THE SARBANES-OXLEY ACT OF 2002: ARE STRICTER INTERNAL CONTROLS CONSTRICTING INTERNATIONAL COMPANIES?

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I. INTRODUCTION

At the dawn of the twenty-first century, the United States corporate landscape was struck by a series of high-profile scandals that rocked the capital market and shook Wall Street at its very foundation. Following these scandals, and in direct response to the fears they instilled in investors, Congress enacted the Sarbanes-Oxley Act (the Act or Sarbanes-Oxley) in July 2002. Supporters of the Act hoped it would usher in a new era in corporate governance and restore investor confidence in publicly-traded companies and the American capital market in general, while others criticized the Act as being both hastily enacted and disproportionate in its scope to the problems it sought to remedy. Though commentators disagree as to the wisdom of the Act, most agree that it has ushered in sweeping changes to the American corporate governance regime. Recent discussions have focused on the Act's impact outside the United States—specifically, on foreign and multinational

corporations. The various provisions of this American law have drawn praise and criticism, as much internationally as domestically, and its effects—both intended and unintended—have been felt far beyond the borders of the United States.

The purpose of this Note is to examine the international effects of Sarbanes-Oxley, to compare the corporate governance framework established by the Act in the United States to governance regimes in other countries, and to evaluate the desirability and feasibility of international harmonization of corporate governance standards. Because of the breadth of the Act, its effects have been felt across the globe. This Note, however, focuses on the impact the Act has had on the corporations and capital markets in Canada and Mexico. This Note begins by providing an overview of Sarbanes-Oxley, describing its key provisions as well as the corporate governance failures Congress sought to remedy with its passage. The remainder is dedicated to the international effects of, and responses to, the Act. Part II provides a discussion of the background to the Act, specifically of the events prompting reform, key provisions of the Act, and a brief review of the Act’s strengths and weaknesses. Part III analyzes the effects Sarbanes-Oxley has had on foreign-based companies that maintain listings on American stock exchanges. That part focuses on three significant effects: the delisting effect, conflicts with foreign laws, and the Act’s role as a catalyst in encouraging other countries to reexamine their own corporate governance regimes. Finally, Part IV discusses the desirability and feasibility of achieving harmonization in corporate governance standards at an international level.

II. BACKGROUND

A. The Implosion of Enron as the Impetus for Reform

Sarbanes-Oxley was passed immediately in the wake of a series of high-profile corporate scandals which revealed systemic failures in the American corporate governance system. Thus, the full implications of the Act are best understood in reference to the facts and controversies of the scandals to which Congress was reacting by its enactment. No single set of facts weighed heavier

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6 See H.R. REP. NO. 108-63(I), at 11 (noting that “the Sarbanes-Oxley Act [was] enacted in 2002 in response to a series of large-scale corporate scandals at companies like Enron, WorldCom, Tyco, Global Crossing, Adelphia, and Rite Aid”).
on the minds of legislators than those surrounding the implosion of the Texas-based energy company Enron.

Enron was created by the 1985 merger of Houston Natural Gas (HNG) and InterNorth, a Nebraska-based energy company.\(^7\) At its naissance, Enron controlled the largest natural gas pipeline system in the United States: 37,000 miles of pipelines extending from Texas to Canada and from Florida to California.\(^8\) Yet the new enterprise also faced some significant challenges. First, because of the recent deregulation of the energy industry, Enron lacked exclusive rights to its vast pipeline network.\(^9\) Second, the company was burdened by significant debt incurred during the merger process.\(^10\) To overcome these obstacles, Enron’s Chairman and CEO, Ken Lay, brought in Jeffrey Skilling, a former consultant “who had a background in banking and asset and liability management.”\(^11\) Under their leadership, Enron flourished throughout the 1990s, expanding aggressively\(^12\) and earning much praise from investors and analysts.\(^13\) By 2001, however, not all was well behind the scenes at the sixth-largest energy company in the world;\(^14\) on December 2 of that year,

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\(^12\) Skilling’s solution was the creation of the energy derivative, a program whereby “Enron would buy gas from a network of suppliers and sell it to a network of consumers, contractually guaranteeing both the supply and price, charging fees for the transaction and assuming the associated risks.” *Id.* The gas bank was eventually expanded into an electricity bank in 1996, and in 1999, Enron launched an internet commodities-trading website that by 2000 was averaging 6,000 daily transactions valued at $2.5 billion. *Enron Timeline*, CHRON.COM (2002), http://www.chron.com/disp/story.mpl/special/enron/1127125.html [hereinafter *Enron Timeline*]. Enron also expanded internationally during this time, acquiring pipeline networks in South America, opening offices in England, and constructing power plants in England and India. *Id.*


\(^14\) *Enron Timeline*, *supra* note 12.
Enron became the largest company in American history to declare bankruptcy.\textsuperscript{15}

What exactly went wrong at Enron is a question that is easier asked than answered. There are, however, several instances of illegal and unethical conduct by corporate managers that contributed to the company's demise; it is clear from the Act's prohibitions that these problems were fresh in legislators' minds.\textsuperscript{16}

First, Enron employed a series of transactions with special purpose entities (SPEs) in order "to manipulate reporting, hide debts, and hide poor-performing assets" from investors, creditors, and regulatory authorities.\textsuperscript{17} Though the use of SPEs is legal and, in fact, common among companies that desire to finance risky deals "without increasing the risk exposure of the main company," the manner in which Enron dealt with SPEs was not consistent with legitimate uses of such entities.\textsuperscript{18} First, the SPEs Enron dealt with lacked independence, as most were controlled by Enron CFO Andrew Fastow, and thus should have been consolidated on Enron's financial statements.\textsuperscript{19} Second, Enron used its own stock to guarantee its transactions with the SPEs; accordingly, it was able to keep debts and failing assets off its books despite the fact that the ultimate

\begin{footnotes}

\item[16] See, e.g., Kenji Taneda, Survey, Sarbanes-Oxley, Foreign Issuers and United States Securities Regulation, 2003 \textit{Colum. Bus. L. Rev.} 715, 734 (2003) (noting that "[t]he major provisions of Sarbanes-Oxley follow the nature of the scandals" that preceded the Act's passage, and identifying several examples of that correlation: "Chief Executive Officer ('CEO')/Chief Financial Officer ('CFO') certification of financial statements (sections 302 and 906), a requirement that all companies listed on an exchange or the Nasdaq have independent audit committees (section 301), a prohibition on personal loans to directors and officers (section 402), as well as restrictions on interim pro forma financial reports (section 401), and on insider trades during blackout periods (section 306)").

\item[17] \textit{Van Niel}, \textit{supra} note 7, at 14.

