

2006

An International Train Wreck Caused in Part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws

Ian L. Schaffer

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Ian L. Schaffer, *An International Train Wreck Caused in Part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws*, 75 Fordham L. Rev. 1829 (2006).
Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss3/27>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

An International Train Wreck Caused in Part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws

Cover Page Footnote

J.D. Candidate 2007, Fordham University School of Law. I would like to thank my parents for the help and support they provided me while I was working on this Note, and all those Law Review members who helped in the production process.

AN INTERNATIONAL TRAIN WRECK CAUSED IN PART BY A DEFECTIVE WHISTLE: WHEN THE EXTRATERRITORIAL APPLICATION OF SOX CONFLICTS WITH FOREIGN LAWS

Ian L. Schaffer*

INTRODUCTION

The extraterritorial application of the Sarbanes-Oxley Act (SOX)¹ may prove problematic and burdensome to foreign companies with U.S. subsidiaries or with securities listed on U.S. exchanges, and to U.S. companies with subsidiaries abroad.² To illustrate this point, consider the SOX provision requiring that companies with securities listed in the United States establish codes of conduct containing procedures that allow employees to anonymously and confidentially report certain proscribed practices (i.e., “whistleblower hotlines”).³ Other countries, however, do not require that companies in their territories establish such anonymous whistleblower hotlines; some might even prohibit the establishment of such hotlines. For example, the French subsidiaries of two American companies recently approached the French Data Protection Authority (CNIL)⁴ seeking authorization to put in place such anonymous whistleblower hotlines.⁵ On May 26, 2005, the CNIL refused to authorize these whistleblower

* J.D. Candidate, 2007, Fordham University School of Law. I would like to thank my parents for the help and support they provided me while I was working on this Note, and all those Law Review members who helped in the production process.

1. Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745 (to be codified in scattered sections of the U.S.C.).

2. For the remainder of this Note, the term “foreign companies” refers, in the collective, to the U.S. subsidiaries of non-U.S. companies, non-U.S. companies doing business with the United States or listed on U.S. exchanges, and to subsidiaries of U.S. companies that are located abroad.

3. See *infra* note 106 and accompanying text.

4. CNIL stands for *La Commission nationale de l'informatique et des libertés*.

5. Exide Techs., CNIL Decision No. 2005-111 (May 26, 2005) [hereinafter Exide Decision], available at www.faegre.com/articles/downform2.asp?doc_num=3&aid=1691 (posting an unofficial translation); McDonald's, CNIL Délibération No. 2005-110 (May 26, 2005) [hereinafter McDonald's Decision], available at <http://www.theworldlawgroup.com/newsletter/details.asp?ID=1243487122005> (posting an unofficial translation).

initiatives, finding that they violated French and European privacy and data protection laws.⁶

Many multinational corporations may soon find themselves in the same precarious situation as these two companies. On the one hand, the company must abide by SOX's regulations to avoid delisting⁷ and, depending on which SOX provisions are violated, potential civil⁸ and criminal⁹ sanctions from the Securities and Exchange Commission (SEC). On the other hand, if the company complies with SOX, it may find that it now faces civil or criminal sanctions from foreign governments for violating laws in effect in those jurisdictions, such as data protection and labor laws.¹⁰ Even in situations where a foreign country does not have a law on its books that would make complying with SOX illegal, the question remains whether it is appropriate for American law to apply to conduct occurring abroad. That is, should foreign companies be punished for conduct that is legal in the jurisdiction in which it occurs?

This Note deals with how the SEC (and U.S. courts) should handle situations in which foreign companies engage in conduct that may be legal where it occurs but that violates SOX, as well as situations where compliance with foreign law requires companies to violate SOX. Part I provides background information regarding the SEC, the reach of the securities laws, SOX, the European reaction to SOX, and foreign laws that might be affected by the extraterritorial reach of SOX. Part I concludes by discussing how U.S. courts have dealt with the extraterritorial application of U.S. antitrust and discovery laws in situations where enforcing such laws abroad would conflict with the interests of a foreign sovereign nation.

Part II analyzes the options available to the SEC (and U.S. courts) in determining whether to penalize a foreign company for violating the provisions of SOX by engaging in prohibited conduct or by failing to engage in required conduct abroad, and the various arguments that support each option. Part III argues that the determination of whether to penalize such foreign companies should be made on a case-by-case basis¹¹ or on an issue-by-issue basis¹² in light of the exigencies of the circumstances. The SEC can make such determinations through the issuance of no-action letters

6. Exide Decision, *supra* note 5; McDonald's Decision, *supra* note 5. For the CNIL's current view concerning the legality of anonymous whistleblower hotlines, see *infra* Part I.D.2.b.iv.

7. Delisting involves having a company's securities removed from the U.S. exchanges.

8. *E.g.*, SOX § 302, 15 U.S.C. § 7241 (Supp. II 2002); *id.* § 303; *id.* § 806.

9. *E.g.*, *id.* §§ 802, 807, 903-04, 906, 1106-07.

10. See *infra* Part I.D.

11. That is, the SEC should determine whether or not a company should be penalized based on the specific circumstances faced by that particular company. Such determinations would have no precedential value. See *infra* notes 34-38 and accompanying text.

12. This term refers to situations in which the SEC should determine, in general, whether or not companies should be penalized for engaging in some specified conduct regardless of the specific circumstances. For example, the SEC or a court may interpret a statute in such a way as to avoid the existence of a securities law violation. See *infra* Part III.B.

(case-by-case basis)¹³ and interpretive opinions (issue-by-issue basis);¹⁴ culminating in an SEC order not to take action against foreign companies where doing so would adversely affect U.S. investors (or the United States in general) to a significant degree. Courts, on the other hand, can make such determinations by conducting a comity analysis¹⁵ to determine whether to exercise extraterritorial jurisdiction (case-by-case basis), and through favorable statutory interpretations of SOX (issue-by-issue basis).¹⁶ Part III proceeds to demonstrate the application of this approach to particular instances where the extraterritorial application of SOX might be problematic to foreign companies.

I. THE CLASH OF THE TITANS: THE CONFLICT BETWEEN SOX AND EUROPEAN LAW

This part provides the relevant background information relating to the conflict between the extraterritorial application of SOX and the laws of foreign nations. Section A describes some of the workings of the SEC. Section B discusses SOX and the reasons for its enactment. Section C describes the foreign reaction to the potential extraterritorial reach of SOX. Section D deals with the potential burdens that the extraterritorial application of SOX would have on foreign companies. Finally, Section E provides the groundwork for an analogy that will be drawn between the extraterritorial application of SOX and other U.S. laws that have been controversially applied abroad.

A. *Securities and Exchange Commission*

This section provides background information concerning the SEC and U.S. securities laws. First, it describes the powers and functions of the SEC. It then discusses the extraterritorial application of the securities laws and the SEC's need for international cooperation in the prosecution and enforcement of securities law violations. Finally, it chronicles the SEC's historical tendency, prior to SOX, to treat foreign issuers differently from domestic ones.

13. See *infra* note 32 and accompanying text.

14. See *infra* note 33 and accompanying text.

15. The term "comity analysis," as used in this Note, refers to the balancing of various factors for the purpose of determining the existence of extraterritorial jurisdiction (legislative or subject matter) and/or whether to abstain from the exercise of such jurisdiction.

16. However, courts must generally "honor an agency's reasonable interpretation of a statute that Congress has entrusted the agency to administer." *Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 123 n.3 (2d Cir. 1998) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)). Thus, this option may not be available to a court if the SEC has already made an interpretation of the statute, and if that interpretation is reasonable.

1. Creation and Functions of the SEC

In response to an unprecedented stock market crash and the resulting investment losses, Congress enacted the Securities Act of 1933¹⁷ and the Securities Exchange Act of 1934 ("Exchange Act").¹⁸ The main purpose of these Acts was to promote consumer protection by requiring that companies disclose all material facts regarding their financial condition.¹⁹ In addition, provisions were included dealing with the prevention of fraudulent conduct (e.g., antifraud and insider trading laws).²⁰

The SEC was established by Section 4 of the Exchange Act²¹ for the purpose of administering and enforcing the securities regulatory statutes, and to protect the public interest in so doing.²² It has broad statutory authority to adopt rules and regulations necessary for the exercise of its functions.²³ The two main functions of the SEC consist of investigating potential illegal activities and adjudicating alleged violations.²⁴ One of the main provisions of the Act deals with the creation and regulation of the national securities exchanges.²⁵ The New York Stock Exchange (NYSE) is the most prominent example of a national exchange that has satisfied the framework of the Act.²⁶ The daily activities of these exchanges are overseen by the Division of Market Regulation of the SEC.²⁷

In addition, the SEC has "the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board."²⁸ If, thereafter, the SEC refuses to exercise its right of review, or if such review is not sought within the designated time, then the decision of "any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, shall . . . be

17. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2000)).

18. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78mm (2000)).

19. See Brandy L. Fulkerson, Note, *Extraterritorial Jurisdiction and U.S. Securities Law: Seeking Limits for Application of the 10(b) and 10b-5 Antifraud Provisions*, 92 Ky. L.J. 1051, 1053-54 (2004).

20. *Id.*

21. Securities Exchange Act of 1934 § 4, 15 U.S.C. § 78d.

22. *E.g.*, *Union Pac. R.R. Co. v. Chi. & Nw. Ry. Co.*, 226 F. Supp. 400, 406 (N.D. Ill. 1964).

23. 15 U.S.C. § 78w.

24. *SEC v. ESM Gov't Sec. Inc.*, 645 F.2d 310, 313 (5th Cir. 1981).

25. 15 U.S.C. § 78f.

26. Daniel M. Gallagher, Comment, *Move over TickerTape, Here Comes the Cyber-Exchange: The Rise of Internet-Based Securities Trading Systems*, 47 Cath. U. L. Rev. 1009, 1013 (1998). To ensure a secure and fair marketplace, the New York Stock Exchange (NYSE) has promulgated rules and regulations by which its members must abide. *Id.* at 1014. The National Association of Securities Dealers Automated Quotations System (NASDAQ), on the other hand, is a registered securities association (as opposed to a national securities exchange like the NYSE), and is governed by 15 U.S.C. § 78o-3.

27. Gallagher, *supra* note 26, at 1021.

28. 15 U.S.C. § 78d-1(a).

deemed the action of the Commission.”²⁹ Finally, Congress has authorized the SEC to grant discretionary exemptions from compliance with the Exchange Act under the appropriate circumstances.³⁰

2. No-Action Process

Not only does the SEC promulgate rules and regulations under the securities laws, it also provides guidance concerning these laws. For example, through the “no-action” process, the SEC staff provides its informal views concerning proposed courses of conduct that raise compliance issues under the securities laws.³¹ The SEC staff may issue two types of letters in responding to requests made through this process. More often than not it will respond by issuing a “no-action” letter, which is “[a] letter from the staff of a governmental agency stating that if the facts are as represented in a person’s request for an agency ruling, the staff will advise the agency not to take action against the person.”³² Alternatively, the SEC may issue a somewhat broader response in the form of an “interpretive” letter, which is an expression of how the staff will interpret a statute or rule in the context of a particular course of conduct.³³

Although the SEC has repeatedly stated that it is not bound by staff no-action letters, a recipient of a favorable letter can be fairly sure that the SEC will treat it as binding.³⁴ While only the recipient can rely on the letter directly, it also indicates to third parties the staff’s current views concerning the specific question involved³⁵—because no-action and interpretive letters are, except as provided for by statute, made available to the public.³⁶ The

29. *Id.* § 78d-1(c).

30. *Id.* § 78mm(a)(1) (“[T]he Commission, by rule, regulation, or order, may . . . exempt any person, security, or transaction . . . from any provision . . . of [15 U.S.C. §§ 78a et. seq.] . . . to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”).

31. Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 Bus. Law. 1019, 1019 (1987). In this process, those interested in pursuing a certain course of conduct write a letter to the SEC staff requesting statutory interpretations or assurances that if such conduct is engaged in, the staff would not recommend that the Commission bring an enforcement action against the requestor. *Id.* at 1019 n.1.

32. Black’s Law Dictionary 1072 (8th ed. 2004).

33. Lemke, *supra* note 31, at 1022; *see also* *Prod. Tool Corp. v. Employment and Training Admin.*, 688 F.2d 1161, 1166 (7th Cir. 1982) (“It is well established that an agency charged with a duty to enforce or administer a statute has inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion.”).

34. Lemke, *supra* note 31, at 1042. This is only the case, however, if the specific facts and circumstances described in the no-action request are determined to exist in fact. *Id.* On the rare occasion that the SEC has brought an enforcement action against a favorable no-action letter recipient, it has alleged that false and misleading statements were contained in the request. *Id.*

35. *Id.* at 1043; *see also* Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 Cornell L. Rev. 921, 924-25 (1998).

36. 17 C.F.R. § 200.81 (2005).

precedential value of SEC staff responses varies depending on whether it involves an “interpretive” or “no-action” letter.³⁷ “Interpretive” letters have more precedential value than “no-action” letters because, while one can be reasonably certain that the staff will interpret a statute or rule the same way in similar situations, the staff decision in a “no-action” letter is dependent upon the specific circumstances involved in a particular request.³⁸

3. Extraterritorial Application of U.S. Securities Laws

The Exchange Act “is silent as to its extraterritorial application.”³⁹ However, despite the general presumption against jurisdiction unless explicitly conferred by statute,⁴⁰ most of the federal circuits, in determining when the federal securities laws reach overseas transactions, have employed a “conduct” and “effects” framework.⁴¹ Federal courts, under the “conduct” test, have “subject matter jurisdiction if the defendant’s conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad.”⁴² Under the “effects” test, a federal court has jurisdiction if the illegal activity occurring abroad causes a “substantial effect” within the United States.⁴³ Satisfying either one of these tests is sufficient for a court to find subject matter jurisdiction.⁴⁴

However, U.S. jurisdiction over foreign companies pursuant to the securities laws arguably extends only to matters that are clearly related to securities regulation.⁴⁵ American statutes “have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.”⁴⁶ Consequently, a U.S. listing does not give the United States license to regulate foreign issuers in all aspects. For example, it could not regulate labor and employment relations of these companies because “labor conditions . . . are the primary concern of a foreign country,”⁴⁷ and American law would therefore not be considered operative with respect to foreign conduct relating to labor conditions regulations.

37. Lemke, *supra* note 31, at 1043.

38. *Id.* at 1043-44.

39. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).

40. *See infra* note 242 and accompanying text.

41. *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 356 (D. Md. 2004).

42. *Alfadda*, 935 F.2d at 478.

43. *See Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989).

44. *In re Royal Ahold*, 351 F. Supp. 2d at 360.

45. *See Minodora D. Vancea, Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?*, 53 Duke L.J. 833, 843 (2003).

46. *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953).

47. *Foley Bros. v. Filardo*, 336 U.S. 281, 286 (1949). Some courts have already held that SOX does not apply to employees working outside of the United States. *See infra* notes 333, 335 and accompanying text.

4. International Enforcement of U.S. Securities Laws

In response to today's global marketplace, where cross-border securities transactions have become routine, efforts to formalize cooperation among regulators have intensified.⁴⁸ Such cooperation is essential to the enforcement of the U.S. securities laws because "[t]he ability to establish subject matter and personal jurisdiction in U.S. courts is of little use if the SEC cannot investigate and take enforcement action against inside traders operating abroad."⁴⁹ Over time, the scope of cooperation has evolved from requests under the Hague Convention and pursuant to "letters rogatory," to the implementation of Mutual Legal Assistance Treaties (MLATs) and Memoranda of Understanding (MOUs).⁵⁰ Each new development enhances international regulatory authorities' ability to prosecute and investigate activities that cross into a foreign regulator's jurisdiction.⁵¹

In civil and criminal proceedings, domestic courts may attempt to obtain information located abroad through the use of "letters rogatory," which are formal requests sent to a foreign tribunal asking that documents be produced or witnesses be examined in that jurisdiction.⁵² This method, however, is problematic for a number of reasons. First, letters rogatory are cumbersome because they require that a judicial proceeding be pending.⁵³ They are also unpredictable because the receiving court is not required to provide assistance nor need it justify its denial.⁵⁴ Finally, these documents are time-consuming,⁵⁵ complicated, and "do not supersede foreign bank secrecy laws."⁵⁶

48. Michael D. Mann & William P. Barry, *Developments in the Internationalization of Securities Enforcement*, 39 Int'l Law. 667, 667 (2005).

49. Robert A. Prentice, *The Internet and Its Challenges for the Future of Insider Trading Regulations*, 12 Harv. J.L. & Tech. 263, 343 (1999).

50. Mann & Barry, *supra* note 48, at 667.

51. *Id.*

52. Richard A. Westin, *Expatriation and Return: An Examination of Tax-Driven Expatriation by United States Citizens, and Reform Proposals*, 20 Va. Tax Rev. 75, 125 (2000); Caroline A.A. Greene, Note, *International Securities Law Enforcement: Recent Advances in Assistance and Cooperation*, 27 Vand. J. Transnat'l L. 635, 639 (1994) ("[I]nformation from abroad may be obtained by the traditional letter rogatory, a formal request from a court in one jurisdiction to a court in the jurisdiction in which the information or evidence is located.").

53. Westin, *supra* note 52, at 125. Thus, before letters rogatory can be sought, an SEC staff member at the administrative level in a criminal investigation must get a prosecutor to impanel a grand jury. *Cf. id.* at 125-26 (referring to an IRS agent in a criminal tax investigation).

