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COMPARATIVE CORPORATE GOVERNANCE SYMPOSIUM

ARTICLES

THE SECURITIES AND EXCHANGE COMMISSION GOES ABROAD TO REGULATE CORPORATE GOVERNANCE

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I. INTRODUCTION

Although the federal securities laws generally have been considered full-disclosure statutes, the United States Securities and Exchange Commission (SEC or the Commission) has been interested in regulating the corporate governance of public corporations to the extent it has any authority to do so. The Securities Exchange Act of 1934 (Exchange Act)[1] established the SEC to administer both the Exchange Act and the earlier Securities Act of 1933 (Securities Act).[2] At that time, responsibility for regulat-

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1. 15 U.S.C. § 78a–mm (2000).
2. *Id*. at § 77a–aa.

ing internal corporate affairs was left generally to state corporation law, state blue sky statutes, and stock-exchange-listing requirements.[3] Further, the SEC did not attempt to regulate the corporate governance of foreign[4] corporations, even if issuers entered the SEC reporting-and-disclosure system. The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley)[5] markedly changed the boundary between federal securities law and state corporation law with regard to corporate governance, not only for United States (U.S.) corporations, but also for foreign corporations.

In one of the SEC's first corporate governance cases, *In re Franchard Corp.,*[6] the Commission took the view that the integrity of management was always a material factor to investors.[7] Nevertheless, although the SEC staff urged that *Franchard Corp.* be used to define the duties of corporate directors, the Commission declined to do so, stating, "The [Securities] Act does not purport . . . to define [f]ederal standards of directors' responsibility in the ordinary operations of business enterprises and nowhere empowers us to formulate administratively such regulatory standards."[8]

When federal courts recognized implied rights of action under Sections 10(b)[9] and 14(a)[10] of the Exchange Act, other courts were tempted to consider cases involving not only misrepresentation but also equitable fraud or breaches of fiduciary duty under state

3. Spec. Stud. Group of the Comm. on Fed. Reg. of Secs., *Special Study on Market Structure, Listing Standards and Corporate Governance*, 57 Bus. Law. 1487, 1498–1499 (2002) [hereinafter Special Study Group].

4. This Article will use the term "foreign" issuer or corporation to denote a non-governmental corporation that is neither organized under U.S. laws nor majority owned by U.S. nationals. *See* 17 C.F.R. § 240.3b-4(c) (2003) (defining the term "foreign private issuer").

5. *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of Titles 11, 15, 18, 28, and 29 of the United States Code).

6. 42 S.E.C. 163 (U.S. Secs. Exch. Commn. 1964).

7. *Id*. at 169–170.

8. *Id.* at 176 (footnote omitted).

9. *See Kardon v. Natl. Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946) (disregarding the lack of an express provision for civil liability in Section 10 because, as a whole, the Exchange Act implies civil liability). The Supreme Court did not specifically approve a private right of action under Section 10(b) until 1971, in *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n. 9 (1971).

10. The Supreme Court recognized a private right of action under Section 14(a) in *J.I. Case Co. v. Borak*, 377 U.S. 426, 430–431 (1964). Foreign issuers are not subject to these proxy rules. *See* 17 C.F.R. at § 240.3a12-3(b) (providing that securities that a foreign private issuer registered are exempt from Section 14(a) of the Exchange Act).

law by corporate managers.[11] This led one commentator to declare that the federal securities laws had given rise to a federal corporation law.[12] However, this observation proved premature.

In *Santa Fe Industries, Inc. v. Green,*[13] the United States Supreme Court seized an opportunity to quash the development of a judge-made federal law of corporate fiduciary duty under Section 10(b) of the Exchange Act.[14] *Santa Fe Industries* resulted from a group of minority shareholders' efforts to contest the appraisal value of their shares through allegations of unfairness and overreaching.[15] The United States Court of Appeals for the Second Circuit took the view that Rule 10b-5 reached "breaches of fiduciary duty by a majority against minority shareholders without any charge of misrepresentation or lack of disclosure."[16] The Supreme Court reversed and held that Section 10(b) cases require "deception, misrepresentation, or nondisclosure."[17] In so doing, the Court rejected the notion that the securities laws "federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden."[18] However, Sarbanes-Oxley did federalize certain portions of the law of corporations for public companies, thus changing the divide between federal and state law.

11. *E.g. Ruckle v. Roto Am. Corp.*, 339 F.2d 24 (2d Cir. 1964); *Shell v. Hensley*, 430 F.2d 819 (5th Cir. 1970).

12. "[A] federal law of corporations now exists. But it has always existed—since the passage of the Securities Act of 1933." Arthur Fleischer, Jr., "*Federal Corporation Law*"*: An Assessment,* 78 Harv. L. Rev. 1146, 1179 (1965).

13. 430 U.S. 462 (1977).

14. *Id*. at 477–480.

15. *Id*. at 466–467.

16. *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283, 1287 (2d Cir. 1976), *rev'd*, 430 U.S. 462.

17. *Santa Fe Indus.*, 430 U.S. at 476.

18. *Id*. at 479. It should be noted that, after *Santa Fe Industries*, some courts took the view that a material nondisclosure of a breach of fiduciary duty that denied minority shareholders an opportunity to seek relief in a state court created a Section 10(b) and Rule 10b-5 claim. *E.g. Goldberg v. Meridor*, 567 F.2d 209, 221 (2d Cir. 1977) (holding that deceit upon a company's minority shareholders and misrepresentation about a looming transaction constitutes a Section 10(b) and Rule 10b-5 claim); *Wright v. Heizer Corp.*, 560 F.2d 236, 250 (7th Cir. 1977) (finding that the majority shareholder's failure to disclose material facts justified a Rule 10b-5 action, when minority shareholders would have been able to file a derivative suit in a state court to enjoin a minority shareholder's breach of fiduciary duty).

In another important precedent concerning the SEC's power to regulate corporate governance, the United States Court of Appeals for the District of Columbia, in *Business Roundtable v. SEC,*[19] invalidated a voting-rights rule adopted by the SEC on the ground that "the rule directly [controlled] the substantive allocation of powers among classes of shareholders," and therefore, "it [was] in excess of the [SEC's] authority under [Section] 19 of the [Exchange Act]."[20] The court found that the SEC regulation was a "rule" under Sections 19(b) and (c) of the Exchange Act, meaning that the SEC had the authority to approve or to disapprove a self-regulatory organization (SRO) rule on this subject, but that the SEC's own rule was not "'in furtherance of the purposes' of the Exchange Act."[21] The court's rationale was that, in the statute, there was no indication that Congress intended to permit such a broad federal preemption over corporate governance and shareholder rights—matters traditionally left to state law.[22] The teaching of the *Business Roundtable* decision is that "[t]he Exchange Act does not enable the SEC to establish a comprehensive federal corporate law through listing standards."[23] Rather, the SEC's authority over corporate-governance-listing standards "must be considered on a case-by-case basis with respect to a specific purpose of the Exchange Act."[24] Because Sarbanes-Oxley greatly enlarged the scope of the Exchange Act as to specific matters of corporate governance, the SEC acquired greater freedom to utilize SRO-listing standards to accomplish corporate governance reform. In implementing Sarbanes-Oxley, the SEC has made ample use of this new authority, raising the interesting question of how the line between federal and state law with respect to a corporation's internal affairs should now be drawn.

The SEC did not attempt to regulate the corporate governance of foreign issuers that entered the SEC disclosure system before the adoption of Sarbanes-Oxley. Because the SEC was inhibited in its efforts to regulate the corporate governance of U.S. corporations, it was an easy policy decision to refrain from inter-

19. 905 F.2d 406 (D.C. Cir. 1990).
20. *Id.* at 407.
21. *Id.* at 409–411 (quoting the statutory language of Section 19(c)).
22. *Id.* at 412.
23. Special Study Group, *supra* n. 3, at 1525.
24. *Id*.

fering with the internal affairs of foreign issuers. Nevertheless, the Commission's general attitude toward foreign issuers has changed over the years. Generally, the most common approaches to regulating foreign issuers that sell securities to domestic investors are as follows: requiring them to comply with host-country laws (national treatment);[25] creating special host-country rules for them;[26] developing harmonized international standards;[27] and accepting compliance with home-country standards (mutual recognition).[28] The U.S. has approached this problem through national treatment, with some special rules to ameliorate the problems of compliance for foreign issuers.[29] The European Union (EU) has a regime of mutual recognition, as do some other jurisdictions.[30] While there is no international securities regulator with the ability to impose a disclosure or other regulatory regime on all issuers worldwide, the International Organization of Securities Commissions (IOSCO) has developed a template for basic disclosure standards, and the International Accounting Standard Board (IASB) is developing international accounting standards (IAS).[31]

From the 1930s until the late-1970s to early-1980s, the SEC took an isolationist approach to problems posed by foreign issuers and the sale of foreign issuers' securities to U.S. nationals.[32] For more than forty years after Congress passed the Securities Act, the SEC staff's attitude was that, if a foreign issuer was going to tap the U.S. capital markets, it should play by the SEC's rules.[33] This attitude was manifested in policy initiatives, such as the Ca-

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25. *See* Roel C. Campos, SEC Commr., Speech, *Embracing International Business in the Post-Enron Era* (Brussels, Belgium, June 11, 2003) (available at http://www.sec.gov/news/speech/spch061103rcc.htm) (discussing the implications of Sarbanes-Oxley on foreign companies selling securities in the U.S., and stating that the Act will treat American and foreign companies similarly).

26. *Id.* This, to some extent, has been the SEC's approach.

27. Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievement of the European Communities*, 31 Harv. Intl. L.J. 185, 191 (1990).

28. *Id.* at 191–192.

29. *Id*. at 228–229; *see supra* n. 25 (describing accommodations that the SEC gives to foreign companies).

30. Marc I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity,* 20 Mich. J. Intl. L. 207, 255–261 (1999).

31. Marc I. Steinberg, *International Securities Law: A Contemporary and Comparative Analysis* 27–38 (Kluwer L. Intl. 1999).

32. Roberta Karmel, Remarks, *Regulating Corporations: Who's Making the Rules?* (Apr. 5, 2003), in 97 Am. Socy. Intl. L. Procs. 269, 272 (2003).

33. *Id*. at 273.

nadian foreign restricted list—later called the foreign restricted list—to keep out unregistered foreign companies.[34] In addition, the SEC made very aggressive claims of extraterritorial application in a series of cases brought under the antifraud provisions of the Securities Exchange Act.[35] Because these were fraud cases, some of which involved organizations that U.S. nationals directed,[36] the Commission did not give too much consideration as to how this expansive extraterritorial application of the securities laws would play out in foreign countries, or how legitimate foreign issuers would interpret the application.

34. *Id.*; *see Kukatush Mining Corp. v. SEC*, 198 F. Supp. 508 (D.D.C. 1961) (holding that an SEC list of Canadian companies believed to be distributing securities in the U.S. without registering under the Securities Act was not unconstitutional), *aff'd,* 309 F.2d 647 (D.C. Cir. 1962).

35. Karmel, *supra* n. 32, at 273. For examples of cases in which the SEC participated as amicus curiae, consult *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261–263 (2d Cir. 1989) (holding that Americans holding 2.5% of a British corporation was enough for American antifraud laws to apply extraterritorially), *modified*, 890 F.2d 569 (2d Cir. 1989); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975) (providing that American investors holding .2% of a foreign investment trust is insufficient for subject-matter jurisdiction); and *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968) (holding that a district court has subject-matter jurisdiction over Exchange Act violations if there are substantial effects in the U.S., even though the transactions occurred outside of the U.S.). *See also SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990) (declaring that a defendant can be subject to personal jurisdiction if he or she causes consequences in a state); *SEC v. Tome*, 833 F.2d 1086, 1087 (2d Cir. 1987) (involving the SEC's suit for violations of antifraud provisions against non-American individuals and companies because of insider trading that consisted of stock being bought on U.S. stock exchanges); *SEC v. United Fin. Group, Inc.*, 474 F.2d 354, 356–357 (9th Cir. 1973) (holding that the determination of jurisdiction should be based upon activities in the U.S. and their impact on American investors, not on the number of American investors compared with total sales). The SEC actively participated in the drafting of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) to assure that its broad extraterritorial jurisdiction was not compromised. *But see* Daniel L. Goelzer et al., *The Draft Revised Restatement: A Critique from a Securities Regulation Perspective*, 19 Intl. Law. 431, 471 (1985) (providing that the draft Restatement would result in narrowing the limits of international law and limiting the effects of U.S. securities laws on international business activities).

36. *E.g. IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980) (holding that there is subject-matter jurisdiction when the securities involved in violations were from American companies and the transactions took place in the U.S.); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 979 (2d Cir. 1975) (involving the sale of securities from an international sales-and-financial service organized in Canada, with its principal place of business in Switzerland, yet distributions went to two American banking houses); *Vencap*, 519 F.2d at 1016–1018 (holding that use of the U.S. to make fraudulent security devices for use abroad can be a basis for subject-matter jurisdiction); *SEC v. Gulf Intercontinental Fin. Corp.*, 223 F. Supp. 987, 994–995 (S.D. Fla. 1963) (providing that, when the true issuers of securities are American individuals and companies and the Canadian company is simply a medium for the issuance of securities, there is subject-matter jurisdiction).

