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## Foreword

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## **F. HODGE O'NEAL CORPORATE AND SECURITIES LAW SYMPOSIUM**

### **AFTER THE SARBANES-OXLEY ACT: THE FUTURE OF THE MANDATORY DISCLOSURE SYSTEM**

#### **FOREWORD**

**TROY A. PAREDES\***

#### **I. A BRIEF INTRODUCTION TO SARBANES-OXLEY**

Even with the recent run-up in stocks—as of mid-August of 2003, the Dow Jones Industrial Average had reached a 14-month high, climbing to 9,428.90, and the Nasdaq Composite Index had reached a 16-month high at 1,761.11<sup>1</sup>—the major stock indices remain significantly off their all-time highs, which saw the Dow Jones Average eclipse 11,722 and the Nasdaq Composite top out at 5,048.<sup>2</sup> Although a number of factors contributed to the stock market decline that started in 2000, including the bursting of the dot-com bubble, a softer economy than many expected, September 11 and the ongoing terrorist threat, and the wars in Afghanistan

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1. E.S. Browning, *Tech Stocks Reach High of Their Own*, WALL ST. J., Aug. 20, 2003, at C1.

2. See, e.g., Karen Talley, *Small-Stock Focus: S&P SmallCap 600 Aims for All-Time High*, WALL ST. J., Aug. 25, 2003, at C8.

and Iraq, for purposes of this Symposium, one factor that weighed on stocks stands out: corporate scandal. Beginning with Enron in the fall of 2001, a wave of corporate scandal crashed on the U.S. economy. In addition to Enron, the scandals involved companies such as WorldCom, Tyco, ImClone, Adelphia, and Global Crossing, to name a few, and ensnared leading financial institutions up and down Wall Street, along with major accounting firms, most notably the collapsed Arthur Andersen. As if the *bona fide* scandals that made the headlines were not enough to drag the markets down, a record number of earnings restatements in recent years—increasing steadily from 116 restatements in 1997, to 158 in 1998, 234 in 1999, 258 in 2000, and to 305 in 2001 when the scandals began to break<sup>3</sup>—have cast further doubt on the governance practices, finances, and business plans of many companies.

Broad and deep capital markets like the U.S. enjoys, where ownership and control are widely separated,<sup>4</sup> depend on a healthy dose of investor confidence to convince investors to hand over trillions of dollars to directors and officers over whom they exercise relatively little influence. Although the nature of business is that some enterprises will succeed and others will fail, shareholders need to trust that the management team holding the company's reins will run the business honestly, in good faith, with due care, and loyally—in short, in the best interests of the shareholders as opposed to in the best interests of the directors and officers. The gross abuses at what amounted to a handful of companies, given that there are approximately 14,000 public companies in the U.S., rocked investor confidence, resulting in a major selloff of equities and deep concerns market-wide. Investors understandably became skittish and, unable to distinguish the “good” companies from the “bad” ones, dashed to the sidelines with cash in hand as events at Enron, WorldCom, and elsewhere unfolded.

The scandals at Enron et al. were particularly disconcerting because so many redundant checks and balances in our corporate governance system and capital markets failed. Where were the boards of directors? Why did securities analysts fail to ask the probing questions that top executives should have been pressed on? How did the auditors overlook the cooked books and the managed earnings? What about the lawyers structuring the

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3. See JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN FINANCE 624 (3d ed. 2003) (citing SECURITIES INDUS. ASS'N, 2001 SECURITIES INDUSTRY FACT BOOK 48).

4. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

deals and preparing the SEC filings? Why did the credit rating agencies wait so long to downgrade companies, in some cases maintaining a company's investment-grade rating even after it was tarnished by scandal? These breakdowns have received a great deal of attention over the past two years, but investors themselves also deserve blame for becoming "irrationally exuberant" during the heady days of the bull markets that spanned the 1990s when people were willing to invest in any company if its stock price was higher today than yesterday or if it had ".com" after its name. Nor are the regulators above reproach. The SEC, for example, had not reviewed Enron's annual report filings since 1997, prompting the Senate Governmental Affairs Committee to be very critical of the country's top securities regulator,<sup>5</sup> which had suffered from being underfunded and understaffed. Although the scandals affected relatively few companies overall, the seeming perfect storm of failures disillusioned many about the U.S. corporate governance system and the integrity of U.S. capital markets.<sup>6</sup>

If the debacle at Enron had been an isolated incident, and could have been written off as the work of a few rotten apples at the company, perhaps Congress and the President would have sat tight. But once WorldCom broke in mid-June of 2002, it became clear that the U.S. corporate governance system was suffering from deep systemic flaws that needed to be fixed. As political pressures mounted, and as stock prices continued to plummet, something had to be done. In late July, within weeks of WorldCom breaking, Congress adopted, by a vote of 99 to 0 in the Senate and 423 to 3 in the House,<sup>7</sup> what is proving to be the most important federal corporate governance and securities legislation since the Securities Exchange Act of 1934: the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").<sup>8</sup> Once President Bush signed the legislation into law

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5. See STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 107TH CONG., FINANCIAL OVERSIGHT OF ENRON: THE SEC AND PRIVATE-SECTOR WATCHDOGS (Comm. Report Oct. 8, 2002); see also Jonathan Weil & John Wilke, *Senate Panel Chides SEC for Falling Short in Enron Regulation*, WALL ST. J., Oct. 7, 2002, at C1.

6. See, e.g., Kurt Eichenwald, *Could Capitalists Actually Bring Down Capitalism?*, N.Y. TIMES, June 30, 2002, § 4, at 1.

7. *Corporate-Oversight Bill Passes, Eases Path for Investor Lawsuits*, WALL ST. J., July 26, 2002, at A1.

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) [hereinafter Sarbanes-Oxley]. Even before Sarbanes-Oxley was signed into law, the Securities and Exchange Commission had taken a modest, but important, step that helped restore investor confidence and convince investors to return to the market. The SEC had issued an order requiring chief executives and chief financial officers to certify the accuracy of their companies' financials by mid-August of 2002, bringing some integrity back to financial statements. Commission Order No. 4-460, Order Requiring the Filing of Sworn Statements Pursuant to Section 21(a)(1) of the Securities Exchange Act of 1934

on July 30, 2002,<sup>9</sup> the markets were given at least some assurance that fraud and corporate abuses would not be tolerated. Indeed, in addition to the actions of Congress and the President, a number of cops on the beat stepped up their efforts to detect and root out corporate misdeeds: new listing standards were proposed for companies trading on the New York Stock Exchange or Nasdaq; the SEC engaged in wide-scale rulemaking and intensified its enforcement efforts; the Department of Justice began to focus its attention on corporate fraud; and New York Attorney General Eliot Spitzer assumed an unprecedented role in going after corporate corruption. Whether or not Sarbanes-Oxley's substantive requirements are good policy that will result in better corporate governance and performance over the long haul—many remain concerned that Congress overreacted and that Sarbanes-Oxley regulates too much risk out of the market, is too costly to comply with, and has distracted senior executives from running their businesses<sup>10</sup>—one thing is certain: a strong regulatory response was needed, at least in the short run, to boost investor confidence.

At its core, the historic Sarbanes-Oxley legislation is about promoting corporate transparency by ensuring full, fair, timely, and accurate disclosures. Sarbanes-Oxley, for example, mandates a host of new disclosures relating to, among other things, off-balance sheet transactions, insider stock transactions, internal control systems, and pro-forma financials; enacts tough new penalties for securities fraud; requires CEOs and CFOs to certify the financial statements of their companies; requires the SEC or, at its direction, the National Association of Securities Dealers or the stock exchanges to adopt rules to remedy conflicts of interest among

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(June 27, 2002). CEO and CFO certifications ultimately became part of Sarbanes-Oxley.

