Barriers to Effective Risk Management

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ABSTRACT

"As long as the music is playing, you've got to get up and dance.
We're still dancing."

This now infamous quote by Charles Prince, Citigroup's former Chief Executive Officer, captures the high-risk, high-reward mentality and overconfidence that permeates much of corporate America. These attributes in turn helped to facilitate a global recession and some of the largest economic losses ever experienced in the financial sector. They also represent certain cognitive biases and cultural norms in corporate boardrooms and management suites that make implementing a meaningful risk culture and mitigating the impact of future economic downturns a challenging proposition.

The global recession highlighted significant failures in firms' risk-management practices. These failures implicated weaknesses not only in firms' financial risk modeling, but also the human or governance side of risk management. Unfortunately, fixing the former might be significantly easier than attending to the latter. Studies suggest that cognitive biases, including confirmation bias, overconfidence or optimism bias, and framing, can impair a board's and management's ability to assess risk accurately. These problems are compounded by the typical incentive structure and the "winner-take-all" mentality adopted by many corporations in the United States.

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This Article analyzes the potential benefits of improved risk-management practices, commonly called enterprise risk management (ERM), and the potential barriers to implementing meaningful ERM at U.S. firms. ERM is an integrated risk-management framework that seeks to improve knowledge of and communication about potential risks throughout the firm, starting with the board and senior management team. Indeed, the board and senior management team are vital to creating a risk culture. This Article considers the impact of boardroom dynamics and U.S. corporate culture on risk-management practices. This Article further considers whether regulation or a different approach is needed to encourage U.S. corporations to invest the necessary human capital in meaningful ERM.
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I. INTRODUCTION

Risk management is not a new concept, but it typically garners renewed attention during periods of corporate scandals or market turmoil.\(^1\) The global recession of 2008 (“2008 recession”) is no exception.\(^2\) Many commentators have highlighted significant risk-management failures as contributing factors to that recession.\(^3\)

The recurring nature of the risk-management problem suggests that the approach to, or the implementation of, corporate risk-management practices is lacking in some respect. Prior studies show that meaningful risk-management practices can enhance firm performance.\(^4\) Yet U.S. corporations are slow to embrace risk manage-


\(^2\) This Article uses the term “2008 recession” to reference the entire period of financial turmoil, which became widely evident in late 2007 and continued into 2009.


\(^4\) See Lori A. Brasseh-Cicchiniti, The Shareholder Value of Crisis Handling Risk Mgmt., May 2003 (explaining 1997 study showing value in risk planning and discussing case studies); Steven M. Cassidy et al., The Market Value of the Corporate Risk Management Function, 57 J. Risk & Ins. 664, 668 (1990) (explaining that markets react positively to risk management); Patrick J. Stroh, Enterprise Risk Management at UnitedHealth Group, 87 Strategic Fin. 26 (2005); Marcel Boyer et al., The Value of Risk Management: A Frontier Analysis 1 (Mar. 15, 2005) (unpublished manuscript), available at
ment, and as evidenced by the 2008 recession, even when they do, the results are underwhelming.\footnote{See infra Parts II.A, II.C.}

This Article examines two possible barriers to effective risk management: individual biases and cultural norms.\footnote{See discussion infra Part V.A (explaining that many of the biases discussed in the individual context apply in the group or collective board context as well); see also Stephen M. Bainbridge, \textit{Why a Board? Group Decisionmaking in Corporate Governance}, 55 \textbf{VAND. L. REV.} 1 (2002); Marleen A. O’Connor, \textit{The Enron Board: The Perils of Groupthink}, 71 \textbf{U. ON. L. REV.} 1233 (2003); James D. Cox & Harry L. Munsinger, \textit{Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion}, 48 \textbf{LAW \\& CONTEMP. PROBS.} 83, 83–84, 99–108 (1985) (describing bases of ingroup bias among directors).} At its core any risk-management technique attempts to provide corporate decision makers with better and more accurate information to identify, assess, and mitigate events that threaten firm value (i.e., risk events).\footnote{See Jeffrey M. Lipshaw, \textit{The Venn Diagram of Business Lawyering Judgments: Toward a Theory of Practical Metadisciplinarity}, 41 \textbf{SETON HALL L. REV.} (forthcoming 2011) (manuscript at 12), available at \url{http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551243} (using boardroom conference example to illustrate uncertainty in decision-making process and noting that, despite extensive advice provided at meeting, “when the time came to make the decision, the CEO had no authority upon which to fall back except her own”).} A firm certainly can adopt strict procedures instructing managers on how and what types of information to evaluate, detailing the timing and participants in risk assessment meetings and requiring periodic reports to the board of directors and senior executives. Those procedures alone, however, will not necessarily change a firm’s decision regarding any particular risk, deter corporate fraud, or help moderate market turmoil.\footnote{See infra Part V.A.} Individuals still make those decisions, and their possible biases and surrounding environment may be more influential than any risk assessment reports.\footnote{See infra Parts II.A, II.C.}

This reality raises an important question: Can the law change the way individuals receive and filter information, or is the human component of risk management an inevitable limitation on its utility? The question is difficult to answer definitively, but this Article sug-
gests that policymakers will encourage, and corporate boards will design and implement, more effective risk-management practices if they acknowledge and attempt to address this limitation.

To assist in this endeavor, this Article analyzes three of the cognitive biases that may impede risk assessment—confirmation bias, overconfidence/optimism bias, and framing—and considers how other legal disciplines have addressed bias in decision making. This Article uses Citigroup Inc. as a case study to highlight potential behavioral and cultural barriers to effective risk management. This Article suggests that training and outside assessment may help corporate decision makers avoid some biases in risk assessment and response decisions.

This Article also considers corporate culture and whether the environment at entrepreneurial or risk-aggressive firms poses a barrier to effective risk-management practices. Most commentators acknowledge that some risk taking is healthy and often necessary to enhancing firm performance. The goal of risk management should not be the elimination of all risk, but rather the pursuit of prudent and informed risk profiling and decision making. The challenge then is to convince firms that value and reward successful high-risk endeavors that risk management can enhance their decisions without changing their profit-oriented objectives.

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10 For a general discussion of cognitive biases and decision making, see Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 SCIENCE 1124 (1974). See also infra Part IV.A.

11 See infra Parts IV, V.

12 For a general discussion of corporate culture, see Alice Belcher, Imagining How a Company Thinks: What is Corporate Culture?, 11 DEAKIN L. REV. 1, 18 (2006). See also infra Part IV.B.

13 See, e.g., ASWATH DAMODARAN, STRATEGIC RISK TAKING: A FRAMEWORK FOR RISK MANAGEMENT 7 (2007) (“A business that decides to protect itself against all risk is unlikely to generate much upside for its owners; however, a business that exposes itself to the wrong types of risk may be even worse off, because it is more likely to be damaged than helped by the risk exposure.”); Diane Brady, Sarbanes-Oxley = a Downturn in Corporate Risk-Taking BUSINESSWEEK (Sept. 26, 2007), http://www.businessweek.com/careers/management/careers/archives/2007/09/sarbanesoxley.html (discussing the need for risk taking to spur economic growth and citing two academic papers suggesting that the Sarbanes Oxley Act of 2002 reduced risk taking); Donald L. Kohn, Fed. Reserve Bank, Address at the Official Celebration of the 10th Anniversary of the Banque Centrale du Luxembourg (Nov. 12, 2008) (transcript available at http://www.federalreserve.gov/newsevents/speech/kohn20081112a.htm) (“A central challenge will be to structure financial oversight to both deter unwanted and excessive risktaking and permit the innovation that can ultimately boost economic growth.”).
This Article evaluates these complex issues in the context of enterprise risk management (“ERM”).\textsuperscript{14} As explained below, ERM is a holistic approach to risk management that goes beyond financial risk modeling and seeks to integrate a firm’s risk assessment and response practices.\textsuperscript{15} It also is a form of risk management that holds value for firms outside of the financial and insurance industries. Consequently, although this Article uses financial institution examples from the 2008 recession, the analysis and suggested prescriptions apply across industries and have far broader implications than simply addressing the fallout from the recession.\textsuperscript{16}

Part II of this Article provides an overview of the ERM movement, discussing its origins, key components, and perceived role in the 2008 recession. Part III summarizes the various regulatory and judicial responses to the 2008 recession that involve some aspect of risk management. Part IV presents a case study of Citigroup Inc. and analyzes its decision-making process during the 2008 recession in light of events and developments in its industry and the economy more generally at the time. Part V then uses the Citigroup case study to evaluate the impact of cognitive biases and corporate culture on risk-management decisions. This analysis leads to a discussion of potential regulatory and market responses to strengthen the ERM movement. This Article concludes by encouraging policymakers and corporate boards to consider cognitive biases and the importance of corporate culture as part of their risk-management dialogue.

II. OVERVIEW OF ERM

Risk often is defined simply as “the possibility of loss or injury.”\textsuperscript{17} In the business context, the concept of risk includes not only the probability of loss but also the consequences of that loss or risk

\textsuperscript{14} See infra Part II.


\textsuperscript{17} MERRIAM WEBSTER’S DICTIONARY 1018 (9th ed. 1985).
event. Managing quantifiable risk is a much easier task than considering unquantifiable risk. Nevertheless, as suggested by the 2008 recession, prudent risk management needs to consider both.

Yet taking this type of broad, all-encompassing approach to managing business risk is a relatively new development. Traditionally, financial institutions and insurance companies used risk-management techniques to hedge financial risk exposures. Risk managers at those companies would analyze the specific type of risk assigned to them (e.g., credit, market, foreign currency, etc.) and design or purchase financial products to mitigate that risk. Risk managers rarely discussed or assessed the company’s overall risk profile; rather, risk management was confined to separate and individual silos. Any meaningful consideration of risk management was even rarer outside of the financial and insurance industries. ERM seeks to address these limitations. This Part provides an overview of the ERM theory, its application in practice, and its perceived role in the 2008 recession.