In 1979, this isolationist approach reached a high-water mark when the SEC adopted a new form for foreign issuer disclosure[37] and changed to an internationalist or comity approach for a variety of business and political reasons.[38] One factor was the development of the Euro securities market and the U.S. government's appreciation that perhaps it was not good policy for the U.S. to encourage a viable global market operating in London in competition with U.S. capital markets.[39] Also, the privatization of formerly state-owned British enterprises involved offering securities of United Kingdom (U.K.) companies in the U.S.[40] This program's involvement of a friendly sovereign government allowed the SEC staff greater flexibility in processing foreign-issuer-disclosure documents.[41] Other factors that tilted the SEC in the direction of internationalism were the beginning of an era of much greater cooperation between the SEC and foreign regulators, the emergence of a truly international regulatory body in the form of a changed IOSCO, and foreign governments' interest in encouraging better securities disclosure and regulatory systems.[42]

During a period of about twenty years in which the SEC adopted an internationalist approach to securities regulation, the SEC revised its forms for foreign issuer registration,[43] and the staff made a concerted effort to accommodate the needs and requirements of foreign issuers that were listing or raising capital in the U.S.[44] The one place where a regulatory line was drawn concerned the reconciliation of accounting statements to U.S.

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37. *See* 17 C.F.R. at § 249.220f (describing the use of Form 20-F); *infra* nn. 44, 67 (discussing Form 20-F).

38. *Infra* nn. 39–42 (providing reasons for the change to an internationalist approach).

39. Rpt. of the Staff of the SEC to the Sen. Comm. on Banking, Hous. & Urb. Affairs & the H. Comm. on Energy & Commerce, *Internationalization of the Securities Markets* II-79–90, III-29–33 (July 27, 1987).

40. For a discussion on U.K. privatization, consult Daniel A. Braverman, *U.S. Legal Considerations Affecting Global Offerings of Shares in Foreign Companies,* 17 Nw. J. Intl. L. & Bus. 30, 105–108 (1996), and Charles S. Whitman III, *Privatizations*, in *International Securities Markets 1991* (PLI Handbook No. B4-6967, June 20–21, 1991).

41. Braverman, *supra* n. 40, 105–108.

42. *See generally* Steinberg, *supra* n. 31, at 27–28, 203–237 (discussing the SEC's attempts to improve international cooperation and to ensure effective enforcement abroad).

43. *See* 17 C.F.R. at § 249.220f (providing the SEC's revised Form 20-F).

44. Uri Geiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 Colum. Bus. L. Rev. 241, 254–255 (1997).

generally accepted accounting principles (U.S. GAAP).[45] In addition, the SEC developed exemptions from its registration requirements for foreign issuers.[46] One consequence of this change in attitude and changes in the global markets was an increase in foreign issuer registrations with the SEC and in U.S. stock-exchange listings of foreign companies.[47] Further, a foundation was laid for an international securities regulatory regime.[48]

In 2002, Congress passed Sarbanes-Oxley, which took a unilateralist approach to foreign issuer registration and regulation.[49] Whether that approach will persist or whether the SEC will return to a more internationalist approach to foreign issuer regulation remains to be seen. However, the statutory provisions make no real exceptions for foreign issuers and apply, on their face, to foreign issuers that have securities registered with the SEC.[50] The Act also includes intolerably short time frames for the passage of implementing rules, which, remarkably, the SEC met.[51] When the SEC passed these rules, it was in a very difficult position, led by an unpopular chairman and under political attack from all quarters in the aftermath of many serious financial scandals.[52] This made it extremely difficult for the SEC to accommodate foreign issuers—or for that matter, U.S. issuers—that had serious problems or concerns with Sarbanes-Oxley. In the short term, this

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45. *Id*.

46. *Id*. at 256–257.

47. *Id*. at 248–249. From 1985 to mid-1996, "the number of foreign reporting companies listed on U.S. securities exchanges [grew] . . . from 189 to 808." *Id*. at 248. By the end of 1999, there were 1,200 foreign companies reporting to the SEC under the Exchange Act. *International Accounting Standards Concept Release*, 65 Fed. Reg. 8896, 8899 (Feb. 23, 2000).

48. Geiger, *supra* n. 44, at 250–257.

49. William H. Donaldson, SEC Chairman, Testimony, *Implementation of the Sarbanes-Oxley Act of 2002* (Sen. Comm. on Banking, Hous. & Urb. Affairs, Sept. 9, 2003) (available at http://www.sec.gov/news/testimony/090903tswhd.htm).

50. *Id*.

51. *Id*.; *see generally Wishy-Washy: New Governance Rules from the SEC*, Economist 60 (Feb. 1, 2003) (available at 2003 WL 6244820) (discussing the short time frame).

52. On the same day in October 2002, the *Wall Street Journal* and *The New York Times* called for SEC Chairman Harvey L. Pitt's resignation. *Cleaning Up Dodge,* Wall St. J. A14 (Oct. 10, 2002) (available at 2002 WL-WSJ 3408336); *Revenge of the Accountants,* N.Y. Times A38 (Oct. 10, 2002) (available at LEXIS, News library, NYT file). Although the Chairman resigned shortly thereafter, the SEC's political problems did not disappear. *See* Stephen Labaton, *In Stormy Time, S.E.C. Is Facing Deeper Trouble,* N.Y. Times A1 (Dec. 1, 2002) (available at LEXIS, News library, NYT file) (discussing the SEC's struggle to maintain its job of protecting investors against abuses in the marketplace amid the growth of business and increased stock ownership).

generated frustrated and angry reactions from European and other commentators and appeared to cause a sharp decline in the number of foreign listings. However, there was a worldwide recession in the year following the passage of Sarbanes-Oxley, so the economy probably was also a factor in the decline of foreign listings. Nevertheless, the unilateralism of Sarbanes-Oxley has created a political obstacle to joint efforts by foreign regulators and the SEC in adopting a common approach to corporate governance problems. Although the EU has some reform ongoing with respect to corporate governance, Sarbanes-Oxley has engendered hostility toward the SEC in Europe and elsewhere.

Part II of this Article will briefly summarize the SEC's fluctuating policies toward foreign issuers, and Part III will outline the provisions of Sarbanes-Oxley that are of importance to foreign issuers with respect to corporate-governance issues. In Part IV, the Author will speculate about the implications of Sarbanes-Oxley upon international corporate-governance standards.

II. SEC POLICIES TOWARD FOREIGN ISSUERS

The number of issuers and investors involved in international securities activities increases every year, and a growing number of companies raise capital or list their shares on foreign exchanges. As of December 31, 2002, there were 1,319 foreign issuers registered and reporting with the SEC—451 of which were listed on the New York Stock Exchange, Inc. (NYSE), and 263 of which were listed on the National Association of Securities Dealers Automated Quotation (NASDAQ).[53] Yet, this is not a new phenomenon. The Mississippi Company, which a Scottish financier formed in France in the early eighteenth century, sold stock to investors all over Europe, inspiring the South Sea Bubble in England.[54] Investors from many nations invested in the Universal Company of the Maritime Suez Canal, which was formed in 1858 and built the Suez Canal.[55] During the 1920s, European and other

53. SEC, *Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission*, http://www.sec.gov/divisions/corpfin/internatl/companysummary.htm (last modified June 6, 2003).

54. Stuart Banner, *Anglo-American Securities Regulation: Cultural and Political Roots, 1690–1860*, at 42–43 (Cambridge U. Press 1998). South Sea Bubble was the name given to a series of financial projects that originated with the incorporation of the South Sea Company in 1711, and ended nine years later in disaster. *Id*.

55. Zachary Karabell, *The Suez Canal: A Cut in the Dunes*, Economist 82 (June 14,

investors purchased securities in the U.S., and U.S. investors purchased foreign securities.[56] From 1920 to 1931, 1,758 foreign capital issues—both governmental and private bonds—were floated in the U.S.[57] During the Depression, many of these bond issues were in default.[58]

When Congress passed the Securities Act, it contemplated the possibility that foreign issuers might make offerings in the U.S. and provided a special disclosure regime for sovereign debt.[59] Further, the law's jurisdictional reach extended to interstate and foreign commerce.[60] The SEC potentially could impose its disclosure obligations on any foreign company that sold shares to U.S. nationals.[61] Similarly, the SEC could require any foreign issuer with $10 million in assets and more than 500 shareholders worldwide—300 of which are U.S. investors—to register its equity securities pursuant to the Exchange Act and, thereafter, to make annual and periodic reports with the SEC.[62] However, because under U.S. law, corporate-governance regulation generally was left to the states, this task similarly was left to the national law of foreign issuers. Among other things, foreign issuers were exempt from SEC proxy solicitation regulations and short-swing insider transaction reporting requirements.[63] This led to the idea that the SEC would not attempt to impose corporate-governance regulations on foreign issuers.[64]

2003) (available at 2003 WL 58583674).

56. *See* Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnatl. L. 677, 691–694 (1990) (discussing factors that led U.S. investors to purchase foreign securities and foreign investors to purchase U.S. Securities in the 1920s).

57. Michael E. Parrish, *Securities Regulation and the New Deal* 74 (Yale U. Press 1970).

58. *Id*.

59. 15 U.S.C. at § 77aa.

60. *Id*. at § 77b(a)(7).

61. *See Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 124 (2d Cir. 1998) (suggesting that the Securities Act applies when both the offer and sale of a security are made in the U.S.); *Consol. Gold Fields PLC*, 871 F.2d at 261 (holding that the SEC could impose registration requirements on offers of unregistered securities that affect the creation of a market for unregistered securities in the U.S.).

62. 15 U.S.C. at § 78*l*.

63. 17 C.F.R. at § 240.3a12-3(b).

64. *See* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications,* 93 Nw. U. L. Rev. 641, 687, 706 (1999) (explaining that, even though issuers are not subject to U.S. corporate law, they must still enter into a listing requirement with NYSE, AMEX, or NASDAQ); James A. Fanto, *The Absence of Cross-Cultural Communication: SEC Mandatory Disclosure and Foreign Corpo-*

Nevertheless, the SEC insisted that foreign issuers, that desired to raise capital in the U.S. or list on a U.S. exchange, enter the SEC disclosure system.[65] In the mid-1970s, the SEC requested public comments on improving the disclosure requirements for foreign issuers, noting that such registration forms "require[d] substantially less information than [that] required of [U.S.] domestic issuers."[66] Despite strong negative comments, the SEC proposed new Form 20-F as a combined registration and annual reporting form,[67] asserting that objections from commenters "must be weighed against the economic interests of the substantial majority of [those submitting] comments."[68] Although the SEC adopted Form 20-F, it bowed to some of the foreign issuers' objections by deleting certain proposed disclosures relating to corporate governance. In particular, the SEC deleted provisions requiring the disclosure of officers' and directors' business experience and background and the identification of the three highest paid officers and directors and the aggregate amount paid to them; it also conditioned a material transactions disclosure to the requirements of applicable foreign law.[69]

Although the SEC refused to accord foreign regulators mutual recognition with respect to foreign-issuer-disclosure standards, with the exception of Canadian issuers,[70] it developed special registration-and-disclosure requirements for foreign issuers.[71] Additionally, following a policy of international cooperation and comity during the 1980s and 1990s, the SEC fashioned special exemptions for foreign issuers[72] and amended its foreign-issuer-disclosure forms to comply with disclosure standards endorsed by

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rate Governance, 17 Nw. J. Intl. L. & Bus. 119, 125 (1996) (explaining that foreign companies provide much less corporate governance information than U.S. companies provide).

65. Coffee, *supra* n. 64, at 687.

66. *Means of Improving Disclosure by Certain Foreign Private Issuers*, 41 Fed. Reg. 55012, 55013 (Dec. 16, 1976).

67. 17 C.F.R. at § 249.220(f). This continues to be the primary reporting form for foreign issuers.

68. *Foreign Private Issuers*, 42 Fed. Reg. 58684, 58685 (Nov. 10, 1977).

69. *Rules, Registration and Annual Report Form for Foreign Private Issuers*, 44 Fed. Reg. 70132, 70133 (Dec. 6, 1979).

70. 65 Fed. Reg. at 8904 n. 38.

71. *Adoption of Foreign Issuer Integrated Disclosure System*, 47 Fed. Reg. 54764, 54764 (Dec. 6, 1982).

72. For examples of special exemptions, consult 17 C.F.R. at §§ 230.144A; 230.901–230.904; 240.12g3-2(b), and *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, 64 Fed. Reg. 61382 (Nov. 10, 1999).