54. Greene, *supra* note 52, at 639; see Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 Wm. & Mary Bill Rts. J. 209, 224 (2002) ("When prosecutors seek such evidence using the traditional letters rogatory approach, the requested countries provide the assistance, if at all, simply as a matter of comity."); Westin, *supra* note 52, at 126 ("Execution by foreign countries of letters rogatory is discretionary and often poorly supervised via diplomatic channels.").

55. It often takes over a year to get the letter due to the complexity of the U.S. Attorney's process. Westin, *supra* note 52, at 126.

56. Greene, *supra* note 52, at 639.

The Hague Convention,⁵⁷ which encompasses letters rogatory, was the first concrete agreement through which the “judicial authority of [one] Contracting State may . . . request the competent authority of another Contracting State . . . to obtain evidence . . . for use in judicial proceedings, commenced or contemplated.”⁵⁸ The Convention’s utility to the SEC is limited, however, because it can be used only in civil judicial proceedings and not in SEC investigations or administrative proceedings—or any other criminal investigation or prosecution.⁵⁹ Moreover, requests may be refused if their execution falls outside the functions of the judiciary, or if the foreign power believes that its sovereignty or security would be prejudiced by their execution.⁶⁰ Finally, Article 23 of the Hague Convention provides a further limitation in that it permits a signatory to “declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.”⁶¹

Fortunately, the SEC is not limited to using the Hague Convention to obtain assistance or information from a foreign state. To facilitate the investigation and prosecution of criminal matters, the United States has entered into MLATs⁶² with more than forty-five countries, including many of the Caribbean islands.⁶³ MLATs that are negotiated through formal diplomatic channels have the force of law and compel their signatories to provide assistance on a broad range of criminal matters.⁶⁴ In addition to granting the power to compel the production of records and the appearance of witnesses, MLATs generally permit signatories to request forfeiture actions, the enforcement of domestically issued forfeiture judgments, and the freezing and/or repatriation of assets located abroad.⁶⁵ Another advantage of such treaties is that parties to MLATs may obtain information either in preparation for or during trial, regardless of whether the requesting

57. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Convention].

58. *Id.* art. 1.

59. Westin, *supra* note 52, at 127; Greene, *supra* note 52, at 639-40.

60. Hague Convention, *supra* note 57, art. 12. However, the treaty goes on to state that “[e]xecution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.” *Id.*

61. *Id.* art. 23.

62. Mutual Legal Assistance Treaties (MLATs), which are bilateral treaties, are negotiated through diplomatic channels and must be ratified by the Senate. Elliott M. Beard, *A Critical Analysis of the Effects of Colello v. SEC on International Securities Law Enforcement Agreements*, 7 Duke J. Comp. & Int’l L. 271, 272-73 (1996).

63. Eric S. Rein & Bethany N. Schols, *Creative New Mechanisms for Banks to Recover Stolen Collateral*, 122 Banking L.J. 725, 727 (2005). MLATs also exist between the United States and, among others, Argentina, Belgium, Canada, the United Kingdom concerning the Cayman Islands, Italy, Spain, Switzerland, Turkey, and Thailand. Greene, *supra* note 52, at 641-42.

64. Snow, *supra* note 54, at 224 (“[MLATs] create an international treaty obligation to provide the types of assistance set out in the agreement.”); Greene, *supra* note 52, at 640.

65. Beard, *supra* note 62, at 273; *see also* Rein & Schols, *supra* note 63, at 727.

state has filed charges.⁶⁶ Thus, unlike letters rogatory and the Hague Convention, MLATs do not require the existence of a judicial proceeding in order to obtain foreign assistance.

Communications made pursuant to MLATs pass directly between the "Central Authorities" of the countries involved,⁶⁷ which are separate from the judiciary.⁶⁸ Because the Department of Justice must approve all requests made pursuant to MLATs, the SEC lacks the basic power to decide whether to request foreign assistance under these treaties.⁶⁹ One of the major limitations on the SEC's use of MLATs to enforce U.S. securities laws abroad is that many of these treaties have "dual criminality" provisions, which require that the offense being investigated is a crime in both jurisdictions.⁷⁰ Another limitation of MLATs is that they often permit the executing country to deny assistance in a number of situations; for example, when assistance would prejudice its sovereignty or security.⁷¹

When using an MLAT is not an option or would be inefficient, the SEC may still seek foreign assistance through an MOU⁷² negotiated with the securities regulator of that jurisdiction. Unlike MLATs, which are negotiated through diplomatic channels, carried out by designated Central Authorities, and require ratification by the Senate, MOUs are negotiated directly between the regulatory bodies in charge of the securities laws of the two countries, are carried out by these same regulatory bodies, and do not require ratification.⁷³ This lack of formality often makes the use of MOUs more efficient and effective than the other methods available to the SEC for obtaining foreign assistance.⁷⁴ An additional advantage of MOUs is that,

66. Greene, *supra* note 52, at 640.

67. Snow, *supra* note 54, at 226. The Central Authority for the United States "is always the United States Attorney General or his designee." *Id.* For purposes of making and receiving MLAT requests, the Attorney General's designee is the Office of International Affairs in the Criminal Division of the Department of Justice. *Id.* For the foreign party to the MLAT, the Central Authority is usually the Attorney General, Minister of Justice, Minister of Interior, or whoever is responsible for international criminal assistance matters in that country. *Id.* at 226-27.

68. Beard, *supra* note 62, at 273. This alleviates the problem of states refusing to hand over information to nonjudicial authorities under the Hague Convention. *Id.*

69. *Id.* at 274; cf. Rein & Schols, *supra* note 63, at 727 ("The powers and remedies offered pursuant to MLAT are not available to private persons or corporations, but rather to the prosecutors. Thus, the [SEC] must seek assistance from the U.S. Attorney's Office.").

70. Beard, *supra* note 62, at 273-74 ("[T]he most important [restriction on the effectiveness of MLATs] is the widespread use of a dual criminality requirement. Under the dual criminality requirement, the offense being investigated must be a criminal violation in both the requesting state and the executing state. Thus, where an action is illegal in the United States, but not in the requested country . . . no assistance as to the investigation of that action may be obtained under an MLAT." (internal citations omitted)).

71. *Id.* at 274; Snow, *supra* note 54, at 225.

72. Memoranda of Understanding (MOUs) are nonbinding agreements among foreign regulators, under which the regulators state their intention to assist one another in the enforcement of various laws and regulations. See Greene, *supra* note 52, at 649.

73. *Id.*

74. Beard, *supra* note 62, at 275 (arguing that the characteristics of MOUs result in "greater speed and reliability of requests and assistance," and "provide [for] a more

unlike MLATs, they do not have dual criminality requirements.⁷⁵ Finally, although MOUs do not obligate the parties to assist one another, such assistance generally tends to be provided.⁷⁶

5. The SEC's Historical Treatment of Foreign Corporations

In the years following the enactment of the securities laws, when the presence of foreign issuers was minimal, the SEC held foreign issuers to the same standard of disclosure that applied to domestic issuers.⁷⁷ However, foreign offerings into the U.S. increased to such a point in the 1960s and 1970s that Congress enlarged the scope of the registration laws on foreign corporations. Consequently, the SEC developed the Foreign Integrated Disclosure System. Under this system, foreign issuers were subjected to slightly different disclosure requirements.⁷⁸ In reaching this decision, the SEC was forced to engage in a difficult balancing of interests—namely, it had to balance the strong interest in providing U.S. investors with full access to consistent and understandable information, with the equally important interest of encouraging foreign companies to make offerings in the United States.⁷⁹

The result of this balancing act was Form 20-F.⁸⁰ In addition to allowing foreign issuers to prepare their financial statements according to their home countries' currency, Form 20-F also gave them the option of using either generally accepted accounting principles (GAAP) or alternative bodies of accounting principles.⁸¹ Finally, specific corporate officers were not required to verify the contents of a Form 20-F. Rather, all that was required was a signature on behalf of the company.⁸²

Form 20-F is just one example of the SEC's traditional policy toward accommodating differences between U.S. and foreign corporate practices

expeditious means for establishing mutual assistance mechanisms"); Greene, *supra* note 52, at 649 ("MOUs are expected to be more efficient and predictable than MLATs in obtaining information regarding securities violations because they are negotiated and implemented by parties with direct responsibility for regulating their respective securities markets.").

75. Beard, *supra* note 62, at 275.

76. Prentice, *supra* note 49, at 345 ("These agreements are not binding, but the parties generally live up to them.").

77. This was because the presence of foreign issuers in the U.S. market was not strong enough to warrant investigating the differences between U.S. and foreign issuers' business practices. Matthew M. Benov, *The Equivalence Test and Sarbanes-Oxley: Accommodating Foreign Private Issuers and Maintaining the Vitality of U.S. Markets*, 16 *Transnat'l Law.* 439, 444 (2003).

78. *Id.*

79. *Id.*

80. If foreign issuers have already registered securities under the Securities Act, then Form 40-F is used. Anupama J. Naidu, Comment, *Was Its Bite Worse than Its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate into Costs to the United States*, 18 *Emory Int'l L. Rev.* 271, 275 (2004).

81. See Benov, *supra* note 77, at 444-45.

82. Certification of Disclosure in Companies' Quarterly and Annual Reports, 67 *Fed. Reg.* 41,877, 41,882 (proposed June 20, 2002) (to be codified at 17 C.F.R. pts. 232, 240, 249).

where doing so does not significantly interfere with investor protection. In balancing its regulatory priorities, the SEC has historically weighed the risk of deterring foreign issuers from the U.S. securities market heavily against the interest in promoting investor protection.⁸³ The accommodations granted to foreign issuers by the SEC include aggregate executive compensation disclosure rather than individual disclosure (where this is permitted in the home country); exemption from the proxy rules and the insider reporting and short swing profit recovery provisions of Section 16; acquiescence in NYSE and National Association of Securities Dealers (NASD) corporate governance standards that are tailored to the needs of foreign private issuers; and interim reporting on the basis of home country and stock exchange practice rather than mandated quarterly reports.⁸⁴ As a result of these accommodations by the SEC, more than 1300 foreign private issuers from over fifty countries had become reporting companies by the end of 2001.⁸⁵

Although the SEC was not expressly granted comprehensive authority over corporate governance by statute, a number of long-standing statutory provisions allow for the SEC to exercise its authority in making corporate governance rules or regulations.⁸⁶ Despite this fact, when it comes to internal domestic corporate law and governance, the SEC has traditionally respected and deferred to the sovereignty of other nations.⁸⁷ For example, following the 1964 Amendments to the Exchange Act, the SEC issued a release explaining that its traditional deference to foreign companies on management disclosure issues stemmed from its recognition that foreign companies had different disclosure regimes abroad.⁸⁸ This all changed in the wake of the corporate scandals at the turn of the twenty-first century.

83. Naidu, *supra* note 80, at 278.

84. Letter from Todd M. Malan, Executive Dir., Org. for Int'l Investment, to Jonathan G. Katz, Sec'y, SEC (Aug. 19, 2002), *available at* <http://www.sec.gov/rules/proposed/s72102/tmmalan1.htm> (discussing SEC Rule S7-21-02).

85. *See id.*

86. Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 *Fordham J. Corp. & Fin. L.* 225, 255-56, 256 n.93 (2005).

87. Corinne A. Falencki, *Sarbanes-Oxley: Ignoring the Presumption Against Extraterritoriality*, 36 *Geo. Wash. Int'l L. Rev.* 1211, 1229 (2004). In fact, the initial Senate bill that ultimately led to the passage of the Exchange Act would have exempted all foreign securities unless the SEC provided otherwise. *Id.* Moreover, in an official SEC policy statement, the SEC stated, "In seeking solutions to common problems . . . the goal of investor protection should be balanced with the need to be responsive to the realities of each marketplace. . . . While seeking common solutions to international issues, regulators should also be mindful and respectful of existing national regulatory frameworks." Regulation of International Securities Markets, Securities Act Release No. 6807, Exchange Act Release No. 26,284, Investment Company Act Release No. 16,636, 53 *Fed. Reg.* 46,963, 46,963-64, 46,966 (Nov. 21, 1988).

88. *See* Registration Forms for Foreign Issuers, 30 *Fed. Reg.* 14,743 (Nov. 16, 1965).

B. *All Aboard the SOX Train: The Sarbanes-Oxley Act*

A wave of corporate accounting scandals was uncovered in the first few years of the twenty-first century.⁸⁹ These scandals, involving numerous large and well-respected firms,⁹⁰ ultimately cost shareholders \$460 billion.⁹¹ When the corporate practices of these companies came to light, the public's confidence in the securities markets and in corporate ethics and governance was shattered.⁹² Although many of these companies' employees had been aware of fraud and other abuses, they had either failed to come forward with this information because they feared retaliation, or they had come forward and their warnings went unheeded.⁹³ Congress responded to this crisis by swiftly passing into law the Sarbanes-Oxley Act,⁹⁴ with the intent of "ensur[ing] that investors [will] once again trust corporate executives and their financial reports, and have confidence in the independence of accountants and analysts."⁹⁵

SOX provided the SEC with wide latitude to use its rulemaking power to resolve many technical issues that remained unaddressed.⁹⁶ For example, the SEC may promulgate rules and regulations that are "necessary or appropriate in the public interest."⁹⁷ Moreover, the SEC has rulemaking power under the Act to develop accounting standards under Section 19 of the Securities Act⁹⁸ and Section 13(b) of the Exchange Act,⁹⁹ define prohibited non-auditing services by rule;¹⁰⁰ prohibit the listing of companies on exchanges due to noncompliance with SOX provisions;¹⁰¹ develop procedures for CEO certification of financials;¹⁰² develop rules for

89. See Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 Admin. L. Rev. 1, 2 (2005).

90. These firms include Enron, Global Crossing, Tyco, and WorldCom. *Id.*

91. John P. Lucci, *Enron—The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 Alb. L. Rev. 211, 212 (2003).

92. Vaughn, *supra* note 89, at 2.

93. *Id.*; See Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L. Rev. 1029, 1041 (2004) (quoting a Wall Street Journal article for the proposition that although numerous employees knew of the fraud at WorldCom, they failed to disclose such information for fear of speaking out).

94. SOX, Pub. L. No. 107-204, 116 Stat. 745 (to be codified in scattered sections of the U.S.C.).

95. Press Release, Sen. Paul S. Sarbanes, Chairman, S. Banking, Housing, and Urban Affairs Comm., Remarks on the Passage of the Public Company Accounting Reform and Investor Protection Act of 2002 (July 15, 2002), available at <http://banking.senate.gov/pre102/0715pass.htm>.

96. See Lucci, *supra* note 91, at 231.

97. 15 U.S.C. § 7202(a) (Supp. II 2002).

98. *Id.* § 77s; see *id.* § 7218(b) (directing that the SEC promulgate rules and regulations for the purpose of carrying out § 77s(b) of this title).

99. *Id.* § 78m.

100. See *id.* § 78j-1(a).

101. *Id.* § 78j-1(m)(1)(A).

102. *Id.* § 7241(a).

the treatment of “off-balance sheet transactions”;¹⁰³ require disclosure regarding the presence of at least one financial expert on the audit committee;¹⁰⁴ and develop rules and regulations concerning the retention of relevant records by auditors.¹⁰⁵ These are just samples of the wide rulemaking authority granted to the SEC under SOX.

To prevent a repeat of Enron-like cases, Congress also incorporated provisions into SOX that were meant to encourage employees to come forth with information regarding financial and accounting irregularities. In particular, Section 301 of SOX amended Section 10A of the Exchange Act of 1934 to state that “[e]ach audit committee shall establish procedures for . . . the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and . . . the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.”¹⁰⁶ Absent compliance with this rule, a company may not list its securities on an American exchange.¹⁰⁷ In addition, SOX has provisions that protect whistleblowers from adverse consequences related to compliance with SOX. For example, Section 806 of SOX, which amends 18 U.S.C. § 1514, protects employees of publicly traded companies from retaliation for reporting conduct that “the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities Exchange Commission, or any provision of Federal law relating to fraud against shareholders.”¹⁰⁸

Finally, SOX has increased the statutory remedies available to the SEC.¹⁰⁹ For example, the SEC previously lacked the authority to impose fines and penalties on issuers or management, and “could not enforce the disgorgement of management’s ill-gotten profits, thus having to rely instead on the equitable discretion of the courts.”¹¹⁰ Subsequent to the passage of SOX, however, the SEC has not only the Exchange Act penalties at its disposal, but also may seek injunctions against certain prohibited

103. *Id.* § 78m(j) (requiring the issuance of “final rules providing that each annual and quarterly financial report required to be filed with the Commission shall disclose all material off-balance sheet transactions”).

104. *Id.* § 7265.

105. 18 U.S.C. § 1520(a).

106. 15 U.S.C. § 78j-1(m)(4). Although the statute does not prescribe specific procedures to be adopted by audit committees, an effective procedure for the complaint process should “(1) protect employees against retaliation; (2) allow for the intake of anonymous complaints; (3) encourage employees to lodge legitimate complaints; (4) call for expeditious internal investigation; and (5) facilitate appropriate remedial response.” Marc I. Steinberg & Seth A. Kaufman, *Minimizing Corporate Liability Exposure When the Whistle Blows in the Post Sarbanes-Oxley Era*, 30 J. Corp. L. 445, 457 (2005).

107. 15 U.S.C. § 78j-1(m)(1)(A).