\item[18] \textit{Id.}

\item[19] \textit{Id.} Under Financial Accounting Standards Board (FASB) guidelines in place prior to 2003, a SPE was considered "independent" and was not required to be included on the sponsoring company's financial statements if two conditions were satisfied: first, outside investors must constitute at least 3% of the ownership interest and, second, that outside investor (or group of investors) must exercise actual control of the SPE. Arlette C. Wilson & Walter M. Campbell, Enron's Aggressive Accounting, \textit{Futures & Derivatives L. Rep.}, July/Aug., 2000, at 12. In 2003, FASB amended its rules to require a sponsoring company that is a "primary beneficiary" of a SPE transaction to consolidate that SPE on its financial statements. \textit{Fin. Accounting Standards Bd. Interp.} No. 46 (2003), available at http://www.fasb.org/fin46r.pdf. It is worth noting that Fastow profited handsomely from his involvement with the SPEs, receiving $30 million in management fees from 1999 to July 2001. \textit{Thomas}, \textit{supra} note 9.
\end{footnotes}
risk was still Enron's.\textsuperscript{20} Finally, exacerbating Enron's misuse of SPEs and related-party transactions was the company's incredibly complex and dense financial reports which made it difficult, even for trained analysts, to discern the true nature of Enron's health.\textsuperscript{21}

A second questionable practice was Enron's use of "mark-to-market" accounting to report, as current profits, the money it expected in the future from long-term energy contracts.\textsuperscript{22} Mark-to-market accounting, like the use of SPEs, is not prohibited; however, it is best suited for items that are easily valued.\textsuperscript{23} These were new items that had never before been marketed or traded in; accordingly, there was little information on which Enron could base profit projections, and little information for investors and analysts to use to measure the accuracy of Enron's reported projections.\textsuperscript{24} Enron's second misuse of the mark-to-market accounting method, and one that "likely constitutes an intentional misrepresentation," involved the company's failure to restate its initial profit estimates when the contracts did not generate profits in accordance with those projections, as required by generally accepted accounting principles.\textsuperscript{25}

A third problem, and one that may have compounded the first two issues described above, was that Enron's outside and supposedly independent auditing firm, Arthur Andersen, operated under significant conflicts of interest.\textsuperscript{26} Andersen received $52 million from Enron in 2000: half for audit

\textsuperscript{20} Van Niel, supra note 7, at 14. Because Enron transferred many of its failing assets to the SPEs, the pledging of Enron shares as a sort of collateral was necessary to compensate the SPE investors for the risk. Thomas, supra note 9. As the value of the assets parked in the SPEs declined, Enron faced a growing obligation to issue additional shares. \textit{Id.} This obligation was a key factor in the company's decision to end its dealings with one group of SPEs—the so-called "Raptors"—in October of 2001, a move that piqued governmental interest in Enron's affairs, and ultimately led to the company's demise. \textit{Id.}

\textsuperscript{21} See Thomas, supra note 9 (discussing the "lack of transparency of Enron's disclosures" and quoting one analyst's statement that "'[t]he notes just don't make sense, and we read notes for a living'").


\textsuperscript{23} \textit{Id.}

\textsuperscript{24} Van Niel, supra note 7, at 15. \textit{See also} Hill et al., supra note 22 (noting that because Enron applied the method to "assets, such as long-term energy contracts, in which there was no transparent trading, Enron had to estimate fair value," and describing the ease with which the company could overestimate profit margins for services "because no one could accurately predict them").

\textsuperscript{25} Van Niel, supra note 7, at 15.

\textsuperscript{26} \textit{Id.} at 17.
services and half for consulting services, which largely consisted of advising Enron how to structure business deals.  

Fourth, Enron misled regulators and investors by using stock option grants to circumvent the prohibition against excessive compensation of executive employees without treating those grants as expenses.  

"Though not illegal," one commentator notes, "this practice allows the posting of financial data that is not complete, especially in Enron's case, where stock options represented a very large and important form of employee compensation."  

A final factor contributing to the heavy losses experienced by Enron employees was the fact that for thirty days in the fall of 2001, Enron's employees' 401(k) pension plan was in a "blackout period during which plan participants were prohibited from making inter-fund transfers within the 401(k) plan." The blackout was a consequence of the company's decision, supposedly made well before it was announced in mid-October, to change plan administrators for the 401(k) plan. During this time, "Enron executives were dumping all of their Enron stock, [while] rank-and-file plan participants could only watch in horror as their life savings disappeared."  

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27 Id. Mr. Van Niel goes on to posit that "Andersen's extensive consulting work for Enron may well have compromised its independence and its judgment in determining the nature, timing, and extent of audit procedures," and suggests additionally that the "consulting fees may also have been lucrative enough to deter Andersen from asking Enron to make revisions to its financial statements." Id. at 16.  

28 Id. at 16.  

29 Id. Appropriate treatment of stock option grants would have reduced Enron's profits from 1998 through 2000 by approximately $188 million. Id.  


31 Thomas, supra note 9. As to the timing of the decision, compare id. (noting that "the timing of the decision certainly has raised suspicions"), with Berglund, supra note 30 (describing the proximity of this announcement with other announcements that drove down the stock price as "entirely coincidental" and "one of the most spectacular applications of Murphy's Law in history").  

32 Berglund, supra note 30. During the blackout, Enron stock fell nearly $4 per share: before the blackout it was trading at $13.81, and after the freeze was lifted, shares were trading at $9.98. BOSTELMAN, supra note 15, § 2:2.2. Meanwhile, CEO Ken Lay sold over 2 million shares of Enron stock in 2001, taking in over $100 million in the process, all the while reassuring employees and investors that the company's highest priority was restoring investor confidence and raising stock prices. Floyd Norris & David Barboza, Enron's Many Strands: Ex-Chairman's Finances; Lay Sold Shares for $100 Million, N.Y. TIMES, Feb. 16, 2002, at A1.
Enron's story is disturbing even standing by itself. However, investors and observers quickly learned that Enron's problems were not isolated. From 2000 to 2002, there were at least twenty-one other similar scandals at companies including WorldCom, Global Crossing, AOL Time Warner, and Tyco International.\(^3\) The loss to the investors and employees of the affected companies was tremendous: when the dust settled, shareholders were out nearly $500 billion.\(^4\) Public confidence in corporate managers and outside auditors and attorneys was virtually non-existent, and by October 9, 2002 the S&P 500 Index fell to half of its (record high) value on March 24, 2000.\(^5\) It became clear that Enron was "the result of significant structural weaknesses in institutional corporate governance and accountability models combined with a lack of personal ethics and integrity."\(^6\) Congress immediately set out to fortify these structural weaknesses and to restore investor confidence in both the markets and corporate governance, and in July 2002, Sarbanes-Oxley was signed into law.\(^7\)

B. Sarbanes-Oxley's Solution to Corporate Governance Failures

Sarbanes-Oxley has been described as "one of the most influential—and controversial—pieces of corporate legislation ever to have hit a statute book"\(^8\) and as "without a doubt . . . the single most important piece of legislation affecting corporate governance, financial disclosure and the practice of public

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\(^6\) *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Markets* 22 (Justin O'Brien, ed., 2005) [hereinafter *Governing the Corporation*].

\(^7\) Lucci, *supra* note 2, at 214.

\(^8\) *Sarbanes-Oxley: A Price Worth Paying?*, ECONOMIST, May 19, 2005.
accounting" since the Great Depression.\textsuperscript{39} The Act’s eleven titles address seven categories: “public disclosure of financial information and regulation of insider conflicts, corporate governance matters . . . , regulation of auditors, new rules for attorneys, responsibilities of ancillary gatekeepers, such as rating agencies, miscellaneous provisions . . . , and remedies and penalties.”\textsuperscript{40}

Sarbanes-Oxley applies with equal force to domestic and foreign companies, although there are some exceptions contained in the Act for foreign issuers and accounting firms.\textsuperscript{41} However, the Act’s provisions do allow for varying degrees of compliance based on a foreign company’s contacts with the United States:

Generally, if a non-United States company has no contacts with the United States . . . and has no contractual agreement to comply with SOX, then SOX jurisdiction does not reach such company . . . Compliance with SOX’s criminal provisions . . . is required of non-United States companies if such companies have “business only” contacts in the United States and have no securities listed on a United States exchange . . . Full compliance with the provisions of SOX is required for any non-United States company whose securities are listed on the NYSE, the American Stock Exchange[,] or NASDAQ . . . Additionally, non-United


\textsuperscript{40} BOSTELMAN, supra note 15, § 3.1. It should also be noted that Congress was not the only institution to affect change in the regulatory regime. In 2002, almost simultaneously with Congress’s passage of Sarbanes-Oxley, American stock exchanges such as the New York Stock Exchange (NYSE) and the NASDAQ also undertook efforts to review and revise their own listing rules to achieve similar goals in good corporate governance. Id. § 2:8.