IOSCO.[73] Further, prior to the enactment of Sarbanes-Oxley, the SEC had worked toward an international accounting regulatory regime, pursuant to which foreign issuers might be able to file documents with the SEC using IAS, rather than U.S. GAAP.[74] Similarly, SROs permitted foreign issuers to obtain waivers from many corporate-governance requirements, although some minimal corporate-governance requirements, such as holding an annual meeting and maintaining an audit committee, could not be waived.[75]

With this background, foreign issuers were shocked to discover that various corporate-governance provisions of Sarbanes-Oxley would apply to them.[76] They had become accustomed to a regime in which the SEC and NYSE "assiduously avoided imposing governance requirements on foreign issuers."[77] Foreign issuers viewed U.S. financial scandals and failures as the context for Sarbanes-Oxley and argued that the SEC should not impose corporate-governance regulations on corporations that function in very different corporate finance systems and with very different structures than U.S. corporations.[78] However, Congress and the SEC took a unilateralist approach to corporate-governance regulation, retreating to the view that, if foreign issuers wish to tap the U.S. capital markets, they need to play by U.S. rules.[79] Despite prior SEC reluctance to interfere in the corporate governance of foreign corporations, the automatic application of many Sarbanes-Oxley provisions to all SEC registered companies made the SEC unwilling to craft exemptions for foreign issuers.[80]

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73. *International Disclosure Standards*, 64 Fed. Reg. 53900 (Oct. 5, 1999).

74. 65 Fed. Reg. at 8896.

75. NYSE, *NYSE Listed Company Manual* §§ 103, 302, 307, http://www.cm.nyse.com/cpgdate/nlcs/lcm.nsf/LaunchFrames (accessed Oct. 15, 2003).

76. Kathryn Stewart Lehman, *Executive Compensation Following the Sarbanes-Oxley Act of 2002*, 81 N.C. L. Rev. 2115, 2133 (2003).

77. John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 Colum. L. Rev. 1757, 1824 (2002).

78. Lehman, *supra* n. 76, at 2132–2133.

79. Karmel, *supra* n. 32, at 273.

80. Lehman, *supra* n. 76, at 2132–2133.

III. THE EFFECT OF SARBANES-OXLEY ON FOREIGN ISSUERS

A. General Observations

Congress passed Sarbanes-Oxley in response to the bursting of the stock-market bubble in the late-1990s and the uncovering of widespread financial fraud at large public companies that had been high fliers during the technology-stock boom.[81] The demise of Enron, Adelphia Communications, Qwest, Global Crossing, WorldCom, and other companies resulted in enormous losses to shareholders and employees of the affected companies, not only of their jobs, but also of their pensions.[82] Scandals involving some foreign issuers were publicized also.[83] Without inquiring too deeply into the reasons for the stock-market bubble and its collapse, or why accounting irregularities at public companies had become so pervasive, Congress passed Sarbanes-Oxley to restore investor confidence.[84] The Act was based primarily on recommendations from the SEC, and in the process, the SEC acquired power to regulate corporate governance at large public companies and to regulate auditors and attorneys more pervasively than it previously had.

Many of the Sarbanes-Oxley provisions apply to companies that are registered with the SEC under the Exchange Act;[85] there-

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81. *Id*. at 2116–2117. "About 1,000 corporations . . . had to restate earnings in the . . . five years" prior to the enactment of Sarbanes-Oxley. Jeff Madrick, *Economic Scene; Bush Is Talking Tough on Corporate Ethics, But Where Is the Regulatory Bite?* N.Y. Times C2 (July 11, 2002) (available at LEXIS, News library, NYT file).

82. *See* John T. Bostelman, *The Sarbanes-Oxley Deskbook* § 2:1–2:2.3, 2:4.2–2:6 (PLI 2003) (describing the effects of the demise of various corporations); Susan J. Stabile, *Enron, Global Crossing, and Beyond: Implications for Workers,* 76 St. John's L. Rev. 815, 819–824 (2002) (discussing reasons why some employees may or may not choose to invest in company stock).

83. *See* John Carreyrou & Mark Maremont, *Lernout States It Had 'Errors' in Accounting,* Wall St. J. C1 (Nov. 10, 2000) (available at 2000 WL-WLJ 26616332) (reporting that a Belgian corporation would "restate its financial statements . . . to make up for past accounting 'errors and irregularities'"); Craig Karmin, *Chill Seizes Foreign Markets after a Brief Rally: March Gains Helped Recover Some of Quarter's Losses; Investors Turn Cautious,* Wall St. J. C12 (Apr. 1, 2003) (available at 2003 WL-WSJ 3963412) (reporting possible accounting scandals in Europe); Michael Schroeder & Vanessa Fuhrmans, *Foreign Firms Trading in U.S. Get a Warning on Deception,* Wall St. J. A14 (Sept. 29, 2000) (available at 2000 WL-WSJ 26611436) (discussing a German corporation's deliberate misinterpretations to investors).

84. Lehman, *supra* n. 76, at 2117.

85. Such registration is pursuant to Section 12 of the Exchange Act. 15 U.S.C. at § 78*l*. Once an issuer is so registered, it becomes subject to annual and periodical disclosure

fore, on their face, these sections apply to foreign as well as U.S. issuers. It has been argued that Congress enacted Sarbanes-Oxley hastily, in response to financial scandals widely reported in the press during an election year, and gave no consideration as to whether it was appropriate to include foreign issuers in the statutory framework.[86] However, some small shifts in attitude at the SEC and its constituents prior to the enactment of Sarbanes-Oxley point in the direction of unilateralism at the SEC, as well as in Congress. The most recent SEC amendments to the Form 20-F filing requirements for foreign issuers made the disclosure requirements more stringent. For example, disclosures about management remuneration are more rigorous,[87] the SEC began prosecuting foreign issuers for securities law disclosure violations,[88] and, in response to U.S. issuers' objections to proposals that would allow foreign issuers to report financial results in IAS rather than U.S. GAAP, the SEC has yet to allow foreign issuers to report in IAS.[89] In its policies toward foreign issuers, the SEC

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requirements and other provisions of the Exchange Act. Foreign issuers may qualify for the Rule 12g3-2(b) exemption from registration by filing materials given to their home-country regulator. 17 C.F.R. at § 240.12g3-2(b). Further, foreign issuers are not subject to the SEC's proxy rules, an area in which the SEC attempted to impose corporate-governance standards prior to the enactment of Sarbanes-Oxley. *See supra* nn. 6–47 (providing a brief overview of the SEC's regulation of corporate governance).

86. Michael A. Perino, *American Corporate Reform Abroad: Sarbanes-Oxley and the Foreign Private Issuer*, 4 Europ. Bus. Org. L. Rev. 213, 213–214 (2003).

87. 64 Fed. Reg. at 53900. Although these amendments were purportedly put into place to conform SEC requirements to IOSCO's nonfinancial disclosure requirements, *id*. at 53901, they imposed some new disclosure obligations on foreign issuers, including additional and more detailed information about the directors' and officers' compensation and management's interest in certain transactions. *Id.* at 53917.

88. *See* SEC, *The Commission Files Accounting Fraud Action against Lernout & Hauspie Speech Products*, http://www.sec.gov/litigation/litreleases/lr7782.htm (Oct. 10, 2002) (announcing a civil injunction action against a European corporation that engaged in fraudulent behavior).

89. In its concept release on possible acceptance of IAS for SEC filings, the SEC seriously questioned the infrastructure for the implementation of IAS reporting, as well as the lack of international auditing standards. 65 Fed. Reg. at 8902. Further, some commenters on this release complained of disadvantages to U.S. issuers. *E.g.* Comments from Frank Fernandez, Sr. V.P., Secs. Indus. Assn., to Jonathan G. Katz, Sec., SEC, *File No. S7-04-00—International Accounting Standards* (May 23, 2000) (available at http://www.sec.gov/rules/concept/s70400/fernand1.htm) (discussing the risk to American investors involved in adopting IAS); Comments from PricewaterhouseCoopers LLP, to Jonathan G. Katz, Sec., SEC (May 23, 2000) (available at http://www.sec.gov/rules/concept/s70400/pricewa1.htm) (describing the disadvantages associated with permitting two different accounting standards). Also, the SEC has refused to allow foreign exchanges direct access to U.S. investors in the U.S., because foreign issuers that do not comply with SEC disclosure and accounting standards could then be traded without SEC registration. *Regulation of Exchanges*, 62

has long been caught between trying to accommodate foreign issuers to encourage them to enter the SEC disclosure system and list on U.S. exchanges, and trying not to be so accommodating that the SEC's policies with respect to U.S. issuers are undermined.[90] However, after the passage of Sarbanes-Oxley, the SEC became more interested in enforcing its new authority over corporate-governance regulation for U.S. issuers, rather than accommodating foreign issuers.

Because Sarbanes-Oxley and its implementing regulations are exceedingly complex and prolix, this Article will not attempt to discuss every provision of the statute, but it will highlight those provisions that have particular impact upon the federalization of corporate governance, federalization of the regulation of corporate advisors, and corporate governance implications of this federalization for foreign issuers.

B. Certifications

Sarbanes-Oxley requires the SEC to adopt rules requiring the principal executive and financial officers of SEC-registered issuers to certify annual and quarterly reports filed with the SEC.[91] The signing officer or officers must certify the following: he or she "has reviewed the report"; "the report does not contain any untrue [or misleading] statement[s]"; in all material respects, the report "fairly present[s] . . . the financial condition and results of operations of the issuer"; and the signing officers "are responsible for establishing and maintaining internal controls," and "have designed such internal controls to ensure that material information . . . is made known to such officers" and others, and "have evaluated the effectiveness of [such] controls."[92] Further, there are criminal penalties for providing false certifications.[93]

Although foreign issuers complained that imposing a certification requirement on their executives was inconsistent with the

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Fed. Reg. 30485, 30529 (June 4, 1997).

90. *Id*.

91. Pub. L. No. 107-204 at § 302, 2002 U.S.C.C.A.N. at 777.

92. *Id*. Rules 13a-14 and 13a-15 have implemented these provisions. 17 C.F.R. at § 240.13a-14–240.13a-15; *Certification of Disclosure in Companies' Quarterly and Annual Reports*, 67 Fed. Reg. 57276, 57277 (Sept. 9, 2002).

93. Pub. L. No. 107-204 at § 906, 2002 U.S.C.C.A.N. at 806 (amending 18 U.S.C. ch. 63).

SEC's historical treatment of foreign corporations,[94] the SEC applied the certification requirement to all registered and reporting companies.[95] This application created some conflicts with foreign law. In some jurisdictions, only the person actually responsible for a violation or omission may be held legally responsible;[96] in other jurisdictions, the entire board is responsible for financial statements published.[97] There were also requests that issuers be able to use local formulations of the term "fairly presents" as the acceptable certification standard.[98] The differences between the U.S. "fairly presents" standard and a "true and fair" standard, which is used in the U.K., other European countries, and Japan, are both subtle and profound.[99] In the U.S. and U.K., accounting certifications are based on professional accounting standards involving professional judgments.[100] In other countries, they are based on legal requirements.[101] Further, the "true and fair" ~~standard varies from country to country.[102] Although the SEC did~~

94. *E.g.* Comments from Dr. Arnold Knechtle, Dir., Fedn. of Swiss Indus. Holding Cos., to Jonathan G. Katz, Sec., SEC, *File No. S7-21-02—Certification of Disclosure in Companies' Quarterly and Annual Reports* (Aug. 19, 2002) (available at http://www.sec.gov/rules/proposed/s72102/aknechtle1.htm) (commenting on the SEC's historical practice of avoiding undue burdens on foreign issuers); Comments from Ian Mullen, C. Exec., British Bankers Assn., to Jonathan G. Katz, Sec., SEC, *Sarbanes-Oxley Act 2002: SEC Consultation on Certification of Disclosures and Other Issues* (Aug. 23, 2002) (available at http://www.sec.gov/rules/proposed/s72102/imullen1.htm) (describing the SEC's historical willingness to allow foreign registrants to implement local corporate-governance standards); *see also* Charles Goldsmith et al., *A Global Journal Report: Europe's CEOs Bite Sarbanes Bullet; New Corporate-Reform Law Vexes Some EU Companies, But They Want U.S. Listing,* Wall St. J. A11 (Aug. 22, 2002) (available at 2002 WL-WSJ 3404183) (reporting on European businesses' criticism of the rules).

95. 67 Fed. Reg. at 577277.

96. Comments from Dr. Arnold Knechtle, *supra* n. 94.

97. *See* Comments from Alexander Schaub, Dir. Gen., EC, to Jonathan Katz, Sec., SEC, *Proposed Rule: Disclosure under Sections 404, 406 and 407* (Nov. 29, 2002) (available at http://www.sec.gov/rules/proposed/s74002/aschaub1.htm) (discussing the lack of clarity in applying these audit-committee provisions to the single- and dual-board systems in Europe).

98. *See* Comments from Linklaters, to Jonathan G. Katz, Sec., SEC, *File No. S7-21-02—Certification of Disclosure in Companies' Quarterly and Annual Reports, Release No. 34-46300* (Aug. 19, 2003) (available at http://www.sec.gov/rules/proposed/s72102/linklaters1.htm) (encouraging the SEC to allow local accounting standards for foreign issuers). The comment also stated that some jurisdictions apply a "true and fair view," while others apply a "present fairly in all material respects" standard. *Id*.; *see* Matthew M. Benov, Student Author, *The Equivalence Test and Sarbanes-Oxley: Accommodating Foreign Private Issuers and Maintaining the Vitality of U.S. Markets*, 16 Transnatl. Law. 439, 449 (2003) (providing that some foreign issuers view "fairly presents" as problematic).