108. SOX § 806, Pub. L. No. 107-204, 116 Stat. 745, 802 (codified at 18 U.S.C. § 1514A).

109. See Maria Camilla Cardilli, *Regulation Without Borders: The Impact of Sarbanes-Oxley on European Companies*, 27 Fordham Int’l L.J. 785, 787-90 (2004).

110. *Id.* at 788.

conduct,¹¹¹ such as the issuing of false financial statements or the failure to maintain an independent audit committee. As with most securities provisions, the SEC continues to have authority to exempt entities from SOX's coverage.¹¹²

The next section discusses the European reaction to SOX. In the past, the SEC had responded to the globalization of U.S. capital markets by granting a series of exemptions and accommodations to facilitate the listing of foreign companies on U.S. exchanges.¹¹³ The SEC appears to have taken a tougher stance in its treatment of SOX, applying its tough new disclosure and corporate governance requirements to both foreign and domestic issuers.¹¹⁴ In light of the international community's hostile reaction, however, the SEC has softened some of SOX's more controversial provisions by granting limited exemptions to foreign issuers.¹¹⁵

C. *Seeking a Transfer from the SOX Train, or at Least a Lower Fare: The Foreign Response to the Potential Extraterritorial Reach of SOX*

This section discusses the aftermath of the SEC's determination that SOX was meant to apply equally to both foreign and domestic companies. Subsection 1 describes the international community's reaction to the potential extraterritorial reach of SOX, while subsection 2 discusses how the extraterritorial application of SOX has impacted, and will likely continue to impact, the U.S. securities market.

1. Foreign Reaction to SOX

The international community did not welcome SOX with open arms.¹¹⁶ From its inception, it has been criticized by foreign commentators as being hastily drafted and as an attempt by Congress to achieve a quick-fix solution to corporate governance problems in an election year.¹¹⁷ Commentators, corporate leaders, and officials, on at least five continents, have either publicly criticized the Act or voiced concern over its ambiguities.¹¹⁸

111. 15 U.S.C. § 78u(d)(1).

112. *See, e.g., id.* § 7216(c) ("The Commission, and the Board . . . may . . . exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board or the Commission issued under this Act.").

113. Kenji Taneda, Note, *Sarbanes-Oxley, Foreign Issuers and United States Securities Regulation*, 2003 Colum. Bus. L. Rev. 715, 716.

114. *Id.*

115. *Id.*

116. Lucci, *supra* note 91, at 217. For example, "[t]he application of the audit-committee-restructuring provisions to foreign issuers created a furor." Roberta S. Karmel, *The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance*, 33 Stetson L. Rev. 849, 874 (2004).

117. Lucci, *supra* note 91, at 217.

118. *Id.* at 235-37.

Calls for exemptions, by companies and countries alike, began almost immediately. In support of such exemptions, many foreign companies publicly stated that, in addition to being too strict, the SOX regulations duplicate regulations already imposed in their respective countries.¹¹⁹ For example, one of Europe's most authoritative representatives of business, the Union of Industrial and Employers' Confederation of Europe (UNICE), argued that companies with primary listings on European exchanges were already subject to tough audit standards, and that the additional burdens of SOX were not necessary to achieve the sought-after result.¹²⁰ The European Commission also got involved. In a letter, dated February 18, 2003, the European Commission requested full recognition of the equivalence of E.U. corporate governance systems from the SEC, and thus full exemptions for E.U. lawyers, companies, and auditors from SOX.¹²¹

European countries also reacted with hostility to the requirement that they register with and submit annual reports to the SOX-created Public Company Accounting Oversight Board (PCAOB).¹²² For example, in a letter to SEC chairman William Donaldson, E.U. Commissioner Frits Bolkestein stated that such registration was "unnecessary, burdensome and disproportionate."¹²³ Furthermore, he argued that PCAOB's access to internal audit documents would breach the professional secrecy laws that exist in most European countries.¹²⁴ Finally, Commissioner Bolkestein demanded an exemption from registering with the PCAOB for European audit firms working for U.S.-listed companies, and warned that the E.U. may be forced to reciprocate by requiring American firms to register with all member states.¹²⁵

119. *Id.* at 234. Executives of these already highly regulated firms argue that SOX adds a layer of unnecessary regulation, and that they should therefore be granted exemptions from its provisions. *Id.* at 240. Thus far, efforts by individual countries to obtain exemptions for their corporations from SOX due to the presence of similar oversight entities have been unsuccessful. *Id.*

120. Cardilli, *supra* note 109, at 791. Moreover, a number of the world's largest companies responded to the new threats of liability posed by SOX by forming the Reciprocity in International Accounting Coalition (RIAC) to lobby for exemptions from SOX (and, in particular, to the accounting rules that apply to foreign firms). Lucci, *supra* note 91, at 218-19. The focus of RIAC is to ensure that future legislation and rules are not applied to foreign corporations or accounting firms, and if they are applied that they be less burdensome on such firms. *Id.* at 219.

121. Letter from Alexander Schaub, Dir.-Gen., European Comm'n (EC), to Jonathan G. Katz, Sec'y, SEC (Feb. 18, 2003) [hereinafter Comment Letter from EC], available at <http://www.sec.gov/rules/proposed/s70203/aschaub1.htm> (commenting on SEC Rule S7-02-03).

122. Cardilli, *supra* note 109, at 808.

123. *Id.*

124. *Id.* Among the jurisdictions with bank secrecy laws are Switzerland, the Bahamas, and the Cayman Islands. Harvey L. Pitt et. al., *Problems of Enforcement in the Multinational Securities Market*, 9 U. Pa. J. Int'l Bus. L. 375, 404-11 (1987).

125. Cardilli, *supra* note 109, at 808.

The SEC responded to these concerns by relaxing some of the SOX rules.¹²⁶ For example, while most U.S. companies were required to comply with the new rules by October 2004, the deadline for compliance by non-U.S. companies was extended until July 2005.¹²⁷ Moreover, to accommodate those foreign practices that make strict compliance with SOX nearly impossible for some companies, the SEC granted a number of exemptions regarding a listed company's audit committee membership.¹²⁸ According to the SEC, the exemptions allow non-U.S. "companies to abide by the 'spirit' of Sarbanes-Oxley without disrupting their existing practices."¹²⁹ Despite these concessions, a survey of nearly a thousand European CEOs revealed that sixty-one percent of them intend to turn their backs on the U.S. market, citing over-regulation as "the biggest threat to their business."¹³⁰

2. Consequences of the Extraterritorial Application of SOX

According to David Hirschmann, a point man at the Chamber of Commerce in Washington, D.C., SOX has brought about a number of unintended consequences which must be addressed.¹³¹ For example, companies are making unnecessary expenditures "to meet the bureaucratic demands of new rules, [and are deciding to] postpone certain technology purchases to avoid running afoul of new compliance requirements."¹³² Adjusting to the new requirements imposed by SOX costs the U.S. economy \$5.5 billion each year.¹³³ In addition, medium-sized companies

126. Andrei Postelnicu, *Concern over ADRs Leads SEC to Relax Sarbanes-Oxley Rules*, Fin. Times (U.S.), Apr. 14, 2003, at 25. The SEC decided to relax the rules mainly because companies such as Daiwa (Japan), Porsche (Germany), and Benfield Group (U.K.) had refused to list themselves on U.S. exchanges due to the stringent requirements of SOX. *Id.*

127. *Id.*

128. *Id.* For example, these exemptions include the following:

(1) allowing non-management employees to serve as audit committee members, consistent with "co-determination" and similar requirements in some countries; (2) allowing shareholders to select or ratify the selection of auditors, also consistent with requirements in many foreign countries; (3) allowing alternative structures such as boards of auditors to perform auditor oversight functions where the structures are provided for under local law; and (4) addressing the issue of foreign government shareholder representation on audit committees.

Falencki, *supra* note 87, at 1235.

129. Postelnicu, *supra* note 126.

130. Larry Schlesinger, *Sarbanes-Oxley Scares Off European CEOs*, Accountancy Age, Jan. 24, 2003, <http://www.accountancyage.com/2031960>.

131. Kurt Eichenwald, *Reform Effort at Businesses Feels Pressure*, N.Y. Times, Jan. 14, 2005, at A1.

132. *Id.*

133. Roland Hefendehl, *Enron, WorldCom, and the Consequences: Business Criminal Law Between Doctrinal Requirements and the Hopes of Crime Policy*, 8 Buff. Crim. L. Rev. 51, 53 (2004).

are incurring substantial costs as a result of SOX, despite the fact that the Act does not specifically target them.¹³⁴

Perhaps the most significant effect of the extraterritorial reach of SOX is the diminishing appeal of American stock exchanges to foreign issuers.¹³⁵ Thus far, Daiwa in Japan, Porsche in Germany, and Benfield Insurance in the United Kingdom have delayed listing on the NYSE due to SOX.¹³⁶ In deciding not to list on the NYSE, Porsche listed SOX's certification requirement as playing a major role in arriving at its decision.¹³⁷ Even when SEC exemptions are taken into account, the significant hardship imposed by SOX on foreign issuers—especially German ones—may cause them to follow Porsche's lead.¹³⁸

To add to this problem, foreign stock exchanges are on the rise and are more than willing to accept, with open arms, those issuers scared off from the U.S. markets as a result of the onerous requirements of SOX. In fact, the London Stock Exchange (LSE) has begun to market itself to companies in Europe and Asia as a means of avoiding the strict requirements of SOX, thus capitalizing on the prospect of greater U.S. regulation.¹³⁹ The LSE, Europe's largest exchange, has been successful in attracting European and German issuers to its capital market.¹⁴⁰ This exchange, along with Euronext,¹⁴¹ the second largest European exchange, provides German issuers with access to capital while subjecting them only to their home countries' regulations, and thus are viable alternatives to the U.S.

134. In fact, the costs associated with listing on a stock exchange by a medium-sized company have increased from \$1.3 to \$2.5 million. *Id.* For example, Werner Brandt (Chief Financial Officer (CFO) at SAP AG) estimates that his company has expended an additional \$2.6 million annually as a result of compliance with SOX. *Id.*

135. The NYSE has reported that in recent years the number of new foreign listings has decreased. Eichenwald, *supra* note 131. For example, due to the rigorous new demands on the American market, the Exchange recently lost out on a giant initial public offering for Air China. *Id.*

136. Falencki, *supra* note 87, at 1234.

137. Naidu, *supra* note 80, at 280. Applying SOX to German corporations had been difficult because, in Germany, the responsibility for the annual financial statement ordinarily resides in several boards consisting of more than twenty individuals. Hefendehl, *supra* note 133, at 52.

138. See *infra* Part I.D.3. In a recent meeting called by the German Industries Federation, at which twenty-four German companies with securities listed on U.S. exchanges were in attendance, an official of Bayer AG stated that "German companies are not very happy with this legislation because indirectly it moves into areas covered by European regulations and in particular contradicts German law." Falencki, *supra* note 87, at 1228 (internal quotation marks omitted).

139. Falencki, *supra* note 87, at 1234. For example, the London Stock Exchange's deputy international business development manager commented that "[q]uite a few companies have postponed or cancelled listings on the NYSE because of regulatory uncertainty. Companies are very concerned about the hard rule approach in the United States, and that does clearly present us with an opportunity which we are grasping." *Id.* (internal quotation marks omitted).

140. See Naidu, *supra* note 80, at 309.

141. Although Euronext's goal is to create a unified European financial market, companies listed on this exchange are primarily subject to their home countries' regulations. *Id.*

exchanges.¹⁴² Consequently, by listing on the LSE or Euronext, German companies can avoid the restructuring and increased exposure to liability imposed by SOX.¹⁴³

The extraterritorial application of SOX significantly increases the cost of compliance for foreign companies that decide not to leave the U.S. market. Currently, approximately 470 foreign companies are listed on the NYSE, “with a combined global market cap of \$3.8 trillion, or about 30% of the total exchange.”¹⁴⁴ If these companies decide to leave the NYSE (or are de-listed by the SEC for violating Section 301 of SOX), U.S. investors will find it more difficult to invest in foreign companies, thereby decreasing their ability to obtain more diversified portfolios.¹⁴⁵

The next section provides some specific examples of how compliance with both SOX and foreign laws may impose a hardship on foreign companies and/or place them in a no-win, catch-22 situation.

D. *SOX on a Collision Course with Foreign Laws and Practices*

Compliance with SOX may be burdensome to companies already complying with similar foreign laws,¹⁴⁶ or may put such companies in a position where they must violate foreign laws. This section samples some relevant foreign laws and discusses how they may pose compliance problems for foreign companies that are subject to SOX. Subsection 1 describes the E.U. policy on data protection and how it may conflict with SOX. Subsections 2 and 3 discuss various French and German laws,

142. *Id.*

143. It should be noted that, at the time of this writing, the NYSE and Euronext are in the process of merging. Roberta S. Karmel, *NYSE-Euronext Merger: NYSE Is Losing Listings to Foreign Exchanges*, N.Y. L.J., Aug. 17, 2006, at 3. However, the two exchanges, the SEC, and E.U. officials have all insisted that this merger will not subject Euronext-listed companies to SEC regulation. *Id.* (“The CEOs of both the NYSE and Euronext have stated that U.S. accounting regulations would not be extended to European companies as a result of the NYSE-Euronext merger . . . [and the SEC] has attempted to reassure foreign issuers listed on Euronext that they will not become subject to the SEC reporting requirements merely because they are listed on Euronext.”). In addition, in discussing the “implications of a possible combination of Nasdaq and the London Stock Exchange . . . [SEC chairman Christopher] Cox said that [the] different countries were likely to continue to have different regulatory standards.” Jeremy Grant, *SEC, Euronext to Discuss NYSE Plans*, Fin. Times (U.S.), Aug. 4, 2006, at 16.

144. Falencki, *supra* note 87, at 1234.

145. *Id.*

146. For example, the regulatory approach adopted by the United Kingdom overlaps with the new rules imposed by SOX to such a significant degree that additional compliance with SOX by U.K. companies would be unnecessarily duplicative. See Falencki, *supra* note 87, at 1225-26. The key difference between the two approaches is that whereas the U.S. system is based on mandatory legislative standards, the U.K. approach relies on voluntary compliance through observance of U.K. law on a “comply or explain” basis. Peter T. Muchlinski, *Enron and Beyond: Multinational Corporate Groups and the Internationalization of Governance and Disclosure Regimes*, 37 Conn. L. Rev. 725, 743 (2005). That is, if companies do not comply with U.K. law, then they are required to explain this departure in company reports and statements, leaving “shareholders and others to judge the effects of this action.” *Id.*

respectively, and how they pose problems for foreign companies who must comply with SOX in addition to their home country laws.

1. Directive 95/46/EC of the European Parliament

In 1995, the European Union adopted Data Protection Directive 95/46/EC (the "Directive").¹⁴⁷ According to the Directive, member states must protect their citizens' "fundamental rights and freedoms," particularly the right to privacy regarding the processing of personal data.¹⁴⁸ Among other things, the Directive requires that personal data must be

- (a) processed fairly and lawfully;
- (b) collected for specified, explicit and legitimate purposes . . . ;
- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected . . . ;
- (d) accurate and, where necessary, kept up to date . . . ;
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected¹⁴⁹

Moreover, the Directive states that personal data may be processed only if the data subject has given his unambiguous consent.¹⁵⁰ The data subject must be provided with the identity of the controller¹⁵¹ and the intended purposes of the data processing.¹⁵² Not only must the data subject be granted access, without excessive delay or expense, to any personal information held by another party, but he must also be given the opportunity to correct any inaccurate information.¹⁵³

In addition to establishing a comprehensive system to protect privacy rights, the Directive also imposes restrictions on the transfer of personal information out of Europe.¹⁵⁴ Transfer of such information may take place only if the country of destination "ensures an adequate level of protection. . . . The adequacy of the level of protection afforded by a [destination] country shall be assessed in . . . light of all the circumstances surrounding a data transfer operation."¹⁵⁵ The Commission has indicated that current U.S. law does not provide an "adequate" level of privacy rights

147. Council Directive 95/46, 1995 O.J. (L 281) 31 (EC) [hereinafter Directive].

148. *Id.* art. 1.

149. *Id.* art. 6.

150. *Id.* art. 7.

151. "Controller" refers to the "person, public authority, agency or any other body [that] determines the purposes and means of the processing of personal data." *Id.* art. 2(d).

152. *Id.* art. 10.

153. *Id.* art. 12.

154. *Id.* art. 25.

155. *Id.* art. 25(1)-(2).

protection for purposes of article 25 of the Directive.¹⁵⁶ Therefore, this provision could pose serious problems for companies subject to SOX, which may frequently require the transfer of personal information outside of Europe.¹⁵⁷

Article 28 of the Directive states that each member state must adopt legislation creating one or more public authorities to implement the Directive within its territory.¹⁵⁸ Each authority must be endowed with investigative powers,¹⁵⁹ effective powers of intervention,¹⁶⁰ and the power to engage in legal proceedings for violations of the national provisions adopted pursuant to the Directive.¹⁶¹ The result of this provision is that twenty-five different sets of laws governing data protection will be on the books in the European Union, any one of which could render compliance with SOX problematic.¹⁶²

2. Conflict Between SOX and French Law

This subsection describes how French law may conflict with SOX's anonymous whistleblower hotline requirement. Subsection 2.a deals with the conflict with French labor law, whereas subsection 2.b deals with the conflict with French data protection law.

a. Labor Law

French labor law rules require an information and consultation process with the personnel representatives (e.g., works council) prior to the adoption and modification of internal regulations.¹⁶³ These regulations must be posted for inspection by the employees and then filed with the clerk of the appropriate labor law court and the appropriate labor inspector.¹⁶⁴ With regard to ethics hotlines and codes of conduct, French labor law

156. Currently, the European Union has designated only Argentina, Canada, Hungary, and Switzerland as providing adequate protection of personal data. Justin Kent Holcombe, *Solutions for Regulating Offshore Outsourcing in the Service Sector: Using the Law, Market, International Mechanisms, and Collective Organization as Building Blocks*, 7 U. Pa. J. Lab. & Emp. L. 539, 571 (2005).

