent), next largest is the energy sector (at eighteen percent), and technology companies account for nine percent.

Most boards look to recruit someone who understands their business and former CEOs are preferable. Every board of directors of a public company must now have an audit committee comprised of entirely independent directors, and each publicly-traded company is required to have at least one qualified “financial expert” on its audit committee. Therefore, public-company audit experience, along with a growing recognition that every board needs expertise to govern the enterprises’ information technology – have become “must have” skills represented on every board. Hopefully, this paper adds to our understanding of the duties and responsibilities of corporate directors and the demographics of those engaged in corporate governance in Texas.