99. Lawrence A. Cunningham, *Semiotics, Hermeneutics, and Cash: An Essay on the True and Fair View,* 28 N.C. J. Intl. L. & Com. Reg. 893, 902 (2003).

100. *Id*. at 902–903.

101. *Id*. at 898–899.

from country to country.[102] Although the SEC did not accept the requests for local formulations of "fairly presents," it clarified that certification is not an attestation that the financial statements accord with GAAP, but rather a broader requirement of "overall material accuracy and completeness."[103]

A related problem for foreign issuers was the limitation on the use of non-U.S. GAAP financial information in registration statements and periodic reports filed on Form 20-F. Sarbanes-Oxley directed the SEC to adopt rules requiring non-GAAP financial measurements to be "reconcile[d] . . . with the financial condition and results of operations . . . under [GAAP]" and that any public disclosure or release of "pro forma financial information" not be false or misleading.[104] While this provision was aimed at abuses in earnings announcements by U.S. companies,[105] it had a serious impact on foreign issuers. In the regulation that the SEC adopted to implement this provision,[106] foreign issuers are not required to reconcile a non-GAAP financial measure to GAAP if the company's securities are "listed . . . outside the [U.S.]," "[t]he non-GAAP financial measure is not derived from or based on a [financial] measure calculated and presented in accordance with [U.S. GAAP]," and "[t]he disclosure is made . . . outside the [U.S.]"[107]

C. Internal Controls and Whistleblowers

Another troublesome disclosure that Sarbanes-Oxley imposes upon foreign issuers requires companies to include an explanation of their internal controls in their annual reports.[108] Under the SEC's final rules, an issuer's annual report must include the following: "[a] statement of [the] management's responsibility [over] . . . internal control[s]" and procedures for financial reporting; a statement of the framework used to evaluate "the effectiveness of the company's internal control[s] over financial reporting"; "[m]anagement's assessment of the effectiveness" of these inter-

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102. *Id.* at 902–904.
103. 67 Fed. Reg. at 57279.
104. Pub. L. No. 107-204 at § 401(b), 2002 U.S.C.C.A.N. at 786.
105. *Cautionary Advice Regarding the Use of "Pro Forma" Financial Information in Earnings Releases*, 66 Fed. Reg. 63731, 63732 (Dec. 10, 2001).
106. 17 C.F.R. at §§ 244.100–244.102.
107. *Conditions for Use of Non-GAAP Financial Measures*, 68 Fed. Reg. 4820, 4821 (Jan. 30, 2003).
108. Pub. L. No. 107-204 at § 404, 2002 U.S.C.C.A.N. at 789.

nal controls over the past year, identifying "any material weaknesses"; and a statement that the issuer's auditors attested to the management's assessment of internal controls.[109] The only relief given to foreign issuers in the SEC's adopting rules was a delayed date for compliance.[110]

In a later interpretive release on the use of non-GAAP financial measures, the SEC reiterated that, in its filings, a foreign issuer may include a non-GAAP financial measure that otherwise would be prohibited if, among other things, the non-GAAP financial measure is "required or expressly permitted by the standard-setter that establishes the [GAAP] used in the [company's] primary financial statements."[111] According to the staff, "expressly permitted" means that the measure is clearly and specifically identified as an acceptable measure by the responsible standard setter.[112]

The whistleblower-protection provisions are contained in three separate sections of Sarbanes-Oxley. A new civil cause of action was established that protects employees of publicly traded companies who lawfully "provide [evidence] . . . or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of the federal mail, wire, bank, or securities fraud statutes, any SEC rule or regulation, "or any provision of [f]ederal law relating to fraud against shareholders."[113] Another provision established criminal liability for whistleblower retaliation.[114] Finally, audit committees of public companies are required to "establish procedures for . . . the receipt, retention, and treatment of complaints" the company receives "regarding accounting, internal accounting controls, or auditing matters," and certain confidential, anonymous employee submissions concerning "questionable accounting or auditing matters."[115]

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109. *Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, 68 Fed. Reg. 36636, 36642 (June 18, 2003).

110. *Id*. at 36647–36648.

111. 68 Fed. Reg. at 4824.

112. *Id*.

113. Pub. L. No. 107-204 at § 806, 2002 U.S.C.C.A.N. at 803 (amending 18 U.S.C. ch. 73).

114. *See id*. at § 1107, 2002 U.S.C.C.A.N. at 810 (subjecting one to a fine and/or imprisonment of not more than ten years).

115. *Id*. at § 301, 2002 U.S.C.C.A.N. at 776 (amending 15 U.S.C. § 78f).

These provisions represent the federalization of state-law statutes protecting whistleblowers.[116] In addition, the SEC's rules regarding "up the ladder" reporting by attorneys is a further federalization of whistleblower protection.[117] However, the whistle-blowing provisions are not limited to U.S. public corporations; the criminal provision states that the provisions should be applied extraterritorially.[118]

D. Executive Compensation and Loans

During the 1990s, executive compensation reached exorbitant levels, and a number of abusive practices came to light when the stock-market bubble burst. Although Congress did not try to limit executive compensation directly, four Sarbanes-Oxley provisions were directed at specific management compensation abuses.

> If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the [CEO] and [CFO] . . . shall reimburse the issuer for . . . any bonus or other incentive-based or equity-based compensation . . . [and] any profits realized from the sale of securities of the issuer during [the twelve-month] period

following the publication of the financial statement required to be restated.[119] To give some teeth to this provision, the SEC was given the authority to freeze assets to prevent an issuer from paying bonuses to executives in cases involving financial fraud.[120] In addition, directors and executive officers of issuers are prohibited from trading in any of the issuer's equity securities during any blackout period when employees are prohibited from trading.[121] These provisions were relatively noncontroversial and were in response to some well-publicized abuses at Enron and other companies that failed prior to the time Congress enacted Sarbanes-

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116. *See* Dennis J. Block & Jonathan M. Hoff, *Whistleblower Protection under the Sarbanes-Oxley Act,* N.Y. L.J. 5, 5, 34 (June 26, 2003) (noting that Sarbanes-Oxley provides for corporate whistleblowers by allowing both civil causes of action and criminal prosecution for retaliation against whistleblowers).

117. *See infra* nn. 196–215 and accompanying text (discussing regulation of attorneys).

118. 18 U.S.C. § 1513(d) (2000).

119. Pub. L. No. 107-204 at § 304, 2002 U.S.C.C.A.N. at 778.

120. *Id*. at § 1103(a)(3)(A)(i), 2002 U.S.C.C.A.N. at 807 (amending 15 U.S.C. § 78u-3(c)).

121. *Id*. at § 306(a)(1), 2002 U.S.C.C.A.N. at 779.

Oxley.[122] Another Sarbanes-Oxley provision affecting management compensation, which prohibits companies from extending, maintaining, or arranging for the extension of credit to any director or CEO of any public company,[123] proved very disruptive to standard arrangements at many corporations. Questions concerning indemnification advances, travel advances, personal use of company cars, split-dollar life insurance, and cashless option exercises have been so pervasive that twenty-five major law firms released a joint outline describing their views on interpretive issues with respect to the prohibition against loans to CEOs.[124]

Since the statute does not contain exemptions for foreign executives and does not require the SEC to pass implementing rules, the Sarbanes-Oxley provisions regarding the forfeiture of bonuses and the prohibition against loans to executives are applicable to foreign issuers in the SEC disclosure system.[125] Furthermore, certain exceptions in the statute for home loans, consumer loans, and credit and margin loans made by banks and financial institutions to their executives do not deal with foreign financial institutions. This unequal treatment has given rise to serious criticism.[126] However, the SEC rule prohibiting directors and ex-

122. *See* Lehman, *supra* n. 76, at 2115–2117 (explaining that Congress passed Sarbanes-Oxley to provide relief due to scandals taking place in the corporate arena, and noting that the Act now hinders several forms of executive compensation). The loans made to executives of Tyco International Ltd., which were exposed shortly before Sarbanes-Oxley was signed, were particularly egregious. *See* Andrew Ross Sorkin & Susan Saulny, *Former Tyco Chief Faces New Charges,* N.Y. Times C1 (June 27, 2002) (available at LEXIS, News library, NYT file) (describing the indictment of Tyco's former Chairman and CEO on charges that he engaged in fraudulent activity when he used company funds and loans for personal use).

123. Pub. L. No. 107-204 at § 402(a)(k)(1), 2002 U.S.C.C.A.N. at 787 (amending 15 U.S.C. § 78m).

124. *See* Bostelman, *supra* n. 82, at § 13:2.1–13:2.6.

125. Lehman, *supra* n. 76, at 2133–2134.

126. *See* Comments from Ian Mullen, C. Exec., British Bankers Assn., to Jonathan Katz, Sec., SEC, *Sarbanes-Oxley Act 2002: SEC Consultation on Certification of Disclosures and Other Issues* (Aug. 23, 2002) (available at http://www.sec.gov/rules/proposed/s72102/imullen1.htm) (highlighting the difficulties that Sections 301, 401, and 402 of Sarbanes-Oxley impose upon foreign issuers, and suggesting that foreign issuers should be exempt from certain requirements contained in those sections); Comments from Sullivan & Cromwell, to Giovanni P. Prezioso, Gen. Counsel, SEC, *Conflicts with Foreign Law under Section 301 and Other Provisions of the Sarbanes-Oxley Act of 2002* (Oct. 11, 2002) (available at http://www.sec.gov/rules/proposed/s72102/sullivanuk1.htm) (discussing the firm's criticism of Section 301 and certain home-country legal requirements, and describing the firm's suggestions of how to remedy such conflicts).

ecutive officers from trading during pension plan blackout periods does contain an exemption for foreign executives.[127]

E. Codes of Ethics

Sarbanes-Oxley requires the SEC to issue rules requiring issuers to disclose whether they have codes of ethics applicable to senior financial officers.[128] The SEC rules implementing this provision require issuers to disclose, in their annual reports, whether a code of ethics has been adopted and, if the issuer has adopted a code of ethics, to file it with the SEC.[129] Although the SEC made these rules applicable to foreign issuers, they only need to make the required disclosures annually.[130]

The SEC rules specify neither the exact details nor any specific language that must be included in a code of ethics, but SRO proposed rules have included some of the matters that should be touched upon.[131] The open-ended nature of the Sarbanes-Oxley provision and SEC rules give considerable scope to the SEC to insert its views concerning corporate governance into the workings of public corporations, either through future enforcement actions or otherwise.

The provision with respect to codes of ethics is similar to the European method of regulating corporate governance through codes and then compelling issuers to disclose whether they comply with code recommendations, and if not, why not.[132] Despite this similarity, Europeans objected to becoming subject to the

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127. 17 C.F.R. at pt. 245. In general, under Regulation Blackout Trading Restriction, a blackout period occurs if there is a three or more day period during which there is a suspension of trading in a covered individual account that affects fifty percent or more of the participants or beneficiaries located in the U.S. *Id*. at § 245.100(b)(1). For foreign issuers, even if this fifty-percent test is met, if the number of affected participants that the issuer covers in the U.S. is less than fifteen percent of the worldwide number of the issuer's employees, the regulation is inapplicable. *Id.* at § 245.100(b)(2)(ii).

128. Pub. L. No. 107-204 at § 406(a), 2002 U.S.C.C.A.N. at 789.

129. 17 C.F.R. at § 229.406; *see Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002*, 68 Fed. Reg. 5110, 5110 (Jan. 31, 2003) (stating that the SEC requires companies to disclose "whether it has at least one 'audit committee financial expert'" and any "amendments to, and waivers from," any relevant code of ethics requirement).

130. 17 C.F.R. at § 229.406(c)(3).

131. *Infra* nn. 216–226 and accompanying text (discussing SRO proposals).

132. Special Study Group, *supra* n. 3, at 1548–1549.

Sarbanes-Oxley provisions regarding codes of ethics.[133] Nevertheless, the SEC imposed such a requirement on foreign issuers.[134]

F. Audit Committees

The SEC began advocating audit committees comprised of independent directors as early as 1941,[135] but took no action to implement this idea until the mid-1970s.[136] It then brought several enforcement cases in which there were consent injunctions ordering a board restructuring so that there would be an audit committee that had a majority of unaffiliated or independent directors.[137] In addition, the SEC used its leverage with the NYSE and other SROs to persuade them to make having an audit committee with a majority of independent directors a condition of listing on an exchange.[138] However, the definition of "independence" in the NYSE's rule was not stringent.[139]

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133. *See* Comments from Alexander Schaub, Dir. Gen., EC, to Jonathan Katz, Sec., SEC, *Proposed Rule: Disclosure under Sections 404, 406 and 407* (Nov. 29, 2002) (available at http://www.sec.gov/rules/proposed/s74002/aschaub1.htm) (describing the EC's concerns regarding disclosure requirements and the negative effect that such requirements will have on foreign companies).