157. E.g., SOX § 301, 15 U.S.C. § 78j-1(m)(4) (Supp. II 2002) (requiring procedures for "the receipt, retention, and treatment of complaints received by" issuers, as well as procedures for confidential, anonymous whistleblowing).

158. Directive, *supra* note 147, art. 28(1).

159. *Id.* art. 28(3).

160. One example of an effective power of intervention is "delivering opinions before processing operations are carried out." *Id.*

161. *Id.*

162. See *infra* Part I.D.2.b. (discussing the conflict between France's data protection law and SOX's whistleblower-hotline requirement).

163. 2 Moquet Borde Dieux et al., *Doing Business in France* § 12.03(6)(b)(i) (citing C. Trav., art. L.122-36(1)).

164. See *id.* (citing Code du travail [C. trav.] arts. L.122-36(3), R.122-12, R.122-13 (Fr.)). Labor inspectors may review the legality of the regulation and at any time may require companies to remove or modify provisions that conflict with applicable labor law. *Id.* (citing Code du travail [C. trav.] art. L.122-37(1)).

provides that restrictions on individual and collective freedoms are unlawful if they are disproportionate to the aim sought and are “not justified by the nature of the task.”¹⁶⁵

In addition, although the French Labor Code contains specific protective provisions for employees who have denounced moral harassment to their employers, no such protection exists for employees who denounce frauds.¹⁶⁶ In contrast, a false denunciation may subject an employee to fines and imprisonment.¹⁶⁷ As of yet, French labor courts have not reported any cases involving the implementation of anonymous whistleblower hotlines. However, applying recent French civil court decisions, French labor courts may, as they have done with regard to monitoring Internet and e-mail use,¹⁶⁸ deem obligations to report coworkers as being a disproportionate restriction on employees’ individual rights and freedoms.¹⁶⁹

b. Data Protection Laws

This subsection deals with the conflict between France’s data protection law and SOX’s requirement for confidential and anonymous whistleblower hotlines. Subsection 2.b.i deals with the French CNIL, while subsection 2.b.ii discusses two recent CNIL decisions rejecting the implementation of anonymous whistleblower hotlines in French subsidiaries of American companies. Subsection 2.b.iii analyzes the source of France’s aversion to anonymous whistleblowing. Finally, subsection 2.b.iv discusses the CNIL’s attempt to reach a compromise regarding SOX’s whistleblower hotline requirement.

165. *French Employee Data Protection and Labour Law Conflicts with Sarbanes-Oxley*, Dechert On Point (Dechert LLP, London), Sept. 19, 2005, at 2 [hereinafter Dechert] (citing Code du travail [C. trav.] arts. L.120-2, 122-35).

166. *Id.* (citing Code du travail [C. trav.] art. L.122-49).

167. *Id.* (citing Code pénal [C. pén.] art. L.226-10).

168. *See, e.g.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Oct. 6, 2004, no. 04/02865 [hereinafter *Novartis Case*], available at <http://www.juripole.fr/J20041006.php>. An unofficial English translation is available at <http://translate.google.com/translate?hl=en&sl=fr&u=http://www.juripole.fr/J20041006.php&prev=/search%3Fq%3DNovartis%2B%2526%2BNanterre%2B%26start%3D10%26hl%3Den%26lr%3D%26ie%3DUTF-8%26sa%3DNJ>.

169. For example, in the *Novartis Case*, Novartis adopted a code of conduct outlining the standards that employees were required to meet in relation to “personal obligations, discrimination, conflict of interest, bribes, insider dealing, competition, legal compliance and duties of confidentiality.” Eva Wong, *Implementing Codes of Conduct, Privacy & Data Protection*, Jan.-Feb. 2005, at 5, 6. The Civil Court of Nanterre (*Tribunal de Grande Instance*) concluded that the code of conduct was an amendment to the company’s internal regulations and illicitly intruded into the private life of the company’s employees. *Id.* It then ordered Novartis to remove its code of conduct from its internal regulations and from its intranet, or face a € 100,000 fine for each day it remained. *See Novartis Case, supra* note 168.

i. The French CNIL

First enacted in 1978, the French Data Protection Act¹⁷⁰—which created the “Commission nationale de l’informatique et des libertés” (CNIL)—was recently amended to transpose the Directive into French law.¹⁷¹ Under French law as it now stands,¹⁷² data must be collected and handled “fairly and lawfully.”¹⁷³ This data should be adequate, pertinent, and not excessive with regards to the purpose for its collection.¹⁷⁴ Moreover, inaccurate or incomplete data must be deleted or rectified, and the individual concerned must have the opportunity to access and correct such data.¹⁷⁵

Data collection, sharing, and disclosure may be established by way of a company’s code of conduct.¹⁷⁶ However, whistleblowing hotlines must comply with both French law and European codes, particularly the Convention for the Protection of Individuals with Regard to Automatic Data Processing of Personal Data¹⁷⁷ as well as Directive 95/46/EC.¹⁷⁸ Although French law requires employees to alert the authorities of suspected financial improprieties, French labor law does not protect an employee’s job security because the whistleblower’s dismissal may be justified under the principles of “obligations to respect confidentiality, link of subordination, and abuse of freedom on expression.”¹⁷⁹

ii. Two Recent CNIL Decisions

Seeking to comply with the newly enacted SOX requirements, the French subsidiaries of two American companies¹⁸⁰ approached the CNIL seeking approval for the establishment of anonymous whistleblowing procedures. On May 26, 2005, the CNIL denied the requests of both McDonald’s France and Exide Technologies, applying the same reasoning in both instances.¹⁸¹

The McDonald’s “professional integrity” plan would have allowed the employees of McDonald’s France to report, either by mail or by fax, any

170. Law No. 78-17 of Jan. 6, 1978, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 7, 1978, p. 227.

171. Law No. 2004-801 of Aug. 6, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Aug. 7, 2004, p. 14063.

172. Law No. 78-17 of Jan. 6, 1978, *amended by* Law No. 2004-801 of Aug. 6, 2004 [hereinafter French Data Protection Law]. The English version of the French Data Protection Law is available at <http://www.cnil.fr/fileadmin/documents/uk/78-17VA.pdf>.

173. French Data Protection Law, *supra* note 172, art. 6.

174. *Id.*

175. *Id.* art. 40.

176. Mark E. Schreiber et al., *Anonymous Sarbanes-Oxley Hotline in the E.U.: Practical Compliance Guidance for Global Companies*, World Data Protection Rep. (BNA Int’l, Wash., D.C.), Aug. 2005, at 1, 6.

177. Jan. 28, 1981, Europ. T.S. No. 108.

178. Schreiber, *supra* note 176, at 6.

179. *Id.* (internal quotation marks omitted).

180. The two American companies are McDonald’s Corporation and Exide Technologies.

181. *See* administrative decisions cited *supra* note 5.

inappropriate conduct of the restaurants' management to the American parent company.¹⁸² After receiving the contents of the mail or faxes from the Ethics Director, the management of McDonald's France would investigate complaints involving its employees; however, the parent company would investigate any complaints involving the management of McDonald's France.¹⁸³ Suspected employees would be informed "that they ha[d] the right to access, rectify or contest within two business days" the reports made against them.¹⁸⁴ If the investigation revealed employee misconduct, the content of the computerized reports would be stored with McDonald's France for a period ranging from one to five years, depending on the nature of the fault committed.¹⁸⁵ Finally, the reports stored with the Ethics Department of the parent company would be kept no longer than three months after the close of an investigation; however, where members of McDonald's France management were implicated, the information would be kept no longer than five years.¹⁸⁶

Exide Technologies hoped to implement an "ethics hotline" that would enable employees to report accounting inaccuracies or irregularities, "possible violations of company principles (rules of ethical or commercial conduct) or of laws currently in force."¹⁸⁷ Such reports were to be made either by email or by calling a toll-free number, and an employee's anonymity was guaranteed if so requested.¹⁸⁸ In actuality, reports and information requests were addressed to an American subcontractor, which was responsible for recording and classifying their contents.¹⁸⁹ Depending upon the classification, a written summary of the reports would be sent to the appropriate person as previously designated by the parent company.¹⁹⁰ If deemed necessary, the recipient would then begin an internal investigation.¹⁹¹ "Finally, the data would be kept for a maximum of one year."¹⁹²

182. McDonald's Decision, *supra* note 5. The contents of these reports would be recorded in a central file under the control of the Director of Ethics of the company. *Id.* Originally, McDonald's had planned to install an ethics hotline and a dedicated email address; however, after discussions with the CNIL, it decided to use a postal address and U.S. fax number instead. Miriam Wugmeister & Daniel P. Westman, *Whistle-blowing Lines: Conflicting Obligations*, Mondaq, July 8, 2005, <http://www.mondaq.com/article.asp?articleid=33612&searchresults=1>.

183. Wugmeister & Westman, *supra* note 182.

184. *McDonald's Decision*, *supra* note 5.

185. *Id.* On the other hand, reports that did not result in an investigation or that led to negative results were to be destroyed within two business days of the final decision. *Id.*

186. *Id.*

187. *Exide Decision*, *supra* note 5.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* "A 'file follow-up' would also be sent, via e-mail, by the parent company to the French General Counsel, who would in turn send this on to the French Human Resources Director." *Id.*

192. *Id.*

Using the exact same language in both cases, the CNIL rejected the proposed whistleblowing procedures of both companies.¹⁹³ First, it asserted that the possibility of establishing an “ethics alert” could only bolster “the risk of slanderous denunciations.”¹⁹⁴ The CNIL then concluded that the objectives sought by such anonymous systems are disproportionate to the risks of slanderous denunciations and of stigmatizing the subjects of such alerts.¹⁹⁵ Finally, the CNIL noted that, by definition, employees subject to such alerts would not be informed as soon as the report is recorded, and may thus lack the means necessary to contest the processing of the relevant data.¹⁹⁶

iii. French Aversion to Whistleblowing

The implementation of anonymous hotlines in France in accordance with SOX poses a cultural problem as well. Slanderous denunciation from anonymous accusers is contrary to French historical and social principles. The French aversion to anonymous whistleblowing dates back to the French Revolution, during which there was a practice called the “lettres de cachet.” Under this practice, people could be anonymously denounced as enemies and sent off to the guillotine.

Moreover, during the Nazi occupation of France, anonymous denunciations to the Gestapo and police were commonly used to persecute religious and ethnic minorities as well as personal enemies.¹⁹⁷ Therefore, in the eyes of French courts and citizens, an anonymous reporter is viewed as an “informer.”¹⁹⁸ In fact, one such ethical hotline implemented by a different American company’s subsidiary has reportedly been referred to as “allo collabo,” the term for informers to the Nazis.¹⁹⁹

iv. CNIL Guidelines for Whistleblowing Schemes

Conscious of the difficulties its *McDonald’s* and *Exide* decisions posed for SOX compliance, the CNIL adopted a document of orientation setting forth guidelines for the proper implementation of such whistleblowing schemes.²⁰⁰ The CNIL declared that, although it had refused to authorize

193. See administrative decisions cited *supra* note 5.

194. See administrative decisions cited *supra* note 5.

195. See administrative decisions cited *supra* note 5.

196. See administrative decisions cited *supra* note 5.

197. Dechert, *supra* note 165, at 1 n.3.

198. Schreiber, *supra* note 176, at 6-7.

199. During World War II, “collabo” was the nickname used to refer to French citizens who collaborated with the Nazis. Mark E. Schreiber et al., *Anonymous Sarbanes-Oxley Hotlines for Multi-National Companies: Compliance with E.U. Data Protection Laws V-9-1, V-9-25*, in 2 *The Practitioner’s Guide to the Sarbanes-Oxley Act* (John J. Huber et al. eds., 2004).

200. CNIL, *Guideline Document Adopted by the “Commission Nationale de L’informatique et des Libertés” (CNIL) on 10 November 2005 for the Implementation of Whistleblowing Systems in Compliance with the French Data Protection Act of 6 January 1978, as Amended in August 2004, Relating to Information Technology, Data Filing*

two specific whistleblowing schemes, it had no objection to such schemes in principle, provided that they are consistent with French data protection rules.²⁰¹

In some circumstances, the implementation of whistleblowing procedures may be justified out of necessity.²⁰² Provided that other rules recommended by the CNIL are followed, the CNIL will approve whistleblowing procedures that are limited in scope.²⁰³ However, the CNIL will analyze procedures that are “not based on statutory or regulatory obligations of internal control in the financial, accounting, banking and anti bribery areas” on a case-by-case basis to determine whether the proportionality of the contemplated whistleblowing procedures and the purposes for which they are sought are legitimate.²⁰⁴ Finally, employees must not be required to use a legitimately implemented whistleblowing system.²⁰⁵

Where anonymous reports are concerned, however, the CNIL has not wavered from its position given in the *McDonald's* and *Exide* decisions. In the eyes of the CNIL, anonymous reporting can only increase the risk of slanderous reports, while requiring identification prior to reporting can only reduce such a risk by increasing the responsibility of reporters.²⁰⁶ Therefore, whistleblowing systems must be designed in ways that require employees to identify themselves every time they make a report.²⁰⁷ However, this does not mean that whistleblowers will be unprotected under such a scheme. To the contrary, an employee's identity will be processed in

Systems and Liberties [hereinafter CNIL Guidelines], available at <http://cnil-front1.heb.fr.colt.net/fileadmin/documents/uk/CNIL-recommandations-whistleblowing-VA.pdf>.

201. *Id.* at 1.

202. *Id.* at 2. The procedures should be viewed merely as complementary to other reporting methods, not as an equivalent to such methods. *Id.* Moreover, whistleblowing procedures must be limited in scope (i.e., because of a French legislative or regulatory obligation to implement such procedures or because of a legitimate interest of the data controller required for processing, so long as the fundamental rights and liberties of the person concerned are respected). *Id.*

203. *Id.* at 3.

204. *Id.*

205. *Id.* at 4. In a letter sent to the CNIL, the French Minister for Labor and Social Affairs stated that “the use of whistleblowing systems must not be compulsory, but be merely encouraged. . . . It can be argued also that a compulsory reporting requirement would breach article L120-2 of the Labor Code as a requirement out of proportion with its objective.” *Id.* (internal quotation marks omitted).

206. *Id.* The CNIL points to several advantages of “identified reports,” including (1) preventing an increase in slanderous reporting; (2) allowing a company to organize, in advance, a scheme protecting the whistleblower against any possible retaliation; and (3) providing for more efficient processing of such reports due to the ability to request additional information from the reporter. *Id.*

207. See *id.* at 4-5 (stating that companies “must not encourage [users of] the system to do so anonymously On the contrary, the procedure must be designed in such a way that the employees using the system are requested to identify themselves each time they make an alert”). In addition, employees should provide data relating to facts, rather than to persons. *Id.*

a confidential manner and will not be disclosed to the incriminated individual.²⁰⁸

The CNIL guidelines also set up rules regarding notice, data retention, and the transfer of data across borders. A person incriminated by a report must be notified as soon as the data concerning him is recorded.²⁰⁹ Information relating to a report later deemed to be unsubstantiated must be destroyed immediately.²¹⁰ Moreover, data relating to reports that required verification should be kept no longer than two months after verification has been completed.²¹¹ Finally, Directive 95/46/EC forbids the transfer of personal data to non-European countries that lack the protective measures described above.²¹² Thus, a conflict may arise if the United States is deemed to be lacking in these protective measures.

The following subsection deals with how German corporate and labor laws may make the adoption of certain SOX provisions very difficult and costly. The potential conflict between German labor law and the implementation of SOX provisions is similar to the conflict between French labor law and the implementation of SOX whistleblower hotlines.²¹³

3. Conflict Between SOX and German Law

a. Corporate Law

Under German law, three types of corporate entities exist: the *Gesellschaft mit beschränkter Haftung* (GmbH), the *Aktiengesellschaften* (AG)²¹⁴ and the *Kommanditgesellschaft auf Aktien* (KGaA).²¹⁵ The AG has

208. *Id.* at 4. This remains true even in light of the accused person's right to access information concerning him. See French Data Protection Law, *supra* note 172, art. 39. Articles 39 and 40 of the Data Protection Act allow a person identified through the whistleblowing scheme to access his data and, if applicable, to request its rectification or deletion. *Id.* arts. 39-40. This right of access, however, does not entitle the individual to request the disclosure of data concerning third parties, such as the identity of the whistleblower. CNIL Guidelines, *supra* note 200, at 7.

209. CNIL Guidelines, *supra* note 200, at 6. Notification enables the implicated person to promptly object to the processing of his data. *Id.* However, a person should not be informed until the necessary protective measures have been taken to ensure that no relevant evidence is destroyed. *Id.* at 7.

210. *Id.* at 6.

211. *Id.* This rule could pose problems for accounting firms attempting to comply with Section 802(a) of SOX, which requires that "[a]ny accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act . . . applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded." 18 U.S.C. § 1520(a)(1) (Supp. II 2002).

