Some Observations on the Use of Structural and Remedial Measures in American and German Law After Sarbanes-Oxley

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1. Regulatory Options

Rational investment decisions require accurate information regarding the operations and performance of issuers. As the U.S. Securities and Exchange Commission ("SEC") has recently noted: "Accurate and reliable financial reporting lies at the heart of our disclosure-based system for securities regulation, and is critical to the integrity of the U.S. securities markets. Investors need accurate and reliable financial information to make informed investment decisions. Investor confidence in the reliability of corporate financial information is fundamental to the liquidity and vibrancy of our markets."[1] Issuers have strong motives to signal to investors that the business information they disclose is correct and complete – so as to build solid reputations and avoid discounts that investors might apply to their stock prices as compensation for undisclosed risk or misrepresented results.[2] A similar argument applies to "gatekeeping" reputational intermediaries, such as auditing firms and investment banks that lend their reputations to their clients in various ways.[3] However, dishonest issuers and gatekeepers can take advantage of a generally honest market (that does not contain a substantial fraud risk discount), and the return on fraud for a given member of a firm might exceed such individual's *pro rata* share of the firm's overall reputational capital, making crime

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[1] Proposed Rule: Standards Relating to Listed Company Audit Committees, SEC Release Nos. 33–8173; 34–47137, 68 *Federal Register* 2638 (January 17, 2003) (to be codified in 17 CFR Parts 228, 229, 240, 249 and 274) (hereinafter "Release No. 34-47137").

[2] *See* Larry E. Ribstein, "Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002", Illinois Law and Economics Working Paper Series, Working Paper No. LE02-008, p. 59 (Sept. 2002), available at http://ssrn.com/abstract_id=33268.

[3] *See* John C. Coffee, *Understanding Enron: "It's About the Gatekeepers, Stupid"*, 57 Bus. Law. 1403, at 1405 (2002).

https://doi.org/10.1017/S2071832200015807 Published online by Cambridge University Press

literally pay; therefore, regulation must be introduced to supplement market controls and mandate full and accurate disclosure.[4]

When designing regulation, legislators have a number of options at their disposal. These include a choice of the jurisdictional entity best suited to impose regulation (in the United States, federal and state options are present),[5] a strategic choice as to whether the adopted measure should be a structural guardrail (*ex ante* option) to protect against the violation to be avoided or a remedial weapon (*ex post* option) with which those who have already offended may be punished (while hopefully deterring others), and whether regulation should be substantive (such as testing in the food and drug area) or a merely procedural (such as mandatory disclosure on securities markets).[6] With regard to jurisdictional entity, the regulation of securities issuers both in the United States and in Germany is shared between federal and state governments and the stock exchanges, which in turn are subject to government regulation.[7] With regard to securities issuers, the securities laws of both Germany and the United States have opted for the procedural route of disclosure for investor protection rather than a substantive evaluation of the economic soundness of a potential issuer's business plan.[8] At the corporate law level, however, a significant difference is visible, for German legislation has traditionally bristled with structural measures designed to prevent abuse *ex ante* and U.S. legislation has opted for a focus on remedial measures designed to compensate for abuse *ex post*.

2. The Regulatory Reach of Corporate Law

In the United States, corporate law is state law. As Professor Melvin Eisenberg notes, U.S. corporate law is essentially "constitutional law; that is, its dominant function is to regulate the manner in which the corporate institution is constituted, to define the relative rights and duties of those participating in the institution, and

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[4] *See* Bernard Black, *The Core Institutions that Support Strong Securities Markets*, 55 BUS. LAW. 1565, at 1567 *et seq.* (2000) and Theodor Baums, "Changing Patterns of Corporate Disclosure in Continental Europe: the Example of Germany", Frankfurt University, Institut fuer Bankrecht Working Paper no. 102, p. 5 (2002), available at: http://www.uni-frankfurt.de/fb01/baums/. Coffee *supra* note 3, at 1406 *et seq.* explains the particular developments of the 1990s that led U.S. gatekeepers to risk their reputational capital in exchange for the rewards of pleasing their clients.