134. 17 C.F.R. at § 229.406.

135. Special Study Group, *supra* n. 3, at 1506; *see In re McKesson & Robbins, Inc.; Summary of Findings and Conclusions*, 11 Fed. Reg. 10918, 10918–10919 (Sept. 27, 1946) (holding that it would be in the investors' best interests to elect current-year auditors and to establish a committee to nominate auditors to report on the company's status).

136. Special Study Group, *supra* n. 3, at 1506.

137. *See e.g. SEC v. Mattel, Inc.*, 555 Fed. Sec. L. Rep. (CCH) ¶¶ 94,807, 96,693 (D.D.C. Oct. 1, 1974) (requiring a corporation to establish an audit committee made up of no fewer than three independent directors to review the financial records); *SEC v. Killearn Props., Inc.*, 731 Fed. Sec. L. Rep. (CCH) ¶¶ 96,256, 92,693–92,695 (N.D. Fla. May 1977) (requiring a company to maintain an audit committee of outside directors that would review the financial records).

138. *See In re NYSE, Inc.*, Exch. Act Release 13346, 11 SEC Docket 1945 (Mar. 9, 1977) (noting that the proposed rule would require listed companies to establish and maintain audit committees composed of independent directors); ALI, *Principles of Corporate Governance: Analysis and Recommendations* § 3.05 cmt. a (1994) (noting that the NYSE requires listed companies to establish and maintain audit committees made up of independent directors).

139. The NYSE listing rules required all "listed [domestic] companies to establish and maintain an audit committee 'comprised solely of directors independent of management and free from any relationship that, in the opinion of its Board of Directors, would interfere with the exercise of independent judgment as a committee member.'" ALI, *supra* n. 138. Other formulations similarly allowed directors to exercise their business judgment to determine questions of independence. *E.g.* ABA, *Corporate Director's Guidebook—1994 Edition,* 49 Bus. Law. 1243, 1257–1258, 1264 (1994) (noting that independent directors, when serving on an audit committee, should exercise their independent judgment).

In September 1998, the heads of the NYSE and National Association of Security Dealers, Inc., (NASD) appointed a Blue Ribbon Committee, at the behest of the SEC Chairman, to inquire into the adequacy of the audit-oversight process by independent directors.[140] The Committee issued a report recommending that "the NYSE and the NASD require that listed companies with a market capitalization above $200 million . . . have an audit committee composed solely of independent directors."[141] The Committee also recommended a requirement of financial literacy for audit committee members.[142] In lieu of the SEC's rule proposals, the SROs filed proposals for amended listing standards.[143] Then, after the collapse of Enron in February 2002, the SEC asked the SROs to further review their listing requirements "with the goal of en-

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140. Special Study Group, *supra* n. 3, at 1509.

141. Blue Ribbon Comm., *Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees* 11, http://www.nyse.com/pdft/blueribb.pdf (1999). The Committee recommended that audit committee members should "be considered independent if they have no relationship to the corporation that may interfere with the exercise of their independence from management and the corporation." *Id.* at 10. The following are examples of questionable relationships:

- a director being employed by the corporation or any of its affiliates for the current year or any of the past five years;
- a director accepting any compensation from the corporation or any of its affiliates other than compensation for board service or benefits under a tax-qualified retirement plan;
- a director being a member of the immediate family of an individual who is, or has been in any of the past five years, employed by the corporation or any of its affiliates as an executive officer;
- a director being a partner in, or a controlling shareholder or an executive officer of, any for-profit business organization to which the corporation made, or from which the corporation received, payments that are or have been significant to the corporation or business organization in any of the past five years; [and]
- a director being employed as an executive of another company where any of the corporation's executives serves on that company's compensation committee.

Id. at 10–11. A "significant" transaction is $200,000 over a two-year period. ALI, *supra* n. 138, at § 1.34(a)(4).

142. Blue Ribbon Comm., *supra* n. 141, at 25–26.

143. *See* SEC, *SRO Rulemaking*, *AMEX Rulemaking: Notice of Filing of Proposed Rule Change Amending the Exchange's Audit Committee Requirements*, http://www.sec.gov/rules/sro/am9938n.htm (Oct. 6, 1999) (describing the proposed rule change concerning independent directors and audit committees); SEC, *SRO Rulemaking*, *NASD Rulemaking: Notice of Filing of Proposed Rule Change Amending Nasdaq's Audit Committee Requirements*, http://www.sec.gov/rules/sro/nd9948n.htm (Oct. 6, 1999) (describing the proposed rule change concerning qualification requirements and design criteria); SEC, *SRO Rulemaking*, *NYSE Rulemaking: Notice of Filing of Proposed Rule Change Amending Audit Committee Requirements of Listed Companies*, http://www.sec.gov/rules/sro/ny9939n.htm (Oct. 6, 1999) (describing the proposed rule change concerning corporate-governance-listing standards).

hancing the accountability, integrity and transparency of the Exchange's listed companies," and, in June 2002, a committee of the NYSE issued a report on possible changes to the NYSE listing standards.[144] This report had a variety of recommendations that went beyond Sarbanes-Oxley, including the following: "[requiring] listed companies to have a majority of independent directors," with a stringent definition of the term "independent";[145] mandating "regularly scheduled executive sessions" of boards chaired by a lead director or independent chairman;[146] "[requiring] listed companies to have [nominating and compensation committees] composed entirely of independent directors";[147] and requiring that "[s]hareholders . . . be given the opportunity to vote on all equity-compensation plans."[148] Several of these recommendations were then filed with the SEC as proposed new listing standards.[149] Among the NYSE proposals were listing requirements to the effect that "non-management directors . . . must meet at regularly scheduled executive sessions" and that nominating and compensation committees be "composed entirely of independent directors."[150] NASDAQ filed similar, although slightly different, listing proposals with the SEC.[151]

Sarbanes-Oxley gave the SEC the authority it had long wanted to restructure corporate audit committees, but it did so primarily by authorizing the SEC to direct SROs to change their listing rules to meet certain standards.[152] Also, Sarbanes-Oxley gave the SEC a mandate to require a public company to disclose

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144. NYSE, *Report of the New York Stock Exchange Corporate Accountability and Listing Standards Committee* 1, http://www.nyse.com/pdfs/corp_govtreport.pdf (June 6, 2002) [hereinafter *NYSE Corporate Accountability Report*].

145. *Id*. at 6–8.

146. *Id*. at 8.

147. *Id*. at 9–11.

148. *Id*. at 17–18.

149. *Supra* n. 137 and accompanying text (providing some of the proposals).

150. *Self-Regulatory Organizations*; *Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Relating to Corporate Governance*, 68 Fed. Reg. 19051, 19051–19053 (Apr. 17, 2003).

151. *See Self-Regulatory Organizations*; *Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Proposed Amendments to NASD Rules 4200 and 4350 Regarding Board Independence and Independent Committees*, 68 Fed. Reg. 14451 (Mar. 25, 2003) (containing similar proposals concerning the independence of directors serving on audit committees and the proposal that they be present for executive sessions).

152. Pub. L. No. 107-204 at § 301, 2002 U.S.C.C.A.N. at 775–777 (amending 15 U.S.C. § 78f).

whether its audit committee includes at least one "financial expert."[153] The SROs' regulation of public-company audit committees and the substantive standards articulated in Sarbanes-Oxley were not significant departures from previous listing standards, but the statute did take authority away from management and place it with the audit committee. The specific grant of authority to the SEC to regulate the structure and duties of audit committees was a radical departure from previous legal theories regarding the divide between federal and state law. Further, this grant of authority embraced restructuring the audit committees of listed foreign issuers.

There are a number of important ways in which Sarbanes-Oxley altered the structure and work of audit committees. Each audit committee member of a listed issuer must be "independent," meaning that an audit committee member "may not, other than in his or her capacity as a [committee] member . . . accept any consulting, advisory, or other compensatory fee from the issuer," or "be an affiliated person of the issuer or any subsidiary thereof."[154] "The audit committee . . . shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer."[155]

> [A]udit committee[s] [must] establish procedures for . . . [receiving, retaining, and treating] complaints . . . regarding accounting, internal accounting controls, or auditing matters; and . . . the confidential, anonymous submission by employees . . . regarding questionable accounting or auditing matters.[156]

The "audit committee [must] have the authority to engage independent counsel and other advis[o]rs," and it must be adequately

153. *Id*. at § 407, 2002 U.S.C.C.A.N. at 790.

154. *Id*. at § 301(m)(3)(B), 2002 U.S.C.C.A.N. at 776 (amending 15 U.S.C. § 78f). This definition of independence is more stringent than prior definitions utilized for listed company audit committees. *Supra* n. 139 (discussing a less stringent definition of independence); *see* ALI, *supra* n. 138, at § 1.34 (providing that a director who has a significant relationship will be deemed disinterested). However, the concept of an independent director is a fluid one and is difficult to encapsulate in a legislative definition. *See e.g. In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920 (Del. Ch. 2003) (holding that "independence" requires an objective examination of whether the director can make decisions based solely on the corporation's best interests).

155. Pub. L. No. 107-204 at § 301, 2002 U.S.C.C.A.N. at 776 (amending 15 U.S.C. § 78f).

156. *Id*.

funded.[157] Although the SROs, rather than the SEC, are to implement all of these requirements, the SROs have authority only to go beyond, not to derogate from, these minimum standards.[158] The SEC is directed to adopt rules requiring a public company to disclose whether its audit committee includes at least one person who is a "financial expert."[159]

The application of the audit-committee-restructuring provisions to foreign issuers created a furor. That statute contained a very limited exemption for foreign-government securities and foreign private issuers that have a board of independent auditors separate from the board of directors.[160] However, the creation of an independent audit committee is a "revolutionary reform" for corporations incorporated under civil-law regimes, because the two-tier board structure does not have independent directors on either the executive or managing board, and representatives of employees compose half of the supervisory board.[161] The rules that the SEC proposed to implement the audit-committee-composition requirements of Sarbanes-Oxley made some concessions to foreign issuers.[162] Exceptions were proposed relating to corporations with mandated employee representation on boards of directors, controlling and foreign-government shareholders, and boards with statutory auditors.[163] Some commenters on this proposal called for a wholesale exemption for foreign issuers based on comity.[164] Others called for flexibility and the pursuit of international convergence on corporate-governance standards.[165] A number of commenters

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157. *Id*.

158. Special Study Group, *supra* n. 3, at 1518.

159. Pub. L. No. 107-204 at § 407, 2002 U.S.C.C.A.N. at 790.

160. 15 U.S.C. at § 78j-1(m)(3)(C).

161. Coffee, *supra* n. 77, at 1825.

162. *Standards Relating to Listed Company Audit Committees*, 68 Fed. Reg. 2638, 2647–2648 (Jan. 17, 2003).

163. *Id*.

164. *E.g.* Comments from Cleary, Gottlieb, Steen & Hamilton, to Jonathan Katz, Sec., SEC, *File No. S7-02-03—Standards Relating to Listed Company Audit Committees* (Feb. 18, 2003) (available at http://www.sec.gov/rules/proposed/s70203/clearygot1/htm) (requesting additional flexibility for foreign private issuers); Comments from Alexander Schaub, Dir. Gen., EC, to Jonathan Katz, Sec., SEC, *Proposed Rule: Standards Relating to Listed Company Audit Committees* (Feb. 18, 2003) (available at http://www.sec.gov/rules/proposed/s70203/aschaub1.htm) (requesting a general exemption for EU companies with equivalent governance requirements).

165. *Id*.; *see also* Comments from Davis Polk & Wardwell, to Jonathan Katz, Sec., SEC, *File No. S7-02-03—Standards Relating to Listed Company Audit Committees* (Feb. 18, 2003) (available at http://www.sec.gov/rules/proposed/s70203/davispolk1.htm) (suggesting

found the exemption for statutory auditors insufficient to accommodate home-country practices.[166]

The adopting release for the SEC rule implementing the audit-composition requirements contained enlarged exemptions for foreign issuers,[167] in recognition of the two-tier board structures of Germany and some other countries,[168] and the requirements in Japan, Italy, and some other countries for statutory boards of auditors.[169] The SEC's rationale was that, in those countries, there was a mechanism, other than the audit committee, to serve as a counterweight to management with respect to the accuracy of audited accounts.[170] Even though some foreign issuers might decide not to list on a U.S. exchange under the new standards,[171] and the corporate governance structures of many foreign companies are significantly different than the structure of U.S. companies, the

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that the rule be more flexible to the "evolving standards of corporate governance" and "permit additional exemptions for foreign private issuers"); Comments from David Devlin, Pres., Fédération des Experts Compatables Européens, to Jonathan G. Katz, Sec., SEC, *SEC Proposed Rule: Standards Relating to Listed Company Audit Committees, File No. S7-02-03* (Dec. 20, 2002) (available at http://www.sec.gov/rules/proposed/s70203/ddevlin1.htm) (commenting on the organization's "support [of the] international convergence of standards to enhance global confidence in auditing").