9. The final legislation was much closer to the original Sarbanes Bill than the original Oxley Bill. For a brief overview of the legislative process resulting in Sarbanes-Oxley, see Joel Seligman, *No One Can Serve Two Masters: Corporate and Securities Law After Enron*, 80 WASH. U. L.Q. 449, 474-82 (2002).

10. This is a particular concern with Sarbanes-Oxley, given that it was adopted relatively quickly in a politically-charged environment. A strong regulatory response to the wave of scandal, however, appears to be consistent with historical practice. Stuart Banner has shown that the major changes in securities regulation over the past 300 years have typically followed market collapses. See Stuart Banner, *What Causes New Securities Regulation?: 300 Years of Evidence*, 75 WASH. U. L.Q. 849 (1997).

For arguments favoring a market-based, as opposed to a regulatory-based, response to the scandals, thus calling into question the wisdom of Sarbanes-Oxley, see, e.g., Troy A. Paredes, *Enron: The Board, Corporate Governance, and Some Thoughts on the Role of Congress*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Bala Dharan & Nancy Rapoport eds., 2003); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1 (2003).

securities analysts; regulates auditor conflicts of interest; and grants the SEC additional authority to regulate the professional conduct of attorneys practicing before the SEC. Perhaps the most important achievement of Sarbanes-Oxley is the creation of the new Public Company Accounting Oversight Board.

Although portions of Sarbanes-Oxley, such as Title I (which establishes the Public Company Accounting Oversight Board) and Title II (which regulates auditor independence) received careful attention in their crafting, much of the legislation was drafted hastily, in some cases at the eleventh hour. Given the overall haste of lawmakers to do something in response to the scandals and the losses that capital and labor alike suffered, Congress, on the whole, ultimately took quick action, especially given the magnitude of the reforms; and in so doing, Congress fastened on particular parts of the mandatory disclosure regime that the scandals brought to the fore and in many instances, simply called for more disclosure. What Congress did not have time to do, in light of the exigent circumstances, political pressures, and falling stock prices, was study the federal mandatory disclosure regime and its enforcement more comprehensively. This matters, because federal securities regulation is best understood and analyzed as a complex system and not as comprising a bunch of independent parts that can be tweaked or even overhauled on a one-off basis to create an effective regulatory scheme.<sup>11</sup> It is not too late, though, to pick up where Congress left off by continuing to take a hard look at how we regulate our securities markets, especially since the SEC is still considering a number of important reforms. This Symposium takes a useful step in the direction of a comprehensive review of the mandatory disclosure system in the aftermath of Sarbanes-Oxley.

## II. A MORE COMPREHENSIVE APPROACH

The goal of the mandatory disclosure regime of the federal securities laws is to promote capital market integrity and the efficient allocation of

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11. For more on a “systems” approach that views corporate governance and securities regulation as comprising complementary parts that fit together to create a whole that is greater than the sum of its parts, see, e.g., Masahiko Aiko, *The Japanese Firm as a System of Attributes: A Survey and Research Agenda*, CEPR PUBLICATION NO. 288 (1992); Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781 (2001); Paul Milgrom & John Roberts, *Complementarities and Systems: Understanding Japanese Economic Organization*, 9 ESTUDIOS ECONOMICOS 3 (1994); Curtis J. Milhaupt, *Property Rights in Firms*, 84 VA. L. REV. 1145 (1998); Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn’t the Answer*, WM. & MARY L. REV. (forthcoming 2003); see generally Lynn M. LoPucki, *The Systems Approach to Law*, 72 CORNELL L. REV. 479 (1997).

capital by ensuring that investors have the information they need to make informed investment decisions. Disclosure serves a second important purpose, which is to encourage management to run the business well by shining light on mismanagement and self-dealing and by giving investors the information they need to make informed decisions when exercising their right to vote and when deciding whether or not to sue for breach of fiduciary duty. By giving investors key information for buying and selling securities and for holding directors and officers accountable, mandatory disclosure injects confidence into the market and obviates the need for more direct government involvement in corporate affairs, at either the state or federal level.