\textsuperscript{41} Taneda, supra note 16, at 735 (“[I]t appears that Congress intended Sarbanes-Oxley to provide for identical treatment of domestic and foreign issuers.”). One notable exception, discussed below, is the extension of deadlines for compliance with Section 404 for foreign private issuers. Similar waivers have been debated for smaller companies who are, it is presumed, less susceptible to scandal (at least those on the scale of Enron’s, with which Sarbanes-Oxley is primarily concerned) as well as less able to shoulder the significant costs associated with compliance. Marie Leone, Small-Company Execs Sound Off on 404, CFO.COM, Apr. 5, 2006, http://www.cfo.com/article.cfm/6767953/c_2984409/?f=archives. Section 106(c) also contains a provision whereby the SEC or the Public Company Accounting Oversight Board (PCAOB) may exempt foreign public accounting firms from any provision of the Act. Sarbanes-Oxley Act, Pub. L. No. 107-204, § 106(c), 116 Stat. 745, 765 (2002).
States companies . . . that have filed a registration statement with the SEC are required to fully comply with SOX.\textsuperscript{42}

Title I of the Act is directed towards improving the regulation of auditors of publicly traded companies. It creates the Public Company Accounting Oversight Board (PCAOB or the Board), a private, non-profit corporation charged with registering, inspecting, and overseeing the auditors of public companies in order to prevent the re-occurrence of the Enron and Arthur Andersen scandal, and adopting and modifying standards to guide auditors in fulfilling their duties.\textsuperscript{43} Furthermore, the Board has the ability, as does the SEC, to bring enforcement actions and sanctions against companies it finds to be in violation of its adopted accounting principles.\textsuperscript{44} Thus, the Act’s provisions are subject to quasi-judicial interpretation through the rule-making processes of these bodies.

Title III contains reforms aimed at corporate responsibility. First, section 301 requires that publicly-listed companies maintain independent audit committees.\textsuperscript{45} Section 302 requires the chief executive and financial officers

\begin{itemize}
\item \textsuperscript{43} Elizabeth Donald & Sheirin Ghoddoucy, Interview, \textit{Corporate Governance and Sarbanes-Oxley “Post-‘Post-Enron’” – An Interview with Professor Thomas Joo of UC Davis School of Law}, 6 U.C. DAVIS BUS. L.J. 24 (2006); see also The Public Company Accounting Oversight Board, \url{http://www.pcaobus.org} (last visited May 13, 2008). Section 101 of the Act requires the PCAOB to develop a continuous program of auditor oversight “in order to protect the interests of investors and further the public interest in the preparation of informative, accurate and independent audit reports for companies the securities of which are sold to, and held by and for, public investors.” Sarbanes-Oxley Act, § 101.
\item \textsuperscript{44} Donald & Ghoddoucy, supra note 43. \textit{See also GOVERNING THE CORPORATION, supra} note 36, at 22–23 (identifying key powers of the PCAOB, including those to “conduct investigations and disciplinary proceedings concerning, and impose sanctions upon, registered public accounting firms and associated persons of such firms,” and to “enforce compliance by registered public accounting firms and their associated persons with the Act, the Board’s rules, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants”).
\item \textsuperscript{45} But see Donald & Ghoddoucy, supra note 43 (“There are two big questions about these . . . committees. First, what is meant by ‘independent’? . . . The definition of independence under Sarbanes-Oxley has been criticized. For example, the directors of audit committees are not supposed to draw any money from the corporation except in their capacity as director. But, they’re still being paid by the corporation to be a director and a member of the committee. Second, does independence do any good? ‘Independent directors’ often means ‘outside directors’ – people who . . . [b]y definition . . . don’t work day-to-day in the corporation. So the
to certify (and accept personal responsibility for) the accuracy of the company’s financial statements.\textsuperscript{46} Section 306, a direct response to the insider trading by Enron executives during the lockdown of employee retirement-savings plans, prohibits such conduct and provides remedies in the event such conduct occurs.\textsuperscript{47} Similarly, section 401 is directed toward improving transparency and accuracy in reporting the use of SPEs and similar off-balance-sheet transactions designed to artificially inflate profits on financial statements while exposing investors to risk.\textsuperscript{48}

Section 404 requires company certification of internal controls, and has drawn more attention—and criticism for being prohibitively expensive to comply with—than any other single provision of the Act.\textsuperscript{49} In response to that criticism, especially complaints that smaller and foreign companies should not be expected to shoulder those costs, in 2004 the SEC announced that it would extend the compliance date for all issuers to July 2005, and in March 2005 announced that it would again extend compliance date for foreign private issuers and non-accelerated issuers another year, to July 2006.\textsuperscript{50}

C. Commendations and Condemnations of Sarbanes-Oxley

As stated above, Sarbanes-Oxley has been both heralded and criticized since its enactment.\textsuperscript{51} Critics label the Act “hastily conceived”\textsuperscript{52} and

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\textsuperscript{47} Sarbanes-Oxley Act, § 306.

\textsuperscript{48} Id. § 401.

\textsuperscript{49} Id. § 404; see also Samuel C. Thompson, Jr., \textit{The Missing Link in Sarbanes-Oxley: Enactment of the “Change of Control Board” Concept, or Extension of the Audit Committee Provisions to Mergers and Acquisitions}, 63 BUS. LAW. 81, 87 (2007) (noting that “there have been significant complaints about the operation of many provisions of the Sarbanes-Oxley Act, principally section 404”).


\textsuperscript{52} Jose O. Garcia Mata, \textit{Changing Role of Mexican Accounting Firms and of the Comisario},
characterize it as a rushed effort by lawmakers faced with mid-term elections to respond to public outcry and maintain constituent support. Others lament the end of an era during which the SEC appeared to be taking a more "internationalist" approach to securities regulation, believing the Act to herald in a new unilateralist approach to regulation.

Many of the most vocal critics of Sarbanes-Oxley are foreign issuers. Following the enactment of the Act, then-EU Commissioner Bolkestein wrote a letter to then-SEC chairman William Donaldson objecting particularly to the creation of the PCAOB, and urging that the "registration of EU audit firms [with the PCAOB] is unnecessary, burdensome, and disproportionate because the EU has already equivalent systems in place that deal with registration, oversight and external quality assurance of auditors which are continuously being improved at EU and national level." Commissioner Bolkestein's concerns—specifically that international solutions such as this should recognize attempts by other countries to regulate similar conduct—are representative of concerns shared by many foreign issuers in Europe, and elsewhere.