18 Damodaran, supra note 13, at 5–6.
19 “Everything that can be counted does not necessarily count; everything that counts cannot necessarily be counted.” Albert Einstein. See also Nassim Nicholas Taleb, The Black Swan: The Impact of the Highly Improbable (2007) (discussing challenges of identifying and addressing surprise risk events); Crowe Horwath, Avoiding the Black Swan: Barriers to Improving Risk Management (2009), available at http://www.cfo.com/whitepapers/index.cfm/download/14467404 (describing a study showing challenges with risk management highlighted by the 2008 recession, including surprise risk events).
20 As discussed below, COSO introduced its first proposal for a comprehensive risk management or ERM framework in 2004. See COSO Report, supra note 15; see also infra Part II.A.
23 See supra note 21.
A. Development of ERM

Although the Barings Bank and Long-Term Capital Management meltdowns highlighted risk-management flaws, it was the Enron, WorldCom, and other corporate scandals of the early 2000s that sparked a call for more comprehensive risk management.\textsuperscript{24} For example, in describing the internal controls adopted by Enron to manage risks associated with related-party transactions, the report of the Enron Special Investigation Committee observed that the “controls as designed were not rigorous enough, and their implementation and oversight was inadequate at both the Management and Board levels.”\textsuperscript{25} The report concluded that Enron’s board failed “to demand more information, and . . . to probe and understand the information that did come to it.”\textsuperscript{26} The response to Enron and similar governance failures was swift and emerged in at least two separate forms: new risk-related disclosure regulations and redefined best practices.\textsuperscript{27}

Risk-related regulations were included in the Sarbanes-Oxley Act of 2002, the listing standards for the New York Stock Exchange (“NYSE”), and the U.S. Department of Justice Sentencing Guidelines. The most extensive of these regulations is section 404 of the Sarbanes-Oxley Act, which requires management to explain and assess the company’s internal control structure and procedures for financial reporting.\textsuperscript{28} Section 406 of the Act also requires reporting companies


\textsuperscript{26} Id., at 23. The United States Permanent Subcommittee on Investigations reached similar conclusions, faulting Enron’s board for approving "new business ventures and complex transactions" with insufficient information and oversight. See Rosen, supra note 24, at 1170.


to adopt a code of ethics for its senior officers or explain why it does not have a code. The NYSE listing standards address both internal controls and codes of ethics and specifically identifies risk assessment as an audit committee responsibility. Moreover, the Sentencing Guidelines offer reduced penalties for companies that demonstrate effective compliance programs that, among other things, incorporate ongoing risk assessment practices.

To assist companies in meeting these various requirements, the Committee of Sponsoring Organisations of the Treadway Commission (“COSO”) developed a more comprehensive framework for risk-management practices referred to as ERM. COSO defines ERM as [A] process, effectuated by an entity’s board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.

impact of the Act, including Section 404 on corporations); see also Larry E. Ribstein, Bubble Laws, 40 HOUS. L. REV. 77 (2003) (same).


32 A detailed explanation of the components of ERM is beyond the scope of this Article. Nevertheless, the COSO report contains those details and additional information. See COSO REPORT, supra note 15. In certain respects, ERM resembles prior organizational literature by emphasizing the need to restructure how firms conceive and utilize knowledge, information, and channels of communication. See, e.g., James Champy & Michael Hammer, Reengineering the Corporation A MANIFESTO FOR BUSINESS REVOLUTION (2003); Peter M. Senge, The Fifth Discipline—The Art and Practice of the Learning Organization (1990); Peter M. Senge et al., The Dance of Change: The Challenges of Sustaining Momentum in Learning Organizations (1999). ERM tries, however, to offer a simplified process for implementing the necessary changes and improving firm culture and governance. See infra Part II.B. Although initial reports suggest that ERM is effective, the longevity of the movement remains to be seen. See supra note 4; infra notes 52-55.

33 COSO REPORT, supra note 15, at 2 (emphasis in original); see Kirkpatrick, supra note 3, at 7. Federal Reserve Bank Governor Susan Bies defined ERM as “a process
ERM is a holistic approach to risk management that considers strategic and operational risks in addition to financial risks and focuses on identifying, assessing, and responding to risk events.\textsuperscript{34}

ERM takes a top-down approach to risk management.\textsuperscript{35} COSO and other commentators stress the importance of the board’s and senior management’s role in ERM.\textsuperscript{36} Under this framework, the board and senior management are critical in creating a risk culture at the firm (i.e., a culture that values and rewards meaningful assessment and communication regarding risk events).\textsuperscript{37} The board also plays an important role in setting the firm’s risk appetite and designing and


\textsuperscript{34} ERM generally targets all potential risk events, including financial risks, operational risks, business risks, litigation risks, and governance and human resource risks. See, e.g., CAROLYN KAY ET AL., [CONFERENCE BD., THE ROLE OF U.S. CORPORATE BOARDS IN ENTERPRISE RISK MANAGEMENT 11 (2006) [hereinafter CONFERENCE BOARD REPORT], available at http://www.ucop.edu/riskmgmt/erm/documents/role_uscorpboards.pdf; see also Simkins & Ramirez, supra note 21, at 584 (“Under ERM, risks can be viewed as falling into two broad areas: core risks (risks which a firm should have a competitive advantage to handle in their business model) and non-core risks (risks which could be hedged by the business or transferred through risk management techniques.”). “ERM consists of eight interrelated components, which are derived from the way management runs an enterprise and integrated with the management process: (1) internal environment, (2) objective setting, (3) event identification, (4) risk assessment, (5) risk response, (6) control activities, (7) information and communication, and (8) monitoring.” Bies, supra note 33; COSO REPORT, supra note 15, at 3–4.


\textsuperscript{36} CONFERENCE BD., EMERGING GOVERNANCE PRACTICES IN ENTERPRISE RISK MANAGEMENT 8–9, 13–17 (2007); CONFERENCE BOARD REPORT, supra note 34, at 15–18; see also infra Part III.A.

monitoring the firm’s ERM program. Many commentators view COSO’s ERM framework as best practices in business risk-management practices.

Notably, despite the regulatory and industry endorsements for enhanced risk-management practices, corporate boards voiced resistance to the concept. Many directors opined that extensive risk-management procedures were unnecessary or too cumbersome; others resisted any mandated approach to risk management. Studies suggest that these sentiments linger in corporate boardrooms even after the 2008 recession.

B. Implementation of ERM

The design and implementation of ERM is firm specific but generally involves the board of directors and senior management first mapping the firm’s business strategies and risks. “Developing an understanding of the linkages between top risk exposures and key strategies and objectives can help both management . . . and risk over-

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38 See, e.g., Barker, supra note 3 (explaining that boards should “(i) evaluat[e] the risks associated with corporate strategies, (ii) defin[e] the risk appetite of the company, [and] (iii) ensur[e] that appropriate resources are devoted to risk identification, avoidance, and mitigation”); CONFERENCE BOARD REPORT, supra note 34, at 6–7 (recommending six primary tasks for boards considering ERM); COSO REPORT, supra note 15, at 6–7 (defining role of board in ERM).

39 See RIMS PAPER, supra note 3, at 6; Richard Clune, ERM: A Status Report, INTERNAL AUDITOR, Feb. 1, 2005, available at http://www.mgt.ncsu.edu/erm/documents/ERMFAApaper21306.pdf (describing a study finding that less than half of respondents adopted ERM-like procedures); Simkins & Ramirez, supra note 21, at 584–85 (“Evidence from studies and surveys indicates that, to date, only about 10% of major companies claim to have implemented many aspects of ERM, While almost all the others claim that they plan to do so in the future.”).

40 See, e.g., CONFERENCE BOARD REPORT, supra note 34, at 18 (noting that “many directors interviewed resisted what they termed ‘an excessively formal’ way to incorporate risk management into their deliberations”).

41 See, e.g., HORWAITH, supra note 19, at 4 (describing a study finding that one-third of respondents view risk management “as an unnecessary interference with business activities”); PricewaterhouseCoopers, ENTERPRISE RISK MANAGEMENT Benchmarking Survey 6 (2008), available at http://www.pwc.com/fi_fi/julkaisut/tiedostot/erm_benchmarking_survey_2008.pdf (explaining that approximately 31% of respondents did not have risk management practices in place); Audit Committees Put Risk Management at the Top of Their Agendas, KPMG (June 16, 2008), http://www.kpmg.co.uk/news/detail.cfm?pr=3120 (describing a study finding that only 46% of respondents were very satisfied with risk practices); Financial Crisis Intensifies Interest in Risk Management Among CFOs, TOWERS PERRIN (Sept. 2008), http://www.towersperrin.com/tp/showctm?doc=_fp&country=global&url=Master_Brand_2/USA/News/Spotlights/2008/Sept/2008_09_30_spotlight_cfo_survey.htm (explaining that “72% of respondents expressed concern about their own company’s risk management practices and ability to meet strategic plans”).
sight by identifying where risks are overlapping within an individual strategy and where certain risks may affect multiple strategies.\textsuperscript{42} With this information, the board and management can evaluate the firm’s portfolio of key risks—assessing the impact and likelihood of each risk event—and set the firm’s risk appetite.\textsuperscript{43}

The core elements of the ERM program then revolve around efficient and effective communication channels and active monitoring of the firm’s risks against its risk portfolio and risk appetite.\textsuperscript{44} Commentators stress the need for risk managers to have direct access to the board and multiple contact points to encourage the free-flow of information and reduce the likelihood that risk reports are presented but not heard.\textsuperscript{45} Firms also are encouraged to develop key risk indicators that facilitate more effective monitoring of potential risk events.\textsuperscript{46}

C. ERM and the 2008 Recession

The 2008 recession revealed significant weaknesses in existing risk-management practices.\textsuperscript{47} Risk-management failures alone did not trigger the recession, but many commentators identify such failures as contributing to the severity of the economic losses. For example, Chairman Ben Bernanke stated: “Among other things, our analysis reaffirms that capital adequacy, effective liquidity planning, and strong risk management are essential for safe and sound banking; the . . . [recession] revealed serious deficiencies on the part of