212. Directive, *supra* note 147, art. 25; CNIL Guidelines, *supra* note 200, at 6.

213. See *supra* Part I.D.2.a.

214. This is an entity that is independent of its shareholders, much like a U.S. corporation. Naidu, *supra* note 80, at 281.

215. *Id.* at 280. While both the *Aktiengesellschaften* AG and the *Kommanditgesellschaft auf Aktien* KGaA are stock corporations, the KGaA is less common as a result of its liability structure. *Id.* at 280-81. Both types of corporations are governed by the German Stock

a two-tiered board structure which consists of the *Vorstand* (“Managing Board”) and the *Aufsichtsrat* (“Supervisory Board”), membership on each being mutually exclusive.²¹⁶ The Managing Board is comprised of the corporate officers and is responsible for running the company.²¹⁷ The Supervisory Board, on the other hand, is comprised of inside directors, outside directors, and labor union and employee representatives.²¹⁸ This board, whose members are elected by the AG’s shareholders, is responsible for supervising the Managing Board and for appointing and removing its members.²¹⁹ Because representatives of the large German banks generally comprise the Supervisory Board, an interlocking network exists among Supervisory Boards within Germany.²²⁰

This two-tiered corporate governance structure causes compliance problems with Section 301 of SOX in numerous respects. First of all, SOX requires that members of the audit committee—which for German issuers would be the Supervisory Board—be independent.²²¹ This requirement is problematic for German issuers because German law requires that, in addition to containing at least one labor representative, one-third of the Supervisory Board must consist of employee representatives.²²² Acknowledging that German companies do not meet SOX’s independence requirements, the SEC proposed a limited exemption in its Final Rule 33-8220,²²³ which would allow employees to serve on the Supervisory Board so long as they are not executive officers.²²⁴ Moreover, nonexecutive

Corporation Act (GSCA), which deals with issues covered by U.S. securities laws and stock exchange rules. The GSCA, however, is primarily interested in protecting creditors. *Id.* at 281.

216. *Id.* at 281-82.

217. Sabyasachi Ghoshray, *Impact of Sarbanes-Oxley on Multiple Listed Corporations: Conflicts in Comparative Corporate Laws and Possible Remedies*, 10 ILSA J. Int’l & Comp. L. 447, 455 (2004).

218. *Id.*

219. Naidu, *supra* note 80, at 282. Moreover, in addition to examining and approving the corporation’s annual financial statements, the Supervisory Board also calls shareholder meetings and approves specified acts of management. *Id.*

220. *Id.*

221. SOX § 301, 15 U.S.C. § 78j-1(m)(3)(A)-(B) (Supp. II 2002) (“Each member of the audit committee of the issuer shall be . . . independent. . . . [T]o be considered . . . independent . . . a member of an audit committee of an issuer may not . . . accept any consulting, advisory, or other compensatory fee from the issuer; or be an affiliated person of the issuer or any subsidiary thereof.”).

222. Naidu, *supra* note 80, at 282.

223. Final Rule: Standards Relating to Listed Company Audit Committees, Securities Act Release No. 8220, Exchange Act Release No. 47,654, Investment Company Act Release No. 26,001, 68 Fed. Reg. 18,788 (Apr. 16, 2003) [hereinafter Release No. 33-8220].

224. *Id.* at 18,802. The Exchange Act Rule defines executive officer as follows:

its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant.

17 C.F.R. § 240.3b-7 (2005).

employees would be permitted to sit on the audit committee of a foreign private issuer if they are elected or named to that issuer's board of directors or audit committee pursuant to its issuer's governing law or documents, a collective bargaining agreement, or other legal or listing requirements of its home country.²²⁵ As a result, companies that are required to have employees or union representatives on their Supervisory Board will no longer be in violation of SOX's independence requirement. However, the inclusion of bank representatives who serve as executive officers on the Supervisory Boards of German issuers²²⁶ is incompatible with SOX's independence requirements.²²⁷

In addition, the SEC's final rule clarifies that the Supervisory Board is best equipped to comply with SOX's audit requirements.²²⁸ If the entire Supervisory Board is considered independent, as defined by SOX, then it can be designated as the audit committee; otherwise, it may form a separate audit committee which meets the independence requirements.²²⁹ However, compliance with SOX would impose significant restructuring costs on German issuers because the German corporate structure currently delegates auditing responsibility to the Managing Board.²³⁰

German issuers also run into difficulty with SOX's certification requirements,²³¹ the violation of which may result in criminal penalty.²³² For example, unlike U.S. corporate structure, which provides for numerous executive officers who ultimately report to, and are subordinate to, the company's CEO, German companies lack the equivalent of a U.S. CEO.²³³ Rather, decisions are made by the board as a whole, and if one member disagrees with a decision, either the decision is not made or that member must leave.²³⁴ Consequently, some have argued that because "it is the management board, and not the individuals comprising it, that is ultimately responsible for management of the company," an SEC requirement forcing

225. Release No. 33-8220, *supra* note 223, at 18,802.

226. *See supra* note 220 and accompanying text.

227. Naidu, *supra* note 80, at 296-97.

228. Release No. 33-8220, *supra* note 223, at 18,802.

229. *Id.*

230. Naidu, *supra* note 80, at 297.

231. 15 U.S.C. § 7241(a)(1)-(2) (Supp. II 2002) (requiring that the CEO and CFO, or persons performing similar functions, certify in each annual or quarterly report that, among other things, the signing officer has reviewed the report and that the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made not misleading); 18 U.S.C. § 1350(a)-(b) ("Each periodic report containing financial statements filed by an issuer with the Securities Exchange Commission . . . shall be accompanied by a written statement by the [issuer's] chief executive officer and chief financial officer (or equivalent thereof) . . . certify[ing] that the periodic report . . . fully complies with the . . . Securities Exchange Act . . . and that information contained in the periodic report fairly presents . . . the financial condition . . . of the issuer.").

232. *See* 18 U.S.C. § 1350(c) (providing criminal penalties for violating the provision's certification requirements).

233. Falencki, *supra* note 87, at 1227.

234. Naidu, *supra* note 80, at 293.

“specific members of the management board to shoulder additional liability on behalf of others” would be inappropriate.²³⁵

b. *Labor Law*

The conflict between SOX whistleblower provisions and German Labor law was demonstrated in a case involving Wal-Mart (the “*Wal-Mart case*”).²³⁶ The Wal-Mart works council brought suit against Wal-Mart in the Labor Court of Wuppertal seeking to cease the operation of the code of conduct telephone hotline.²³⁷ The works council argued that the operation of such a hotline was subject to a codetermination right and thus required the consent of the Wal-Mart works council.²³⁸ The court held that such a whistleblower clause in the code of conduct “affect[s] the order within the company and also the conduct of the individual employee within the company,” and thus requires the consent of the works council to be valid.²³⁹

The conflict here between SOX whistleblower hotline requirements and German labor law thus appears to be more procedural than substantive. Nothing inherent in whistleblower hotlines violates German labor laws.²⁴⁰ Rather, it is the manner of implementation that may run afoul of the law. Had Wal-Mart first approached the works council and obtained its approval for the hotline, the hotline would be legitimate (at least with regard to German labor laws).

Before determining whether foreign companies should be penalized for noncompliance with various SOX provisions due to inconsistency with the

235. Falencki, *supra* note 87, at 1227 (quoting a letter sent to the SEC by the law firm Cleary Gottlieb Steen and Hamilton LLP).

236. Arbeitsgericht Wuppertal [ArbG] [Labour Court of Wuppertal] June 15, 2005, 5 BV 20/05 (F.R.G.) [hereinafter *WalMart Case*], translated at http://www.faegre.com/articles/downform2.asp?doc_num=1&aid=1691 (last visited Oct. 10, 2006).

237. *Id.* The code of conduct hotlines were in place to encourage employees to use it to report anonymously ethical misconduct or any violation of the company’s internal code of conduct by coworkers. *Id.*

238. World Law Group, Unofficial English Translation of German WalMart Code of Conduct Decision, <http://www.theworldlawgroup.com/newsletter/details.asp?ID=74555728> 2005 (last visited Oct. 10, 2006). Works councils retain codetermination rights in situations where the council has joint decision-making authority, such as matters regarding the establishment’s rules of operation and the conduct of the establishment’s employees. See Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Sept. 25, 2001, BGB1. I at 2518, § 87 para. 1 (F.R.G.), translated in B. Ruster, *Business Transactions in Germany*, app. 10 (Christian Campbell et al. eds. 2005). Usually, management will obtain the works council’s consent by agreeing upon a works agreement. See *id.* § 77 para. 2. If such an agreement is not reached, the matter will be decided by an arbitrator. See *id.* § 76. Decisions made by management lacking the required contributions of the works council are invalid and need not be followed by employees. See 3 Ruster, *supra*, § 29.06(1)(a) n.10 (2006).

239. *WalMart Case*, *supra* note 236, at 10.

240. That is, German labor law, when viewed in isolation, does not itself prohibit the implementation of an anonymous whistleblowing procedure. See Schreiber, *supra* note 176, at 6.

laws of their home countries, a brief discussion of analogous situations regarding the extraterritorial application of U.S. laws may prove helpful.

E. *Other Controversial U.S. Laws Applied Abroad*

This section discusses two other U.S. laws which have been applied extraterritorially by U.S. courts, and describes the various ways that courts have dealt with situations involving conflicts between these laws and the laws of fellow sovereign nations.²⁴¹ Subsection 1 describes the extraterritorial treatment of the antitrust laws; subsection 2 deals with the extraterritorial reach of the discovery laws.

1. U.S. Antitrust Law

Early courts framed antitrust issues involving extraterritorial analysis in terms of legislative jurisdiction, i.e., whether Congress intended the antitrust laws to apply to anticompetitive conduct abroad. Such analysis required the court to analyze the statute to determine Congress's intent. For example, in *American Banana Co. v. United Fruit Co.*, Justice Oliver Wendell Holmes stated that "in case of doubt to a construction of any statute [it should] be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."²⁴² This approach to the extraterritorial application of U.S. laws, known as the "strict territoriality" principle, would confine the reach of such laws to the U.S. borders unless Congress undoubtedly meant for them to be applied abroad.

A second approach to the extraterritorial reach of U.S. laws involves the "effects" test. This approach was most famously articulated by Judge Learned Hand in *United States v. Aluminum Co. of America* ("*Alcoa*").²⁴³ Although the defendants were foreign companies with no direct connection to the United States, Judge Hand held that the Sherman Act was applicable because the agreement had a direct effect upon the United States and its

241. The term "conflict" is being used broadly in this sentence to refer to situations where (1) U.S. law prohibits a foreign company (as defined *supra* note 2) from engaging in conduct abroad that would otherwise be perfectly legal under the laws of the nation in which it is to take place; (2) U.S. law requires a foreign company to engage in conduct that would cause it to violate a law of its home country, or of some other country, and (3) compliance with U.S. law would be overly burdensome to foreign companies due to the current status of their home country law (e.g., compliance would result in significant corporate restructuring, or would subject companies to duplicative legislation). See *infra* text accompanying note 258 for a discussion on the term "true conflict."

242. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909); see also *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (stating that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States").

243. 148 F.2d 416 (2d Cir. 1945). In this case, a Swiss corporation composed of six foreign aluminum ingot producers was organized for the purpose of fixing quotas for aluminum ingots. *Id.* at 442.

foreign commerce, and was intended to affect U.S. domestic and foreign commerce.²⁴⁴ In arriving at this conclusion, Judge Hand said that the court's role was to determine whether Congress intended for the Act to apply to extraterritorial activities.²⁴⁵ Thus, *Alcoa*, like *American Banana*, assumed that Congress intended to respect the limits imposed by international comity²⁴⁶ and international conflict of laws principles on legislative jurisdiction.

*Timberlane Lumber Co. v. Bank of America*²⁴⁷ added a balancing approach to the extraterritorial jurisdiction equation. After determining that "[t]he effects test by itself is incomplete because it fails to consider other nations' interests,"²⁴⁸ the court suggested that, in an international setting, it must also consider whether the "interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."²⁴⁹ The court in *Timberlane* thus made international comity analysis (i.e., interest balancing) and the effects test of *Alcoa* prerequisites to the assertion of extraterritorial jurisdiction.²⁵⁰ Other courts soon re-characterized the extraterritoriality analysis as one of subject matter jurisdiction, i.e., whether federal courts had the power to hear cases involving foreign conduct, and separated

244. See *id.* at 443-44. Judge Learned Hand's decision, coming at a time of intense international friction in the aftermath of World War II, "reflected a growing concern that State or national boundaries might shield perpetrators from the law when the effect of misconduct created injuries beyond the reach of the local jurisdiction. . . . [This decision enabled the United States] to protect U.S. markets against conduct occurring in foreign territory." Susan E. Burnett, *U.S. Judicial Imperialism Post Empagran v. F. Hoffmann-Laroché? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 *Emory Int'l L. Rev.* 555, 571 (2004).

245. *Alcoa*, 148 F.2d at 443. Judge Hand refused to impute to Congress an intention to violate international conflict-of-law rules, stating "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *Id.*

246. "International comity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law." *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997).

247. 549 F.2d 597 (9th Cir. 1976).

248. *Id.* at 611-12.

249. *Id.* at 613.

250. *Id.* at 613-14. The court identified seven factors to be weighed when conducting the interest balancing test:

[1] the degree of conflict with foreign law . . . , [2] the nationality . . . of the parties and the . . . principal places of businesses . . . , [3] the extent to which enforcement by either state can be expected to achieve compliance, [4] the relative significance of effects on the United States as compared with those elsewhere, [5] the extent to which there is explicit purpose to harm or affect American commerce, [6] the foreseeability of such effect, and [7] the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614.

international comity considerations from the effects test.²⁵¹ According to these courts, subject matter jurisdiction was first established through application of the “intended effects” test of *Alcoa*.²⁵² After a court determines that it has subject matter jurisdiction, it must resort to the principles of international comity to determine whether it should exercise this jurisdiction.²⁵³ In determining whether extraterritorial jurisdiction should be exercised, courts will conduct an extensive inquiry involving the balancing of a number of competing factors,²⁵⁴ the outcome of which may differ depending on the particular circumstances involved.²⁵⁵

The majority opinion in *Hartford Fire Insurance Co. v. California*²⁵⁶ added a further wrinkle to subject matter jurisdiction analysis to extraterritoriality. According to Justice David Souter, principles of international comity should only be considered in situations where a “true conflict” exists between foreign and domestic law.²⁵⁷ He also concluded that a “true conflict” does not exist unless a person is subject to the inconsistent laws of two countries, both of which cannot simultaneously be complied with.²⁵⁸ Justice Antonin Scalia, in dissent, argued that issues concerning the extraterritoriality of U.S. law should be analyzed in terms of legislative jurisdiction.²⁵⁹ He argued that courts must distinguish the question of whether the court has jurisdiction to hear the case from the

251. *E.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291 (3d Cir. 1979) (“The challenge here is to conduct by an American corporation in a foreign country, arguably legal there, and the issue is whether that activity is answerable in the courts of the United States under the Sherman Act’s broad and potentially far-reaching language.”).

252. *Id.* at 1291-92.

253. *Id.* at 1296 (noting that while the right to a remedy might be clear in a purely domestic situation, “[w]hen foreign nations are involved . . . it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction”); *see McBee v. Delica Co.*, 417 F.3d 107, 120 (1st Cir. 2005) (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) for the proposition that “comity considerations, such as whether relief ordered by an American court would conflict with foreign law, were properly understood not as questions of whether a United States court possessed subject matter jurisdiction, but instead as issues of whether a court should decline to exercise the jurisdiction that it possessed”).

254. In addition to the factors mentioned in *Timberlane*, *see supra* note 250, courts should also consider the following: (a) the “[a]vailability of a remedy abroad and the pendency of litigation there;” (b) the “[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief;” (c) whether the exercise of jurisdiction and granting of relief will place a party “in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;” (d) “[w]hether the court can make its order effective;” and (e) “[w]hether a treaty with the affected nations has addressed the issue.” *Mannington Mills*, 595 F.2d at 1297-98.

255. *Id.* at 1298 (“[T]he extensive inquiry required [need not] yield the same answer in each instance [because the] legislation and policy of each nation is not likely to be the same, nor is it probable that the effect upon commerce in each instance will be as substantial as others.”).

256. 509 U.S. 764 (1993).

257. *Id.* at 798-99.

258. *Id.* at 799.

259. *Id.* at 812.

question of whether the law reaches the extraterritorial conduct that is alleged.²⁶⁰ In determining the extent to which Congress has exercised its legislative jurisdiction, Scalia would apply two canons of statutory construction: (1) a presumption against extraterritorial application of the statute, and (2) a presumption that it was not the intention of Congress to violate principles of international law.²⁶¹ Applying the international law presumption, Justice Scalia argued that the scope of the antitrust laws should be interpreted consistently with the principles of international comity and international conflict of laws.²⁶²

2. International Discovery: Comity Analysis Used in Situations of Conflict

In adjudicating cases, especially those international in nature, U.S. courts frequently require evidence that is located abroad.²⁶³ However, U.S. courts seeking to obtain such evidence often are faced with barriers. For example, a number of countries, such as Switzerland, have bank secrecy laws that prevent foreign banks from releasing information to U.S. courts.²⁶⁴ Other countries, in response to the extraterritorial application of U.S. law, have enacted blocking statutes making it illegal to send evidence to the United States.²⁶⁵ Blocking laws generally embody “national interests in prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state. They cannot be waived by private parties because they protect national interests . . . rather than private interests.”²⁶⁶

In many instances, U.S. courts have held that defendants in a U.S. action may not refuse to comply with discovery orders despite the fact that compliance would violate foreign laws.²⁶⁷ The rationale for such decisions is that a party that conducts international business and subjects itself to

260. *Id.* In Justice Antonin Scalia’s view, the Sherman Act’s extraterritorial reach “has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.” *Id.* at 813.