The extension of the section-404 compliance date is one example of a larger criticism of the Sarbanes-Oxley Act. One professor observes the logical fallacy of trying to remedy and prevent egregious (and, in many instances, knowing and willful) breaches of corporate governance rules by passing new corporate governance rules, because:


56 See generally Cardilli, supra note 55 (discussing European reaction to passage of Sarbanes-Oxley).
looking at Enron, one of the problems was people simply ignoring the regulations. . . . You can pass whatever rules you want; slimy people are still going to break them. One way you can prevent people from breaking existing regulations is to enforce those regulations more strictly. I think it probably would have been better to crack down on enforcement of existing regulations, rather than to pass more of them that ultimately won't be enforced.\(^{57}\)

Similarly, Professor Davis observes the "puzzling" means chosen to combat the perceived Enron failures, noting that "[i]t is almost as if Congress is saying: [Enron] should have done better, so all corporations should recreate the Enron board and try harder."\(^{58}\) Finally, the sheer scope of the Act has been criticized: Sun Microsystems CEO Scott McNealy analogized the Act's attempt to prevent corporate malfeasance to throwing "buckets of sand into the gears of the market economy."\(^{59}\)

In the years since the Act's passage, its supporters have been just as vocal as its critics. While some critics complain about the costs of compliance, some CEOs have recognized that at the end of the day, the law's provisions might serve to improve corporate efficiency and productivity.\(^{60}\) Moreover, in a 2005 survey of 200 financial executives, 42% described the Act as a "way to improve [their] business controls and processes," and 44% believed the law was a "net gain to investors."\(^{61}\) Also, there are efficiency and consistency arguments in favor of a centralized, coordinated legislative corporate governance scheme; as one PriceWaterhouseCoopers executive noted, "Executives credit Sarbanes-Oxley with providing a consistent, formalized structure for corporate governance and control."\(^{62}\) Finally, many proponents

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\(^{57}\) Donald & Ghoddoucy, supra note 43.


\(^{59}\) Del Jones, Sarbanes-Oxley: Dragon or White Knight?, USA TODAY, Oct. 19, 2003, at 1B. Echoing McNealy's sentiments was Overstock.com CEO Patrick Byrne, saying that "[a]s a general rule of thumb, any bill that passes the United States Senate 97-0 is probably a horrible idea." Id.

\(^{60}\) Id.


point to evidence that the Act, despite its shortcomings, is actually achieving the goals it was designed to accomplish:

Since the passage of Sarbanes-Oxley, public trust and confidence in the capital markets have increased and many aspects of corporate governance have been modified. Needed changes in auditor relationships with clients have taken place as a result of more active and effective audit committees. In addition, [CEOs and CFOs] are increasing their attention to key governance, internal control, and financial reporting issues. New internal control requirements, while not without cost, are adding value for many companies. The PCAOB's inspections of audit firms are finding areas where audit quality can be significantly improved. Finally, many entities not covered by the Act have voluntarily implemented similar practices.63

III. INTERNATIONAL EFFECTS OF SARBANES-OXLEY

Because Sarbanes-Oxley applies to any firm—domestic or foreign—that is listed on an American stock exchange, its effects are not confined to the territorial borders of the United States. As of April 30, 2008, there are 414 non-U.S. issuers listed on the New York Stock Exchange (NYSE), representing forty-five countries.64 It would be impractical to examine the effects of Sarbanes-Oxley in each of those forty-five countries; instead, this Note focuses on the impact the Act has had in Canada and Mexico. These countries are

63 GOVERNING THE CORPORATION, supra note 36, at 24. See also Sarbanes, supra note 53 (discussing a Financial Times article by two former Goldman-Sachs partners that found that the Act's reforms “have led to a 10 percent improvement in the corporate governance performance of large U.S. companies compared with their foreign counterparts” and commenting that “[t]he finance and audit committees of corporate boards are taking their roles much more seriously and imposing greater accountability on their members”), and Morse, supra note 52, at 89 (noting the rhetoric surrounding the Act but “posit[ing] that the SOX drama has been somewhat beneficial by shocking the global community into heightened levels of accountability, fostering a strong and expanding culture of responsible and transparent corporate governance”).

important partners in business, trade, and investment with the United States, and securities of issuers from each country are traded on U.S. markets.\textsuperscript{65}

This Note addresses three prominent international effects of Sarbanes-Oxley. First is the delisting effect—the concern that Sarbanes-Oxley’s stringent requirements will have a deterrent effect on foreign firms’ willingness to list on American exchanges.\textsuperscript{66} Second is the problem of conflicts between the Act’s provisions and foreign laws to which cross-listed companies are subject.\textsuperscript{67} For example, a German company with stock traded on both American and German exchanges is subject to both nations’ regulatory regimes; when inconsistencies in those laws cannot be reconciled, the issuing company is left in the unpleasant situation of having to choose which set of rules to violate and with which set to comply.\textsuperscript{68} Third, the Act has (arguably) had an unintended catalytic effect of encouraging other countries to evaluate and, where necessary, reform their own corporate governance rules.\textsuperscript{69}

\textit{A. The Delisting Effect}

One criticism of Sarbanes-Oxley is that, by increasing corporate responsibility and the costs of compliance, it provides disincentives for firms to list on American exchanges, and creates incentives for those who are already registered in the United States to delist, in order to avoid those costs.\textsuperscript{70}

\textsuperscript{65} Non-U.S. Common Issuers, \textit{supra} note 64. Of the 414 non-U.S. issuers listed on the NYSE as of April 30, 2008, seventy-seven are Canadian and seventeen are Mexican. \textit{Id.} As of April 6, 2008, there are 304 foreign firms listed on the NASDAQ, including forty-nine Canadian and three Mexican companies. NASDAQ, NASDAQ Non-U.S. Companies Spreadsheet, http://www.nasdaq.com/asp/NonUSDownload.asp (last visited June 3, 2008).

\textsuperscript{66} See generally \textit{Morse}, \textit{supra} note 52.


\textsuperscript{68} \textit{See, e.g.}, Davidoff, \textit{supra} note 67.

\textsuperscript{69} \textit{See, e.g.}, Jason Thompson, \textit{The Paradoxical Nature of the Sarbanes-Oxley Act As it Relates to the Practitioner Representing a Multinational Corporation}, 15 \textit{J. TRANSNAT’L L. & POL’Y} 265, 279 (2006) (“The lack of uniformity among E.U. nations and conflict between the [Sarbanes-Oxley Act] and E.U. data protection laws place multinational companies in precarious positions.”).

\textsuperscript{70} Detlev F. Vagts, Editorial Comment, \textit{Extraterritoriality and the Corporate Governance Law}, 97 \textit{AM. J. INT’L L.} 289, 293 (2003). If a firm desires to exit from the U.S. market, going
These concerns are especially acute with respect to small and foreign companies. The delisting effect is a product of the essentially contractual nature of American securities markets: by accepting the benefits of being traded on a U.S. exchange, a corporation—whether foreign or domestic—must accept the corresponding obligations imposed by American securities laws, including Sarbanes-Oxley.

Clearly, a company is free to elect not to trade its shares on an American exchange in the first instance. With respect to those companies that are already traded on U.S. exchanges and seek to delist, however, there are several obstacles to the delisting process that create strong incentives against delisting. First, avoiding Sarbanes-Oxley means actually deregistering with the SEC, not simply removing a company’s stock from active trading on an exchange. The deregistration process, in turn, requires that the issuer certify that it has less than 300 American shareholders; if the number of American shareholders climbs above 300 within eighteen months of the issuer’s completion of private is an option, but a firm that desires to remain publicly held has options in order to do so. See Martin C. Daks, Companies ‘Go Dark’ to Avoid SOX Compliance, N.J. L.J., Aug. 3, 2006, available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1154509535896. It may trade on a foreign exchange, or it may trade on a quotation medium such as the Pink Sheets, and thus avoid the SEC’s disclosure requirements. Id; see also Vagts, supra, at 293 (noting that “a side effect of Sarbanes-Oxley may be to enhance the volume of transactions on, and hence prosperity of, stock exchanges outside the United States”), and Carney, supra note 46, at 152 (describing the London Stock Exchange’s successful attempts to recruit firms who desire to avoid the costly requirements of Sarbanes-Oxley compliance). Daks notes that companies traded on the Pink Sheets, “instead of providing more information to investors, . . . provide none,” supra, and Professor Carney describes the Pink Sheets as a “poor substitute for the more complete and instantaneous information of other trading systems.” Carney, supra note 46, at 143. For a further discussion of the Pink Sheets, see generally PennyMarkets.com, A Little About the Pink Sheets, http://www.pennymarkets.com/pinks.shtml (last visited June 3, 2008).

