

ASPEN CASEBOOK SERIES

MILLER

**THE LAW OF GOVERNANCE,
RISK MANAGEMENT,
AND COMPLIANCE**



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Law & Business

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THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE

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Preface

This book is born out of concern and conviction. As a professor specializing in corporate and financial law, I have long nurtured an interest in governance, risk management, and compliance—topics which seemed to be incompletely conceptualized and imperfectly understood either individually or in relationship to each other. As an observer of business practices and financial markets, I am convinced that governance, risk management, and compliance are important today and will only increase in significance over the coming decades. As an independent director of a financial institution, I am impressed by the subtlety and breadth of the governance issues facing business organizations in a rapidly changing world. Added together, these considerations—coupled with the dearth of materials covering these topics on a systematic basis from a legal point of view—led me to write this book.

A word is in order about terminology. The world of governance, risk management, and compliance is populated by an exotic zoo of acronyms, technical terms, and metaphors, often used without much attempt to offer a precise definition or to explain the background of their use. I have attempted to avoid most of these terms, preferring instead to write in a simple and nontechnical way. However, the reader will observe that technical language does find its way into the pages that follow. Where arcane terminology is used, it is usually for one of two purposes. Sometimes the words usefully capture ideas or nuances of meaning that would not be embodied in more familiar language (for example, the notion of a “risk appetite”). At other times, I use unusual language because the terms are ubiquitous among people working in the field of governance, risk management, and compliance (e.g., the “three lines of defense” or “enterprise risk management”). Anyone who wants to become active in this field needs to know how to use these terms; you may as well start now. To aid the reader in this journey, I include text boxes containing definitions of many of the key concepts.

I have used the following conventions in excerpting materials. From time to time I have presented documents or problem sets involving fictional organizations. No connection with any actual organization is intended or should be assumed. In the interest of brevity I have limited the excerpted material to text which is most pertinent to the question at hand; although I provide background needed for a full understanding, some context is necessarily lost. I have included ellipses when substantive text is omitted but have not indicated the omission of citations, paragraph numbers, or other non-substantive material. Footnotes are included only where they add something important. In order to increase readability I have occasionally, and without alerting the reader, made stylistic

alterations: breaking longish sections of text into separate paragraphs or joining shorter sections together, revising or eliminating headings, or changing the case of text. Readers should refer to the original texts for more information.

One cannot spend many years in the world of law and law practice without coming into contact with leading problems of the day. I am grateful for having been a witness to some of the events recounted in this book. Those experiences have stimulated my interest in the topic of governance, risk management and compliance and enriched my understanding of the events and underlying social policies. Although I don't believe these experiences have biased the ideas presented in this book, in the interest of full disclosure I note that I have been involved in numerous class actions and shareholders derivative suits as a lawyer, adviser or expert witness. I served as an expert in cases arising out of the failure of Bank of Credit and Commerce International (BCCI), the Enron scandal, and the Deepwater Horizon oil spill. I am a member of the board of directors and the audit, risk, and compensation committees of State Farm Bank, a thrift institution which is a wholly-owned subsidiary of State Farm Mutual Automobile Insurance Company.

Many people assisted in the preparation of this volume. Lauren Citrome, Colin S. Huston-Liter, and Adam Karman provided excellent research assistance. My extraordinarily capable assistant, Jerome Miller, helped keep me organized and facilitated the process in innumerable ways. Many colleagues and friends provided advice, counsel, and feedback: Jennifer Arlen, Colleen Baker, Stephen Bainbridge, Carole Basri, Karen Brenner, Theodore Eisenberg, Howell Jackson, Bruce McClure, Gerald Rosenfeld, Roberta Romano, and Helen Scott among many others. I have been fortunate to learn about governance from some exceptionally able business leaders including Charles Brummel, Carolyn Chin, Gerald Czarnecki, Steve Jones, Eric Macholdi, Ed Rust, Marilyn Seymann, Mike Smith, Paul Smith, Michael Tipsord, Howard Thomas, and Astrid von Baillou. I am grateful to my publisher, Wolters Kluwer, for their professional production operation and for their confidence in producing a course book for a topic with no established market. My wife, Allison Brown, tolerated prolonged periods of distraction and research; she also provided generous input into many questions both of structure and detail. She taught me a great deal about governance, risk management, and compliance! While each of these people or institutions provided invaluable input, none of them is responsible for errors or shortcomings. Responsibility for those is mine alone.

Geoffrey Parsons Miller
January 2014

THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE

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