166. *See* Comments from Baker & McKenzie, to Jonathan Katz, Sec., SEC, *Proposed Rules for Standards Relating to Listed Company Audit Committees (File No. S7-02-03) Regarding Ukraine* (Feb. 18, 2003) (available at http://www.sec.gov/rules/proposed/s70203/baker1.htm) (suggesting revisions to Rule 10-A so the exemption would be available to Ukrainian issuers); Comments from Davis Polk & Wardwell, *supra* n. 165 (suggesting modification "for consistency with a broader range of home country laws"); Comments from Hiroshi Endo, Dir., Nippon Keidanren (Japan Bus. Fedn.), to Jonathan Katz, Sec., SEC, *Comments on the Proposed Rule: Standards Relating to Listed Company Audit Committees (File. No. S7-02-03)* (Feb. 18, 2003) (available at http://www.sec.gov/rules/proposed/s70203/hendo1.htm) (offering modifications to increase exemptions and to ensure that Japanese issuers could fit into the exemption); Comments from Stefano Micossi, Italian Assn. of Ltd. Liab. Cos., to Jonathan Katz, Sec., SEC, *Standards Relating to Listed Company Audit Committees—Proposed Rule in Release Nos. 33-8173; 34-47137; IC-25885; File No. S7-02-03* (Feb. 18, 2003) (available at http://www.sec.gov/rules/proposed/s70203/smicossi1.htm) (arguing for accommodation with "evolving corporate governance rules and practices of other countries").

167. 17 C.F.R. at § 240.10A-3.

168. *Standards Relating to Listed Company Audit Committees*, 68 Fed. Reg. 18788, 18802 (Apr. 16, 2003).

169. *Id*. at 18803 n. 160.

170. *Id*. at 18802.

171. *See* Craig Karmin, *World Stock Markets: Foreign Firms Lose Urge to Sell Stock in U.S.,* Wall St. J. C1 (July 24, 2003) (available at 2003 WL-WSJ 3975005) (noting a reduction in foreign listings, in which analysts have blamed Sarbanes-Oxley).

SEC declined to apply a general mutual-recognition standard to the requirement for audit committee composition.[172]

In the final rule defining a "financial expert" for the audit committee, the SEC came up with a new term—"audit committee financial expert."[173] Additionally, the SEC required reporting companies, in their annual reports, to disclose whether they have at least one such expert, and if they do not have an audit committee financial expert, they must provide an explanation.[174] Such an expert must possess the following characteristics:

> (i) An understanding of [GAAP] and financial statements;
> (ii) The ability to assess the general application of [GAAP] in connection with the accounting for estimates, accruals and reserves;
> (iii) Experience preparing, auditing, analyzing or evaluating financial statements that . . . are generally comparable to . . . the registrant's financial statements . . . ;
> (iv) An understanding of internal controls and procedures for financial reporting; and
> (v) An understanding of audit committee functions.[175]

In its final rule, the SEC recognized that such an individual could have acquired his or her qualifications for becoming an audit committee financial expert through "[e]ducation and experience as a principal financial officer" or auditor, experience supervising or "assessing the performance of companies," experience as a public accountant or through "[o]ther relevant experience."[176] The SEC also created a safe-harbor provision for audit committee financial experts to the effect that such a designation "does not impose . . . any duties, obligations or [liabilities] that are greater than the duties, obligations [or liabilities] imposed such a person" would have as an audit committee member.[177] The only relief

172. 68 Fed. Reg. at 18802.
173. 17 C.F.R. at § 229.401(h)(1).
174. *Id*. For an explanation of the disclosure requirements, consult 68 Fed. Reg. at 5110; *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002*, 68 Fed. Reg. 15353, 15353 (Mar. 31, 2003).
175. 17 C.F.R. at § 229.401(h)(2).
176. *Id*. at § 229.401(h)(3).
177. *Id.* at § 229.401(h)(4)(ii).

given to foreign issuers was that, in determining whether someone is an audit committee financial expert, the understanding of GAAP need not be U.S. GAAP, but can be the GAAP that the issuer uses to prepare its primary financial statements.[178]

G. Regulation of Accountants

The creation of the Public Company Accounting Oversight Board (PCAOB)—a new federal watchdog for the regulation of the public accounting profession—is at the heart of the reforms embodied in Sarbanes-Oxley,[179] but this new framework affects corporate governance only indirectly. The use of the PCAOB to obtain leverage over foreign accountants has proven very controversial. In Sarbanes-Oxley, the SEC obtained the power it long sought to formulate auditing standards and to discipline accountants for improper professional conduct.[180] The PCAOB's responsibilities include the following: the registration and inspection of all "public accounting firms that prepare audit reports" for public companies; the adoption and modification of "auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports" for public company audits; the investigation of registered firms for violations of rules relating to audits; and the imposition of sanctions for such violations.[181] This federalization of the regulation of auditing standards is significant. In addition, Sarbanes-Oxley did not exempt foreign auditors from its provisions. The PCAOB—as one of Sarbanes-Oxley's first acts after its formation[182]—proposed a rule requiring the registration of foreign auditors for SEC registered and reporting companies.[183] This caused great consternation abroad and has been protested vigorously.[184] The Sarbanes-Oxley's legislative history sug-

178. *Id.* at Instr. 3 to Item 401(h). Also, foreign issuers have until July 31, 2005, to comply with this new rule. 68 Fed. Reg. at 18788.

179. Pub. L. No. 107-204 at § 101, 2002 U.S.C.C.A.N. at 750.

180. *Id*. at § 101(a), 2002 U.S.C.C.A.N. at 750.

181. *Id*. at § 101(c), 2002 U.S.C.C.A.N. at 750.

182. The SEC has approved the PCAOB as an appropriate organization under Sarbanes-Oxley. *Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002*, 68 Fed. Reg. 23336, 23336 (May 1, 2003).

183. *Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules Relating to Registration System*, 68 Fed. Reg. 35016, 35020 (June 11, 2003).

184. *See* David S. Hilzenrath, *Foreign Firms Wary of SEC Rules; Business Regulators from Abroad Urge Exemptions,* Wash. Post E04 (Dec. 18, 2002) (available at 2002 WL 104307027) (reporting that representatives of certain global accounting firms urged the

gests, however, that Congress meant to subject foreign auditors of companies that sell shares to U.S. investors to the jurisdiction of the PCAOB.[185] Further, the SEC seems intent upon having the right to obtain documents from foreign auditors that may be privileged in their jurisdictions.[186]

Sarbanes-Oxley also has a number of auditor-independence provisions that affect not only auditors, but also audit committees and executives and directors of public companies.[187] Most of these provisions were a response to egregious conflicts of interest at Enron and other failed companies, which the SEC was unable to abolish previously.[188] Under Sarbanes-Oxley, an auditor for an issuer is prohibited from providing a list of non-audit services, including the following:

> (1) bookkeeping . . . ;
> (2) financial information systems design and implementation;
> (3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;
> (4) actuarial services;
> (5) internal audit outsourcing services;
> (6) management functions or human resources;
> (7) broker or dealer, investment advisor, or investment banking services;
> (8) legal services and expert services unrelated to the audit; and

SEC to offer relief from the rules to foreign countries); *Foreign Legislation Seen Hindering PCAOB Oversight of Foreign Auditors,* 9 World Sec. L. Rep. (BNA) 15 (Apr. 2003) [hereinafter *Foreign Legislation*] (providing examples of the negative reaction abroad); *PCAOB Proposes Rules on Investigation, Inspection; Progress Seen on Foreign Front,* 35 Sec. Reg. & L. Rep. (BNA) 1306 (Aug. 4, 2003) (discussing the negative reaction overseas).

185. Sen. Rpt. 107-205 at 11 (July 3, 2002).

186. *See* Carrie Johnson, *Accounting Panel, SEC Backs Registry for Foreign Auditors,* Wash. Post E01 (Apr. 1, 2003) (available at 2003 WL 17424865) (reporting that foreign auditors have lobbied for exemption); Carrie Johnson, *Deloitte Probe to Test Reach of U.S. Laws; SEC Plans to Subpoena Ahold's Foreign Auditor,* Wash. Post E01 (Feb. 28, 2003) (available at 2003 WL 13335507) (referencing Sarbanes-Oxley, which allowed SEC lawyers to subpoena audit papers from foreign offices of big U.S. accounting firms). Data privacy and confidentiality laws in some foreign countries may be a serious barrier to giving work papers to the SEC. *Foreign Legislation*, *supra* n. 184, at 15.

187. Pub. L. No. 107-204 at §§ 201–209, 2002 U.S.C.C.A.N. at 771–775.

188. Hilzenrath, *supra* n. 184, at E04.

(9) any other service that the [PCAOB] determines, by regulation, is impermissible.[189]

Further, the issuer's audit committee must pre-approve all services that an auditor provides.[190] The SEC's rule implementing this provision requires disclosures designed to give investors an understanding of how the audit committee is managing the company's relationship with its auditor.[191] Other provisions of Sarbanes-Oxley require rotation of an audit partner every five years[192] and direct the SEC to study the possible mandatory rotation of audit firms.[193] A conflict-of-interest provision prohibits anyone who was employed by an auditor for an issuer within a one-year period from becoming the "[CEO], controller, [CFO], or chief accounting officer" of the issuer.[194] These auditor-independence requirements affect foreign issuers and their auditors. While the SEC has made some very limited accommodations for foreign auditors, it has applied the auditor independence and rotation rules to them generally.[195]

H. Regulation of Attorneys

The Sarbanes-Oxley provision giving the SEC authority to regulate attorneys is another big topic that is beyond the scope of this Article, but it also impacts corporate governance indirectly and has implications for foreign lawyers. Further, it federalizes

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189. Pub. L. No. 107-204 at § 201(g), 2002 U.S.C.C.A.N. at 771–772 (amending 15 U.S.C. § 78j-1).

190. *Id*. at § 202, 2002 U.S.C.C.A.N. at 772 (amending 15 U.S.C. § 78j-1).

191. *Strengthening the Commission's Requirements Regarding Auditor Independence*, 68 Fed. Reg. 6006, 6027–6028 (Feb. 5, 2003).

192. Pub. L. No. 107-204 at § 203(j), 2002 U.S.C.C.A.N. at 773 (amending 15 U.S.C. § 78j-1). This could result in a problem at some foreign locations where there are not a large number of audit partners with expertise in a particular industry, but the only relief given to foreign issuers in the SEC's implementing rules was transition relief. 68 Fed. Reg. at 6021–6022.

193. Pub. L. No. 107-204 at § 207, 2002 U.S.C.C.A.N. at 775. Now that there are only four big firms, thanks to the Justice Department's decision to close down Arthur Anderson, such a system would accomplish little. The GAO was instructed to study the concentration within the accounting profession. *Id*. at § 701, 2002 U.S.C.C.A.N. at 797.

194. *Id*. at § 206, 2002 U.S.C.C.A.N. at 774–775 (amending 15 U.S.C. § 78j-1).

195. *See* Ethiopis Tafara, Acting Dir., OIA, SEC, Speech, *Addressing International Concerns under the Sarbanes-Oxley Act* (Luxembourg, June 10, 2003) (available at http://www.sec.gov/news/speech/spch061003et.htm) (reporting that, although the SEC has made accommodations for foreign issuers, it intends to insist upon the independence of foreign auditors).

an area of the law in which the SEC's reach has long exceeded its grasp and which has been extremely controversial. The furor over the SEC's proposed rulemaking to implement Sarbanes-Oxley with respect to lawyers indicates that this controversy will continue.

In Sarbanes-Oxley, the SEC finally achieved legislative blessing for its ability to bring administrative actions against both attorneys and accountants and to censure, suspend, or bar any person from "appearing or practicing before the Commission."[196] Further, Sarbanes-Oxley defines "improper professional conduct" as "intentional or knowing conduct, including reckless conduct" and "highly unreasonable [negligent] conduct" or "repeated instances of unreasonable [negligent] conduct."[197] Setting forth this standard settled a controversy as to whether the SEC had the authority to sanction auditors for negligent conduct.[198]

In addition to giving the SEC the power to bring malpractice cases against attorneys, Sarbanes-Oxley directs the SEC, "[n]ot later than 180 days after the enactment of [the] Act . . . [to] issue rules . . . setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission . . . in the representation of issuers."[199] Such rules include "requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the [CEO]."[200] Further, "if the counsel or officer does not appropriately respond to the evidence," the attorney must "report the evidence to the audit committee of the board . . . or to another committee . . . comprised solely of [independent] directors," or to the full

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196. Pub. L. No. 107-204 at § 602, 2002 U.S.C.C.A.N. at 794 (amending 15 U.S.C. § 78a et seq.). The grounds for such disciplinary sanctions are as follows:

(1) not to possess the requisite qualifications to represent others;
(2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or
(3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.

Id.

197. *Id*.

198. *See* Norman S. Johnson & Ross A. Albert, *"Déjà Vu All over Again": The Securities and Exchange Commission Once More Attempts to Regulate the Accounting Profession through Rule 102(e) of Its Rules of Practice*, 1999 Utah L. Rev. 553, 575–600 (discussing the issue of whether the SEC has the ability to impose sanctions).