261. *Id.* at 814-15. In Scalia’s view, although the presumption against the extraterritorial application of the Sherman Act has been overcome by precedent, the international law presumption is still relevant to determining the statute’s substantive reach because customary international law places limits on a nation’s exercise of its legislative jurisdiction, and Congress is generally presumed not to have exceeded those limits. *Id.*

262. *Id.*

263. *See supra* Part I.A.4.

264. *See Pitt, supra* note 124, at 404-11.

265. *See id.* at 411-15.

266. Michael A. Gerstenzang, *Insider Trading and the Internationalization of the Securities Markets*, 27 Colum. J. Transnat’l L. 409, 421 (1989). For example, “[t]he French blocking law (No. 80-538 of July 16, 1980) . . . forbids nationals, and certain others with ties to France, from divulging economic, commercial, industrial, financial or technical matters to foreign authorities except as provided by international agreement.” *Id.* at 423.

267. *E.g.*, SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 119 (S.D.N.Y. 1981) (ordering a Swiss bank to respond to the SEC’s interrogatories).

conflicting laws must thereafter bear the burden of such a conflict.²⁶⁸ However, defendants finding themselves in such catch-22 situations will not always be forced to comply with U.S. discovery orders; rather, U.S. courts generally conduct a comity analysis prior to determining whether to exercise their enforcement jurisdiction.²⁶⁹

In general, when two countries have jurisdiction to, and actually do, prescribe and enforce rules of law that require inconsistent conduct, international law requires that each country, in good faith, consider moderating the exercise of its enforcement jurisdiction in light of factors such as

- (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.²⁷⁰

Part II of this Note addresses how the SEC (and U.S. courts) may respond to a request for relief from the penalties of SOX (e.g., delisting or criminal sanctions) made by a company that violated a SOX provision that

268. *E.g.*, *United States v. First Nat'l City Bank*, 396 F.2d 897, 905 (2d Cir. 1968) (“[S]urely an American corporation cannot insulate itself from a federal Grand Jury investigation by entering into a contract with an American bank abroad requiring bank secrecy. If indeed Citibank might suffer civil liability under German law in such circumstances, it must confront the choice [between] the need to surrender to one sovereign or the other the privileges received therefrom or, alternatively a willingness to accept the consequences.” (citation and internal quotation marks omitted)).

269. *E.g.*, *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1279-81 (7th Cir. 1990) (conducting a comity analysis in a situation where a defendant, by producing evidence to an American court, would be subject to potential criminal sanctions for being in violation of Romanian law); *Banca Della Svizzera Italiana*, 92 F.R.D. at 117-19. A number of factors are relevant to any comity analysis in the context of a district court's power to order foreign discovery in the face of objections by foreign states. These factors include

- (1) the importance to the . . . litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 544 n.28 (1987) (internal quotation marks omitted).

270. *Reinsurance*, 902 F.2d at 1279-80. After balancing the “vital national interests” of the United States and Romania, the court determined that Romania's interest appeared to be “more immediate and compelling.” *Id.* at 1280-81. The court also noted that district courts, in their discretion, “may require a good faith effort from the parties to seek a waiver of any blocking provisions.” *Id.* at 1282 (citing as examples *In re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982) and *United States v. First National Bank of Chicago*, 699 F.2d 341, 346-47 (7th Cir. 1983)).

conflicted²⁷¹ with foreign law. In doing so, many of the theories discussed above in the context of the extraterritorial application of the Sherman Act and U.S. discovery laws will be drawn upon by way of analogy.

II. ON A COLLISION COURSE, SOX TRAIN REACHES A JUNCTION AND MUST SELECT THE PROPER ROUTE: VARIOUS APPROACHES TO HANDLING FOREIGN REQUESTS FOR RELIEF

This part lays out the various approaches that the SEC²⁷² could adopt to deal with conflicts between SOX provisions and foreign laws, and lists some justifications that could be made for each. Section A discusses the option of strictly enforcing SOX at home and abroad, even in the face of noncompliance due to a conflict with foreign law. Section B discusses the various options involving the refusal to strictly enforce SOX against foreign companies. Section C lays out the argument that the SEC and U.S. courts do not have authority either to enforce or to exempt foreign companies because SOX has no extraterritorial effect at all.

A. *Strict Enforcement: Denying Exemptive Relief to Foreign Companies*

The first approach the SEC (and U.S. courts) could adopt is to strictly enforce the provisions of SOX extraterritorially, even when such provisions are inconsistent with, or duplicative of, foreign laws. Subsection 1 analyzes the application of this approach to the various circumstances in which the extraterritorial application of SOX would conflict²⁷³ with foreign law, while subsection 2 provides some justifications for adopting this approach.

1. Strict Enforcement Option in Action

Under this approach, the provisions of SOX would be applied equally to all foreign companies subject to SOX regardless of whether such application conflicts with foreign laws, and regardless of the type of conflict that results. That is, exemptive relief would be denied to a foreign company regardless of whether the basis for the requested relief is that (1) the contemplated conduct is legal in the country where it is to occur; (2) the company already complies with foreign laws equivalent to SOX, making compliance with SOX overly burdensome because it would subject the company to costly double regulation; or (3) compliance with SOX would force the company to violate a foreign law which would subject it to civil or criminal penalties abroad—i.e., a “true conflict”²⁷⁴ exists between SOX and this foreign law.

271. See *supra* note 241 for the broad meaning given to the term “conflict” as used in this sentence.

272. To some degree U.S. federal courts could also use these approaches.

273. See *supra* note 241 and accompanying text.

274. See *supra* note 258 and accompanying text.

2. Justifications for Strict Enforcement

This subsection lists various justifications for enforcing the penalties mandated by SOX against foreign companies that fail to strictly comply with the provisions of SOX. Subsection A.2.a discusses the advantage of having a single set of laws that are applied uniformly to all companies regardless of their places of origin.²⁷⁵ Subsection A.2.b provides a policy argument for punishing such companies for noncompliance.

a. *Level Playing Field Justification*

On June 11, 2003, SEC Commissioner Roel C. Campos spoke at the Centre for European Policy Studies in Brussels, Belgium.²⁷⁶ In this speech, he provided a number of reasons why providing SOX exemptions to foreign companies may not be the best policy. For example, like any national regulator, the SEC has the right to set terms and conditions that must be met before financial service providers may access investors in its jurisdiction.²⁷⁷ Implementing different terms and conditions depending on the market participant's origin ("mutual recognition") "lead[s] to an incoherent, fragmented market."²⁷⁸ Because this is not in the best interest of investors or the market, the SEC prefers to establish a single set of rules for participants in the U.S. market.²⁷⁹ The philosophy is that all participants should be on a "level playing field," and that no issuer, intermediary, exchange, or other participant should be discriminated against based on its country of origin.²⁸⁰

275. This argument may be termed the "level playing field justification." Under this view, U.S. law should not differentiate between companies based on place of origin because it is more efficient and fair to have one set of rules that apply uniformly to all companies than two sets of differing rules applied non-uniformly.

276. His remarks were entitled, "Embracing International Business in the Post-Enron Era," and were designed to outline the SEC's regulatory philosophy as it relates to cross-border business. Roel C. Campos, Comm'r, SEC, *Embracing International Business in the Post-Enron Era*, Speech at Centre for European Policy Studies (June 11, 2003), available at <http://www.sec.gov/news/speech/spch061103rcc.htm>. The views expressed in this speech were his own and do not necessarily reflect those of the SEC. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* For the past seventy years, the SEC has provided equal treatment to all market participants with "[f]ew distinctions . . . based on the domicile of the issuer or service provider. After all, [American] investors are entitled to the same protections regardless of whether an issuer is foreign or domestic." *Id.*

280. *Id.* "The level playing field is necessary for three reasons: [1] equal protection of U.S. investors regardless of the issuer's origin; [2] avoiding unfair competition by foreign issuers to the detriment of their U.S. competitors; and [3] discrimination against foreign issuers would deprive U.S. investors of foreign investment opportunities." Paul B. Ford, *Sarbanes-Oxley—An International Markets Perspective*, in 2 35th Annual Institute on Securities Regulation, Corporate Law and Practice Handbook Series 353, 361 (PLI Corporate Law & Practice, Course Handbook Series No. B-1396, 2003).

Providing an exemption to companies who violate SOX due to a conflict²⁸¹ with foreign law is inconsistent with the “level playing field” principle. Such an exemption would give these companies access to American investors on terms different from those available to other companies listed on U.S. exchanges. “This, in turn, puts considerable stress on our system of regulation, disrupting the level playing field we have created for all market participants.”²⁸²

b. *Prevention of an Environment Conducive to Fraud*

It is without question that “[t]he United States has a substantial interest in the enforcement of its securities laws and the protection of investors in the United States securities markets.”²⁸³ This interest would be thwarted if the SEC were to grant exemptions to foreign companies in situations where compliance with SOX would conflict²⁸⁴ with the laws of their home countries. For example, such exemptions would enable multinational corporations to move all of their fraudulent operations to jurisdictions with laws in place that would exempt them from SOX compliance.²⁸⁵ Alternatively, such exemptions may encourage foreign countries to enact laws contrary to SOX for the purpose of providing their companies with a competitive advantage.²⁸⁶ In light of these policy considerations, and the importance of the U.S. securities laws,²⁸⁷ one can argue that exemptions to SOX should not be granted even when noncompliance is due to a “true conflict” with foreign law.²⁸⁸

281. See *supra* note 241.

282. Campos, *supra* note 276.

283. *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 479 (S.D.N.Y. 2001).

284. *Supra* note 241.

285. Cf. *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832, 847 (9th Cir. 2002) (en banc), *rev'd on other grounds sub nom Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (“Were a defense based on lack of control over requested information [due to foreign statutes enacted to shield foreign corporations from routine reporting requirements] a requirement of substantive due process, an insurer could evade any kind of state disclosure statute or regulation simply by transferring all relevant documents to an affiliate over which it lacks direct control.”). *Gerling* involved a California statute (Holocaust Victim Insurance Relief Act, or HVIRA) that required any insurer doing business in the state that sold insurance policies to Europeans between 1920 and 1945 (i.e., Holocaust-era policies) to file certain information about the policies with the Commissioner. *Id.* at 836. This regulation applied to insurance companies that were “related” to companies that sold such Holocaust-era policies, regardless of whether the relationship arose before or after the policies were issued. *Id.* Any insurer that failed to comply with the reporting requirements was subject to the suspension of its certificate of authority to conduct business in the state of California. *Id.*

286. For example, a number of countries have done this in the past by passing blocking statutes to combat the extraterritorial reach of U.S. laws. See *supra* notes 265-66 and accompanying text.

287. See *Cromer*, 137 F. Supp. 2d at 479; *SEC v. Banca della Svizzera Italiana*, 92 F.R.D. 111, 117 (S.D.N.Y. 1981) (finding the enforcement of the securities laws to be a “vital national interest”).

288. See *supra* note 258 and accompanying text. That is, even if a true conflict exists and a comity analysis is conducted, the U.S. interest in enforcing SOX in such a situation could be deemed to trump any interest the foreign sovereign has in enforcing its own laws—in

B. Not Strictly Enforcing SOX

Rather than strictly enforcing SOX across the board, the SEC (and to a limited extent, courts²⁸⁹) could decide to adopt an approach that would call for granting relief to foreign companies under certain circumstances. This section discusses the various approaches to exemptive relief that could be adopted by the SEC and, in certain circumstances, by courts.

1. Exempt All Foreign Companies Subject to Adequate Regulatory Regimes

The SEC could decide to exempt from the regulatory requirements of SOX all foreign companies who are already subject to adequate securities and corporate governance regulations.²⁹⁰ Under this approach, if foreign countries subject companies in their territories to corporate governance regulations deemed adequate by the SEC, then these companies would be exempt from the requirements of SOX. Consequently, the fact that such a company could not, or would not, comply with SOX because of its home country's labor laws,²⁹¹ data protection laws,²⁹² or corporate laws and/or structure²⁹³ would no longer be an issue. On the other hand, should the SEC determine that compliance with a foreign country's securities and corporate governance regime would inadequately protect U.S. investors, then it will strictly enforce the requirements of SOX as to these companies.

The rationale for adopting this approach stems from the fact that such companies are already complying with laws that have the same effect as SOX's requirements.²⁹⁴ Thus, forcing such companies to comply with SOX would overburden them with duplicative requirements, whereas U.S.

which case SOX would be enforced despite the existence of the true conflict. *See, e.g., In re Aircrash Near Roselawn*, 172 F.R.D. 295, 310 (N.D. Ill. 1997).

289. Courts are more limited in their discretion to provide relief to foreign companies because courts, unlike the SEC, do not have the authority to grant exemptions to the securities laws.

290. This is the approach being pushed for by the European Commission. *See* Comment Letter from EC, *supra* note 121; *see also* Falencki, *supra* note 87, at 1236 ("If the home country of a foreign corporation has an adequate regulatory structure for corporate governance, the SEC should exempt that company from the requirements of the Sarbanes-Oxley Act.").

291. *See supra* Part I.D.2.a & Part I.D.3.b.

292. *See supra* Part I.D.1 & Part I.D.2.b.

293. *See supra* note 146 and Part I.D.3.a.

294. Comment Letter from EC, *supra* note 121 (arguing that "EU companies and auditors are already subject to . . . Member State corporate governance requirements [that] . . . are in their different ways as effective and efficient at providing investor protection as U.S. rules"); Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament: Reinforcing the statutory audit in the EU*, at 15-17, COM (2003) 286 final (May 21, 2003) [hereinafter *Communication from the Commission*] (referring to discussions between the Commission of the European Communities and the United States embarked upon for the purpose of "achiev[ing] recognition that EU regulatory approaches to the protection of investors and other stakeholders are equivalent to US rules").

companies would only be subject to one set of regulations.²⁹⁵ Such a result could negatively impact the United States in at least two major ways. First, foreign countries could decide to give extraterritorial effect to their securities and corporate governance laws and not exempt U.S. companies based on the equivalence of U.S. laws in these areas.²⁹⁶ At least with regard to the European Union, this would mean that in addition to complying with SOX, U.S. companies would have to comply with an additional twenty-five sets of securities and corporate governance regulatory regimes.²⁹⁷ This would be extremely costly and burdensome on U.S. companies with foreign subsidiaries or which have a dual listing on a foreign exchange. Second, forcing foreign companies to comply with SOX, without exception, may deter foreign companies from entering and/or remaining in U.S. capital markets.²⁹⁸ This is detrimental to U.S. investors because the presence of foreign securities in U.S. markets promotes portfolio diversification by increasing investment options.²⁹⁹

2. Always Refuse to Enforce SOX when Compliance Violates Foreign Law

A second approach to providing exemptive relief involves refusing to enforce provisions of SOX on foreign companies whenever compliance with foreign law prevents compliance with SOX. Under this approach, relief would be denied to a U.K. company³⁰⁰ requesting relief either on the ground that the contemplated conduct is legal where it is to occur or on the ground that compliance would result in costly double regulation. On the other hand, a request for exemptive relief would be granted to a foreign company doing business in France that fails to implement the required anonymous whistleblower hotline because doing so would cause it to violate French data protection or labor laws.³⁰¹

The adoption of this approach would be consistent with the doctrine of sovereign compulsion. The doctrine of sovereign compulsion states that a person is not subject to punishment for acts committed within a foreign territory that were ordered or compelled by the sovereign of that

295. Comment Letter from EC, *supra* note 121.

296. Communication from the Commission, *supra* note 294, art 16 (stating that if the SEC refuses to exempt E.U. audit firms from the requirement that they register with the Public Company Accounting Oversight Board, then “the EU will have to consider parallel solutions e.g. requiring the registration of US audit firms in the EU”).

297. *See supra* note 125 and accompanying text.

298. *See supra* Part I.C.2.

299. *See* Release No. 33-8220, *supra* note 223, at 18,802 (noting that the SEC “ha[s] long recognized the importance of the globalization of the securities markets . . . for investors who desire increased diversification”); Campos, *supra* note 276 (stating that “investors benefit from [the SEC] taking care not to regulate business out of existence” and that, in fulfilling its duty, the SEC “must also work towards ensuring that a positive investment environment flourishes”).

300. *See supra* note 146.

301. *See supra* Part I.D.2.

territory.³⁰² This doctrine is an extension of the “act of state” doctrine, which states that “[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”³⁰³ This defense does not apply to the acts of a foreign sovereign that are not exclusively within its own territory.

The SEC could determine, for example, that the doctrine of foreign compulsion requires it to refrain from delisting a company, such as McDonald’s or Exide,³⁰⁴ for violating the anonymous whistleblower hotline provision when compliance would have forced the company to violate a foreign country’s data protection laws. This assumes, of course, that the office that has violated the SOX whistleblowing hotline provision is located in the territory of the sovereign that is declaring such hotline to be illegal (e.g., France). The act of state doctrine, and thus the doctrine of foreign compulsion, only recognizes a foreign country’s sovereignty over conduct within its territory. Therefore, conduct occurring outside of that sovereign’s jurisdiction cannot trigger the exemptive relief provided for by these doctrines.

