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The Sarbanes-Oxley Act of 2002: Assessing Its Impact, Charting Its Future

FOREWORD

AS THE DOT-COM BOOM TURNED TO BUST at the dawn of the Twenty-First Century, the resulting recession was exacerbated by several major accounting and corporate governance scandals at large public companies including Enron, WorldCom, and Tyco.¹ Executives were revealed to have been, in effect, robbing their own companies and depriving shareholders of money that was rightfully theirs.² Such scandals eroded investor confidence in accounting practices, financial disclosure, and public corporations more generally.³ In response, the Sarbanes-Oxley Act of 2002⁴ (SOX) was enacted to restore lost confidence.⁵ Introducing accounting and other governance reforms, the Act represents the most far-reaching reform to the securities laws since the 1930s.⁶

On the fifth anniversary of the Sarbanes-Oxley Act's enactment, the University of Maryland School of Law brought together academics, practitioners, and leaders in the business community. Together, they analyzed the Act's impact and discussed the issues that will facilitate and hinder its future effectiveness. This Issue of the *Journal of Business & Technology Law (JBTL)* is composed of the articles and essays produced by that conference. These articles discuss an array of topics including SOX's effect on corporate ethics, the accounting industry, capital markets, criminal

1. See, e.g., *Adelphia Commc'ns Corp. v. Rigas*, No. 02-41729 (REG), 2004 WL 2186582, at *1 (S.D.N.Y. Sept. 27, 2004) (detailing history of investigation and lawsuit against Adelphia); ROBERT BRYCE, *PIPE DREAMS: GREED, EGO, AND THE DEATH OF ENRON* (2003); BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003); MIMI SWARTZ & SHERRON WATKINS, *POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON* (2003); Steve Lohr, *How to Exorcise A Corporate Scandal*, N.Y. TIMES, June 4, 2005, at C1; Mark Maremont & Jerry Markon, *Ex-Tyco Chief Evaded \$ 1 Million in Taxes on Art*, *Indictment Says*, WALL ST. J., June 5, 2002, at A1; James B. Stewart, *Where Did Tyco's Money Go?*, NEW YORKER, Feb. 17, 2003, at 132; DENNIS BEREFOED, ET AL., *REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF WORLD COM, INC.* (2003), available at <http://news.findlaw.com/hdocs/docs/worldcom/bdस्पcomm60903rpt.pdf>.

2. Lohr, *supra* note 1.

3. Bob Greifeld, *The View From Nasdaq*, WALL ST. J., July 30, 2004, at A10.

4. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

5. Cf. Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Congress*, N.Y. TIMES, July 31, 2002, at A1 (quoting Harvey L. Pitt, the chairman of the SEC, as stating that Sarbanes-Oxley was the "first step in restoring confidence"); Stephen Labaton, *A Push to Fix the Fix on Wall Street*, N.Y. TIMES, Dec. 17, 2006, § 4, at 4.

6. John R. Emshwiller et al., *Lay's Legacy: Corporate Change—But Not the Kind He Expected*, WALL ST. J., July 6, 2006, at A1.

law, and the obligations of corporations to their shareholders and non-shareholder constituents.

Sarbanes-Oxley and corporate governance scandals sparked an intense debate regarding corporate ethics and the most effective means of ensuring that corporate officers, directors, and agents carry out their duties in an ethical and responsible manner.⁷ Indeed, the changes forced by Sarbanes-Oxley make it worthwhile to address corporate best practices on ethical behavior. Accordingly, this Issue of the *JBTL* includes articles that address SOX's impact on corporate ethics.

A significant portion of SOX focuses on ensuring better financial disclosure by enhancing the regulation of outside auditors and the accounting process.⁸ For example, the Act not only created the Public Company Accounting Oversight Board (PCAOB) to oversee public auditors, but also required public companies to implement a system evaluating the effectiveness of their internal controls as they relate to financial reporting.⁹ This Issue of the *JBTL* includes articles that explore the impact of SOX on financial accounting and the accounting industry, while examining lessons learned from implementing SOX's various accounting provisions and how those lessons should shape the application of SOX in the future.

SOX also has dramatically affected the capital markets—however unclear that effect may be. On the one hand, many contend that SOX was necessary to restore investor confidence in the integrity of U.S. markets.¹⁰ On the other hand, others maintain that the increased regulation has encouraged going private transactions and increased investment in foreign markets.¹¹ One thing is for sure, SOX's impact on the capital markets remains unclear.

SOX not only enhanced criminal penalties and sentences for violations of various securities and federal laws, but also played a role in the increased prosecutions of white-collar crime more generally.¹² This Issue of the *JBTL* includes articles that address the proper role of criminal sanctions in the corporate environment, SOX's impact on criminal enforcement efforts, and the extent to which these efforts will be sustained in the long-term.

Lastly, SOX embodies several provisions aimed at ensuring that corporate officials take greater responsibility for corporate disclosures and are more accountable to shareholders and the public.¹³ The Act also seeks to provide some protections for

7. See Stephen Labaton, *Paulson, at Talks on Regulation, Suggests Pendulum Has Swung Too Far*, N.Y. TIMES, Mar. 14, 2007, at C3.

8. Sarbanes-Oxley Act §§ 101, 404; see also Labaton, *supra* note 5.

9. See Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291 (2005); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 983–1006 (2005) (describing the creation of the PCAOB); Labaton, *supra* note 5; Stephen Labaton, *S.E.C. to Ease Auditing Standards for Small Publicly Held Companies*, N.Y. TIMES, Dec. 11, 2006, at C1.

10. Bumiller, *supra* note 5; Jackie Calmes & Deborah Solomon, *Snow Says "Balance" Is Needed In Enforcing Sarbanes-Oxley Law*, WALL ST. J., Dec. 17, 2004, at A1.

11. Labaton, *supra* note 5.

12. See, e.g., Geraldine Szott Moohr, *On the Prospects of Deterring Corporate Crime*, 2 J. BUS. & TECH. L. 25, 25–26 (2007).

13. See Calmes & Solomon, *supra* note 10.

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employees who report corporate fraud.¹⁴ This Issue of the *JBTL* includes articles that assess the manner in which SOX has influenced corporate culture and the relationships between various corporate agents.

Indeed, SOX's reforms have greatly impacted how the corporate world functions. Of course, the depth of this impact will become clearer over time. Nevertheless, we hope that this Issue of the *JBTL* will highlight SOX's impact thusfar, and provide a guide to chart the Act's future.

14. Bumiller, *supra* note 5.