[5] For a nicely framed debate of the issues in the context of takeover regulation, *see* Johnathan R. Macey, *Displacing Delaware: Can the Feds Do a Better Job Than the States in Regulating Takeovers?* and Lucian Arye Bebchuck & Allen Ferrell, *On Takeover Law and Regulatory Competition*, both in 57 BUS. LAW. at 1025 and 1047, respectively (2002).

[6] For a thorough, yet brief discussion of the "battle of the philosophies" surrounding the adoption of the Securities Act of 1933, *see* Louis Loss & Joel Seligman, FUNDAMENTALS OF SECURITIES REGULATION 25 *et seq.* (4th ed., 2001).

[7] *See* Thomas L. Hazen, TREATISE ON THE LAW OF SECURITIES REGULATION §§ 1.1 – 1.3 (3rd ed. 1995) and Siegfried Kümpel, BANK- UND KAPITALMARKTRECHT 1190 (2nd ed., 2000).

[8] *See* Hazen, *Id.* at § 1.2 and Kümpel, *Id.* at 1192 *et seq.*

to delimit the powers of the institution vis-à-vis the external world."[9] In Germany, a federal law, the Stock Corporation Act (*Aktiengesetz*),[10] governs the establishment, management and many financial aspects of stock corporations (*Aktiengesellschaften*). As Professor Karsten Schmidt notes, pursuant to German corporate law, "*the constitution-like, prescribed structure of the stock corporation* may be altered only slightly by the articles of incorporation, given that – contrary to closely held corporations and partnerships – the stock corporation is governed by *the principle that the form of constitutional documents is strictly prescribed*."[11]

Thus, a typical American corporate law, such as the Delaware General Corporation Law[12] or the Revised Model Business Corporation Act[13] provides the incorporators of a stock corporation with significantly more freedom in shaping the organization and operation of the business (referred to in German as "*Gestaltungsfreiheit*"),[14] than does the *Aktiengesetz*. Indeed, Professor Hans-Joachim Mertens dryly remarked shortly after German reunification that a future economic historian would have great difficulty in discerning whether the principle of strictly prescribed structure originated in the capitalist or in the communist half of Germany.[15] German corporate law grants incorporators significantly less creative freedom because it mandates significantly more *ex ante* structural restrictions designed to guarantee investors and creditors a certain minimum of statutory protection.[16] In the overall mix of regulation, German law presents significantly more *ex ante*, structural

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[9] Melvin A. Eisenberg, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 1 (1976).

[10] The *Aktiengesetz* is a detailed law of more than 400 provisions that not only governs the establishment and governance of a stock corporation, but also provides a detailed regulatory framework for the relationship between a corporation and its auditors and the operation of corporate groups. For a highly informed discussion of current developments affecting German corporation law, *see* Theodor Baums, "Company Law Reform in Germany", Frankfurt University, Institut fuer Bankrecht Working Paper no. 100 (2002), available at: http://www.uni-frankfurt.de/fb01/baums/. An excellent translation of the Stock Corporation Act is by Hannes Schneider & Martin Heidenhan, The German Stock Corporation Act (Beck/Kluwer, 2001).

[11] Karsten Schmidt, GESELLSCHAFTSRECHT 771 (4th ed. 2002) (italics in original) (Author's translation. Please note that I have translated *Gesellschaft mit beschränkter Haftung* (GmbH) as "closely held corporation", which is inexact because the German form is governed by a separate law rather than taking on its character because of the nature of a less dispersed shareholding structure.)

[12] Delaware Code, Title 8, available on the Internet at http://www.state.de.us/corp/DE-law.htm.

[13] Committee on Corporate Laws of the Section of Business Law of the American Bar Association, MODEL BUSINESS CORPORATION ACT (1984).

[14] *See* Herbert Wiedemann, *Erfahrung mit der Gestaltungsfreiheit im Gesellschaftsrecht*, in GESTALTUNGSFREIHEIT IM GESELLSCHAFTSRECHT, DEUTSCHLAND, EUROPA UND USA, 11TH ZGR SYMPOSIUM 6 (Lutter & Wiedemann eds., 1998).

[15] Hans-Joachim Mertens, *Satzungs- und Organisationsautonomie im Aktien- und Konzernrecht*, 3 ZGR 426 (1994).