\textsuperscript{42} COSO PAPER, supra note 35, at 13.
\textsuperscript{43} Id. at 14–15.
\textsuperscript{44} Id.
\textsuperscript{45} See supra Part II.A and infra Part III.A.
\textsuperscript{46} COSO PAPER, supra note 35, at 17–18 (“Key risk indicators . . . are metrics used by some organizations to provide an early signal of increasing risk exposure in various areas of organization.”).
\textsuperscript{47} Kirkpatrick, supra note 3, at 7 (“Despite the importance given to risk management by regulators and corporate governance principles, the financial turmoil has revealed severe shortcomings in practices both in internal management and in the role of the board in overseeing risk management systems at a number of banks.”); see also supra note 3. For example, a study revealed that risk managers at UBS AG were aware of potential losses in the firm’s subprime mortgage holdings in early 2007 but did not advise senior executives of these potential losses until July 2007. Kirkpatrick, supra note 3, at 11. Moreover, UBS’s board did not learn of the firm’s financial situation until August 2007. Id. at 11–12. UBS subsequently acknowledged that “[a]s a result of [risk management] weaknesses, the firm failed to adequately assess correlated risks and risk concentrations.” UBS AG, ANNUAL REPORT ON FORM 20-F FOR 2009, at 120 (Mar. 11, 2009), available at http://www.ubs.com/1/e/investors/sec_filings.html.
some financial institutions in one or more of the areas." Similarly, the Chairman of Morgan Stanley, John Mack, testified before the Financial Crisis Inquiry Commission that "[i]n retrospect, many firms were too highly leveraged, took on too much risk and did not have sufficient resources to manage those risks effectively in a rapidly changing environment."  

Although it is difficult to pinpoint one key deficiency in existing risk-management practices, a lack of integration and communication appears to be one of the most significant problems. The traditional segregated approach to risk management prevented many firms from understanding their true exposure if various identified risks converged and from communicating those risks efficiently to senior executives and directors. Consequently, firms’ responses to the changing financial landscape during 2007–2008 were slow and in many cases too late.

At least one study suggests that financial institutions with more integrated risk-management programs performed better during the 2008 recession. The study posits that these firms communicated information throughout the organization more efficiently and were able to implement necessary changes more effectively. A nimble response to a risk event can preserve significant value. More studies and data are needed to evaluate fully the impact of ERM, but initial studies and anecdotal evidence suggest that ERM provides more time-

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50 See Kirkpatrick, supra note 3, at 8–12.
51 See Harner, supra note 3, at 50–51 (describing silo approach to risk management and its role in the 2008 recession).
53 See SENIOR SUPERVISORS GROUP, supra note 52.
54 See, e.g., RMS Paper, supra note 3, at 3–4 (explaining the impact of risk management failures on firms during the 2008 recession and how to address those issues).

III. RISK-MANAGEMENT RESPONSES TO THE 2008 RECESSION


Not surprisingly, policymakers and commentators are scrutinizing the causes of the 2008 recession and searching for ways to avoid, or at least mitigate, the next economic downturn.\footnote{See, e.g., Patrice Hill,CEOs Trade Blame with Congress over Financial Crisis, WASH. TIMES, Jan. 14, 2010, at A1, available at http://www.washingtontimes.com/news/2010/jan/14/ceos-trade-blamewith-congressoverfinancecrisis/ (“Wall Street clashed with Washington on Wednesday over the causes of the biggest financial crisis since the Great Depression, with political leaders and financial chieftains trying to cast the blame on each other.”); Dawn Kopecki & Matthew Leising, "Derivatives Industry Gets Second Look from Congress", BLOOMBERG (June 22, 2009, 11:45 AM), http://www.bloomberg.com/apps/news?pid=20601087&sid=aTZhIZjYCeS8 (“Congress will take a second shot at the derivatives industry after its decision nine years ago to forgo regulations led to a $592 trillion market that brought financial firms to their knees.”).} Some of this discussion has focused on risk management and improving firms’ risk-
management practices. This Part highlights the developments regarding risk management as a result of the 2008 recession. As discussed below, industry proponents are encouraging more attention to ERM, while regulatory responses focus on enhanced disclosure regarding risk management and governing risk through executive compensation schemes. Part V then considers how neither approach fully accounts for the behavioral and cultural barriers to effective risk management.

A. ERM as a Potential Solution

In a speech in January 2007, Federal Reserve Bank Governor Susan Bies stated, “A successful enterprise risk-management process can help an organization meet many of [its] challenges by providing a framework within which managers can explicitly consider how the organization’s risk exposures are changing.” Governor Bies discussed the importance of ERM not only in the context of large financial institutions and subprime-lending practices but also as universal principles valuable to firms of all sizes in all industries. As she explained,

[W]hether someone is designing a new branch office, shipping tapes to a backup site for storage, developing the layout for a newspaper ad, or training new employees, they [should] consciously think about risk as one of the elements of that business activity. Increased risk awareness by staff throughout the enterprise is integral to managing risk successfully.

Many commentators agree with Governor Bies’ focus on firm-wide risk responsibility and the creation of a risk culture within firms as a response to the 2008 recession. In 2009, COSO issued a thought paper, titled Strengthening Enterprise Risk Management for Strategic Advantage to assist boards in strengthening risk-management practices and complying with anticipated regulatory mandates on risk man-

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60 See, e.g., Mary Schapiro, Sec. & Exch. Comm’n, Address at the Council of Institutional Investors (Apr. 6, 2009), available at http://www.sec.gov/news/speech/2009/speech040609.htm. (“The Commission will be considering whether greater disclosure is needed about how a company — and the company’s board in particular — manages risks, both generally and in the context of setting compensation.”).

61 Bies, supra note 33. Governor Bies identified those challenges as including “emerging technologies and business processes, new financial instruments, the growing scale and scope of financial institutions, and changing regulatory frameworks.”

62 Id.

63 Id.
agement, such as the SEC rule on proxy disclosure enhancement.\(^{64}\)

Much of the thought paper discusses the importance of the board’s role in ERM and provides guidance for boards in fulfilling that role.\(^{65}\) COSO explains that “[b]ecause management is accountable to the board of directors, the board’s focus on effective risk oversight is critical to setting the tone and culture towards effective risk management through strategy setting, formulating high-level objectives, and approving broad-based resource allocations.”\(^{66}\)

Specifically, COSO identifies four areas of risk-related tasks for boards: (1) “[d]iscuss risk-management philosophy and risk appetite;” (2) “[u]nderstand enterprise risk-management practices;” (3) “[r]eview portfolio of risks in relation to risk appetite;” and (4) “[b]e apprised of the most significant risks and related responses.”\(^{67}\) This type of board involvement provides more information to directors and can help them better understand the overall business enterprise. It also signals to management and others at the firm the importance of risk responsibility and the need to align the firm’s risk appetite with its business strategies.

Other commentators suggest that ERM, as opposed to more traditional financial risk management, can facilitate a more complete risk assessment that captures at some level what generally is viewed as unquantifiable risk. Speaking to this point, the Risk and Insurance Management Society, Inc. (“RIMS”) observed, “A number of actuaries, financial managers and consultants regularly advocate a primarily ‘scientific’ and quantifiable approach for enterprise risk management. Certain financial institutions seem to have replaced sound business judgment with this ‘scientific’ approach.”\(^{68}\) RIMS perceives ERM as a means of reintroducing sound business judgment to the risk-management process, allowing firms to identify and respond

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\(^{61}\) See COSO PAPER, supra note 35. For a discussion of the SEC rule on proxy disclosure enhancement, see infra Part II.B.1.

\(^{65}\) See COSO PAPER, supra note 35.

\(^{66}\) Id. at 4.

\(^{67}\) Id. at 5.

\(^{68}\) RIMS PAPER, supra note 3, at 5. RIMS faults over-reliance on historic controls and risk metrics for some of the losses experienced during the 2008 recession. Id. at 6. It posits that “[t]here was a failure to embed enterprise risk management best practices from the top all the way down to the trading floor, with the mistaken assumption that there is only one way to view a particular risk.” Id. at 7; see also Nocera, supra note 3, at 9 (discussing flaws in relying solely on VaR and noting that, in the context of the 2008 recession, “[i]nstead of scrutinizing VaR for signs of impending trouble, they took comfort in a number and doubled down, putting more money at risk in the expectation of bigger gains”).
more effectively and efficiently to both quantifiable and unquantifiable risks.\textsuperscript{69} A report prepared for the Organisation for Economic Co-operation and Development reached similar conclusions regarding the 2008 recession and the value of ERM in that context.\textsuperscript{70} The report urges more emphasis on the corporate governance or human component of risk management and suggests ERM as a technique for achieving that objective.\textsuperscript{71} Among other things, the report stresses the need for better understanding of and communication regarding risks, noting that “[e]ven if risk-management systems in the technical sense are functioning, it will not impact the company unless the transmission of information is through effective channels, a clear corporate governance issue.”\textsuperscript{72}

In addition, Standard & Poor’s has integrated ERM assessment into its ratings analysis.\textsuperscript{73} For example, Standard & Poor’s is interviewing its rated, nonfinancial issuers regarding their ERM practices.\textsuperscript{74} The questions asked during these interviews concern: (1) the company’s process for identifying top risks; (2) how often that process takes place; (3) how those risks are managed; (4) who is responsible for risk management; (5) the board’s role in risk management; and (6) how the company has responded to unexpected information in its industry.\textsuperscript{75} Standard & Poor’s and ERM proponents