See Robert Prentice, Sarbanes-Oxley: The Evidence Regarding The Impact of SOX 404, 29 CARDOZO L. REV. 703, 729 (2007) ("All told, SOX 404’s costs should soon be a relatively minor concern for large public companies. However, its costs are potentially very burdensome for small firms, a fact that has created much controversy and induced the SEC to repeatedly postpone SOX 404’s application to smaller firms.").

See Vagts, supra note 70, at 293 (noting that foreign “firms listed on [American] exchanges . . . can be held to have consented to” regulation under American securities laws).

deregistration, the issuer will find itself again subject to SEC reporting requirements and, thus, Sarbanes-Oxley.74

Above and beyond the difficulty of accomplishing delisting and deregistration with the SEC, there are compelling reasons why a firm may elect not to attempt to do so. First, a delisting firm that intends to remain publicly held will have to explain to shareholders decision to exit the U.S. market; where those reasons involve a desire to avoid compliance with an Act designed to promote good corporate governance practices, shareholders might rethink the desirability of their investment. Conversely, issuing companies from countries lacking strong corporate governance regimes can reassure their investors of the soundness of their business, accounting, and governance practices by voluntarily subjecting themselves to the rigorous standards of Sarbanes-Oxley.75

A second disincentive for a firm to delist in order to escape Sarbanes-Oxley’s ambit stems from the global trend toward increased corporate responsibility: while it might avoid SOX by listing on a foreign exchange, it will likely face increased regulation wherever it decides to list.76 Moreover, even where foreign requirements are in fact less stringent than Sarbanes-Oxley’s, the benefit a firm will receive from switching trading markets may not ultimately outweigh the costs associated with that switch, which include the delay associated with deregistering with the SEC and adjustment costs such as those associated with researching potential new markets.77

A fourth reason a firm would not want to exit U.S. markets is the unrivaled access to expert and specialist investors afforded to participants in American

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74 Morse, supra note 52, at 97. With respect to deregistration and delisting, see generally 17 C.F.R. § 240.12d2-2 (2005).


76 For example, “Marco Ventoruzzo, legal counsel to the Italian stock exchange, characterizes SOX rules as ‘not so different from those in Italy.’” Morse, supra note 52, at 117. Morse discusses reforms in Mexico and Japan that subject companies in those countries to requirements similar to Sarbanes-Oxley’s. Id. at 119–23.

77 This concern is especially relevant if investors are less willing to invest in markets where they receive less protection, in which case the costs of switching markets would also entail some degree of lost investors. See id. at 110 (stating that “[i]nvestors are far more likely to invest in non-U.S. firms insofar as they can rely upon the assurances and security provided by SEC registration and its accompanying compliance requirements”).
markets. Finally, although compliance with the Act does entail costs, a hasty decision to delist overlooks the fact that many of the Act's provisions encourage good business practices.

Since Sarbanes-Oxley’s enactment, there is empirical evidence that some firms have chosen to exit the U.S. market. There is similar evidence that other firms have chosen not to enter the U.S. market because of the costs associated with regulatory compliance. It is more difficult, however, to obtain comparable evidence as to what proportion of the delisting trend is attributable to Sarbanes-Oxley. Some delisting issuers have made it clear that the decision to delist was motivated in part or in whole by a desire to avoid compliance with the Act.

Other companies, however, “clearly recognize the

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78 See id. at 100, 110 (noting that “many large international firms clearly recognize the value of maintaining unfettered access to U.S. capital markets” and also that U.S. markets are attractive to foreign issuers because of their size and the “access to millions of affluent investors” afforded).

79 Id. at 110. For further discussion of these, and additional, disadvantages to delisting, see Brad Jacobsen & Chris Scharman, Going Dark—An Alternative to Sarbanes-Oxley Compliance, UTAH BAR J., Apr. 26, 2007, http://webster.utahbar.org/barjournal/2007/04/going_dark_an_alternative_to_s.html (identifying as potential disadvantages of delisting “reduced liquidity of a company’s stock; reduced ability to use a company’s stock as currency in acquisitions; perceived loss of prestige; potential to make stock-based incentive plans less attractive to employees; loss of access to the capital markets to raise money; ... not having audited financial statements and complying with certain of the requirements of SOX may make a company less attractive as a potential acquisition target or for future financings; ... the substantial risk of shareholder litigation regarding the decision to go dark; potential loss of stock value and, even if the company maintains trading status on the Pink Sheets, lower trading volumes; and no payments are made to shareholders in connection with the loss of liquidity that going dark will bring”).

80 At the end of 2003, there were 467 foreign issuers on the NYSE, including twenty-three Mexican and seventy-eight Canadian firms. 467 NYSE Non-U.S. Listed Issuers from 50 Countries, http://www.nyse.com/pdfs/03nonUSIssuers.pdf (last visited Apr. 6, 2008). By April 30, 2008, the total number of non-U.S. issuers has fallen to 414, of which seventy-seven are Canadian and seventeen are Mexican companies. Non-U.S. Common Issuers, supra note 64.


82 See, e.g., Karmel, supra note 54, at 857 (observing the difficulty of identifying a single cause of the delisting trend because, for example, ordinary business cycles and a worldwide recession likely affected some companies’ decisions to delist).

83 For example, “[h]ardware wholesaler Moore-Handley... said [in October 2003] that it was taking the necessary steps so that it won’t have to comply with Sarbanes, including delisting itself from the Nasdaq exchange.” Jones, supra note 59. Moore-Handley’s CEO estimated that
value of maintaining unfettered access to U.S. capital markets[,]" and have chosen not to delist. Though it is not clear what role Sarbanes-Oxley has played (and continues to play) in the delisting trend, there is enough evidence that the SEC continues to exhibit concern. In 2006 it set up an advisory committee to study the Act’s effects, and in April of 2006 that committee recommended that businesses with equity capitalization of $787 million or less be exempt from complying with certain of the Act’s provisions.

B. Conflict and Overlap with Foreign Laws

Many of the companies that do not elect to exit the U.S. market by delisting also maintain listings in other countries. Being subject to multiple sets of regulations, an issuer might find itself facing provisions that irreconcilably conflict with each other. In these instances, the assertion of U.S. jurisdiction to enforce American laws is especially controversial in light of concerns of extraterritoriality and comity. These concerns are further exacerbated in cases where the relevant foreign country has in place a comparable set of corporate governance rules aimed at regulating the same abuses that Sarbanes-Oxley was designed to regulate.

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compliance with the Act would cost the firm—which earned $300,000 in 2002—$250,000. Id. Similarly, a 2004 survey of 113 U.K. firms that maintained listings in both the United States and the United Kingdom revealed that several firms planned to delist from American exchanges, despite the SEC’s willingness to stagger the dates of compliance with Section 404, because the costs of maintaining those registrations outweighed the perceived benefits. Morse, supra note 52, at 95–96.

Morse, supra note 52, at 100. In 2003, another CEO stated that his company, Pervasive Software, which had $39 million in revenue at the time, would maintain its listing because it anticipated fast growth in the future. Jones, supra note 59.

Daks, supra note 70.