3. Situation-Specific Granting of Relief

Alternatively, relief from the provisions of SOX may be provided to a company or group of companies on a case-by-case basis in light of the exigencies of the circumstances. Under this approach, courts or the SEC will refuse to enforce the provisions of SOX against foreign companies only if, after analyzing and weighing a number of relevant factors and competing interests, it is determined that such relief is necessary. The extent of this analysis, and of the factors to be considered, will differ depending on whether relief is requested of the SEC or of a court. Subsection B.3.a discusses how the SEC may handle requests for relief, whereas subsection B.3.b addresses how U.S. courts could deal with such requests.

a. SEC: *Balancing Approach*

Although the SEC does not practice mutual recognition,³⁰⁵ it has traditionally accommodated foreign companies—coming from countries with different customs and regulatory systems—where doing so did not sacrifice investor protections.³⁰⁶ The SEC can take a similar approach

302. See *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 606 (9th Cir. 1976); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970) (“When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign.”).

303. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

304. See *supra* Part I.D.2.b.ii.

305. See *supra* notes 277-78 and accompanying text.

306. Campos, *supra* note 276 (“[The SEC has] recognized that, in some cases, accommodations for foreign participants must be made where it is possible to make them

when dealing with requests for relief from the provisions of SOX. In general, the SEC may provide exemptive relief from the provisions of the Exchange Act—which now includes many SOX provisions—to the extent that such relief is permitted by the public interest and is consistent with investor protection.³⁰⁷ Thus, where doing so would be consistent with the public interest, the SEC could decide to provide relief to a specific company or group of companies from a particular SOX provision.³⁰⁸ This situation-specific approach to granting relief would call upon the SEC to provide accommodations to foreign companies when doing so would be in the best interest of U.S. investors and when failing to do so would be detrimental to U.S. investors.³⁰⁹

b. Courts: Comity Analysis

Although U.S. courts cannot grant exemptions from U.S. laws on public policy grounds because this would improperly delve into the domain of the legislature, they can provide relief to foreign companies through reliance on notions of international comity. However, before such relief can be granted, a suit must be brought in a U.S. court against a foreign company for the violation of a SOX provision. Relief, in such situations, will take the form of a court's refusal to enforce the provisions of SOX as to a particular foreign company. However, the circumstances in which relief will be provided, and the grounds on which the court bases its decision, will depend on what that court views as the proper role of a comity analysis. Subsections B.3.b.i, B.3.b.ii, and B.3.b.iii discuss the various approaches that courts could adopt as to the proper role of comity analysis.

i. *Mannington Mills* Approach to Comity

According to this approach, courts look to notions of international comity to determine whether to exercise extraterritorial jurisdiction.³¹⁰ After determining that the U.S. law at issue in the case has extraterritorial reach, for example, as a result of either the conduct or effects test,³¹¹ these courts will then balance a number of relevant factors (i.e., conduct a comity analysis)³¹² in order to determine whether they should exercise or decline their jurisdiction under the given circumstances.

without sacrificing investor protection. Thus, in a number of contexts, we have made adjustments to our rules resulting in more favorable treatment to foreign market participants.”); *see supra* Part I.A.5 and note 87.

307. *See supra* note 30 and accompanying text.

308. *See* *Fontaine v. SEC*, 259 F. Supp. 880, 890 (D.P.R. 1966) (“[I]t is the responsibility of the [SEC] . . . to determine the extent, if any, to which the public interest will permit accommodation between . . . the Exchange Act and . . . foreign law.”).

309. Part III of this Note will discuss some of the factors that the SEC should take into account in determining whether to grant relief in a particular situation.

310. *See supra* note 253 and accompanying text.

311. *See supra* text accompanying notes 41-44.

312. *See supra* notes 250, 254.

When foreign companies request relief from the provisions of SOX, courts subscribing to this approach will conduct a comity analysis regardless of the type of conflict involved;³¹³ though the type of conflict involved may play a role in the balancing process. Thus, in determining whether to exercise jurisdiction over a German company that requests SOX relief due to incompatibility with their labor and corporate laws, over a French company that requests SOX relief due to incompatibility with their labor and data protection laws, or over a U.K. company that requests SOX relief due to costly duplicative regulatory regimes, these courts will consider notions of international comity.

ii. *Hartford Fire Insurance*: The Majority's Approach to Comity

For courts subscribing to the majority view in *Hartford Fire Insurance*, comity analysis serves the same function as it does for courts adopting the *Mannington Mills* approach—that is, such an analysis is conducted for the purpose of determining whether to exercise or decline the court's jurisdiction. However, courts adopting this approach will only conduct a comity analysis in situations involving a “true conflict”—that is, in situations where it is impossible for a foreign company to comply with both foreign and domestic law.³¹⁴

Consequently, under this approach, a court would not conduct a comity analysis in a situation where a company had violated SOX by engaging in conduct abroad that was legal in that jurisdiction, even if that company was already subject to foreign laws that are arguably the equivalent of SOX. Nor would such an analysis occur in a situation where a German company failed to implement the required whistleblower hotline,³¹⁵ because nothing inherent in German labor law makes compliance with SOX's whistleblower hotline requirement impossible.³¹⁶ Rather, with regard to German labor law, the only barrier to the implementation of these hotlines is procedural; namely, works council consent must first be obtained.³¹⁷ On the other hand, if the French CNIL determines that a particular company's whistleblower hotline is illegal—for example, because the proportionality of the contemplated whistleblowing is not legitimate, or because the CNIL determines that all anonymous reporting is illegal³¹⁸—then a U.S. court

313. See *supra* note 241.

314. See *supra* note 258 and accompanying text.

315. Such failure could occur either because the works council refused to agree to implementation of the hotline, or because a German court ruled that its current operation is illegal because the company implemented it without first seeking approval of the works council.

316. See *supra* note 240 and accompanying text.

317. Although German issuers could still argue that the SOX whistleblower hotline requirement is overly burdensome because it gives the works council leverage over the employer in negotiations over its implementation, this burden would not be considered a true conflict under *Hartford Fire Insurance*'s majority opinion.

318. See *supra* note 204 and accompanying text.

subscribing to the *Hartford Fire Insurance*'s majority approach would conduct a comity analysis in that case.³¹⁹

iii. *Hartford Fire Insurance*: The Minority's Approach to Comity

The minority opinion in *Hartford Fire Insurance* emphasized a canon of statutory construction, completely independent of the presumption against extraterritoriality,³²⁰ stating that acts of Congress should “never . . . be construed to violate the law of nations if any other possible construction remains.”³²¹ This canon of construction “is relevant to determining the substantive reach of a statute because ‘the law of nations,’ or customary international law, includes limitations on a nation’s exercise of its jurisdiction to prescribe.”³²² Although Congress has constitutional authority to exceed these “customary international-law limits on jurisdiction to prescribe,” it is generally presumed not to have done so.³²³ Consequently, courts have frequently held “that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.”³²⁴

To determine whether the regulation of particular foreign persons or conduct conflicts with principles of international law, courts subscribing to *Hartford Fire Insurance*'s minority approach will look to notions of international comity (and conduct a comity analysis).³²⁵ The purpose of

319. It should be noted that the discussion here about the options available to a court adopting the *Hartford Fire Insurance*'s majority approach in a case where a foreign company violates Section 301's whistleblower hotline requirement is purely hypothetical, and is being discussed merely to illustrate a situation involving a “true conflict” between SOX and foreign law. A court would probably not be involved in a proceeding for the violation of Section 301 because the de-listing penalty is carried out by the SEC—and therefore there is not much that courts can do. However, this discussion of the options available to a court in situations where a foreign company violates Section 301 would *not* be purely hypothetical to a court that has adopted *Hartford Fire Insurance*'s minority approach. See *infra* Part II.B.3.b.iii (noting that under the minority approach a court could decide that a particular SOX provision has no extraterritorial effect because prescriptive jurisdiction is lacking).

320. See *infra* note 331 and accompanying text.

321. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.)).

322. *Id.*

323. *Id.*

324. *Id.*

325. See *id.* at 817-20. Courts subscribing to *Hartford Fire Insurance*'s minority approach view notions of “comity” not as

comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather [as] what might be termed “prescriptive comity”: the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. Comity in this sense includes the choice-of-law principles

this analysis is to determine whether the U.S. law serving as the basis for the action actually prohibits the conduct at issue—as opposed to whether a court should exercise jurisdiction over a matter involving conduct already deemed to be prohibited by U.S. law.³²⁶ Finally, this approach does not view the presence of a “true conflict” as a prerequisite to conducting a comity analysis.³²⁷

The next section discusses the option of refusing to give extraterritorial effect to various provisions of SOX on the basis of the presumption against extraterritoriality—without conducting a situation-specific comity analysis.

C. Absent Clear Expression, SOX Is Not to be Given Extraterritorial Effect

Courts or the SEC could decide that the vast majority of SOX provisions are not applicable abroad. The fact that most provisions of SOX lack explicit language declaring their extraterritorial reach could be construed to imply that no such reach was intended. Under this approach, U.S. companies with foreign subsidiaries or foreign offices and non-U.S. companies listed on U.S. exchanges or which have U.S. subsidiaries would not have to worry about incurring penalties based on conduct occurring at their non-U.S. offices. Consequently, a company such as McDonald’s would not be delisted if its foreign subsidiary neglected to establish a procedure for the anonymous reporting of questionable accounting methods because doing so would violate the laws of the country where it is situated,³²⁸ so long as the American branches were in compliance with this requirement. In addition, German issuers would not be burdened with costly restructuring of their corporations,³²⁹ while U.K. issuers would not be subject to duplicative regulatory schemes.³³⁰

The adoption of this approach would be consistent with the presumption against extraterritoriality, a well-known “canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”³³¹ It may therefore be argued that, far from signaling Congress’s

that, “in the absence of contrary congressional direction,” are assumed to be incorporated into our substantive laws having extraterritorial reach.

Id. at 817 (citations omitted).

326. *See id.* at 817-18, 818 n.9.

327. *Id.* at 820-21 (noting that the fact that the petitioners “were not compelled by any foreign law to take their allegedly wrongful actions [does not] preclude[] a conflict-of-laws analysis here”).

328. *See supra* Part I.D.2.b.ii.

329. *See supra* Part I.D.3.a.

330. *See supra* note 146.

331. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7 (1st Cir. 2006) (“Where, as here, a statute is silent as to its territorial reach, and no contrary congressional intent clearly appears, there is generally a presumption against its extraterritorial application.”). In addition to “reflect[ing] the notion that when Congress legislates, it is primarily concerned with domestic conditions,” this presumption also serves the purpose of “protect[ing] against unintended clashes between our laws and

intent for SOX provisions to be applied abroad—as is maintained by the SEC, at least with regard to Section 10A(m) of the Exchange Act³³²—the lack of differentiation between foreign and domestic issuers actually suggests that this provision of SOX is not applicable abroad.³³³ In fact, the United States Court of Appeals for the First Circuit, relying upon the presumption against extraterritoriality, has already held that one of SOX's whistleblower protection provisions, 18 U.S.C. § 1514A,³³⁴ does not have extraterritorial reach.³³⁵

Part III advocates for the adoption of the approach outlined above in Part II.B.3, excluding Part II.B.3.b.ii, whereby the SEC will provide relief to foreign companies from the provisions of SOX after weighing a number of relevant factors.³³⁶

III. SOX ON THE RIGHT TRACK: THE PROPER APPROACH TO HANDLING FOREIGN REQUESTS FOR SOX RELIEF

A. *Allowing for Situation-Specific Detours from SOX through the No-Action Process*

The SEC should handle requests seeking relief from the provisions of SOX through the no-action process,³³⁷ or some analogous process.³³⁸

those of other nations which could result in international discord.” *Carnero*, 433 F.3d at 7 (internal quotation marks omitted).

332. See Release No. 33-8220, *supra* note 223, at 18,802 (stating that in light of “Section 10A(m) of the Exchange Act mak[ing] no distinction between domestic and foreign issuers . . . [and the fact that] the importance of maintaining effective oversight over the financial reporting process is relevant for listed securities of any issuer, regardless of its domicile . . . the [SEC’s] direction to the SROs will apply to listings by foreign private issuers as well as domestic issuers”).

333. This argument is supported by recent court decisions such as the one in *Carnero v. Boston Scientific Corp.*, which held that SOX does not apply to employees working outside of the United States. *Carnero v. Boston Scientific Corp.*, No. Civ.A.04-10031, 2004 WL 1922132 (D. Mass. Aug. 27, 2004), *aff’d*, 433 F.3d 1 (1st Cir. 2006). In support of its conclusion that nothing in § 1514(A)—which prohibits retaliation against an “employee” for whistleblowing—suggests that Congress meant for it to apply abroad, the court made note of the fact that no distinction was drawn between overseas and domestic employees. *Id.* at *2.

334. See *supra* note 108 and accompanying text.

335. *Carnero*, 433 F.3d at 6-7. This case involved an action under section 806 of SOX, in which a former employee at two foreign subsidiaries of Boston Scientific Corporation (BSC) alleged that he had been terminated in retaliation for “whistleblowing”—for telling BSC that Latin American subsidiaries had created false invoices and had inflated sales figures.” *Id.* at 2.

336. Part III will focus primarily on the SEC and the justifications in favor of adopting a situation-specific approach to granting relief. However, many of these same justifications would also support one or another of the approaches that courts could adopt to handle such situations of conflict. Those approaches are described *supra* Part II.B.3.b.

337. See *supra* Part I.A.2. Through the no-action process, the SEC staff provides requesting parties with its enforcement position regarding specific factual scenarios or its interpretation of statutes and rules in the context of a particular course of conduct. Gallagher, *supra* note 26, at 1027.

Under this approach, the SEC will provide relief to foreign companies by issuing favorable no-action letters and/or interpretive letters.³³⁹ In addition to being the most pragmatic approach available, all of the benefits associated with the no-action process would carry over.³⁴⁰

Under this approach, foreign companies may request relief from a SOX provision in one of two ways. First, they may request that, in light of the specific circumstances they currently face, the SEC should not initiate an enforcement action against them. Second, they may request that the SEC should, if possible, interpret a particular SOX provision in such a way that their proposed course of conduct would not be in violation of its terms. The relief granted from the former type of request—i.e., the issuance of a favorable no-action letter—would be available only to the particular requestor.³⁴¹ Therefore, others in similar situations would have to write their own letters requesting relief. However, relief granted from the latter type of request—i.e., the issuance of a favorable interpretive letter—would be available to all those similarly situated.³⁴²

In determining whether to grant the requested relief, the SEC staff should rely not only on notions of public policy, but should also draw upon notions of international comity.³⁴³ Thus, when a request is authored by a foreign company and involves conduct that will take place in a foreign jurisdiction, the SEC should conduct a comity analysis³⁴⁴ similar to the interest balancing tests adopted by courts in cases involving the extraterritorial

338. For example, in situations where U.S. securities laws conflict with foreign laws, the SEC may decide to delegate its exemptive authority to its staff (or perhaps to an SEC division created for the purpose of dealing with such problems). Consequently, a favorable no-action or interpretive letter issued by the staff (or designated SEC division) would be deemed the action of the Commission if the SEC refused to exercise its right of review. See *supra* notes 28-29 and accompanying text.

339. See *supra* Part I.A and notes 32-33 and accompanying text. Whereas no-action letters analyze specific courses of conduct (and whether such conduct will lead to an SEC enforcement action), interpretive letters analyze specific statutes, rules, or regulations as they apply to particular fact patterns. Gallagher, *supra* note 26, at 1027 n.103.

340. For example, among other advantages, the process allows the staff to take positions on the basis of public interest and protection of investors (as opposed to adopting positions solely on the basis of laws that are often unclear); it also allows a given position to be taken even though there is no agreement by the staff or the Commission for the basis of the decision; and it enables the staff to permit apparently lawful, but completely novel, types of proposals to go forward despite the fact that the staff is currently unable to take a position on the proposal. Lemke, *supra* note 31, at 1021 n.10.

341. See *supra* notes 34-38 and accompanying text.

342. See *supra* notes 34-38 and accompanying text.

343. On numerous occasions, the SEC has issued favorable no-action letters in response to companies' requests for relief on international comity grounds. *E.g.*, Banco Bilbao Vizcaya Argentaria, S.A., SEC No-Action Letter, 2001 WL 461290, at *7-8 (Apr. 19, 2001); Pharmacia Aktiebolag, The Upjohn Company, Pharmacia & Upjohn, Inc., SEC No-Action Letter, 1995 WL 570452, at *3 (Sept. 15, 1995); Procordia Aktiebolag and Aktiebolaget Volvo, SEC No-Action Letter, 1990 WL 286327, at *13-14 (Mar. 30, 1990).