[16] *See* Heribert Hirte, *Die aktienrechtliche Satzungsstrenge: Kapitalmarkt und sonstige Legitimationen versus Gestalungsfreiheit*, in Lutter & Wiedemann *supra* note 14, at 81 *et seq.*

"guardrails" at the corporate law level, with a reduced dependence on *ex post* remedial measures, such as litigation. It acts restrictively and preemptively.

3. A Mix of Remedies in Securities Regulation

Even though American state corporate laws are constitutional in nature and do set forth a general framework for the corporation, they do not generally set forth *ex ante* structural measures like a mandatory board structure or specific qualifications for the persons eligible to become corporate directors. The U.S. federal securities laws, first adopted in the 1930's,[17] supplement the thin investor protections provided in corporate law, but generally rely on mandatory disclosure to provide investors with statutory protection. The listing requirements of stock exchanges have historically served to fill gaps not addressed by either state or federal laws.[18] Thus the continued listing requirements of major stock exchanges, such as the New York Stock Exchange ("NYSE"), do contain *ex ante* structural measures that allow the exchange to exercise control preemptively to deny the listing of a company if it fails to meet a given requirement or to delist the company *ex post* if it drops below the standard of the requirement.[19] Aside from such listing requirements, however, because U.S. corporations are left considerable freedom *ex ante* in structuring their operations and organizations, compliance with the securities and corporate laws is ensured almost exclusively through *ex post* remedies, foremost being actions for liability, damages and penalties, whether filed by a private investor or the government.

Germany's Exchange Act (*Börsengesetz*) was, in its original form, adopted more than 100 years ago,[20] but has been completely reworked since then and the majority of Germany's securities law (*Wertpapieraufsichtsrecht*)[21] is quite new, and implements

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[17] The securities laws consist of seven statutes, of which the most important for this essay are the Securities Act of 1933; 15 U.S.C. §§ 77a *et seq.*, hereinafter "Securities Act", and the Securities Exchange Act of 1934; 15 U.S.C. §§ 78a *et seq.*, hereinafter "Exchange Act". For a good, brief discussion of the securities laws, *see* Loss & Seligman, *supra* note 6, at 37 *et seq.*

[18] *See* John C. Coffee, *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*", 111 Yale L. J. 1, at 26 *et seq.* (2001).

[19] For example, the Listed Company Manual ("LCM") of the NYSE, at § 303, requires that listed companies adopt certain corporate governance structures and practices. The standard Listing Agreement of the NYSE, at II.7, requires the listed company to maintain an audit committee at all times.

[20] The German Exchange Act (*Börsengesetz*) was originally adopted in 1896, and has been significantly amended over the years, most recently in 2002. The *Börsengesetz* is available in English translation with other German securities laws in Hartmut Krause, GERMAN SECURITIES REGULATION (Beck/Butterworths: 2001), although it should be noted that this edition does not include the substantial amendments that were introduced in 2002. For a relatively brief and thorough commentary on the *Börsengesetz see* Wolfgang Groß, KAPITALMARKTRECHT (2000).

[21] Beyond the *Börsengesetz*, the two principle laws in this field are the Securities Trading Act (*Wertpapierhandelsgesetz*), which was first adopted in 1994, and the Securities Sales Prospectus Act (*Verkaufsprospektgesetz*), which was first adopted in 1990. These laws are also available in translation; *see*

European Community Directives,[22] which in turn embody the disclosure philosophy of the much older American laws.[23] As a result, German securities laws also provide disclosure duties and *ex post* remedies for the violation of such duties,[24] (24) thereby displaying a rough structural parallel to U.S. law. In addition, German stock exchanges, the Frankfurt Stock Exchange being foremost among them, have initial and continued listing requirements that supplement the disclosure requirements found in the securities laws and the structural measures found in the Stock Corporation Act.[25] However, as noted above, because German corporate law contains significant, *ex ante* structural measures that each stock corporation must follow in order to be incorporated and with which each must comply on a regular basis, corporate law leaves less slack for the *ex post* remedies of the securities laws to pick up. For better or worse, prevention through structure rather than enforcement through lawsuit or threat of lawsuit is the result. Even today it is relatively difficult to seek damages from a director of a German corporation, and leading German scholars have articulated reform proposals to correct this imbalance.[26]

4. An Ounce of Preemption in Sarbanes-Oxley

Among German scholars, the movement of German law in the direction of the American model is well known and much discussed.[27] Any movement in the other

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Krause, *supra* note 20. A leading commentary on the German securities laws is Siegfried Kümpel *et al.*, KAPITALMARKTRECHT: HANDBUCH FÜR DIE PRAXIS (1971, updated to 2002).