199. Pub. L. No. 107-204 at § 307, 2002 U.S.C.C.A.N. at 784.

200. *Id*.

board.[201] Although this "up the ladder" reporting of law violations was a permitted practice in most state ethics rules applicable to attorneys, the American Bar Association (ABA) rules did not go quite as far and did not permit a lawyer to disclose confidential information to a third party.[202]

The SEC rulemaking proposal to implement the Sarbanes-Oxley provisions regarding attorneys' professional responsibilities went far beyond the statutory provisions. It required that any attorney, who "report[s] evidence of a material violation of [the] securities laws or breach of [a] fiduciary duty" and is not satisfied that the chief legal officer or CEO has responded appropriately, must make a "noisy withdrawal" from continued representation of the corporation—that is, the attorney must resign from the engagement and notify the SEC.[203] The SEC proposed an alternative that issuers could form a Qualified Legal Compliance Committee (QLCC), which would have the responsibility of notifying the SEC of an attorney's withdrawal.[204] This proposal was an attempt to hold corporate attorneys responsible for documenting their clients' violations of the law and then reporting those violations to a government prosecutor.[205] This was a return to the much discredited and ultimately abandoned whistleblower theory of *SEC v.*

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201. *Id*. Senator John Edwards sponsored Section 307 and tried to make clear that a lawyer for a public corporation represents the corporation and its shareholders, and not the corporate officers. *See* 107 Cong. Rec. S6551–S6552 (daily ed. July 10, 2002) (discussing the fact that attorneys are required to report evidence to the audit committee if the counsel or officer does not deal with the situation properly).

202. *See generally* Lisa H. Nicholson, *A Hobson's Choice for Securities Lawyers in the Post-Enron Environment: Striking a Balance between the Obligation of Client Loyalty and Market Gatekeeper,* 16 Geo. J. Legal Ethics 91 (2002) (reporting that most states have adopted standards of confidentiality that are broader than what the ABA permits); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 Bus. Law. 143, 157 (2002) (stating that the majority of states have not adopted the ABA's narrow rules). In fact, the origin of Section 307 seems to have been the idea of six legal ethics professors who were in disagreement with the ABA. *See* Richard W. Painter, Panel Remarks, *The Evolving Legal and Ethical Role of the Corporate Attorney after the Sarbanes-Oxley Act of 2002* (Wash., D.C., Nov. 22, 2002), in 52 Am. U. L. Rev. 613, 615–620 (2002) (providing Professor Painter's remarks on Section 307). In August 2003, the ABA amended its model ethics rules to permit "up the ladder" reporting and outside disclosure. Greg Pease, *ABA Amends Model Ethics Rules to Permit up the Ladder Reports of Corporate Wrongs,* 35 Sec. Reg. & L. Rep. (BNA) 1358 (Aug. 18, 2003).

203. *Implementation of Standards of Professional Conduct for Attorneys*, 67 Fed. Reg. 71670, 71673 (Dec. 2, 2002).

204. *Id*. at 71674.

205. *Id*.

National Student Marketing Corp.,[206] which no court ever accepted. The SEC further proposed to determine any questions of attorney-client privilege involved in whistleblowing and to preempt any state-law rules preventing such conduct.[207] The proposed rule would have applied to any breach of fiduciary duty recognized at common law, as Sarbanes-Oxley contains the phrase "breach of fiduciary duty or similar violation" in describing the types of problems that must be reported "up the ladder."[208] Whether Congress' hastily drafted words were meant to overturn Supreme Court caselaw, drawing a distinction between the federal securities laws and state corporation laws concerning fiduciary duty, is an interesting question.

After a comment-letter process in which there were a multitude of negative comments, the SEC cut back on its proposal and eliminated the "noisy withdrawal" provisions.[209] Nevertheless, in a newly proposed rule, the SEC floated the idea of requiring public companies to file a report with regard to any resignation by an attorney dissatisfied with a corporate counsel or CEO reaction to evidence of a material violation of securities law or breach of fiduciary duty.[210] Although this story relates primarily to the federalization of the regulation of attorneys, it clearly affects corporate governance.

The SEC's proposed rule on attorney obligations drew no distinction between U.S. and foreign attorneys. The SEC then held a Roundtable on December 17, 2002, to discuss the proposed rule's international impact, at which strong objections to its application to foreign attorneys were voiced.[211] Further, more than forty comment letters addressed the international aspects of the rule.[212] In

206. 457 F. Supp. 682 (D.D.C. 1978).

207. 67 Fed. Reg. at 71674.

208. *Id*.

209. *Implementation of Standards of Professional Conduct for Attorneys*, 68 Fed. Reg. 6296, 6306 (Feb. 6, 2003).

210. *Implementation of Standards of Professional Conduct for Attorneys*, 68 Fed. Reg. 6324, 6329 (Feb. 6, 2003).

211. 68 Fed. Reg. at 6314.

212. *Id.* Foreign bar associations and others objected to the SEC's proposal on many grounds, including that the SEC had no right to discipline foreign lawyers; that the proposed rules would require foreign attorneys to interpret U.S. law, which would be unreasonable and inappropriate; that the conflict between foreign attorney-client-privilege rules in foreign jurisdictions would conflict with the "noisy withdrawal" proposal; and that the proposed rules could extend coverage to nonlawyers' and lawyers' work product without knowledge of the incorporation of such documents' contents into SEC filings. *See e.g.*

its final rule, the SEC defined an "attorney" to include "any person who is admitted, licensed, or otherwise qualified to practice law in any [foreign or domestic] jurisdiction."[213] It included an exception for a "non-appearing foreign attorney," meaning,

> an attorney . . . admitted to practice law . . . outside the [U.S.] . . . [w]ho does not hold himself or herself out as practicing, and does not give legal advice regarding [U.S. law], . . . [and conducts] activities that would constitute appearing and practicing before the [SEC] only incidentally to . . . the practice of law in a

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Comments from Comisión Nacional Bancaria y de Valores, to Jonathan Katz, Sec., SEC, *Sarbanes-Oxley Act § 307—Implementation of Standards of Professional Conduct for Attorneys—Part 205 (File No. 33-8150.wp)* (Dec. 18, 2002) (available at http://www.sec.gov/rules/proposed/s74502/jfcalderon1.htm) (expressing a general desire to retain the Mexican Bar's sole authority to discipline Mexican lawyers); Comments from Dr. Domek, Pres., German Fed. B., to Jonathan Katz, Sec., SEC, *Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys* (Dec. 17, 2002) (available at http://www.sec.gov/rules/proposed/s74502/dombek1.htm) (urging the SEC to exempt foreign lawyers—i.e., German lawyers—from the proposed rules); Comments from Tohru Motobayashi, Pres., Japan Fedn. of B. Assns., to Jonathan Katz, Sec., SEC, *Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys (Release Nos. 33-8186; 34-47282; IC-25920)* (Mar. 31, 2003) (available at http://www.sec.gov/rules/proposed/s74502/tmotobayashi1.htm) (stating that the "noisy withdrawal" proposal will encroach upon Japanese attorneys' duty of confidentiality); Comments from Ronald F. Pol, Pres., Corp. Lawyers' Assn. of New Zealand, and Peter Turner, CEO & Gen. Counsel, Australian Corp. Lawyers Assn., to Jonathan Katz, Sec., SEC, *Implementation of Standards of Conduct for Attorneys* (Dec. 18, 2002) (available at http://www.sec.gov/rules/proposed/s74502/rfpol1.htm) (voicing concerns that the proposed rules would be a "trap" for the unknowing attorney, would restrict the effectiveness of legal counsel, and would have a negative impact on business development); Comments from Alexander Schaub, Dir. Gen., EC, to Jonathan Katz, Sec., SEC, *Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys* (Dec. 13, 2002) (available at http://www.sec.gov/rules/proposed/s74502/aschaub1.htm) (observing European legal preemption of a "noisy withdrawal" and a perception that "reporting up the ladder" places an undue burden on European lawyers); Comments from Swiss Bankers Assn., to Jonathan Katz, Sec., SEC, *Proposed Rule on Implementation of Standards of Professional Conduct for Attorneys; Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02* (Dec. 18, 2002) (available at http://www.sec.gov/rules/proposed/s74502/uproth1.htm) (emphasizing a conflict between the SEC's proposed rules and the Swiss confidentiality law); Comments from 77 Law Firms, to Jonathan G. Katz, Sec., SEC, *Sarbanes-Oxley Act § 307—Implementation of Standards of Professional Conduct for Attorneys—Part 205 (File No. 33-8150.wp)* (Dec. 18, 2002) (available at http://www.sec.gov/rules/proposed/s74502/77lawfirms1.htm) (addressing concerns that the proposed rules had conflicting interpretations, contradicted Sarbanes-Oxley's legislative history, and exceeded the scope of the SEC's power under Sarbanes-Oxley); *see also* Rachel McTague, *Foreign Lawyers Raise Concerns about Reporting Rule Proposed by SEC*, 34 Sec. Reg. & L. Rep. (BNA) 2040 (Dec. 23, 2002) (discussing concerns of foreign lawyers).

213. 17 C.F.R. at § 205.2(c).

> [foreign] jurisdiction . . . or . . . only in consultation with [U.S.] counsel.[214]

Whether this accommodation for foreign attorneys will satisfy the very critical comments received on the SEC's proposed rule will probably depend on how the SEC interprets its rule. Further, the SEC's pending proposal to compel issuers to report attorney resignations in their SEC filings, in lieu of a mandated "noisy withdrawal" rule, would be applicable to foreign issuers.[215]

I. Added SRO Requirements

In June 2002, a NYSE committee issued a report recommending changes to the NYSE listing standards.[216] This report had a variety of recommendations for changes in NYSE listing standards that went beyond Sarbanes-Oxley, including the following: "[requiring] listed companies to have a majority of independent directors," with a stringent definition of the term "independent";[217] mandating "regularly scheduled executive sessions" of boards chaired by a lead director or independent chairman;[218] "[requiring] listed companies to have [nominating and compensation committees] composed entirely of independent directors";[219] requiring that "shareholders . . . be given the opportunity to vote on all equity-compensation plans";[220] and "[requiring] listed foreign private issuers to disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards."[221] These recommendations were then transmitted to the NYSE Board of Directors, and several of them have been filed with the SEC as proposed new listing standards.

In addition to proposals that relate to audit committees, the NYSE has proposed that "non-management directors . . . must meet at regularly scheduled executive sessions," and that nomi-

214. *Id*. at § 205.2(j).
215. 68 Fed. Reg. at 6331.
216. *NYSE Corporate Accountability Report*, *supra* n. 144. SEC Chairman Pitt requested this project to review the SEC's corporate-governance-listings standard. *Id.* at 1.
217. *Id*. at 6–8.
218. *Id*. at 8.
219. *Id*. at 9.
220. *Id*. at 17.
221. *Id*. at 22.

nating and compensation committees be "composed entirely of independent directors."[222] However, with regard to such changes that Sarbanes-Oxley did not mandate, listed foreign issuers need only "disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards," either on their web sites or in their annual reports.[223] NASDAQ filed similar, although slightly different, listing proposals with the SEC.[224] Further, the SEC's approval of the new listing requirement, proposed by both the NYSE and NASDAQ, that "shareholders . . . be given the opportunity to vote on all equity-compensation plans," does not apply to plans covering employees residing in non-U.S. jurisdictions.[225]

Even more dramatic governance reforms may be forthcoming. In mid-July 2003, the SEC issued an extensive report recommending changes in the regulations governing the director-selection process, with a view toward giving shareholders greater participation in this process.[226] However, it is unlikely that any reforms resulting from these recommendations will impact foreign issuers directly because they are not subject to the proxy rules.

IV. IMPLICATIONS

Very generally, the SEC has implemented the Sarbanes-Oxley Act by imposing new disclosure requirements on foreign issuers and accommodating them, to a limited extent, in the implementation of regulatory corporate-governance standards. Nevertheless, many of the new disclosure obligations affect corporate governance, and the accommodations made with regard to board composition and structure and the regulation of foreign auditors

222. 68 Fed. Reg. at 19053–19054.

223. *Id.* at 19058.

224. 68 Fed. Reg. at 14451.

225. *Self-Regulatory Organizations; New York Stock Exchange, Inc. and National Association of Securities Dealers, Inc.; Order Approving NYSE and Nasdaq Proposed Rule Changes and Nasdaq Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to NYSE Amendments No. 1 and 2 and Nasdaq Amendments No. 2 and 3 Thereto Relating to Equity Compensation Plans*, 68 Fed. Reg. 39995, 39997, 40003 (July 3, 2003).

226. SEC, Div. of Corp. Fin., *Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors*, http://www.sec.gov/news/ studies/proxyrpt.htm (July 15, 2003).

and attorneys may not go far enough to alleviate the problems and concerns of foreign issuers. The reaction of foreign issuers to Sarbanes-Oxley will be significant to the SEC's administration of the statute and its new rules because approximately ten percent of SEC registrants are foreign issuers, representing twenty percent of all registered issuers by capitalization.[227] Yet, the existence of this significant and growing group of registered companies makes it difficult for the SEC to make exceptions for foreign issuers that are not made for U.S. issuers.