This Symposium focuses on three aspects of mandatory disclosure: (1) what should be disclosed and how; (2) how should compliance with the federal securities laws be ensured; and (3) should issuers have more choice among competing regulatory regimes. For any disclosure-based regulatory regime to be effective, the information that is disclosed must be good in that it is accurate and complete. Incomplete or fraudulent information is worse than no information at all, and too little information can leave investors wanting. Simply the perception of inadequate disclosure can put investors ill at ease. The need for quality disclosures explains why so much dismay was expressed at the accounting conflicts of interest that appear to have compromised the independence of many auditors charged with signing off on company financials. But a disclosure regime depends on more than just good information. It equally depends on the information being put to good use by investors, securities analysts, portfolio managers, brokers, and others participating in securities markets. “User” conflicts of interest were another problem contributing to the recent scandals, as, for example, securities analysts that investors rely on as key “filters” of information issued biased research reports and recommendations in order to curry favor from companies that were current or potential investment banking clients.

The disclosure of information and its digestion are just part—albeit an important part—of an effective mandatory disclosure regime. The effective public and private enforcement of the federal securities laws is also key. Strong enforcement is needed not only to ensure that the mandated disclosures are forthcoming, but also to hold the “gatekeepers,” such as investment bankers, securities analysts, credit rating agencies, accountants, and lawyers, accountable to better ensure the integrity of the information that is disclosed and that early warning signs of fraud or other corporate abuses are detected and hopefully headed off. In the handwringing over what caused the scandals at Enron, WorldCom, and

elsewhere, some argued that a dampened risk of legal liability—as a result of, among other things, the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 that make it harder for plaintiffs to survive a motion to dismiss a securities fraud claim<sup>12</sup> and the U.S. Supreme Court’s decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*<sup>13</sup> that there is no private right of action for aiding and abetting securities fraud—set the stage for corporate and accounting abuses. Another camp responded that the laws on the books were adequate to stem the abuses, and that few, if any, new laws were warranted in reaction to Enron and the other scandals; rather, regulators simply needed to enforce the extant laws more rigorously. Sarbanes-Oxley ultimately enacted several new enforcement-related provisions, including a new provision prohibiting securities fraud, one extending the statute of limitations for private rights of actions, and stiffer criminal sanctions. Congress did not, however, consider easing constraints on private litigation, such as by softening the PSLRA’s heightened pleading requirements or overturning *Central Bank*.

Perhaps the quintessence of a comprehensive approach to the study of federal securities regulation is to challenge the basic premise—in other words, should the federal government have a near-monopoly on regulating our securities markets?<sup>14</sup> This question is an outgrowth of the earlier debate between proponents of mandatory disclosure and those who argued that capital market pressures are adequate to induce companies to voluntarily disclose information investors want. Although as a matter of positive law the mandatory versus voluntary disclosure debate has been settled in favor of mandatory disclosure since the 1930s, the debate has resurrected itself in recent years in the form of issuer choice. The issuer-choice debate centers less on whether or not there should be mandatory disclosure at all, and instead on whether or not issuers should have more choice among competing regulatory regimes. The debate has particular relevance post-Sarbanes-Oxley, as the federal securities laws in the U.S. have become even more demanding. Advocates of issuer choice argue that companies should be able to choose the securities law regime of the

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12. LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 1278-85 (4th ed. 2001).

13. 511 U.S. 164 (1994).