[22] Many of the earlier Directives on listing and continuing disclosure requirements have been consolidated in the Directive of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (2001/34/EC) p. 1 O.J. July 6, 2001 (L 184).

[23] In her extensive study of European securities regulation, Niamh Moloney notes that while exhibiting extensive differences in regulatory structure (i.e., European laws are focused on market integration and do not (yet) have an overseer equivalent to the powerful SEC), the European securities regime imposes "mandatory disclosure requirements on issuers." Niamh Moloney, EC SECURITIES REGULATION 53 (2002).

[24] Initial disclosure requirements and corresponding liability provisions are found in the *Verkaufsprospektgesetz* and the *Börsengesetz* and a number of ongoing disclosure requirements are found in the *Wertpapierhandelsgesetz*. Significant disclosure requirements in the takeover context are found in the German Securities Acquisitions and Takeovers Act (*Wertpapiererwerbs- und Übernahmegesetz*).

[25] *See* Theodor Baums & Stefan Hutter, "Die Information des Kapitalmarkts beim Börsengang (IPO)", Frankfurt University, Institut für Bankrecht Working Paper no. 93 (2002), available at: http://www.uni-frankfurt.de/fb01/baums/. Also *see* Deutsche Boerse AG, "Going Public-Grundsaetze" as of July 15, 2002; available from the Frankfurt Stock Exchange at http://deutsche-boerse.com/INTERNET/EXCHANGE/index.htm.

[26] For recommendations to facilitate actions for liability, *see* BERICHT DER REGIERUNGSKOMMISSION CORPORATE GOVERNANCE (GOVERNMENT REPORT ON CORPORATE GOVERNANCE) Margin Note 71 *et seq.* (Baums ed., 2001).

[27] For an article by a leading commentator promoting the advantages of the U.S. model, *see* Marcus Lutter, *Vergleichende Corporate Governance – Die deutsche Sicht*, ZGR 2001, p. 224. For an article presenting

direction – whether it be an "influence" of German law on U.S. law or a rational drift toward the type of structural measures used in Germany – has been much less observed.[28] Whether drift or influence, however, this shift East has recently received a significant push through the Sarbanes-Oxley Act of 2002 (the "SOA"),[29] which introduced certain requirements that are strikingly similar to the type of *ex ante* structural requirements found in the German Stock Corporation Act: a statutory mandate of audit committees in listed companies and a statutory definition of the "independent" directors who must be seated in such committees.[30]

Section 301 SOA instructs the SEC to adopt a rule according to which national securities exchanges may not list the securities of an issuer that fails to comply with certain audit committee requirements set forth in the same § 301.[31] Although the SOA does not expressly require an issuer to install an audit committee, its definition of audit committee, found in § 3.a 58 Exchange Act, as amended, provides that if an issuer has no such committee, the requirements will apply to the entire board of directors, which would obviously create an even broader intrusion into the issuer's freedom to structure its company organization. These *ex ante* requirements go both to the powers and duties of the audit committee and to the qualities of its members. Each issuer's audit committee must have the power to retain independent counsel and other advisers, and must receive sufficient funding (§10A(m) nos. 5 and 6, Exchange Act, as amended).[32] The audit committee must be "directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer" (§ 10A(m) no. 2 Exchange Act, as amended).[33] The audit committee must establish procedures to receive, retain, and address complaints regarding "accounting, internal accounting

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a less favorable, post-Enron view of the U.S. model, *see* Günter Christian Schwarz & Björn Holland, *Enron, WoldCom . . . und die Corporate Governance-Discussion*, ZIP 2002, p. 1661.