\textsuperscript{69} RIMSPAPER, supra note 3.
\textsuperscript{70} See Kirkpatrick, supra note 3, at 4.
\textsuperscript{71} Id. at 2 (“The risk management systems have failed in many cases due to corporate governance procedures rather than the inadequacy of computer models alone: information about exposures in a number of cases did not reach the board and even senior levels of management, while risk management was often activity rather than enterprise-based.”).
\textsuperscript{72} Id. at 11.
\textsuperscript{74} See, e.g., Dreyer & Balic, supra note 16, at 2 (“Since the third quarter of last year, our analysts have begun to incorporate specific ERM discussions into their regular meetings with the companies we rate, focusing on risk-management culture and strategierisk management as two universally applicable aspects of ERM.”); AON GLOBAL RISK CONSULTING, ENTERPRISE RISK MANAGEMENT: S&P ENHANCEMENT WHITE PAPER 3 (2009), available at http://www.aon.com/about-aon/intellectualcapital/attachments/riskservices/enterprise_risk_management_enhancement_white_paper.pdf  [hereinafter AON PAPER].
\textsuperscript{75} See, e.g., Dreyer & Balic, supra note 16, at 2-3 (identifying seven key questions for company interviews and noting that Standard & Poor’s “analysts have explored managements’ views of the most consequential risks that their firms face, their like-
generally view the ERM framework as an important tool for mitigating future economic downturns through better information flow and core cultural changes.\textsuperscript{70}

\subsection*{B. Risk-Related Policy}

Even before the extent of the 2008 recession was apparent, U.S. federal financial regulatory agencies issued Interagency Guidance on Nontraditional Mortgage Product Risks ("Interagency Guidance") that emphasized the importance of risk management with respect to nontraditional mortgage products, including subprime mortgages.\textsuperscript{77} The Interagency Guidance, dated September 29, 2006, observed that "risk layering, combined with the broader marketing of nontraditional mortgage loans, exposes financial institutions to increased risk relative to traditional mortgage loans."\textsuperscript{78} It urged financial institutions to adopt rigorous risk-management practices that closely monitor the volume and volatility of nontraditional mortgage loan originations and investments.\textsuperscript{79} Among other guidelines, it suggested that financial institutions "[m]aintain capital at levels that reflect portfolio characteristics and the effect of stressed economic conditions on collectability."\textsuperscript{80}

Nevertheless, many financial institutions failed to implement the types of controls, monitoring, and communication procedures recommended by the Interagency Guidance. For example, despite the warning that nontraditional mortgage products may not perform well in a stressed environment, and that firms should consider collectability issues, many financial institutions did not account for a decline in the housing market in their financial risk modeling.\textsuperscript{81} Likewise,

\begin{footnotes}
\textsuperscript{70} See, e.g., Dreyer & Balic, supra note 16, at 2 (explaining the purpose of ERM consideration); Aon paper, supra note 74, at 4.
\textsuperscript{78} Id. at 2.
\textsuperscript{79} Id. at 1–2, 4.
\textsuperscript{80} Id. at 6.
communication between risk managers and senior management was delayed, incomplete, or both.

In response, policymakers introduced several risk-related initiatives, and the courts weighed in on the issue as well. As discussed below, many of the regulatory responses focus on increased disclosure regarding risk-management practices and regulating risk through restrictions on executive compensation schemes. This Part also discusses the Delaware Court of Chancery’s decision in the Citigroup litigation, which posits a low threshold for boards’ risk oversight responsibilities and, consequently, may underscore the need to explore disclosure, executive compensation, and other alternative means to help regulators and markets monitor firms’ risk-management practices.

1. Proposed or Adopted Regulatory Responses

In May 2009, Senator Charles Schumer introduced the Shareholder Bill of Rights Act of 2009 in the Senate (“Shareholder Bill”).\(^{82}\) The stated purpose of the Shareholder Bill was “[t]o provide shareholders with enhanced authority over the nomination, election, and compensation of public company executives.”\(^{83}\) Section 5 of the Shareholder Bill provides that reporting companies shall “establish a risk committee, comprised entirely of independent directors, which shall be responsible for the establishment and evaluation of the risk management practices of the issuer.”\(^{84}\)

In addition, in December 2009, the Securities and Exchange Commission (“SEC”) addressed risk-management practices in its final rule on proxy disclosure enhancement.\(^{85}\) The rule requires reporting companies to discuss their general risk-management practices and

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\(^{83}\) Id. § 5.

\(^{84}\) Id.

how their compensation schemes relate to risk profiles. It also mandates a disclosure regarding the board’s role in and oversight of risk management. The SEC posits that “disclosure about the board’s involvement in the oversight of the risk management process should provide important information to investors about how a company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company.”

Also in December 2009, the U.S. House of Representatives approved the Wall Street Reform Act and Consumer Protection Act of 2009 (“Wall Street Act”). The Wall Street Act addresses risk management in the context of executive compensation. Specifically, it grants regulators extensive authority to assess whether a firm’s compensation scheme “is aligned with sound risk management” and “to prescribe joint regulations prohibiting any feature of any incentive-based arrangement that encourages such inappropriate risks.” Other regulations relate risk to executive compensation and seek to control risk through firms’ compensation schemes.

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86 Id. at 68336-7.
87 Id. at 68344-45.
88 Id. at 68345.
90 Id.
91 Id. § 2004.
2. The Judicial Response

As discussed above, several proposed regulatory responses to the 2008 recession focus on executive compensation. The relation between risk and executive compensation is an important component of any risk-management program, including ERM. Several commentators, however, have observed significant flaws in trying to reduce risk and achieve financial stability through compensation reform. In fact, such an approach appears incomplete at best. Nonetheless, public outrage over executive compensation during the 2008 recession and the perceived difficulty in enhancing board oversight duties under state law likely influenced the compensation-reform approach.

Consider the views of the Delaware Chancery Court in the In re Citigroup Inc. Shareholder Derivative Litigation. The court granted the defendants’ motion to dismiss with respect to the plaintiffs’ allegations that “director defendants breached their duty of oversight ei-

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93 See supra Part III.B.1.

94 See Daniel K. Tarullo, Fed. Reserve, Address at the University of Maryland’s Robert H. Smith School of Business Roundtable on Executive Compensation: Practices and Reforms (Nov. 2, 2009) (transcript available at http://www.federalreserve.gov/newsevents/speech/tarullo20091102a.htm) (explaining that “some firms gave loan officers incentives to write a lot of loans, or traders incentives to generate high levels of trading revenues, without sufficient regard for the risks associated with those activities,” and that those incentives undermine “the very foundation of sound risk management”); Kirkpatrick, supra note 3, at 14 (discussing components of compensation that might encourage short-termism and risk taking and noting that “the system of bonuses in investment banking provides incentives for substantial risk taking while also allowing no flexibility for banks to reduce costs when they have to: at the upper end, the size of the bonus is unlimited while at the lower end it is limited to zero”); see also Aligning Risk Management and Executive Compensation, ENTERPRISE RISK MGMT. INITIATIVE, Dec. 1, 2008, available at http://www.mgt.ncsu.edu/erm/index.php/articles/entry/aligning-executive-compensation (“A 2008 study conducted by The Wall Street Journal and ERI Economic Research Institute found that the median CEO salary of a Standard and Poor’s 500 company increased 20.5 percent from the previous year while corporate revenues increased only 2.8 percent.”); Okamoto & Edwards, supra note 92, at 21–25 (discussing additional empirical studies analyzing links between executive compensation and firm performance).

95 See Okamoto & Edwards, supra note 92, at 26–44 (criticizing prevailing views that “excessive” risk can be controlled through compensation-related reform on both functional and completeness grounds and discussing the difficulty with defining excessive risk and when regulating that risk might be socially desirable).

96 See Kirkpatrick, supra note 3, at 14–15 (explaining that alignment between compensation practices and longterm interests of firm does not necessarily improve risk assessment and noting that “one study . . . reports that financial institutions that collapsed had a CEO with high stock holdings so that they should normally have been risk averse, whereas the ones that survived had strong incentives to take risks”).

97 964 A.2d 106 (Del. Ch. 2009).
ther because the oversight mechanisms were not adequate or because the
director defendants did not make a good faith effort to comply
with the established oversight procedures.\footnote{Id. at 127.} The court discussed
those allegations under the standard articulated in \textit{In re Caremark In-
Ritter}.\footnote{911 A.2d 362 (Del. 2006).} The court explained that “[t]he presumption of the business
judgment rule, the protection of an exculpatory § 102(b)(7) provi-
sion, and the difficulty of proving a \textit{Caremark} claim together function
to place an extremely high burden on a plaintiff to state a claim for
personal director liability for a failure to see the extent of a company’s business risk.”\footnote{In re Caremark, 698 A.2d at 971. For an excellent discussion of these three cases and their relation to failure to monitor claims, see Stephen M. Bainbridge, \textit{Caremark and Enterprise Risk Management}, 34 J. Corp. L. 967 (2009).}

The Delaware Chancery Court’s reluctance to impose liability on
Citigroup’s directors for allegedly failed or inadequate risk-
management practices is consistent with the general notion that
business decisions should be made in the boardroom and not the
courtroom.\footnote{In re Citigroup, 964 A.2d at 125.} It also reflects the complexity of assessing business risk and the delicate balance between risk and return. As Chancellor Chandler stated, “Business decision-makers must operate in the real
world, with imperfect information, limited resources, and an uncer-
tain future. To impose liability on directors for making a ‘wrong’
business decision would cripple their ability to earn returns for inves-
(5th Cir. 1992) (“Under this familiar rule of American jurisprudence, the courts re-
frain from second guessing business decisions made by corporate directors in the ab-
sence of a showing of fraud, unfairness or overreaching.”); Dodge v. Ford Motor Co.,
170 N.W. 668, 684 (1919) (“The judges are not business experts.”); see also Stephen M. Bainbridge, \textit{The Business Judgment Rule as Abstention Doctrine}, 57 VAND. L. REV. 83,
95–100 (2004) (discussing development of business judgment rule).}

Although no liability resulted in the \textit{Citigroup} case, the conduct of
Citigroup and the individuals responsible for its risk-management
activities prior to and during the 2008 recession make for a compel-
lng case study. The information available to Citigroup’s executives
and how they used that information provides insight into corporate risk assessment and highlights cultural norms that may impede meaningful ERM.