14. States, of course, also have a role to play in securities regulation, although the federal government, through the SEC, is the dominant securities regulator in the U.S. For more on important recent developments in state securities law, see Joel Seligman, *The New Uniform Securities Act*, 81 WASH. U. L.Q. 243 (2003).



federal government, any state, or any foreign country.<sup>15</sup> Some take issuer choice further to include the possibility of allowing issuers to choose to be regulated by stock exchanges, as opposed to (rather than in addition to) the regulatory regime of any state, federal, or foreign government. At bottom, issuer choice proponents claim that investors can “price” a regulatory regime just as they can “price” a company’s financials and overall business strategy. Issuer choice, it is said, gives both companies and investors more options and is thus more efficient than a one-size-fits-all mandatory federal securities law regime. Issuer choice rests on the basic observation, which is hard to dispute, that not all issuers are the same and not all investors are the same; different issuers and investors are sure to have different preferences for disclosure and enforcement regimes. The major selloff of U.S. equities that followed on the heels of Enron and the other scandals, as well as the various market-based reforms that have been urged on companies, investment banks, accounting firms, and others, bolster the issuer choice position, suggesting that capital markets are “pricing” corporate governance more today than ever. In fact, Institutional Shareholder Services, GovernanceMetrics International, Standard & Poor’s, and others have started grading the corporate governance structures of companies, just as Standard & Poor’s or Moody’s grade their debt.<sup>16</sup> Critics of issuer choice counter that regulatory competition will result in too little disclosure and enforcement and ultimately a “race to the bottom,” as competing jurisdictions relax their regulatory regimes in order to convince issuers to opt in. Indeed, the alternative read on the recent scandals is that more regulation is needed to protect the markets from themselves and from corporate insiders.

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15. See, e.g., ROBERTA ROMANO, *THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION* (2002); Stephen J. Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 CAL. L. REV. 279 (2000); Stephen J. Choi & Andrew T. Guzman, *National Laws, International Money: Regulation in a Global Capital Market*, 65 FORDHAM L. REV. 1855 (1997); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 CAL. L. REV. 903 (1998); Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom?*, 95 MICH. L. REV. 2498 (1997); Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335 (1999); Merritt B. Fox, *The Securities Globalization Disclosure Debate*, 78 WASH. U. L.Q. 567 (2000); Merritt B. Fox, *The Issuer Choice Debate*, 2 THEOR. INQ. IN L. (2001); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Paul G. Mahoney, *The Exchange as Regulator*, 83 VA. L. REV. 1453 (1997); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEOR. INQ. IN L. 1 (2001); Frederick Tung, *From Monopolists to Markets?: A Political Economy of Issuer Choice in International Securities Regulation*, 2002 WIS. L. REV. 1363 (2002).

16. See, e.g., [http://governancemetrics.com/\(gu3yaan4lw1ofd55tsqjxk55\)/Default.aspx](http://governancemetrics.com/(gu3yaan4lw1ofd55tsqjxk55)/Default.aspx); <http://www.isscgq.com/abouttheratings.htm>; <http://www.governance.standardandpoors.com>.

In his article in this Symposium, Professor Cox<sup>17</sup> focuses on reforming the financial reporting system of U.S. securities markets to ensure that the financial information companies disclose is accurate. As he notes, financial fraud was at the heart of the scandals prompting Congress to adopt Sarbanes-Oxley, and the number of earnings restatements, although not necessarily rising to the level of fraud, has skyrocketed in recent years. What is responsible for this “financial maelstrom”? According to Cox, “U.S. generally accepted accounting principles (GAAP) have become too rule-oriented.” It is, therefore, too easy for companies, with the acquiescence of their auditors, to comply with the letter of GAAP while offending its spirit. (Of course, many of the scandals, such as those at Enron and WorldCom, involved blatant fraud.) In Cox’s words, “[T]he reasoning is that the abundance of technical rules leads naturally to the trees obscuring the vision of the dominating forest.” At bottom, the fix Cox offers is more independence. Not only does he support the new requirements mandating that public companies have entirely independent audit committees, consistent with the monitoring role of the board of directors, but he supports other measures, including the new Public Company Accounting Oversight Board, that further ensure auditor independence and the integrity of our financial reporting system. Cox is hopeful that, as a result of these and other financial reporting reforms, the broad principle of “fair presentation of the reporting firm’s financial performance and position” will prevail over mere technical compliance with GAAP.