Often corporate governance conduct prohibited under the more stringent Sarbanes-Oxley Act is legal under the regulatory laws of another country. For example, one commentator notes that “[i]n Australia, compliance with Sarbanes-Oxley would violate Australian law.” Lucci, supra note 2, at 243.

Mindora D. Vancea, Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?, 53 DUKE L.J. 833, 833, 860 (2003). Extraterritoriality refers to the ability of a country to regulate behavior outside of its territory through application of its laws, while comity refers to a nation’s willingness to “[recognize] the legislative acts of another nation.” Id. See also Vagts, supra note 70, at 289 (“Both official and unofficial commentators abroad have objected to portions of the law as overextending the reach of American control.”).
The fact that inconsistencies exist between American and foreign regulations does not mean that those inconsistencies are necessarily insurmountable. The PCAOB has engaged in consultations and discussions with both regional and national regulators in Europe (at the regional level with European Commission regulators, as well as at the national level with regulators from individual countries), Canada, Australia, Japan, and France.\textsuperscript{88} Additionally, regulatory agencies in other countries have demonstrated some willingness to provide guidance to their issuers. For example, in response to concerns raised by French cross-listed corporations about a conflict between Sarbanes-Oxley's whistleblower protections and French law, France's Commission Nationale de l'Informatique, a data protection agency, issued guidelines for companies to follow in crafting their whistleblowing mechanisms in a manner consistent with French privacy laws.\textsuperscript{89}

In those instances where the Act is not inconsistent with foreign laws, it frequently poses a second problem to foreign issuers: many of Sarbanes-Oxley's provisions seek to regulate problems already regulated by foreign laws, so it is both "unnecessary and inefficient for the U.S. to impose its own corporate governance regulations" on such issues.\textsuperscript{90} Duplicitous regulation creates the possibility of future difficulties of compliance with two sets of rules rather than one and also increases the costs associated with such compliance.\textsuperscript{91}

\textbf{C. The Catalytic Effect}

In addition to the effects, described above, that Sarbanes-Oxley has had on individual companies subject to its provisions, there has been discussion of whether the Act has had a broader, more macro-level impact on international corporate governance. Although the corporate scandals prompting the Act's

\textsuperscript{88} Governing the Corporation, supra note 36.
\textsuperscript{89} Dugie Standeford, Decision Said to Accommodate U.S. Law but Leave EU Compliance Unclear, COMM. DAILY, Jan. 3, 2006. The Act calls for the creation of "whistleblower channels" for anonymous reporting of violations of corporate accounting and auditing laws. Id.
\textsuperscript{90} Vancea, supra note 87, at 842. Two examples of such duplicity, discussed below, are the mandate of CEO and CFO certification of financial reports and the requirement that companies adopt financial reporting procedures and disclosure controls; these requirements are found in both Sarbanes-Oxley as well as in rules promulgated by Canadian Securities Administrators (CSA). Ontario Secs. Comm'n, Multilateral Instrument 52-109, available at http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20040326_52-109-cert.jsp (last visited June 3, 2008).
\textsuperscript{91} Vancea, supra note 87, at 842.
passage were largely unique to the United States in 2002, as that changed, the Act began to function as a catalyst for other countries to reexamine their own corporate governance regime. One observer, forecasting this effect early after the Act was enacted, predicted that the Act would "become the benchmark against which every other jurisdiction's corporate governance rules are tested." The role of Sarbanes-Oxley as catalyst for reform in both Canada and Mexico, is discussed in turn below.

1. Canada

Canadian lawmakers responded quickly to Congress's enactment of Sarbanes-Oxley and in 2004 enacted a similar series of reform measures. The Canadian laws are, in some respects, replicas of Sarbanes-Oxley's provisions, though in other instances there are important modifications accounting for the structural and cultural differences existing between the two countries. Primarily, Canadian lawmakers perceived these reforms as a convenient way of ensuring the continuance of preferential access to American capital markets. Being a response to American reforms, rather than a response to corporate scandals, the Canadian laws represent more of an attempt

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92 No country, or even region, experienced corporate scandals on the same scale as the United States did prior to the enactment of Sarbanes-Oxley. Nevertheless, Europe experienced a similar scandal surrounding the collapse of dairy giant Parmalat in 2003. For a discussion of the Parmalat scandal and its revelations regarding European corporate governance failures, as well as implications for reform in Europe, see Claudio Storelli, Note, Corporate Governance Failures—is Parmalat Europe's Enron?, 2005 Colum. Bus. L. Rev. 765, 766 (2005).

93 See, e.g., Morse, supra note 52, at 118 (describing the trend of homogenization of best business practices and noting the "trailblazing effort" of the United States in passing Sarbanes-Oxley and the reasonable expectation that other world economic leaders will follow suit).

94 Andrew Sawers, Act Brings Greater Accountability, Fin. Director (U.K.), Oct. 1, 2002, at 51. Likewise, Morse suggests that "SEC enforcement efforts and the criminal sanctions associated with noncompliance will promote SOX mandates as the gold standard or, at the very least, as a reliable proxy against which to compare all other corporate governance standards." Morse, supra note 52, at 117.


96 Id.

97 Id. This preferential access is important to Canadian issuers because "Canadian firms make up the single largest group of foreign firms listed on U.S. stock exchanges, with approximately 15% of Toronto Stock Exchange (TSX) listed firms having a U.S. listing." Id.
to maintain, rather than revive, investor confidence. Hence, there was less of a sense of urgency in crafting and passing the Canadian reforms than in passing Sarbanes-Oxley, and the Canadian reforms are more “non-prescriptive” than Sarbanes-Oxley’s provisions.  

Aside from the context in which the two countries’ laws were passed, the capital markets of the United States and Canada differ in several important respects that make a “cut and paste” version of Sarbanes-Oxley unworkable in Canada. First, Canada does not have a national regulatory body for its capital market to rival the American SEC. Instead, securities regulation is subject to provincial—not federal—legislation. In a country with different sets of regulatory rules, many of the same concerns discussed in this Note are present on a micro-level. Furthermore, enforceability is difficult where there is no national regulatory agency to ensure compliance across provinces and territories.

Second, the Canadian market consists primarily of thinly-traded companies with little or no institutional investment. While relatively few American companies have a single controlling shareholder, a much higher percentage (over 25%, according to Toronto Stock Exchange (TSX) estimates) of Canadian firms have a single controlling shareholder. Also, more than three quarters of the companies on the TSX index have three or fewer shareholders with legal or effective control of the corporation. Third, directorships of Canadian corporations are far more interconnected than their American counterparts: “[o]f the one hundred most profitable [Canadian] companies, forty-five percent held ten percent or more of the shares of another company on the list.” Fourth, Canadian companies are able to go public earlier than American companies, and many Canadian publicly-held firms are small by American standards. Concerns therefore arise that imposing requirements

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98 Id. at 5, 13.  
99 Id. at 6.  
100 Davis, supra note 58, at 982. Although the Canadian provincial regulators together formed the Canadian Securities Administrators (CSA), which develops instruments and policies to be adopted by the provinces, this organization lacks the power of the SEC to pass rules that are binding and enforceable without any further adoption by agencies or states. Id. at 982–83.  
101 GRAY, supra note 95, at 6.  
102 Davis, supra note 58, at 982.  
103 Id. at 983.  
104 GRAY, supra note 95, at 10.
as stringent as Sarbanes-Oxley's would be an unworkable burden on many of these companies.\textsuperscript{105}