IV. A CASE STUDY: CITIGROUP INC.

Citigroup Inc. is a storied financial services firm. With roots dating to 1812, Citigroup “has approximately 200 million customer accounts and does business in more than 140 countries.”\textsuperscript{105} It provides a variety of financial products and services to its customers, including “consumer banking, credit cards, corporate and investment banking, securities brokerage and wealth management.”\textsuperscript{106} Citigroup carries approximately $1.857 trillion of assets and approximately $1.702 trillion of liabilities on its balance sheet.\textsuperscript{107}

The 2008 recession hit Citigroup hard, notwithstanding, or perhaps because of, its massive scope and size. It experienced losses of approximately $10 billion by the start of the fourth quarter of 2007,\textsuperscript{108} and the losses continued into 2009.\textsuperscript{109} Citigroup’s stock price dropped precipitously as well, falling to below $4 per share in November 2008 and below $1 per share in March 2009.\textsuperscript{110}

As a result, Citigroup accepted assistance from the U.S. government under the Troubled Asset Relief Program (“TARP”). Specifically, Citigroup received over $45 billion in capital infusions from the government, and the government agreed to guarantee approximately $306 billion in loans and securities.\textsuperscript{111} The government converted


\textsuperscript{106} Id. at 7.

\textsuperscript{107} Id. at 9.


\textsuperscript{110} Dash & Creswell, supra note 81 (“Citigroup’s stock has plummeted to its lowest price in more than a decade, closing Friday [November 2008] at $3.77.”); Laurie Klikowski, Citigroup Shares in Rally Mode THESTREET.COM (Mar. 9, 2010, 3:49 PM), http://www.thestreet.com/story/10698901/1/citigroupsharesinarallymode.html.

$25 billion of its investment into Citigroup common stock.\textsuperscript{112} Citigroup repaid the remaining $20 billion in December 2009.\textsuperscript{113}

Prior to its participation in TARP, Citigroup, its CEO (Charles Prince), its risk managers, and its board of directors made interesting decisions. Despite various market and industry indications that the subprime-mortgage market was deteriorating quickly in early 2007, Citigroup stayed firmly committed to its large subprime mortgage and collateralized-debt obligation (“CDO”) portfolios and related investment strategies.\textsuperscript{114} In fact, in July 2007, Mr. Prince brushed aside these warnings and stated, “as long as the music is playing, you’ve got to get up and dance. We’re still dancing.”\textsuperscript{115}

Mr. Prince’s statement is not the only evidence that Citigroup as an institution failed to appreciate or ignored the significance of the subprime-mortgage crisis. Following the Bear Stearns collapse in the summer of 2007, Citigroup assured the SEC that it anticipated no subprime-mortgage losses.\textsuperscript{116} One report suggests that Citigroup indicated that “the probability of those mortgages defaulting was so tiny that they excluded them from their risk analysis.”\textsuperscript{117} That approach proved devastating in October 2007 when Citigroup announced that “third-quarter profit would fall 60% from the prior year after huge write-downs for unsold debt it issued to finance corporate takeovers and for big losses on the value of subprime mortgage-backed securities.”\textsuperscript{118}

Standing alone, Citigroup’s position would not appear unreasonable. When placed in context with the other events of late 2006 and early 2007, however, the position becomes more troubling. Con-


\textsuperscript{114} See, e.g., Dash & Creswell, supra note 81 (explaining events leading up to Citigroup’s announcement of significant losses in October 2007).


\textsuperscript{116} See Dash & Creswell, supra note 81.

\textsuperscript{117} Id.

consider the following sampling of information known by or available to Citigroup executives:119

- February 8, 2007: HSBC Holdings plc and New Century Financial Corp. announce concerns regarding performance of their subprime-mortgage portfolios and perceived risks are reflected in ABX’s credit-default swap index.120
- February 20, 2007: Federal Reserve Board Governor Susan Bies observes that “[o]ne segment of [the mortgage market] . . . is starting to behave in a very problematic way and that is the subprime adjustable rate mortgages.”121
- February 21, 2007: NovaStar Financial Inc. loses one-third of its stock value due to subprime-mortgage issues.122
- March 4, 2007: HSBC Holdings plc forced to take a $11 billion write-off to cover subprime-mortgage losses.123
- March 12, 2007: Reports predict a significant surge in home foreclosures and that “[t]he deepest housing decline in 16 years is about to get worse.”124
- March 2007: Fremont General and New Century Financial stop making loans, and “People’s Choice files for bankruptcy.”125

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April 6, 2007: “American Home Mortgage writes down the value of risky mortgages rated one step above subprime.”


May 30, 2007: Report suggests manipulation in subprime-mortgage market and notes that “[s]ince the beginning of 2006, more than 50 U.S. mortgage companies have put themselves up for sale, closed or declared bankruptcy.”

June 12, 2007: Bear Stearns suspends redemptions at its hedge funds, which posted an 18.97 percent loss in April 2007, and “RealtyTrac announces U.S. foreclosure filings surged 90 percent in May from May 2006.”

July 2007: Standard & Poor’s, Moody’s, and Fitch “downgrade bonds backed by subprime mortgages,” and Bear Stearns announces that its hedge funds are essentially worthless.

July 18-19, 2007: Federal Reserve Bank Chairman Ben Bernanke acknowledges that “there will be ‘significant losses’ due

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125 Economic Committee Timeline, supra note 119, at 24.

126 Id.


131 Economic Committee Timeline, supra note 119, at 22-23.
to subprime mortgages” and that “the problems ‘likely will get worse before they get better.”

Admittedly, hindsight reveals information not always visible in the moment, but Citigroup faced fairly stark evidence in early to mid-2007. Citigroup’s inaction is perhaps even more striking given that it held approximately $55 billion in U.S. subprime-mortgage assets at the time. In addition, “Citigroup was the biggest CDO underwriter, responsible for $46.9 billion of the securities sold in the first nine months” of 2007. Those holdings also led to significant write-downs in 2007.

The remainder of this Article considers the Citigroup scenario in the context of ERM and proposed and potential regulatory responses to the perceived risk-management failures associated with the 2008 recession. It is easy to posit that better or more rigorous risk-management procedures would have prevented the losses that both Citigroup shareholders and the markets more generally suffered, but it is much harder to prove that proposition. The existing law governing corporate boards’ compliance obligations and the basic behavioral and cultural barriers that impede many decision-making processes only intensify that challenge.

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132 Id. at 22. Chairman Bernanke did observe that the subprime mortgage problems “have not spilled over into the greater system” and opined that the problems were “‘bumps’ in ‘market innovations.” Id.

133 See Donald C. Langevoort, Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review, 51 Vand. L. Rev. 1499, 1504 (1998) (explaining hindsight bias as “people over estimat[ing] the extent to which they could have predicted some future event (i.e., its foreseeability) once they learn what actually happened”); see also Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982) (“After-the-fact litigation is a most imperfect device to evaluate corporate business decisions.”); Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, 65 U. Chi. L. Rev. 571, 576 (1998) (“Research by cognitive psychologists has shown that the folk wisdom on hindsight is correct—past events seem more predictable than they really were.”).


136 Id.

137 See infra Part V.

138 Id.

139 See supra Part III.B.2 and infra Part V.
V. POTENTIAL BARRIERS TO THE ERM SOLUTION

At its core, ERM strives to change corporate culture and improve information and communication regarding risk events.\footnote{See supra Parts II.A, III.A.} Those objectives alone, however, will not necessarily result in better risk management.\footnote{See Lipshaw, supra note 8, at 21 ("The problem with any reduction to rules . . . is the illusion of objectivity, something fostered by the particular construct of concepts that constitutes law generally.").} Indeed, a firm could implement a process that projects an ERM façade but does nothing substantive to change the way decision makers consider and resolve risk issues. Moreover, that process likely would satisfy existing and proposed risk regulations.\footnote{See supra Part III.B.} As discussed above, those regulations focus primarily on disclosure regarding risk-management practices and do not prescribe the content or scope of those practices.

Accordingly, before firms adopt or policymakers mandate ERM, or any other risk-management protocol, all participants need to consider whether more processes alone will improve risk management and enhance firm value or whether something else is needed. Specifically, will more reporting and information necessarily result in different or better decisions? If not, how do we improve risk management and does the law have a role to play in that process?

A. Behavioral Barriers to Effective ERM

Why did Citigroup keep dancing well into 2007? Several key indicators in its industry and the economy more generally suggested that caution was warranted.\footnote{See supra Part IV.} Some of its competitors observed these indicators and instituted responsive measures. For example, J.P. Morgan observed red flags in late 2006 and “exited the business of securitizing subprime mortgages when it was still booming.”\footnote{Shawn Tully, Jamie Dimon’s Sweat Team: How J.P. Morgan’s CEO and His Crew Are Helping the Big Bank Beat the Credit Crunch, CNMONEY (Sept. 2, 2008, 4:02 PM), http://money.cnn.com/2008/08/29/news/companies/tully_dimon.fortune.} J.P. Morgan reportedly embraces ERM, focusing on structure and culture. See Enterprise Risk Management, in THE CENTENNIAL GLOBAL BUSINESS SUMMIT REPORT 3–4 (Harvard Business School 2008), available at http://www.hbs.edu/centennial/businesssummit/globalbusiness/enterprise-risk-management.pdf (explaining that, at J.P. Morgan, “[r]isk management starts with tone at the very top” and includes “a culture of collaboration”); see also Cinderella’s Moment, THE ECONOMIST, Feb. 11, 2010, available at http://www.economist.com/specialreports/displaystory.cfm?story_id=15474145 (observing that financial institutions like J.P. Morgan that sur-
investors actually grossed large profits during 2007 by shorting mortgage-backed securities. But Citigroup remained committed to its investment strategy, with little meaningful hedging, until arguably it was too late.

It is difficult to discern with any precision the motivation for Citigroup’s conduct. Nevertheless, analyzing its course of action through the lens of behavioral economics provides an interesting perspective on risk management. Citigroup, like most financial institutions, had risk-management procedures in place prior to the 2008 recession. Its risk managers and executives had access to in-


formation that suggested significant potential risk to its major asset portfolios.\textsuperscript{148} Yet, Citigroup consistently asserted that its risk exposure was nominal.\textsuperscript{149}

The behavioral-economics literature documents unconscious cognitive biases that might account for the Citigroup scenario.\textsuperscript{150} Many commentators have thoughtfully analyzed the impact of individual and group biases on decisions by and relations among boards of directors and senior management.\textsuperscript{151} This Article considers three of those biases in the risk-management context: confirmation bias, overconfidence or optimism bias, and framing.