Professor Macey, in his contribution to this Symposium,<sup>18</sup> considers another side of the disclosure coin. In addition to the “supply side” of disclosure (*i.e.*, the production, formatting, and dissemination of information) that Cox focuses on, Macey points out that there is a “demand side” of disclosure (*i.e.*, the interpretation of information and its translation into trading decisions). Macey argues that demand-side problems were the primary factor leading to Enron’s demise and to the other corporate scandals. As he explains, “The Enron collapse demonstrates . . . that the ‘sunlight’ that disclosure brings about is useful only if market mechanisms are in place that are capable of observing and interpreting the information that the sunlight brings into view.” In terms of

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17. James D. Cox, *Reforming the Culture of Financial Reporting: The PCAOB and the Metrics for Accounting Measurements*, 81 WASH. U. L.Q. 301 (2003).

18. Jonathan R. Macey, *A Pox on Both Your Houses: Enron, Sarbanes-Oxley and the Debate Concerning the Relative Efficiency of Mandatory Versus Enabling Rules*, 81 WASH. U. L.Q. 329 (2003).

demand-side reforms—Sarbanes-Oxley primarily focuses on the supply-side—Macey proposes that “tax and other financial incentives” should be given to short sellers and to traders in single stock futures. This would not only encourage greater scrutiny of disclosures but would also reduce the “social stigma” associated with betting against a company or the market as a whole by taking a short position. Macey also has an interesting take on Sarbanes-Oxley. Macey discusses myriad provisions of Sarbanes-Oxley that regulate what he characterizes as the “(contractual) relationship” between issuers and their accountants and lawyers. He ultimately supports Sarbanes-Oxley’s mandatory rules, over more enabling ones, because in his view, the new mandates address distortions (*i.e.*, conflicts of interest) in the contracting process by which companies engage outside advisors. In his view, the distortions had gotten to the point where accountants and lawyers “were no longer acting as gatekeepers, but as aiders and abettors, and perhaps even primary actors in the misdeeds of their clients,” justifying a regulatory response.

The article I contributed to this Symposium<sup>19</sup> links together the supply and demand sides of disclosure. My basic point is that more information is not necessarily better than less, contrary to a basic tenet of a disclosure-based regulatory regime like the federal securities laws. “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>20</sup> But, as I stress, sunlight can also be blinding. Securities regulation primarily focuses on the supply side, mandating extensive disclosures, which have become more burdensome post-Sarbanes-Oxley. Securities regulation pays relatively little attention to how investors and securities market professionals use (*i.e.*, search and process) the information in making investment decisions. Drawing on decision theory and the literature on investor psychology, I argue that people can become overloaded and make worse decisions with more information. In particular, building on the realization that people are boundedly rational, studies show that when faced with complex tasks, such as those involving vast quantities of information, people often adopt simplifying decision strategies that require less cognitive effort but that are less accurate than more complex strategies. The basic intuition of information overload is that investors, securities analysts, and others might make better decisions by bringing a more complex decision strategy to bear on less information than by bringing a simpler decision strategy to bear on more information.

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19. Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417 (2003).

20. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (1914)

Accordingly, I conclude that the model of mandatory disclosure that says more information is better than less might be counterproductive, and I evaluate the possibility of scaling back the mandatory disclosure system.