Finally, some commentators believe that reformers should seek to accomplish their desired results through carrots rather than sticks: they argue that a rules-based approach (such as that imposed by Sarbanes-Oxley) tends to create an unhealthy "find the loophole" corporate mentality—a mentality that can be avoided by instead implementing and incentivizing compliance with voluntary guidelines and best standards.\textsuperscript{106} The approach suggested by these observers has the added advantage of leaving companies with the flexibility to make day-to-day decisions in operating their businesses.\textsuperscript{107}

One area in which the influence of the American experience was clearly felt by Canadian reformers is the preparation taken prior to enactment. Canadian lawmakers sought to avoid the confusion and uncertainty surrounding Sarbanes-Oxley's passage, as well as criticisms of it being enacted too hastily, by embarking on an extensive consultation process prior to enacting any changes.\textsuperscript{108} These reform efforts resulted in a series of national instruments and policies promulgated by the CSA, and ultimately left to adoption by the individual provincial governments.\textsuperscript{109} Like Sarbanes-Oxley, the Canadian rules call for CEO and CFO certification of financial reports and require companies to adopt financial reporting procedures and disclosure controls.\textsuperscript{110} They also echo Sarbanes-Oxley's reforms of audit committees,\textsuperscript{111} and propose the creation of a national accounting board analogous to the PCAOB.\textsuperscript{112}

Following the promulgation of the CSA's instruments, the British Columbia Securities Commission (BCSC) issued a notice refusing to adopt the CSA's proposals on certification and audit committees, stating

\begin{itemize}
\item \textsuperscript{105} Id. at 7.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} Id. Given the differences between American and Canadian corporate structures, philosophies, and capital markets, at least one commentator suggests that Canadian lawmakers might have done better to look to the European Union for guidance, where the differences (at least in capital structure) are less disparate. See Davis, supra note 58, at 955.
\item \textsuperscript{108} GRAY, supra note 95, at 7.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Ontario Secs. Comm'n, Multilateral Instrument 52-109, supra note 90.
\end{itemize}
that it viewed the certification requirement as a nuisance filing because current regulation provided prohibitions on misleading statements of the corporation's financial position with both directors and executive officers being liable for any such misrepresentation. [The BCSC] also had concerns about the ability of directors to evade their present responsibility by claiming reliance on the officers' certification. With respect to the requirement for independent directors on audit committees, the BCSC said it preferred using a combination of positive general duties in the regulatory regime requiring a corporation to have an audit committee and to disclose material information about that committee's membership and their qualifications.\textsuperscript{113}

The Canadian experience demonstrates some of the difficulties facing any reformers. While Canadian reformers sought to avoid many of the problems that plagued the American reform effort, they ultimately experienced a different set of problems unique to Canada's peculiar corporate climate and capital structure.

2. Mexico

Just as America's neighbor to the north has experienced effects of Sarbanes-Oxley's enactment, so too has its southern neighbor. As one commentator noted, "Mexico, an important participant in the regional and global economies, is not immune to the side effects of the medicine being administered to attempt to cure the ills of the U.S. crisis of confidence" in the accounting profession and capital markets.\textsuperscript{114} Because many Mexican entrepreneurs have strong ties to American corporations, they have an acute awareness of both the governance problems and solutions such as Sarbanes-Oxley in the United States. Thus, even for those Mexican businesses that are not legally bound to comply with the Act, it "has transformed the way Mexican companies' CEOs and CFOs are looking at things."\textsuperscript{115} Furthermore, because of the ease with which money can cross borders, investment markets have become increasingly competitive. Investors choose where to invest their

\textsuperscript{113} Davis, \textit{supra} note 58, at 986–87.
\textsuperscript{114} Mata, \textit{supra} note 52, at 49.
money based on a number of different factors, but certainly investor confidence will be stronger where there exists adequate safeguards against corporate malpractice. Given that Sarbanes-Oxley implemented such safeguards in the United States, the need for similar reform in Mexico was soon apparent in order to maintain an active competitive corporate environment. One SEC Commissioner commented that "[t]he Mexican government recognizes that in the global economy, investors must be protected[, r]egulation similar to Sarbanes-Oxley will attract capital to their economy" and, Mexican lawmakers hope, stop the delisting trend plaguing Mexico’s stock market as well as assuage skeptical investors’ perceptions of Mexico’s markets as rigged.

In response to these pressures, particularly the need to remain competitive in the global economy, Mexican lawmakers initiated their own efforts toward corporate governance reform and increased investor confidence in the wake of the Sarbanes-Oxley reforms in the United States. Although many of the regulations passed in 2003 were already in the making prior to the Enron scandal and enactment of Sarbanes-Oxley, the Act’s passage in the U.S. did put additional pressure on Mexican lawmakers to remove the issue from the back-burner and hasten the pace of reforms. Those efforts, directed primarily toward remedying perceived inadequacies in corporate oversight and enforcement, as well as toward making corporate governance more transparent, culminated in December 2005 with approval by Mexico’s federal Congress of a securities market law, the Ley del Mercado de Valores (LMV).

Additionally, just as American exchanges amended their listing requirements and regulations, by 2004, Mexico’s answer to the SEC, Comision Nacional Bancaria y de Valores (CNBV), had amended its own rules to reflect some of the changes made through, and in the wake of, Sarbanes-Oxley. Currently,

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116 Morse, supra note 52, at 121.
117 Josh Lyons & Kara Scannell, Mexico Moves to Toughen Up Securities Laws; Tries to Attract Foreign Investors, GLOBE & MAIL (Can.), Dec. 8, 2005, at B17. See also Mata, supra note 52, at 53 (noting “the need of Mexican public companies to implement strict corporate governance practices to offset the perception that closely controlled companies have overriding managements and boards of directors which remain exclusively an Old Boys' Club”).
118 Lyons & Scannell, supra note 117.
119 Heather, supra note 115, at 58.
121 Mata, supra note 52, at 49. However, Mata notes that the new Mexican rules “fall short” by failing to require some of the CEO and CFO certifications required by Sarbanes-Oxley. Id.
there is no oversight body analogous to the PCAOB in Mexico; however, the CNBV has initiated efforts toward the creation of such a body.\textsuperscript{122} One commentator notes that although the establishment of an oversight board in Mexico is desirable, it "would require unavailable resources needed to attract the required talents to conduct a professional and fair oversight function," and suggests that for the time being this move bodes well for the future of Mexican reforms.\textsuperscript{123} Additionally, following a series of crises in the mid-1990s in the banking industry, the CNBV in 2000 "exhorted public companies to voluntarily adopt the recommendations of the Best Corporate Practices Code and required formal reporting of the degree of adherence to the recommendations" designed to promote good corporate governance.\textsuperscript{124} Based on corporate reports, compliance with the regulations appears to be widespread, but commentators have questioned the extent to which those corporate reports provide reliable and accurate evaluations of compliance by the companies preparing them.\textsuperscript{125}

Just as Sarbanes-Oxley was subject to much criticism from the outset, the LMV and related regulations have faced similar opposition. Billionaire media mogul Ricardo Salinas Pliego,\textsuperscript{126} led that opposition by criticizing the LMV as

\textsuperscript{122} \textit{Id.} at 50.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 51.
\textsuperscript{125} \textit{Id.} Mata's research indicates that, in 2002, 61% of issuers adopted the BCPC recommendations on make up of boards of directors, and 88% adopted recommendations on operation and duties of boards of directors. Seventy-three percent adopted recommendations on disclosure of information to shareholders, and 87% adopted the recommendation that audit committees' conclusions be validated by an independent auditor. The recommendation that rated lowest in adoption by companies was that regarding the performance evaluation and compensation of top management, adopted by only 49% of issuers as of 2002. However, he also notes that the lack of meaningful guidance as to what documentation must be generated to support adherence to these recommendations means that, in many cases, reported compliance is based on subjective management interpretations rather than reliance on any objective criteria to measure adherence. \textit{Id.} at 52. \textit{See also} Heather, \textit{supra} note 115, at 56–57 (noting the existence of "questions about the reliability of any so-called compliance statistics," but also that "[a] majority of the Mexican companies on the [Mexican] stock exchange have adopted many of the principals in the Code").