Confirmation bias commonly is defined as “the tendency to ascribe too much weight to evidence that confirms [individuals’ or groups’] views and too little weight to evidence that invalidates their

\textsuperscript{148} See supra Part IV.

\textsuperscript{149} See, e.g., Joshua Gallu & Donald Griffin, SEC Says Prince, Rubin Knew of Losses on Assets at Sal’s Focus, BLOOMBERG (Sept. 9, 2010, 11:09 AM), http://www.bloomberg.com/news/2010-09-09/prince-rubin-knew-assets-at-focus-of-sec-claim-fueled-losses-agency-says.html (“The New York-based bank’s executives repeatedly stated in 2007 that it had reduced exposure to subprime mortgage securities by 45 percent to $13 billion, as investors and analysts clamored for information about the deteriorating market, according to the agency’s July complaint.”); Jim Zaroli, Citigroup CEO Prince Falls to Subprime Debacle, NPR.ORG (Nov. 5, 2007), http://www.npr.org/templates/story/story.php?storyId=15995002 (“Prince, 57, was insisting just a few months ago that Citigroup’s subprime exposure was not serious.”).

\textsuperscript{150} See, e.g., Inga Chira et al., Behavioral Bias Within the Decision Making Process, 6 J. BUS. & ECON. RESEARCH 11 (2008) (“[Behavioral finance] draws on the psychology and cognitive science literatures to examine why individual decision-making often deviates from rational choices in systematic ways.”); Tversky and Kahneman, supra note 10, at 1124 (“[P]eople rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors.”).

views. Some commentators have identified instances of confirmation bias in corporate boardrooms, including the decision of Sun Microsystems to continue an aggressive investment strategy in the face of an economic downturn. This hubris encourages individuals on an unconscious level to seek out information supporting their position and discount opposing views.

Citigroup’s risk supervisors were operating in an environment that fostered confirmation bias. Reports suggest that Citigroup’s trading supervisor, Thomas Maheras, relied on Citigroup’s ratings from the ratings agencies to bolster his position that “the bank ‘would never lose a penny.’” Likewise, statements from Chairman Bernanke and others during this period provided support for his position. For example, in May 2007, Chairman Bernanke repeated his March statements that “[t]he Federal Reserve does not foresee a broader economic impact from the growing number of mortgage defaults.” Moreover, Mr. Prince, colleagues, and subordinates at Citigroup heavily relied on Mr. Maheras’ projections to continue their public statements that the bank was financially sound.

152 Hersh Shefrin, Behavioral Corporate Finance, 14 J. APPLIED CORP. FIN. 113, 118 (2001); see also Chira et al., supra note 150, at 12.


154 See Dash & Creswell, supra note 81. See also Bradley Keoun, Maheras Says Citigroup Expanded into CDOs at Urging of Bank’s Consultants BLOOMBERG (Apr. 7, 2010, 1:34 PM) http://www.bloomberg.com/news/2010-04-07/citigroup-consultants-urged-cdo-drive-maheras-says.html (“Even in the summer and fall of 2007, I continued to believe, based upon what I understood from the experts in the business, that the bank’s super-senior CDO holdings were safe.”) (quoting Mr. Maheras).


156 See Dash & Creswell, supra note 81. A related, but distinct bias, is commitment bias. Irvis L. JANIS & LEON MANN, DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT (1977). That hubris makes it difficult to change course or exit a failing business strategy. In Citigroup’s scenario, Mr. Prince committed to aggressive growth in Citigroup’s CDO products early in his tenure. Dash & Creswell, supra note 81; see also Bradley Keoun, Citi’s Prince Says No One Saw CDO Losses Coming BLOOMBERG (Apr. 8, 2010, 2:26 PM), http://www.bloomberg.com/news/2010-04-08/prince-rubin-say-they-didnt-recognize-citigroup-cdo-risk-before-crisis.html (noting Citi’s executives’ CDO growth strategy); Matt Pittman, Citigroup’s ‘Last Roman’ CDO Shows Enron Accounting, BLOOMBERG (May 22, 2008, 4:40 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a42143EyVai8 (explaining one of Citigroup’s CDOs and observing that “Citigroup Inc. created a $2.5 billion mortgage-backed security called Bonificius Ltd. in August as capital markets seized up and panic swept Wall Street”); Zarroli, supra note 149 ("[Citigroup has] been very aggressive and they’ve been pushing profit growth very hard in a lot of areas. And that means that you pile up
In addition, Citigroup’s executives’ willingness to buy into rosy projections despite the realities surrounding its industry demonstrates overconfidence and an optimism bias.\textsuperscript{157} Several studies have identified overconfidence as a trait affecting corporate CEOs.\textsuperscript{158} Individuals in these powerful positions tend to overestimate their own abilities; they often believe that they are the exception to the rule.\textsuperscript{159} Other financial companies may be affected by the 2008 recession, but their company will be the lone standing survivor. As one commenta-
tor observes, “[M]any companies may unintentionally engage in excessive optimism, especially when their existence depends on favorable forecasts.”

Finally, framing can play a significant role in risk-management decisions. “Studies on framing of legal risks find, for example, that taxpayers who owe money are more likely to cheat on their taxes than taxpayers who expect a refund.” Although framing arguably infected some of Citigroup’s decisions in 2007, a framing bias likely had a much larger impact in creating the situation in which Citigroup found itself at that time.

Consider the following account:

In 2005, stung by regulatory rebukes and unable to follow Mr. Weill’s penchant for expanding Citigroup’s holdings through rapid-fire takeovers, Mr. Prince and his board of directors decided to push even more aggressively into trading and other businesses that would allow Citigroup to continue expanding the bank internally.

As Mr. Prince searched for ways to regain Citigroup’s prowess, he and his colleagues likely were operating in a loss frame, making them more risk seeking. “This risk taking might be conscious, but deci-

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102 Chira et al., supra note 150, at 12.

103 Ian Weinstein, Don’t Believe Everything You Think: Cognitive Bias in Legal Decision Making, 9 CLINICAL L. REV. 783, 797 (2003) (“[F]raming bias is the tendency to view a given problem in different terms depending on the perspective from which the problem is viewed.”); see also Jeffrey J. Rachlinski, Gains, Losses, and the Psychology of Litigation, 70 S. CAL. L. REV. 113 (1996) (explaining framing bias); X.T. Wang, Framing Effects: Dynamics and Task Domains, 68 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES, Nov. 1996, at 145 (same).

104 Richard W. Painter, Convergence and Competition in Rules Governing Lawyers and Auditors, 29 J. CORP. L. 397, 404 (2004); see also Robert B. Thompson, Securities Regulation in an Electronic Age: The Impact of Cognitive Psychology, 75 Wash. U. L.Q. 779, 784 (1997) (“But I think that there are enough examples where framing leads investors to violate simple economic principles that the SEC and the courts would want to recognize it.”).

105 Dash & Creswell, supra note 81; see also Mara Der Hovanesian et al., Can Chuck Prince Clean Up Citigroup?, BUSINESSWEEK, Oct. 4, 2004, at 32, available at http://www.businessweek.com/magazine/content/04_40/b3902049_mx011.htm (describing many challenges facing Mr. Prince in turning around Citigroup). For example, one commentator observed, “[M]r. Prince] came in at a time when you know a famous leader had been yanked away and there were a lot of problems in the past. All sorts of market disruptions occurred. And he wasn’t a charismatic leader who could rally the troops necessarily.” Jim Zarroll, supra note 149 (quoting Professor Roy Smith).

106 See, e.g., Painter, supra note 162, at 403 (“Some psychological studies suggest that decision makers are risk averse when deciding between two alternatives that they perceive to result in a gain, but risk preferring when deciding between two alternatives that they perceive to result in a loss.”); Wang, supra note 161, at 146 (describing
sion makers can also conceal risk-preferring behavior from themselves by adjusting their estimates of risk artificially downwards.\textsuperscript{165}

Notably, cognitive biases can overlap and often enable each other. For example, the loss framing that might have influenced Mr. Prince’s initial decision to invest aggressively in the CDO market likely made him susceptible to confirmation and commitment biases with respect to the success of that strategy (as well as his overall strategic plan for Citigroup).\textsuperscript{166} Moreover, cognitive biases were not the only factors contributing to Citigroup’s scenario. Citigroup certainly had weak controls and risk management, and it admittedly was dealing with a very difficult economic environment.\textsuperscript{167}

The presence of cognitive biases in the decision-making process, however, cautious against blind reliance on more internal controls and risk management as the solution. As discussed below, the designers of any ERM program should consider cognitive biases.\textsuperscript{168} Reflecting on the Citigroup scenario, having more high-level individuals responsible for risk assessment and having direct access to individuals on the ground gathering the risk-related information might have shattered the confirmation bias sooner. Part of Citigroup’s problem

loss framing in context of Tversky and Kahneman’s prospect theory and explaining that, under this theory). “[P]eople code the possible choice outcomes as gains and losses, and tend to be risk averse when choosing among prospects seen as gains but risk seeking when choosing among prospects seen as losses.” \textit{Id.}; see also Richard H. Thaler et al., \textit{The Effect of Myopia and Loss Aversion on Risk Taking: An Experimental Test}, Q. J. Econ., May 1997, at 647, 648, available at http://www.econ.brown.edu/fac/Kfr_Eliaz/Thaler1.pdf (explaining myopic loss aversion and noting that “[e]mpirical estimates find that losses are weighted about twice as strongly as gains”).\textsuperscript{165}

Painter, supra note 162, at 404.

\textsuperscript{166} Indeed, even after announcing huge losses in October 2007, Mr. Prince continued to pronounce his confidence in Citigroup and his vision for the firm, stating: “No one can be happy with the results in our fixed-income business or with the results that relate to that. But, I think if you are able to look at other parts of the business, if you look at the strategic plan we’re executing on, I think any fair-minded person would say that strategic plan is working.” Zarroli, supra note 149.