344. The existence of a "true conflict" should not be a prerequisite to conducting this analysis. Rather, the presence of a "true conflict" should be one of the factors that a court takes into account in its comity analysis—albeit a very important factor that is to be given great weight in the balancing process.

reach of U.S. antitrust and discovery laws.³⁴⁵ In addition to the factors considered by those courts,³⁴⁶ the SEC should also consider (1) the purpose behind a conflicting foreign law and the timing of its enactment;³⁴⁷ (2) the company's relationship to the United States and to the foreign jurisdiction³⁴⁸—i.e., whether there is evidence of forum shopping; (3) the true purpose of the foreign company's request for relief, if evidence of this intent exists;³⁴⁹ (4) whether providing a foreign company with relief from SOX will have a significant or negligible impact (either positive or negative) on U.S. investors; and (5) whether the foreign company is subject to corporate governance and securities regulations equivalent to those of the United States. Although the SEC does not recognize the policy of mutual recognition,³⁵⁰ a foreign company's compliance with regulations reasonably equivalent to those of SOX is nevertheless relevant to the SEC's balancing of the competing sovereign interests involved in the dispute. For example, although the United States has a substantial interest in the enforcement of its securities laws,³⁵¹ this interest is tempered when the foreign company is subject to regulations equivalent to those of SOX that are consistently enforced by the foreign jurisdiction. In such a situation, the vital national interests of the foreign jurisdiction may trump the now diminished U.S. interest, thus supporting a decision to provide relief to the foreign company on international comity grounds.

The adoption of this approach is preferable to that of the other approaches discussed in Part II. It is preferable to the strict-enforcement approach for a number of reasons. First, the provision of some form of exemptive relief is necessary not only on international comity grounds, but also because providing such relief is in the best interest of U.S. investors and securities markets. Many foreign companies have already chosen to forgo listing on U.S. exchanges, and many others are contemplating delisting their current U.S. securities due to the burdensome costs

345. See *supra* notes 250, 254, 269-70 and accompanying text.

346. *Id.*

347. For example, if a foreign jurisdiction enacts a law that conflicts with SOX for the sole purpose of protecting its corporations from SOX's reach, then the SEC should find that the U.S. interest in enforcing its securities laws trumps the foreign jurisdiction's interest in its conflicting law. Cf. *In re Aircrash Disaster Near Roselawn*, 172 F.R.D. 295, 310 (N.D. Ill. 1997) (considering the fact that the "French [blocking] law was originally created [for the purpose of] block[ing] United States antitrust laws" as a relevant factor favoring the application of U.S. law despite the potential conflict with foreign law).

348. For example, the SEC should not grant relief to a company that relocated from the United States to a foreign jurisdiction for the purpose of avoiding SOX (either because that jurisdiction has laws equivalent to, but somewhat more lenient than, those of the United States, or because relocating to that jurisdiction causes a situation of conflict, and the notions of international comity counsel against the assertion of U.S. law).

349. For example, if the SEC discovers documents or internal memoranda evidencing an intent to relocate the company's fraudulent practices to a foreign subsidiary (located in a jurisdiction with laws more lenient than SOX) subsequent to an SEC grant of relief, then the SEC obviously should not grant such relief.

350. See *supra* notes 305-06 and accompanying text.

351. See *supra* note 283, 287 and accompanying text.

associated with SOX compliance.³⁵² Denying exemptive relief even in situations involving legitimate conflicts with foreign law will only make matters worse. A mass exodus of foreign issuers from the U.S. securities market will be detrimental to U.S. investors because of the declining diversity of available securities.³⁵³ This decline will only increase as a greater number of companies choose to stay away from the U.S. market, while others are simultaneously forced from the market through SOX enforcement.

Second, denying any form of exemptive relief would alienate not only foreign companies, but foreign governing agencies as well (because their sovereign authority is being devalued). Should the SEC choose to apply SOX to conduct occurring abroad without providing any form of exemptive relief, then foreign countries may retaliate against U.S. companies through similar measures.³⁵⁴ Thus, in addition to complying with SOX, American multinational corporations would also have to comply with numerous other regulatory regimes whose laws may vary to a significant degree. This would vastly increase the cost of conducting business abroad, which will likely have an adverse effect on U.S. investors.

Third, an approach denying any exemptive relief is, in actuality, inconsistent with the notion of a "level playing field"³⁵⁵ because companies operating solely in the United States are advantaged since they are not subject to conflicting foreign law. Under the no-action system, however, all companies are treated similarly, in that they all may request relief through the no-action process when faced with foreign penalties. Furthermore, the adoption of the no-action approach would not promote an environment conducive to fraud³⁵⁶ because exemptive relief is not guaranteed. If it appears that a company moved to a jurisdiction with conflicting laws for the sole purpose of evading compliance with SOX, then the SEC will issue a no-action letter denying exemptive relief.

Finally, and perhaps most importantly, the adoption of some system of foreign exemptive relief ultimately benefits U.S. investors in the long run by creating an atmosphere of regulatory cooperation, as opposed to regulatory alienation. The SEC reserves the right to alienate foreign companies, governments, and regulatory agencies, but it must pick and choose its battles carefully. The global market in securities is rapidly growing, cross-border transactions are commonplace, and violations of the securities laws are increasingly occurring abroad. For the SEC to successfully enforce the U.S. securities laws in this increasingly global

352. *See supra* Part I.C.

353. *See supra* note 299 and accompanying text.

354. Some officials have already threatened that unless foreign companies are entirely exempt from SOX, then each member state of the European Union may in turn force companies located in the United States to comply with their individual laws. *See supra* notes 125, 296-97 and accompanying text.

355. *See supra* Part II.A.2.a.

356. *See supra* Part II.A.2.b.

marketplace, it must continue to receive cooperation from foreign regulatory agencies.³⁵⁷ Currently, the SEC receives foreign assistance in enforcing the U.S. securities laws through the use of letters rogatory,³⁵⁸ the Hague Convention,³⁵⁹ MLATs,³⁶⁰ and MOUs.³⁶¹ Although extremely useful, each of these methods of obtaining foreign assistance has its own flaws, and all of them generally allow foreign agencies, courts, or central authorities to refuse to provide the requested relief under certain circumstances.³⁶² Consequently, if these agencies are needlessly alienated by the SEC's strict enforcement of SOX—without providing relief under any circumstances—in complete disregard of that country's sovereign interests, then they may not cooperate in enforcing U.S. securities laws within their territories. Such a course of conduct would be to the detriment, rather than benefit, of U.S. investors. For all of these reasons, the SEC should, pursuant to its authority to grant exemptions “to the extent that such exemption[s] [are] necessary or appropriate in the public interest,”³⁶³ adopt some form of exemptive system for situations involving conflict with foreign law.

Although an approach involving exemptive relief is necessary, providing foreign companies with too much exemptive relief is not the best course of action. Exempting all issuers subject to relatively equivalent foreign law³⁶⁴ encourages forum shopping for the least restrictive equivalent alternative. Companies engaged in fraudulent conduct will then move those operations to a subsidiary in the least restrictive equivalent jurisdiction. Moreover, this approach to exemptive relief would not account for situations in which a foreign sovereign's law conflicts with SOX, but where that sovereign lacks an adequately equivalent corporate governance regulatory regime. Under the equivalence approach, no exemption would be granted regardless of how strong the foreign jurisdiction's vital national interest is as compared to the corresponding U.S. interest in a particular SOX provision (which may be minimal in that particular instance). For this reason, the no-action process approach is more useful for handling such situations because it incorporates a comity analysis into the decision to grant relief.

An approach that would provide foreign companies with exemptive relief from SOX whenever they are subject to conflicting foreign law³⁶⁵ would also not be in the best interest of investors. First, this might encourage U.S. companies either to relocate to, or open foreign subsidiaries in, countries having laws that directly conflict with SOX's mandates. As a result, these companies would move all their illegal and fraudulent activities to such

357. *See supra* notes 48-49 and accompanying text.

358. *See supra* note 51 and accompanying text.

359. *See supra* notes 57-58 and accompanying text.

360. *See supra* notes 62-66 and accompanying text.

361. *See supra* notes 72-76 and accompanying text.

362. *See supra* notes 54, 59-61, 69-72, 76 and accompanying text.

363. 15 U.S.C. § 78mm(a)(1) (2000).

364. *See supra* Part II.B.1.

365. *See supra* Part II.B.2.

jurisdictions to avoid being penalized under SOX—because this approach would exempt them from SOX's provisions. This not only creates an environment conducive to fraud, but it also provides an incentive for foreign governments to pass laws that directly conflict with SOX in order to attract business to their jurisdictions. Moreover, although such an approach to exemptive relief finds support in the doctrine of sovereign compulsion,³⁶⁶ this doctrine is frequently not followed.³⁶⁷ Furthermore, while policy considerations may often favor granting exemptions, at other times the importance of applying U.S. law in a particular situation may be so great that it eclipses any negative impact that may result. The no-action approach takes all of these considerations into account.

Finally, denying extraterritorial effect to SOX provisions that lack explicit language concerning their reach³⁶⁸ is also inappropriate. The fact that many SOX provisions are silent regarding their extraterritorial reach does not necessarily mean that, under all circumstances, the presumption against extraterritoriality absolutely bars their application abroad.³⁶⁹ For example, where precedent exists as to an Act's extraterritorial reach, the presumption against extraterritoriality may be overcome.³⁷⁰ Courts have held that, under certain circumstances, the U.S. securities laws can have extraterritorial reach.³⁷¹ Consequently, as with the antitrust laws, the

366. See *supra* notes 302-03 and accompanying text.

367. For example, in the context of international discovery, companies are often ordered to comply with U.S. discovery requests despite the fact that compliance with such requests violates foreign secrecy or blocking statutes. *E.g.*, *Fontaine v. SEC*, 259 F. Supp. 880, 891 (D.P.R. 1966) (“Should it ultimately be found that it is necessary in the public interest that the disclosures required under the Securities Exchange Act . . . be required of [Investors Overseas Services (IOS)] even if such disclosure could be had only through violation of Swiss law . . . then IOS must decide whether or not it wishes to continue to do business in the United States. If IOS wishes to do so through the use of the mails and facilities of interstate commerce, it must be willing to comply fully with United States law. If not, it is up to IOS to determine where it wants to do business.” (footnote omitted)).

368. See *supra* Part II.C.

369. See, *e.g.*, *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7 (1st Cir. 2006) (“[I]n appropriate circumstances Congress’s extraterritorial intent [may be] implied without explicit statement in the text or even history.”).

370. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (“[I]f the question were not governed by precedent, it would be worth considering whether th[e] presumption [against extraterritoriality] controls the outcome here. We have, however, found th[at] presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.”).

371. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 529-30 (1974) (“It has been recognized that the 1934 Act . . . applies when foreign defendants have defrauded American investors, particularly when . . . they have profited by virtue of proscribed conduct within our boundaries. This is true even when the defendant is organized under the laws of a foreign country, is conducting much of its activity outside the United States, and is therefore governed largely by foreign law.” (footnote omitted)); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (“Conduct within the territory alone would seem sufficient from the standpoint of *jurisdiction* to prescribe a rule. . . . [W]hen . . . there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law.”);

presumption against the extraterritorial application of the securities laws has been overcome—at least when the requirements of the conduct or effects tests have been satisfied. The provisions of SOX merely amend the securities laws and should therefore be given the same extraterritorial treatment. Thus, the presumption against the extraterritorial application of SOX is overcome to the same extent as the other securities laws.³⁷²

B. Application of the Situation-Specific Approach to SOX Relief

Applying the approach proposed above in Part III.A, this section discusses how the SEC should have reacted in the immediate aftermath of the two CNIL decisions that declared anonymous whistleblower hotlines to be in violation of France's data protection laws.

First, the SEC should have recognized that the two CNIL decisions represented "true conflict" situations. As such, the SEC should have

Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) ("Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities [T]he usual presumption against extraterritorial application of legislation . . . [does not] show Congressional intent to preclude application of the Exchange Act . . . when extraterritorial application of the Act is necessary to protect American investors."); see *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 121-24 (2d Cir. 1995) (applying both the conduct and effects tests in determining extraterritorial jurisdiction); see also Restatement Third of Foreign Relations Law § 416(1)(c)-(d) (1987) ("The United States may generally exercise jurisdiction to prescribe with respect to [1] conduct, regardless of where it occurs, significantly related to a transaction [in securities carried out, or intended to be carried out, either predominantly in the United States or on an organized U.S. securities market], if the conduct has, or is intended to have, a substantial effect in the United States; [and] [2] conduct occurring predominantly in the United States that is related to a transaction in securities, even if the transaction takes place outside the United States.").

372. This conclusion is consistent with *Carnero*, which held that section 806 of SOX does not have extraterritorial effect. *Carnero*, 433 F.3d at 6-7. There, the court stated that "while the Sarbanes-Oxley purpose to protect investors and build confidence in U.S. securities markets may be a factor supporting extraterritorial application of the instant whistleblower protection provision . . . contrary indicia prevent our determining that Congress has evidenced its 'clear intent' for extraterritorial application." *Id.* at 8. For example, in contrast to Congress's silence regarding the extraterritorial application of Section 806, Congress expressly provided for the extraterritorial enforcement of a different SOX whistleblower statute. Compare SOX § 806, 18 U.S.C. § 1514A (Supp. II 2002) (silent regarding its extraterritorial reach), with SOX § 1107, 18 U.S.C. 1513(d) (providing for extraterritorial jurisdiction). The court in *Carnero* concluded that providing extraterritorial reach to section 1107 but not to section 806 "conveys the implication that Congress did not mean [for] Section 806 to have extraterritorial effect." 433 F.3d at 10. In addition, the court noted that [i]f the whistleblower protection provision is given extraterritorial reach in a case like the present one, it would empower U.S. courts . . . to delve into the employment relationship between foreign employers and their foreign employees . . . [thereby] open[ing] the door for U.S. courts to examine and adjudicate relationships abroad that would normally be handled by a foreign country's own courts and government agencies pursuant to its own laws.

Id. at 15. In arriving at its decision not to extend the reach of section 806 abroad, the court relied heavily on "the well-established principle of sovereignty that no nation has the right to impose its labor standards on another country." *Id.* at 15 (internal quotation marks omitted).

embarked upon a comity analysis regardless of which view it adopted as to the appropriate role of such an analysis. Because the provisions of SOX are really just amendments to the U.S. securities laws, the U.S. interest in this case is just as substantial here as it would be in a pre-SOX violation of the securities laws. However, the French interest in this case, unlike in those cases where its blocking statute was employed to hamper U.S. discovery orders,³⁷³ is equally, if not more, compelling. First of all, the data protection law was implemented long before any legislation like SOX was ever contemplated. Moreover, it was implemented not just by France but by the entire European Union—and thus was not enacted for the purpose of circumventing SOX.³⁷⁴ Second, France has a deep-seated cultural antipathy toward anonymous denunciations dating at least as far back as WWII, if not all the way back to the French Revolution.³⁷⁵ Finally, the U.S. interest in enforcing SOX's whistleblower hotline provision is severely tempered under the circumstances.³⁷⁶ The CNIL did not ban outright the use of whistleblower hotlines as a violation of its data protection laws; rather, it only directly opposed anonymous reporting, as contrasted to confidential reporting which would be acceptable under certain circumstances.³⁷⁷ Therefore, providing relief in this situation would be permitted in the public interest and would also be consistent with investor protection.³⁷⁸

After determining that providing relief to these two French subsidiaries from SOX's anonymous whistleblower hotline requirement is appropriate, the SEC would then have to determine how it should provide such relief. In this particular situation, the SEC actually would have two options at its disposal. First, assuming requests have already been made, the SEC could issue favorable no-actions letters to these two French companies. Other French companies, however, would then have to submit their own requests in order to obtain relief.

Alternatively, the SEC may resolve this particular conflict by means of an interpretive letter. SOX's whistleblower hotline provision requires implementation of procedures for "the confidential, anonymous submission by employees . . . of concerns regarding questionable accounting or auditing matters."³⁷⁹ The comma between the words "confidential" and "anonymous" implies a requirement for a confidential *and* anonymous

373. See *supra* note 347.

374. See *supra* note 347 and accompanying text.

375. See *supra* Part I.D.2.b.iii.

376. If France is found to strictly enforce its own corporate governance regulations, which are equivalent to those of SOX, over companies in its territories, then the U.S. national interest would be diminished even further because the absence of the protections afforded to investors by SOX would be made up for by the presence of France's reasonably equivalent corporate governance regulations.

377. See *supra* Part I.D.2.b.iv.

378. This relief would thus conform to 15 U.S.C. § 78mm(a)(1) (2000).

379. 15 U.S.C. § 78j-1(m)(4)(B) (Supp. II 2002).

procedure for reporting financial inaccuracies.³⁸⁰ However, confidential and anonymous whistleblowing procedures are mutually exclusive. That is, a confidential procedure cannot be strictly anonymous.³⁸¹ Consequently an ambiguity exists in the SOX statute as to the phrase “confidential, anonymous submission.” As the agency appointed by Congress to implement SOX (as well as the other securities laws), it is up to the SEC to interpret the statute so as to remove this ambiguity. In this case, the SEC could interpret the SOX whistleblower hotline provision in such a way that its mandate would be satisfied by using confidential reporting procedures. Once the SEC has declared that confidential whistleblower hotlines are sufficient to meet the requirement of Section 301, the conflict between this provision and French data protection laws would cease to exist, and French companies would then be free to comply with SOX without facing repercussions at home.

CONCLUSION

Exemptive relief from SOX is not only necessary, but is also in the public interest. However, making exemptive relief too accessible only subverts the purposes of the Act. Rather, a balance is needed between too much and too little exemptive relief. Use of the no-action process, or some other process that allows the SEC to consider exemptive relief on a case-by-case basis, is the answer. The SEC should use this situation-specific analysis to resolve any future conflicts between SOX and foreign laws. Moreover, this approach need not be limited to SOX, but could also be applied to resolve similar conflicts involving other securities laws.

380. *Id.*

381. This is because a confidential system requires that at least one person or machine possesses the whistleblower's identity—that is, a whistleblower can in some way be traced back to his report, though his or her identity will remain undisclosed.

Notes & Observations