The stiffest enforcement measures are criminal. Professor Brickey's article<sup>21</sup> argues that Sarbanes-Oxley's criminal provisions make "significant strides toward piercing the veil of corporate silence." (Putting her argument in context, Brickey catalogues the major criminal securities and accounting fraud prosecutions the recent scandals have led to, such as those arising out of Enron, WorldCom, ImClone, Adelphia, and Tyco.) Brickey observes that insiders—including a company's officers and employees, as well as its lawyers, accountants, and investment bankers—are particularly valuable to the successful prosecution of complex financial frauds, and thus a linchpin in the effective enforcement of the federal securities laws, because insiders can provide a useful "roadmap" of what happened, as Sherron Watkins did at Enron. Brickey identifies two key features of Sarbanes-Oxley that encourage individuals to cooperate with federal prosecutors. First, Sarbanes-Oxley affords corporate whistleblowers important legal protections, although they still remain subject to being shunned and shamed at the office. Brickey is realistic, however, in her assessment of the impact of the whistleblower protections, wondering out loud whether Watkins, for example, would have taken "action that she feared would doom the corporation and put the livelihoods of thousands of people at risk" by blowing the whistle on Enron instead of operating within the company's chain of command as she did. The second change Sarbanes-Oxley brings about concerns cooperating witnesses. In particular, the legislation toughens criminal fraud penalties and directs that the sentencing guidelines be revised to require longer sentences for securities fraud. The risk of a long prison term can in turn be leveraged to induce witnesses to cooperate. At bottom, for both whistleblowers and potential cooperating witnesses, Sarbanes-Oxley changes the risk/reward tradeoff of assisting the government in pursuing securities fraud.

Professor Krawiec turns her attention to internal compliance.<sup>22</sup> Because the law is necessarily incomplete, according to Krawiec, effective enforcement requires companies to establish self-enforcement mechanisms. Lawmakers cannot foresee every eventuality or solution and thus defer, if only out of necessity, to businesses and their advisors to fill

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21. Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime after Sarbanes-Oxley*, 81 WASH. U. L.Q. 357 (2003).

22. Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

in the gaps. Krawiec, pointing to a growing body of empirical studies, argues that internal compliance regimes do not effectively deter prohibited conduct and may serve as little more than “window-dressing” that provides both “market legitimacy and reduced legal liability.” In short, parties to the internal compliance process, including division managers, compliance personnel, legal departments, outside counsel, and consultants, are able to exploit the law’s incompleteness by developing gap-filling strategies that serve each party’s own self-interests as part of the ongoing renegotiation (*i.e.*, implementation and enforcement) of the law. Two problems arise, in Krawiec’s view: first, corporate misdeeds may be underdeterred; and second, resources are wasted on ineffective internal compliance efforts. She is especially critical of the extent to which the legal system gives companies a liability break if they have an internal compliance structure in place. The implication of Krawiec’s argument is that legal regimes should be less reliant on self-regulation, which, of course, suggests a need for more rigorous enforcement of stricter laws. As Krawiec puts it, “[T]he poor empirical showing of internal compliance structures, combined with the opportunities (highlighted by the Incomplete Contracts Governance Theory) for private parties to appropriate any social benefits created by legal policy, should cause a more cautious approach to such proposals than is currently evidenced in the legal literature.”

In his remarks, Stephen Cutler, Director of the SEC Division of Enforcement, underscores the importance of effective securities law enforcement.<sup>23</sup> Instead of focusing on any particular feature of enforcement, Cutler focuses on a bigger picture concern—namely, the “contemporary federal/state cooperation in the securities regulation arena.” Against the backdrop of a long tradition of state “blue sky” laws, the states, led by New York Attorney General Spitzer, have stepped up their efforts to regulate securities markets post-Enron. Just as many have expressed concern that the federal government has begun to federalize corporate law, others, as Cutler observes, have expressed concern that the states are assuming too great of a role in regulating securities markets. Although Cutler ultimately gives a nod to the dual regulatory regime that governs U.S. securities markets, he seems unprepared to cede much authority, cautioning that “as federal regulators, we must acknowledge the value of the states’ enforcement firepower, and, in return, prevail upon our state counterparts to recognize that when a state enforcement matter

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23. Stephen M. Cutler, Director, Division of Enforcement, U.S. Securities and Exchange Commission, Remarks at the 2003 F. Hodge O’Neal Symposium hosted at Washington University School of Law from February 21-22, 2003, 81 WASH U. L.Q. 545 (2003).

implicates a competing federal regulatory interest, consultation and cooperation with the [SEC] may be critical.” The “mutual goal” of state and federal regulators, as he sees it, is to “avoid re-balkanizing” the securities markets, which argues for a single, dominant federal regulator to deal with national issues affecting our securities markets.