\textsuperscript{168} See infra Part V.C.
appears to be that most risk information and decisions funneled through Mr. Maheras.\textsuperscript{109}

\textbf{B. Cultural Barriers to Effective ERM}

When Mr. Prince took over as CEO of Citigroup, the firm had a reputation for being aggressive and obsessed with maximizing short-term gains.\textsuperscript{170} At the time, Citigroup was under intense scrutiny for its roles in Enron and WorldCom, as well as questionable trading practices in Japan and Europe. Mr. Prince vowed to change corporate culture but ultimately remained aggressive in his pursuit of profits, creating a culture where "senior managers got addicted to the revenues and arrogant about the risks they were running."\textsuperscript{171}

Citigroup is not alone in promoting an aggressive, win-at-all-cost corporate culture. That culture arguably is the norm in the United States.\textsuperscript{172} The 2008 recession has called into question the utility of that culture, and many policymakers and commentators, including ERM proponents, are pushing for an overhaul of corporate culture.\textsuperscript{173} But change is hard and slow, and memories of tragic events like the

\textsuperscript{109} See Dash & Creswell, supra note 81.
\textsuperscript{171} See Dash & Creswell, supra note 81; Zarroli, supra note 149 (noting that Citigroup under Mr. Prince has "been very aggressive and . . . pushing profit growth very hard in a lot of areas").
\textsuperscript{172} See, e.g., Francesco Guerrera et al., Damning Insight into Corporate Culture Sheds Light on Fall of a Wall Street Giant, FINANCIAL TIMES, Mar. 13, 2010, http://www.ft.com/cms/s/0/d044f9822e40-11d4-509c-00144fabc0.html (noting that the examiner report on Lehman Brothers describes the firm as an "organisation prepared to take short cuts and huge risks to boost earnings, where control and accounting procedures were found to be sorely lacking"); Psychology of Enron's Demise, supra note 151, at 54 ("Enron has been described as having an arrogant climate. Such a climate is prone to greater homogeneity because differing views are not valued. This homogeneity can result in exaggerating the impact of various decision-making biases."); Cynthia Webster & Allyn White, Exploring the National and Organizational Culture Mix in Service Firms., J. ACAD. MARKETING SCI. (2009) (describing a study analyzing corporate cultures in United States and Japan and observing that the "U.S. is characterized by such values as assertiveness, decisiveness, innovativeness . . . and risk-taking, which stem from its frontier-conquering history."). Interestingly, J.P. Morgan’s corporate culture has been described as “extremely cautious, ultra-conservative, and bureaucratic.” Liz Wolgemuth, JPMorgan and Bear Stearns: A Culture Challenge, U.S. NEWS & WORLD REPORT, Mar. 31, 2008, available at http://www.usnews.com/money/careers/articles/2008/03/31/jpmorgan-and-bear-stearns-a-culture-challenge.html. This difference may reflect J.P. Morgan’s earlier embrace of general ERM principles. See supra note 144.
\textsuperscript{173} See supra Parts II.A, III.A.
2008 recession are short. Moreover, pressure in the boardroom to increase the bottom line remains.

Notably, studies suggest a strong link between corporate culture and risk-management practices.\textsuperscript{174} For example, one study of firms in thirty-five different countries shows a strong, negative association between harmonious corporate cultures and risk taking and a strong, positive association between individual-centric corporate cultures and risk taking.\textsuperscript{175} The study defines “harmony” in the context of cultures that are “more accepting of traditional ways of doing business rather than striving for innovation.”\textsuperscript{176} It defines “individualism” in the context of cultures that “focus on individual freedom and personal challenge.”\textsuperscript{177} Perhaps not surprisingly, the United States scored the highest on cultures exhibiting individual-centric characteristics.\textsuperscript{178}

Although this study focuses on corporate culture in relation to country of origin, its data provide helpful insight into the values that enhance or detract from cultivating a risk culture.\textsuperscript{179} As demonstrated by the Citigroup scenario, a win-at-all-costs culture may impede a firm embracing ERM beyond a pure process approach. ERM proponents recognize this limitation, which drives in part their strong emphasis on corporate culture.\textsuperscript{180} “Enterprise risk management—to be effective—must fundamentally change the way organizations think about risk.”\textsuperscript{181} Accordingly, in addition to mechanisms to mitigate cognitive biases, policymakers and ERM proponents must create incentives for U.S. boards and management to buy into a risk culture.

\subsection{C. Strengthening ERM Proposals}

More people knowing more information and accepting responsibility for risk decisions is a good first step in addressing risk-management failures. ERM provides a useful framework to achieve those objectives. But a firm adopting ERM or even just more rigorous risk-management procedures will not necessarily improve risk-

\textsuperscript{175} Id. at 7, 28–29.
\textsuperscript{176} Id. at 7.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 13.
\textsuperscript{179} Id. at 17–23.
\textsuperscript{180} INTERNATIONAL CORPORATE GOVERNANCE NETWORK, ICGN CORPORATE GOVERNANCE PRINCIPLES 5–7, 8 (Apr. 27, 2010).
\textsuperscript{181} RIMS PAPER, supra note 3, at 9.
management decisions. Risk-related regulations and best practices need to account for cognitive biases and the challenges in creating true risk cultures, and whether through regulation or the markets, firms need incentives to commit the time and resources necessary to develop effective ERM.

1. Breaking down the Behavioral Barrier

Overcoming cognitive bias is a tricky endeavor. One popular approach is training to sensitize individuals to their potential biases. This technique is used in a variety of settings, including discrimination in the workplace and strategic decisions in the courtroom. Studies are split regarding the utility of training, and some commentators observe the risk of the training itself being biased or creating new biases. Nevertheless, as boards and management consider ERM and reflect on risk-related decisions, training regarding decision-making skills, including the impact of cognitive biases, may complement the process with nominal downside risk.

182 See supra Part V.A.


184 See Bisom-Rapp, supra note 183, at 29-30 (describing uncertainty regarding success of bias training and noting dearth of empirical support for approach); Katherine L. Milkman et al., How Can Decision Making Be Improved? 379-80 (Persp. on Psychol. Sci., Working Paper No. 08102, 2008) (noting that studies show that training produces only minimal success); see also Christine Jolls & Cass R. Sustein, Debiasing through Law, 35 J. LEGAL STUD. 199, 229 (2006) (“But in some circumstances, a strategy of debiasing through law could introduce new distortions through its effect on those who did not previously exhibit bounded rationality.”); Lipshaw, supra note 8, at 21 (“But the recursiveness of selfanalysis is problematic in the internal making as opposed to the analysis, of judgments; one may attempt to assess the extent of one’s own bias, framing issues, heuristics, and so, but the analysis itself may be subject to those same influences.”).

185 See, e.g., Lawrence A. Cunningham, Behavioral Finance and Investor Governance, 59 WASH. & LEE L. REV. 767, 788-92 (2002) (suggesting training to combat investor biases); Jolls & Sustein, supra note 184, at 234 (“[D]ebiasing through law—especially debiasing through substantive law—is a distinctive and sometimes far preferable alternative to the strategy of insulating legal outcomes from the effects of bounded rationality.”); see also Tristin K. Green, A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong 60 VAND. L. REV. 849, 860 (2007) (suggesting that training, in connection with structural changes, may address biases more effectively at least in workplace discrimination context).
This is not to say that boards will automatically make better or unbiased decisions; they might not. The training, however, would increase the prospect of boards and management at least hesitating and reflecting on a decision before pulling the trigger. That reflection time could result in some better outcomes. Many firms have incorporated ongoing training for their boards. Extending that training to management to cover cognitive biases likely can be done at little cost and with significant potential return.

In addition to training, boards and management could create objective tools to gauge biases. For example, in setting the firm’s risk appetite, the board and management could break out in detail the firm’s acceptable risk exposure overall and in different segments or projects and then adopt rigorous approval procedures for changing or making exceptions to those designations. By setting parameters at the outset—before any surprises or exigencies—boards and management would have an objective measure for their subsequent decisions. The change/exception approval process again would mandate a moment of hesitation and give decision makers the opportunity to recognize any bias. They may still miss the opportunity, but it gives the individuals involved in the process yet another chance to get it right.

Another technique would be employing an outside consultant to model potential risks and to role-play with the board and management. Here, the consultant basically would play devil’s advocate,

186 See, e.g., Green, supra note 184, at 858-60; Timothy D. Wilson & Nancy Brekke, Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations, 116 PSYCHOLO. BULL. 117, 130-35 (1994) (explaining ways to improve outcomes of bias training by emphasizing awareness of, motivation for and consequences/direction of bias).


188 See supra Part II.B (discussing mapping and profiling aspects of ERM).

189 An outside consultant could serve in various capacities. For example, studies regarding the impact of training show a greater success rate with handson personal coaching for the decision maker. See Katherine L. Milkman et al., supra note 184, at 382. Alternatively, the consultant could serve as a “choice architect,” who “design[s] situations in which choices are made . . . to maximize the odds that decision makers will make wise choices.” Id. at 386-87 (citing Richard H. Thaler & Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (Yale Univ. Press) (2008)). A similar proposal is being encouraged in Australia. See Leon Gettier, Reversing Risks, IN THE BLACK, Nov. 2009, at 39, available at http://www.cpaaustralia.com.au/newsletters/3639_Reversing_%20Risks.pdf (A real opportunity lies in developing roles in companies with risk expertise, for experts who
identifying remote or seemingly inconsequential risks and countering the board’s and management’s responses with opposing perspectives. In Citigroup’s scenario, a consultant could have asked the hard questions like why are Citigroup’s holdings safe while others in the industry are exposed. If Citigroup had responded that it was relying on its ratings from outside agencies, the consultant could have asked why an outsider’s assessment of the firm’s risk should trump an internal assessment and point out that outside perspectives typically are based on information provided by the firm.

It is of course easy to script this conversation with the benefit of hindsight and much more difficult to do it in the moment. The purpose of the consultant would not necessarily be to identify what the board and management missed. Rather, a primary objective would be to facilitate or teach the board and management how to facilitate conversations leading to that information. In that regard, the consultant technique could be a once-a-year training program or a resource tapped into in times of uncertainty.