Among the possible effects of the application of Sarbanes-Oxley to foreign issuers are two diametrically opposed scenarios. On the one hand, foreign issuer registrations and listings in the U.S. could decline significantly, to the detriment of the markets in New York and to the benefit of markets abroad, particularly London. On the other hand, worldwide corporate-governance standards could change so that U.S. standards and standards elsewhere become harmonized. Although it is difficult to predict what the actual results of Sarbanes-Oxley will be, the attitude of the SEC staff and the SEC's policies in enforcing Sarbanes-Oxley and refining the rules adopted under the statute could make a difference. If the SEC embarks upon a unilateralist policy of insisting that all foreign issuers rise to a U.S. standard, diminished activity by foreign investors in the U.S. can be anticipated. The SEC frequently presumes that U.S. standards are superior to standards abroad—an attitude that is greatly resented overseas. In fact, although there have been plenty of scandals regarding non-U.S. companies, the U.S. scandals of the past few years are hardly an advertisement for the superiority of U.S. corporate-governance standards. If the SEC returns to a more internationalist approach, it can be anticipated that corporate-governance standards everywhere will adapt to the Sarbanes-Oxley regime and the strength of the U.S. markets will continue to attract foreign issuer listings. The SEC may also attempt to sidestep the problems of applying Sarbanes-Oxley to foreign issuers by fashioning further exemptions from registration for large institutional investors.[228]

227. Cunningham, *supra* n. 99, at 896.

228. Such an approach could be fashioned by permitting foreign exchange screens in the U.S. for the exclusive use of institutional investors. *File No. S7-16-97 Regulation of Exchanges*, 62 Fed. Reg. 30485, 30529 (June 4, 1997).

The scanty evidence available suggests that Sarbanes-Oxley may have placed a damper on foreign issuers' enthusiasm for U.S. listings. "Germany's Porsche and Japan's Daiwa Securities Group and Fuji Photo Film announced they would delay planned U.S. stock listings, citing confusion over the regulatory environment."[229] But other circumstances, such as the aftermath of the accounting scandals in the U.S., the weak global economy, and generally poor stock markets worldwide, could also be factors in decisions not to come to the U.S. markets.[230] In its comment letter of February 2003, regarding the SEC's proposed audit-committee standards, the NYSE observed that several foreign listed companies were considering delisting from the NYSE or the SEC, and that one company had elected to list in London instead of New York because of Sarbanes-Oxley.[231] However, delisting is very difficult,[232] so any adverse impact on U.S. listings is likely to be prospective.

Although foreign issuers have objected strenuously to the SEC's rulemaking pursuant to Sarbanes-Oxley becoming applicable to them, and some foreign regulators have joined in these objections,[233] foreign regulators are beginning to put in place their own corporate governance reforms in response to the scandals in the capital markets and Sarbanes-Oxley. Very generally, the European approach to corporate governance is one of self-regulation by corporate governance codes; public companies then

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229. Karmin, *supra* n. 171, at C1.

230. *Id*.

231. *See* Comments from Darla C. Stuckey, Corp. Sec., NYSE, to Jonathan G. Katz, Sec., SEC, *Standards Relating to Listed Company Audit Committees* (Feb. 21, 2003) (available at http://www.sec.gov/rules/proposed/s70203/dcstuckey1.htm) (encouraging support for a previous suggestion that the SEC should avoid making its rules too specific and should let companies enforce the rules upon themselves).

232. Perino, *supra* n. 86, at 242–244. The NYSE has proposed a liberalization of its Rule 500, which has made it difficult to delist from the Exchange, but can be accomplished by a vote from a listed company's board of directors. Floyd Norris, *Big Board to Eliminate Rule on Moving to Another Market,* N.Y. Times C6 (Aug. 8, 2003) (available at LEXIS, News library, NYT file). To exit from the SEC disclosure system, however, a foreign issuer must certify that it has

> securities . . . held of record by . . . [l]ess than 300 persons resident in the [U.S.] or . . . [l]ess than 500 persons resident in the [U.S.] where the total assets of the issuer have not exceeded $10 million on the last day of each of the issuer's most recent three fiscal years.

17 C.F.R. at § 240.12g-4.

233. *Commission Threatens Retaliation over U.S. Auditor Registration Rules,* 9 World Sec. L. Rep. (BNA) 10 (May 2003).

disclose whether or not they are in compliance with such codes.[234] Because of the different corporate-finance structures in different European countries, these codes differ from country to country, but many of them have been the subject of reform efforts in recent years.[235] The Cadbury, Greenbury, and Hampel Reports in the U.K., the Vienot Report in France, and the Peters Report in the Netherlands have all focused on issues such as the role of the CEO, independent directors, audit committees, and management remuneration.[236] The OECD has promulgated principles for corporate governance that have been a prod to reform with respect to shareholder rights and board functions.[237]

In May 2003, the European Commission presented an action plan for enhancing corporate governance and modernizing company law to strengthen shareholder rights and to help restore investor confidence in capital markets.[238] This plan embodied the Commission's response to a report that the High Level Group of Company Law Experts presented in November 2002.[239] Among other things, the Commission's Action Plan set forth the following initiatives: requiring "an Annual Corporate Governance Statement" by listed companies; "promoting the role of (independent) non-executive or supervisory directors"; including the "[m]inimum standards on the creation, composition and role of the nomination, remuneration and audit committees [to] be defined at EU level and enforced by Member States"; making directors' remuneration more transparent; and developing a legislative frame-

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234. Special Study Group, *supra* n. 3, at 1549.

235. *See* Karel Lannoo, *A European Perspective on Corporate Governance,* 37 J. Com. Mark. Studs. 269 (June 1999) (discussing the various codes and reform efforts); Holly J. Gregory & Robert T. Simmelkjaer II, *Comparative Study of Corporate Governance Codes Relevant to the European Union and its Member States*, http://europa.eu.int/comm/internal_market/en/company/company/news/corp-gov-codes-rpt-part1_en.pdf (Jan. 2002) (providing a comprehensive overview of relevant codes).

236. *Id.* at tbl. 5.

237. OECD, *OECD Principles of Corporate Governance*, http://www.oecd.org/dataoecd/47/50/434764.pdf (May 1999).

238. Europa, *Internal Market, Modernising European Company Law*, http://www.europa.eu.int/comm/internal_market/en/company/company/modern/index.htm (accessed Sept. 25, 2003) [hereinafter *Modernising European Company Law*].

239. *Id.*; *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe*, http://www.europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf (Nov. 4, 2002) [hereinafter *Report of the High Level Group of Company Law Experts*].

work for shareholder rights.[240] This proposal did not involve a formal European Corporate Governance Code because, in the view of the Commission, this "would simply add an additional layer between international principles and national codes."[241] This initiative is clearly a response to Sarbanes-Oxley; however, it is designed to bring EU companies up to an international standard that will be respectful of European legal and cultural differences in corporate governance. Another initiative to improve the auditing of company accounts was a Commission recommendation setting minimum quality-assurance standards for statutory audits.[242]

EU press releases issued in connection with these proposals are interesting because they attempt to put the EU in a position of being cooperative and competitive, yet resistant to the SEC in its extraterritorial application of Sarbanes-Oxley.[243] When introducing the Commission's Action Plan,

> Internal Market Commissioner Frits Bolkestein said: "Company law and corporate governance are right at the heart of the political agenda, on both sides of the Atlantic. That's because economies only work if companies are run efficiently and transparently. . . . The Commission is shouldering its responsibilities: Corporate Europe must shape up and do the same. Working in partnership, we have a unique opportunity to strengthen European corporate governance and to be a model for the rest of the world."[244]

At the same time, in a question-and-answer press release about the Action Plan, the Commission asserted that the Action Plan is not an "admission that EU corporate governance is not currently up to [U.S.] levels post Sarbanes-Oxley."[245]

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240. *Modernising European Company Law*, *supra* n. 238, at http://www.europa.eu.int/comm/internal_market/en/company/company/modern/index.htm.

241. *Id*.

242. *Commission Proposes Measures to Improve Auditing, Governance,* 9 World Sec. L. Rep. (BNA) 3 (June 2003).

243. Europa, *EU Institutions Press Releases*, *Company Law and Corporate Governance: Commission Presents Action Plan*, http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc+IP/03/716/O/R (May 21, 2003).

244. *Id*.

245. Europa, *EU Institutions Press Releases*, *Commission Action Plan on "Modernising Company Law and Enhancing Corporate Governance in the European Union"—Frequently Asked Questions,* http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc+MEMO/03/112 (May 21, 2003) [hereinafter *Frequently Asked Questions*].

> It is not helpful to look at this in terms of a race: neither side is "ahead" of the other. Clearly a lot of work is being done and will continue to be done on both sides of the Atlantic.
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> . . .
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> Unfortunately the [Sarbanes-Oxley] Act creates a series of problems due to its outreach effects on European companies and auditors, and the Commission is engaged in an intense regulatory dialogue with a view to negotiating acceptable solutions with the . . . [SEC].[246]

Similarly, in June 2003, Canadian securities regulators unveiled an initiative to restore investor confidence and to bring Canada into line with U.S. standards with three corporate governance rules on auditor oversight,[247] certifications in companies' reports,[248] and audit committees.[249] These proposals were put forth as a response to the challenge of Sarbanes-Oxley.[250] When the rules were announced, the Chairman of the Ontario Securities Commission stated, "The rules are robust as parallel rules required by the Sarbanes-Oxley legislation, but address unique Canadian concerns."[251]

These significant efforts to harmonize European and Canadian law are likely to encourage other countries to propose similar reforms and also to encourage the formulation of international corporate-governance standards by such organizations as the OECD and IOSCO.[252] Yet, significant differences between U.S. and European norms persist and make harmonization and eventual mutual recognition difficult. For example, the High Level Group of Company Law Experts recommended that the nomina-

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246. *Id*.

247. Ontario Secs. Commn., *Rules & Regulation, 52-108 Auditor Oversight*, http://www.osc.gov.on.ca/en/Regulation/Rulemaking/Rules/rule_52-108_20030627_multilateral-instrument.htm (June 27, 2003).

248. Ontario Secs. Commn., *Rules & Regulation*, *52-109 Certification of Disclosure in Companies' Annual and Interim Filings*, http://www.osc.gov.on.ca/en/Regulation/Rulemaking/Rules/rule_52-109_20030627_multilateral-instrument.htm (June 27, 2003).

249. Ontario Secs. Commn., *Rules & Regulation*, *52-110 Audit Committees*, http://www.osc.gov.on.ca/en/Regulation/Rulemaking/Rules/rule_52-110_20030627_multilateral-instrument.htm (June 27, 2003).

250. *Proposed Corporate Governance Rules Meant to Restore Investors' Confidence,* 9 World Sec. Rep. (BNA) 3 (July 2003).

251. *Id*.

252. Lawrence I. Speer, *International Developments: G-8 Leaders Reaffirm Earlier Commitment to Better Governance, Accounting Standards*, 35 Sec. Reg. & L. Rep. (BNA) 955 (June 9, 2003).

tion and remuneration of listed companies' directors and the board's supervision of the audit committee or similar body should be decided exclusively by independent directors.[253] But the Commission's Action Plan asserted that executive directors are best placed to know the qualities needed for board appointments.[254] Nevertheless, the Action Plan envisions the adoption of a recommendation on directors' remuneration.[255] Further, there are still two-tier boards in many European countries.[256] After Sarbanes-Oxley, the most important difference between European and U.S. corporate governance is that the U.S. has encapsulated generally accepted good practice into federal law and SEC rules, rather than self-regulatory codes.

It would appear that foreign issuers' reactions to Sarbanes-Oxley will follow a familiar pattern—foreign issuers' vigorous protest to being subjected to new SEC regulations, followed by foreign regulators' responsive actions to impose some of the same new standards, likely to lead to accommodations by both the foreign issuer community and the SEC to a new regime. Despite the hoopla surrounding the passage of Sarbanes-Oxley, some have questioned whether the Act accomplishes much more than putting into law what was previously accepted as good corporate practice.[257] Nevertheless, the SEC has been given tools to reform corporate governance practices that it did not have previously, and this is a significant new federal power in the hands of an activist agency. If the SEC's past predilections are an indication of future policies, serious structural corporate governance reforms will not be imposed upon foreign issuers. Alternatively, the growing number of foreign issuer registrants and international competition for investments and capital make it more difficult for the SEC to impose stringent rules on U.S. companies and not on foreign companies. Whether the SEC will resolve this tension through international cooperation or through a more unilateralist approach is a question for the future.

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253. *Report of the High Level Group of Company Law Experts*, *supra* n. 239, at 60–62.

254. *Frequently Asked Questions*, *supra* n. 245, at http://www.europa.ev.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc+MEMO/03/112.

255. *Id*.

256. *Id*.

257. Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work)*, 35 Conn. L. Rev. 915, 917–923 (2003).