[28] The discussion led by American scholars such as Michael Porter at the end of the 1980's suggesting that certain advantages found in both Japan and Germany be adapted (*see* Porter, *Capital Disadvantages: America's Failing Capital Investment System*, HARV. BUS. REV. (1992)), have scarcely been raised since the Asian financial crisis and the U.S. bull market of the late 1990's. *See* Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, AM. J. COMP. L., 328, at 331 (2001).

[29] Public Law 107-204, July 30, 2002 (H.R. 3763) Sarbanes-Oxley Act of 2002, An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. Available on the Internet at http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi.

[30] *See* § 301 SOA. This point is discussed at length below. Another such structural measure, the outright ban on most types of loans to executives set forth in § 402 SOA, goes even farther than the equivalent measures found in §§ 89 and 115 *Aktiengesetz*, which provides a type of disinterested director approval rule approaching a standard used under § 143 Del. Gen. Corp. Law in connection with § 144 Del. Gen. Corp. Law.

[31] The SEC proposes to comply with this requirement through proposed Exchange Act Rule 10A-3; 17 CFR 240.10A-3, released on January 8, 2003 in Release No. 34-47137, *supra* note 1.

[32] *See* proposed Exchange Act Rule 10A-3(b) nos. 4 and 5.

[33] *See* proposed Exchange Act Rule 10A-3(b) no. 2.

controls, or auditing matters" as well as "the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters" (§ 10A(m) no. 4 Exchange Act, as amended).[34] The *members* of the audit committee must be *independent* board members, which means that they may not " i) accept any consulting, advisory, or other compensatory fee from the issuer; or ii) be an affiliated person of the issuer or any subsidiary thereof" (§ 10A(m) no. 3 Exchange Act, as amended).[35]

The SEC's proposed Exchange Act Rule 10A-3, which would implement § 301 SOA, defines an "affiliated person" as someone who directly or indirectly "controls" the issuer or is so controlled by the issuer.[36] "Control" will not be found if the person holds less than 10 % of any class of the issuer's equity securities, is not an executive officer of the issuer and is not a director of the issuer.[37] A director, executive officer, partner, member, principal or designee of an affiliated person is also deemed to be such an affiliated person for purposes of this requirement.[38] It should be noted that for German companies listed on a U.S. stock exchange, the supervisory board (*Aufsichtsrat*) of the corporation will be deemed to be the "board of directors," labor representatives seated on the supervisory board may still be deemed independent, provided they are non-management employees, and large block shareholders and foreign governments meeting certain requirements may each seat one representative on the board without breaching the independence requirements.[39]

5. A Shift Toward Ex Ante Regulation

These requirements for the makeup of a corporation's board and the qualifications of its members would be enforced by stock exchanges both *ex ante* by refusing listing and *ex post* through delisting, provided that the non-complying listed company be given an opportunity to cure the violation.[40] As noted above, such *ex ante* measures are not new in the United States at the level of stock exchange listing requirements. For example, the version of § 303.01.A LCM in force well before the SOA was enacted expressly states that a company listed on the NYSE must have an audit committee. All members of the audit committee must be "independent" pursuant to § 303.01.B.2 LCM, and § 303.01.B.3.a LCM sets forth strict criteria defining "independence". Such measures are new, however, at the level of federal law. In fact, before the enactment of the SOA, courts had expressly denied the SEC

[34] *See* proposed Exchange Act Rule 10A-3(b) no. 3.
[35] *See* proposed Exchange Act Rule 10A-3(b) no. 1.
[36] *See* proposed Exchange Act Rule 10A-3(e) no. 1.i).
[37] *See* proposed Exchange Act Rule 10A-3(e) no. 1.i).
[38] *See* proposed Exchange Act Rule 10A-3(e) no. 1.ii).
[39] *See* proposed Exchange Act Rule 10A-3(b) no. 1.iv).
[40] *See* proposed Exchange Act Rule 10A-3(a).