2. Breaking down Cultural Barriers

As articulated in the ERM literature, the board and senior management must implement and maintain the creation of a risk culture. ERM training again may help boards and management appreciate exactly what it means to have a risk culture and the value of that culture. The training, however, will not create a risk culture; a risk culture will be the product of board and management initiative.

can go in and model scenarios for managers to get a much deeper understanding of their risk profile.

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100 See, e.g., Burke, supra note 183, at 523–28 (discussing potential value of having internal and external checks on decision making, including checks that challenge thinking or assumptions of decision maker); Dan Lovallo & Olivier Sibony, The Case for Behavioral Strategy, MCKINSEY QUARTERLY, Mar. 22, 2010, at 8, available at https://www.mckinseyquarterly.com/PDFDownload.aspx?ar=2551&srid=7&gp=1 (urging internal and external review of risk options and noting that “[s]ometimes, simply coaxing managers to articulate the experiences influencing them is valuable”). The President & CEO of the Federal Reserve Bank of Boston has suggested an outside review by regulatory supervisors that could ask firms questions regarding risk exposures, including those viewed as nominal by the particular firm, and then “could evaluate the impact and perhaps conclude that the chance of a cascading systemic financial crisis was too big of a chance to take.” Rosengren, supra note 81.

101 See supra note 133.

102 See Lovallo & Sibony, supra note 190.

103 See supra note 38.

104 See supra Parts II.A, III.A.
Why would a board agree to create a risk culture? The board has a duty to maximize shareholder wealth, and many firms abide by a high-risk, high-reward strategy. And is not failure just a risk of doing business?

Those are difficult questions, and the answer may not be the same for every firm. Boards, management, and stakeholders looking to avoid the extraordinary and unexpected losses experienced in recent corporate scandals and the 2008 recession might find the endeavor worthwhile. As noted above, more data showing the value of ERM may help convince these firms to adopt the procedures voluntarily (or involuntarily under stakeholder pressure). Alternatively, policymakers could mandate compliance. In either event, training and motivation will be crucial to ERM's success.

3. Regulating ERM

As business techniques, ERM and the approaches for addressing bias and creating a risk culture sound great, but do they raise legal issues or require legal intervention? ERM directly impacts corporate governance. To the extent that the law evaluates and governs the relationship between the board, management, and shareholders, ERM invokes legal consideration. Nevertheless, this Article does not suggest that the law should mandate ERM for every corporation in every context.

Rather, ERM appears better suited as a best practice for corporate governance that would offer firms legal protection against cer-

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105 See supra notes 52–55.
106 See, e.g., Okamoto & Edwards, supra note 92, at 47–52, 54 (proposing a thoughtful approach to mandating more thorough risk management procedures through regulation that focuses on, among other things, deliberation, contemporaneous rationale and regulator oversight).
107 Imposing a mandatory risk management scheme on all public corporations likely would increase resistance to implementing meaningful ERM programs and encourage thoughtless compliance with the stated process. See, e.g., Jeffrey M. Lipshaw, Sarbanes-Oxley, Jurisprudence, Game Theory, Insurance and Kant: Toward a Moral Theory of Good Governance, 50 WAYNE L. REV. 1083, 1088 (2004) (examining the shortcomings of the Sarbanes-Oxley Act and similar legislation and observing that "[f]rom the positivist point of view, Sarbanes-Oxley is a rule that imposes an obligation on corporate directors not to repeat the sins of the Enron and WorldCom debacles. And public companies have duly obeyed, like drivers at stop signs in empty intersections at three a.m., often out of compliance for compliance sake, and not for salutary benefit that should result from compliance"); Roberta Romano, The Sarbanes-Oxley Act and the Making of Quick Corporate Governance, 114 YALE L.J. 1321 (2005) (assessing the utility of the Sarbanes-Oxley Act based on the information and process underlying the legislation). The complexity of business-risk decisions and the variance based on a number of critical factors, including industry and size counsel in favor of encouraging ERM through best practices and incentives.
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tain liabilities. The framework for this approach largely exists in the
regulations adopted after the corporate scandals in the early 2000s.198
The Sarbanes-Oxley Act and the NYSE listing requirements already
require corporations to consider risk and adopt codes of ethics, and
the listing requirements also require board training.199 A firm could
easily expand a code of ethics to cover its risk-management policy,
and it could likewise expand training in scope and attendance.200
Moreover, firms could opt out of these requirements by disclosing
their decision to do so, recognizing that they lose any protections or
defenses available to firms following the guidelines.201

As to those protections and defenses, the Sentencing Guidelines
could provide reduced penalties for firms establishing an ERM pro-
gram that complies with best practices.202 The SEC could grant addi-
tional weight to ERM programs in considering whether to file en-
forcement actions, and courts could use ERM best practices as
evidence refuting knowledge in securities cases and proving good
faith where boards are alleged to have failed to act in the face of a
known duty or risk.203 Even in the context of duty-to-monitor claims,
ERM could expedite or streamline the litigation, particularly if self-
regulatory organizations or similar institutions emerge to review and
certify ERM programs.204

198 See supra notes 27–31.
199 See supra Part IIIA. As discussed above, many commentators criticize the one-
size-fits-all nature of many aspects of the Sarbanes-Oxley Act, as well as certain of its
other features. Id. The proposals discussed in this Article try to avoid many of those
pitfalls.
200 See, e.g., Psychology of Exxon’s Demise, supra note 151, at 55–58 (suggesting use of
a code of ethics and training to create a more ethical corporate culture). Notably,
many firms have both a code of ethics and a code of conduct. A firm’s code of con-
duct also might be an appropriate place to discuss risk policies either in addition to
or in lieu of discussing it in the code of ethics.
201 See, e.g., supra Part II A (discussing the “disclose or explain” nature of the ethics
code requirements under the Sarbanes Oxley Act); see also Luca Enríques & Paolo
Volpin, Corporate Governance Reforms in Continental Europe, 21 J. ECON. PRINCIPLES 117,
134–36 (2007) (describing process whereby German firms may opt out of certain gov-
ernance requirements upon a vote of shareholders representing at least 75% of the
shares).
202 See supra Parts II A, IIIA; see also Hess, supra note 31, at 1806–16 (discussing
challenges and benefits of trying to encourage ethical corporate cultures under the
Sarbanes Oxley Act and the Sentencing Guidelines).
203 See supra Part III B.2; see also Harner, supra note 3, at 55–56.
204 Self-regulation is a broad concept that includes any attempt by an industry to
moderate its conduct with the intent of improving marketplace behavior for the
ultimate benefit of consumers. The universe of self-regulatory organizations includes
industry-wide or economy-wide private groups that provide, inter alia, certification,
product information, complaint resolution, quality assurance, industrial standards,
In determining what constitutes best practices and whether to acknowledge a process as effective ERM, policymakers and industry players need to consider the potential barriers to effective ERM, including those discussed in this Article.\textsuperscript{205} Accordingly, best practices should include training on cognitive biases, require objective risk setting and risk-modification standards, and recommend outside consultants. They also should emphasize the board’s role in creating a risk culture and require boards to demonstrate their commitment to that culture through the firm’s code of ethics, dissemination of risk information, and participation in the process. Using a best-practices approach allows firms to tailor ERM programs to their specific needs or adapt those programs to internal or external changes.

In addition to regulatory incentives to adopt ERM, the markets could be very influential in ERM’s meaningful development.\textsuperscript{206} As stakeholders realize the value of ERM, shareholders can request that firms adopt ERM either informally or through shareholder proposals, and lenders can address ERM disclosures in their transaction documents. Likewise, as investors become more knowledgeable about ERM, they may make investment decisions based on firms with certified or well-documented ERM programs. As discussed above, Standard & Poor’s is already working to provide investors with this type of information.\textsuperscript{207}

Just as risk management did not cause the 2008 recession, improving risk-management practices through ERM or otherwise will not prevent the next one. Nevertheless, thoughtful and considered risk planning may mitigate the losses suffered by firms in the next economic downturn and generally constitutes good business. To the extent that such practices preserve firm value and thereby protect

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\textsuperscript{205} See supra Parts V.A, V.B.

\textsuperscript{206} See Harner, supra note 3, at 52-53; see also INTERNATIONAL CORPORATE GOVERNANCE NETWORK, supra note 180 (encouraging institutional investors to take an active role in reviewing and assessing a firm’s risk management practices, explaining “[t]he objective of these principles is to help investors assess how well a portfolio company’s board—either unitary or supervisory—is effectively overseeing risk management.”).

\textsuperscript{207} See supra Part III.A.
stakeholders’ interests, policymakers and markets should provide appropriate incentives for firms to adopt meaningful ERM.

VI. CONCLUSION

As some commentators have observed, the 2008 recession was a “wake-up call” for risk management. Many firms not only were surprised by developments during the recession but also had no effective means to communicate or respond to the changing financial landscape. The subprime-mortgage crisis and subsequent events paralyzed their operations. Better risk-management practices would not have averted the 2008 recession, but they might have shortened the duration and eased the severity of the financial turmoil.

As policymakers and firms reflect on the recession, they should consider how risk-management improvements can help firms operate more efficiently and be better prepared for the next round of operational or economic surprises. Here, ERM offers a technique for firmwide risk identification, assessment, and response that involves the board of directors, senior management, and appropriate individuals throughout the firm. Like any risk-management practice, however, ERM has its limitations and is not a cure for all corporate ills.

Policymakers and industry organizations promulgating best practices should recognize the behavioral and cultural barriers to effective risk management and encourage processes that account for those limitations. Among other things, guidelines suggesting ERM and cognitive-bias training and the integration of risk practices into codes of ethics might assist firms in developing meaningful risk assessment and not simply more risk-related process. The goal of any risk-related policy should be helping firms make better-informed decisions—both as to the substance of the problem and the means for reaching the decision itself. As Warren Buffett has observed, “Risk comes from not knowing what you’re doing.”

208 See id.
209 See supra Parts II.A, III.A.
210 See supra Part V.C.