\textsuperscript{126} Salinas, the chairman of TV Azteca SA, Mexico's second-largest broadcaster, acquired his fortune through "television, retail, and cellular services," and partially through inheritance;
a "cut-and-paste" replica of Sarbanes-Oxley that, among other flaws, fails to recognize the continuing importance of family-controlled businesses in Mexico.\textsuperscript{127} Salinas's objections, however, are not based entirely on an objective concern about the inapplicability of the Act's provisions to the Mexican economy: he is the first executive of a foreign company accused, in the form of a fraud suit filed by the SEC, of violating Sarbanes-Oxley's provisions.\textsuperscript{128} Additionally, there are discussions of Mexican prosecutors bringing an insider-trading case against Salinas, which would be the first in that country.\textsuperscript{129}

IV. INTERNATIONAL HARMONIZATION OF CORPORATE GOVERNANCE STANDARDS

One criticism of Sarbanes-Oxley is that it was an American response to an American problem, and that therefore it should not be applied to foreign companies or, for that matter, relied upon by foreign countries in crafting similar corporate governance regulation. However, in recent years that argument has been somewhat undercut as other countries have experienced corporate scandals similar to those prompting the Sarbanes-Oxley reforms.\textsuperscript{130}


\textsuperscript{127} Lyons & Scannell, supra note 117. The typical Mexican public company is controlled by a small concentration of family members, and audit committees have found it difficult to persuade family shareholders that reforms are worth the additional cost. Heather, supra note 115, at 56–57.

\textsuperscript{128} Lyons & Scannell, supra note 117. See also Press Release, Sec. & Exch. Comm’n, SEC Charges TV Azteca and Its Chairman—Ricardo Salinas Pliego—with Fraudulent Scheme to Conceal Salinas’ $109 Million Windfall Through Related Party Transactions (Jan. 4, 2005), available at http://www.sec.gov/news/press/2005-1.htm. The SEC allegations were that “he bought the discounted debt of one of his outside holdings, Unefon, and then sold it back to the company at face value. In doing so, he allegedly pocketed close to $109 million in the process for himself and a partner” at the expense of shareholders. Salinas, supra note 126. Although existing Mexican laws did not prohibit such a deal, the LMV would have required disclosure to outside directors of Salinas’s involvement in the shell company. Lyons & Scannell, supra note 117. Without admitting or denying the charges against him, Salinas settled with the SEC, agreeing to pay $7.5 million and never to serve as an executive or director of any company listed on an American exchange. Elisabeth Malkin, Billionaire in Mexico Settles Case with S.E.C., N.Y. TIMES, Sept. 16, 2006.

\textsuperscript{129} Salinas, supra note 126.

\textsuperscript{130} For example, the collapse in 2003–2004 of Italian Parmalat brought with it the harsh realization that Europe was not immune from corporate scandals, notwithstanding the loud
Just as scandals have not confined themselves to a single country or continent, neither have they confined themselves to a single type. The contours of the Enron scandal were shaped by the culture and structure of the American economy and capital market; foreign corporate scandals are likewise a product of their own unique environments. Given that all scandals are not created equal, the question arises whether a "one size fits all" solution is possible or desirable. One commentator questions the ability of American laws to solve problems peculiar to various foreign scandals, and suggests that foreign companies that are already regulated by adequate foreign safeguards in their home countries should be exempt from some of Sarbanes-Oxley's provisions.\(^3\)

A second argument against attempting international harmonization of corporate governance rules stems from concerns of federalism, extraterritoriality, and comity. First, corporate management in the United States has traditionally been left to the states, and some have criticized Sarbanes-Oxley for essentially commandeering the issue to the federal government.\(^3\) Additionally, there are the concerns about the Act's ability to regulate conduct outside of American jurisdictions and the interference with foreign governance rules that might occur through the application of Sarbanes-Oxley's provisions to foreign companies. Third, as was witnessed on a smaller scale by the CSA's unsuccessful attempts at achieving regulation

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\(^{131}\) Lawrence A. Cunningham, *From Convergence to Comity in Corporate Governance Law: Lessons from the Inauspicious Case of SOX*, 1 INT'L J. DISCLOSURE & GOVERNANCE No. 2 (2004), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=462142. Cunningham acknowledges the difficulty in defining what safeguards are "adequate," but suggests that two factors to be considered are: first, the existence of a comprehensive set of enforced securities regulations; and, second, a lack of widespread scandals and corruption. *Id.* Countries that meet Cunningham's criteria include Canada, France, Germany, the Netherlands, the U.K., Japan, Australia, and perhaps Israel. *Id.*

harmonization within Canada, harmonization among various countries could prove unworkable.

Finally, there is no reason to assume that a solution to corporate governance problems must necessarily materialize through legislation. First, the various exchanges could set their own standards and rules, thus allowing companies and investors to make decisions for themselves, based on their own perceptions of each option's associated costs and benefits, about where to list and invest. However, enforcement under this option might be problematic to the extent that it is advantageous to have a single central enforcer like the SEC, rather than leaving enforcement to each individual exchange. On the other hand, maintaining a single enforcing agency such as the SEC, but having it enforce different sets of rules against companies listed on different exchanges, is equally inefficient and costly.

Another possibility would be to revert to a de-centralized corporate governance regime. Until the 1930s, with the creation of the SEC and the federal legislation and regulation that came with it, corporate governance was an issue left to the states. However, by increasing the number of sets of regulations and creating possibility for divergence among regulations in various states, this problem could exacerbate already-existing concerns of exposing companies to conflicting regulations. Additionally, the enforcement concerns above are equally applicable to this option.

V. CONCLUSION

Sarbanes-Oxley, like any act of such breadth, has its advantages and its disadvantages. While it has undoubtedly imposed costs on companies who choose to trade their stock on American exchanges, it has also imposed practices that, generally speaking, support increased corporate visibility and accountability, and that protect investors against the type of corporate abuses that were so prevalent at the end of the twentieth century.

Given the difficulties experienced by countries such as Canada in national harmonization, international homogenization of regulatory rules would be a daunting task. Because, however, other countries have followed the American

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133 Shortly after the Enron scandal, both the New York Stock Exchange and the NASDAQ amended their corporate governance listing standards to promote director independence, increase the powers and requirements of the audit committee, and address other perceived failures in the pre-Enron regime. Press Release, Sec. & Exch. Comm'n, NASD and NYSE Rulemaking: Relating to Corporate Governance (Nov. 4, 2003), available at http://www.sec.gov/rules/sro/34-48745.htm. Many of these changes were similar to those undertaken by Sarbanes-Oxley.
example in reforming their own regulations, and because American enforcement agencies seem willing to work with foreign regulatory agencies to make compliance easier for multinational firms subject to multiple sets of regulations, harmonization may not be necessary, as long as clear incongruities between Sarbanes-Oxley and foreign acts are either resolved or reconciled.

For all of its flaws, Sarbanes-Oxley did take important steps to rid the American corporate environment of flagrant abuses by executives and directors, and while the remedy chosen might have some significant side effects, it appears, going on five years after its passage, that the Act is at least a significant step toward the cure, and toward a healthier corporate culture in the future.