power to issue rules in the area of corporate law. In *Sante Fe Industries v. Green*,[41] the U.S. Supreme Court stated that "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stock holders, state law will govern the internal affairs of the corporation."[42] The U.S. Court of Appeals for the District of Columbia Circuit specifically applied this principle to strike down an SEC rule that would have prohibited shares with fractional voting rights, noting that the rule "directly invade[d] the 'firmly established' state jurisdiction over corporate governance."[43] It cannot seriously be doubted that the U.S. Congress has the power to legislate in this "state realm" for the limited purpose of ensuring honest disclosure by companies listed on national securities exchanges.[44] However, it is very interesting that the Congress has found it necessary to do so in the SOA, thereby creating an *ex ante* structural measure resembling the type of mandatory structures that have long been found in German corporate law. As in the past, it would seem that the severity of the stock market crisis works to justify a regulatory measure of like dimension.[45]

One need not look far to detect such *ex ante* structural provisions in the German Stock Corporation Act and related laws. The following is only a rough sampling to illustrate the point: The size and the makeup of the supervisory board of an AG is strictly regulated by the Co-Determination Act.[46] The members of the supervisory board of an AG must possess legally specified personal qualifications (§ 100 AktG), and no member of the management board may also be a member of the supervisory board (§ 105 AktG). Only the shareholders' meeting may appoint the corporation's auditor (§ 122 AktG). As a preemptive measure to protect creditors of the corporation, an AG cannot be established with a share capital less than € 50,000 (§ 7 AktG) and the payment of a dividend that impairs this legal capital is prohibited (§ 57 AktG). The voting rights of common shares are provided for by law and many not be waived or multiplied in the articles of incorporation (§ 12 AktG), and pre-emptive rights may be excluded in the context of an increase in capital only in specifically enumerated circumstances (§ 186 AktG). If future board members act as incorporators or if contributions in-kind are made to establish an AG, a special

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[41] *Sante Fe Industries v. Green*, 430 U.S. 462 (1975).
[42] *Id.*, at 479.
[43] *The Business Roundtable v. SEC*, 905 F.2d 406, 413 (1990), citing *CTS Corp. V. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987).
[44] For an excellent discussion or the issues surrounding the separation of corporate and securities law, *see* Donald C. Langevoort,*Seeking Sunlight In Santa Fe's Shadow: The SEC's Pursuit of Managerial Accountability*, 79 WASH. U. L.Q. 449 (2001).
[45] *See* Stuart Banner, *What Causes New Securities Regulation: 300 Years of Evidence*, 75 WASH. U. L.Q. 849, 850 (1997).
[46] *See* § 7 *Gesetz über die Mitbestimmung der Arbeitnehmer* of May 4, 1976.

auditor must audit the incorporation process and a report must be issued (§§32-33 AktG).

Certainly, neither the corporate law of an American state nor the newly amended Exchange Act bristles with so many structural safeguards. However, with the Sarbanes-Oxley Act, the federal government and the SEC have taken a small step in the direction of the German model. The constitution of corporate boards and the qualities of their members are now to a significant extent fixed *ex ante* if the corporation is listed on national securities exchange. The federal rule defining "independent" directors may also have an indirect impact on state law, given that the participation of "disinterested" directors ("disinterestedness" being a transaction-oriented variant of "independence") in a decision will often trigger the protection of the business judgement rule.[47] Such *ex ante* pre-emptive measures certainly reduce flexibility, and could prove expensive by reducing corporate performance,[48] but any thorough evaluation of their effect on U.S. issuers and the U.S. capital markets should factor in the possible savings created by obviating some of the complex litigation that has traditionally been necessary *ex post* in the United States to remedy regulatory violations. Indeed, an ounce of preemption might save Congress from having to reintroduce the pound of writ and demure that the Private Securities Litigation Reform Act of 1995 ("PSLRA")[49] was designed to avoid.[50]

[47] For Delaware law, see *Aronson v. Lewis*, 473 A.2d 805, at 812 (Del. Supr. 1984), and with regard to the Revised Model Business Corporation Act, *see* § 8.31(a) no. 2.iii).

[48] For a balanced evaluation of whether the increased regulation stemming from the SOA can be expected to bring positive results on the capital markets, *see* Ribstein, *supra* note 2.

[49] Pub. L. No. 104-67, amending the Securities Act and the Exchange Act.

[50] On the regretful possibility that the PSLRA helped to create the Enron disaster, *see* Coffee *supra* note 3, at 1409 *et seq.*