The overlapping regulatory regime that Cutler describes stands in contrast to proposals favoring issuer choice. When it comes to granting issuers more choice among competing regulatory regimes, the recent scandals call into question whether a market-oriented approach to securities regulation is effective. Indeed, the U.S. response has been more regulation and enforcement on every level. On the other hand, it should be noted that Enron et al. also indict the U.S. regulatory regime; the scandals occurred in a setting of extensive mandatory requirements. And as mentioned earlier, there has been a strong market-based response to the recent scandals, as advocates of issuer choice anticipate.

Returning to Macey’s article, his support of the legal mandates of Sarbanes-Oxley that remedy market failures by improving the contracting process between companies and their outside advisors can be read as favoring a legal response that is ultimately consistent with “free-market solutions.” Markets cannot function without some substantive law and legal institutions supporting them. By solving contracting problems, the legal system can better assure that the very gatekeepers the market depends on to hold management accountable and to “price” governance structures and regulatory regimes perform their functions in good faith, independently, and with due care. In this sense, some law—even mandatory law—is necessary for issuer choice.

As Professor Sale points out, the goal of securities regulation is not disclosure itself, but “quality disclosure.”<sup>24</sup> Any consideration of issuer choice, therefore, must consider how the quality of the disclosures made within it will be evaluated. Sale contends that the regulatory regime of every jurisdiction depends on gatekeepers to digest information, let alone to help structure the underlying transactions. Therefore, before moving toward issuer choice, Sale concludes that steps need to be taken to ensure that the “gatekeepers are doing their jobs—both here and abroad.” To be sure, much of Sarbanes-Oxley and other extensive regulatory reforms and enforcement actions attempt to resolve conflicts of interest and other gatekeeper problems in the U.S., as Sale notes; but she remains concerned that not enough has been done, and she is doubtful that more reforms are

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24. Hillary A. Sale, *Gatekeepers, Disclosure, and Issuer Choice*, 81 WASH. U. L.Q. 403 (2003).

forthcoming from Capitol Hill in the near term, especially with respect one key gatekeeper: investment banks.

In his commentary, Murray Weidenbaum,<sup>25</sup> while generally advocating choice and competition, suggests a factor that might cut against strong form issuer choice. Weidenbaum questions whether investors should face a “bewildering variety of corporate reporting systems.” (Indeed, the same concern that disfavors having a variety of reporting systems might recommend against moving toward more principles-based financial reporting in the U.S., as Cox proposes.) Weidenbaum goes on to propose a moderated “federalism approach,” whereby general global guidelines would be adopted that are flexible enough to accommodate variations across countries.

### III. CONCLUSION

This Symposium’s principal contribution is its consideration of the future of the mandatory disclosure regime of the federal securities laws from a more comprehensive perspective that focuses on a number of parts that contribute to a very complex regulatory system. To be sure, more work remains to be done. Indeed, the hard look we have given our securities markets and how we regulate them lately should continue, even when times are good and no scandals are hitting the headlines. Securities regulation needs to be nimble and able to accommodate new innovations and changing business and investor needs and concerns, which can arise when stocks are climbing, as well as when they are crashing. Put differently, our regulatory regime must remain “state of the art,” and we must anticipate future developments and not simply react to them.

It is still too early to know what the net impact of Sarbanes-Oxley will be on corporate governance and performance. Sarbanes-Oxley imposes a number of new governance and disclosure mandates on companies, but at a cost that was not fully accounted for when the legislation was passed. The true test of Sarbanes-Oxley might not come until the markets and regulators become lax during the next bull market. The hope is that by having routinized a host of new governance and disclosure practices, Sarbanes-Oxley will prevent any wave of scandal from spreading throughout the markets. Time will tell.

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25. Murray Weidenbaum, *Choice of Regulatory Regimes and Related Issues of Corporate Governance*, 81 WASH. U. L.Q. 555 (2003).