Symposium Securities Regulation and Corporate Responsibility

Panel II: Lawyering and Disclosure After the Sarbanes-Oxley Act

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Abstract by Caroline Katz

Speakers included John Huber, partner at Latham & Watkins and former Director of SEC's Division of Corporation Finance; Donald Langevoort, professor and former SEC counsel; Thomas Hazen, professor at UNC-Chapel Hill Law School; and Jerry Markham, professor and former SEC counsel, Chicago Board of Options Exchange, and the Division of Enforcement at the Commodity Futures Trading Commission.

Mr. Huber discussed the "rules of the road" to be followed in rulemaking in general. These rules include having the authority to do what you want to do, balancing the need for investor protection with the cost of compliance, following the unintended consequences of your rulemaking, being ready to adjust, coordinating with other rulemaking bodies to avoid duplication and conflicts, and thinking about the big picture. The presentation then goes on to point out important differences between the past and the present including the political atmosphere, "CNBC effect," SEC issues are now front page news, people are more invested today, and the fact the SEC is under time deadlines. Mr. Huber concluded with an emphasis on the importance of comments and revision in the rulemaking process and commends the work of the SEC for their rulemaking program under the Sarbanes-Oxley Act.

Mr. Langevoort discussed the spillover effects of Sarbanes-Oxley. He spoke mainly about the issues of federalism and the disclosure environment. The federalism issue is relevant because the SEC (a federal agency) is on the disclosure side and substantive corporate law is left to the states. The disclosure environment issue is also important-especially the issue of "real time disclosure," the idea that there is a duty to disclose on a continuous basis all material information that comes into a company's possession. While the law represents disclosure as periodic, Sarbanes-Oxley gives a push in the direction of "real time disclosure." Regardless of these two specific issues, it is necessary to consider the questions of confidentiality, ripeness, and cost as the SEC moves towards rulemaking of this sort.

Mr. Hazen discussed the new rules regulating lawyer conduct, mandated by Sarbanes-Oxley. There is a heightened awareness now of this type of rules because of Enron, Sarbanes-Oxley, and the specific rules recently adopted by the SEC. The biggest policy controversy here is whether, and to what extent, the SEC should be regulating lawyer conduct in the first place. And the second issue is whether these new SEC rules will actually change the way that corporate securities lawyers practice. Mr. Hazen does feel that these rules are a consciousness raising effort and may be a small step in changing the nature of this field of law practice.

Mr. Markham discussed the restructuring of financial regulatory systems. He began with the various myths that exist which are keeping the present federal securities laws from being reexamined, including the myth that the federal securities laws are responsible for creating the largest financial system in the world, that the stock market crash caused the Great Depression, that the federal securities laws allowed markets to recover and regain confidence by investors, and that the federal securities laws assure full disclosure. Mr. Markham criticized the accountant/auditor system currently used by the SEC and ultimately suggests adopting a commodity based model for financial regulatory systems.