

## Symposium Securities Regulation and Corporate Responsibility

### *Panel III: The Changing Landscape of Corporate Governance and Market Regulation*

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Abstract by Caroline Katz

Speakers included Barbara Ann Banoff, professor at Florida State University College of Law; Erica Beecher-Monas, professor at University of Arkansas; Doug Shulman, President for Regulatory Services and Operation at the National Association of Securities Dealers; and James Doty, a partner at Baker Botts and former general counsel at the SEC.

Ms. Banoff discussed gatekeeper liability under section 11 of the Securities Act of 1933, which is an express liability provision that imposes damages on the issuer, its directors, its senior management, its accountants and its underwriters for material misstatements or omissions in any registration statement. Ms. Banoff focused her attention on the impact the section has had on current financial issues. This section is relevant to these issues because it opens up the issuers involved in recent scandals to liability if they had filed any registration statements. To write this article, Ms. Banoff studied a financial statement report from the General Accounting Office which included sixteen cases, including Enron and Rite Aid. She was especially interested in whether any government enforcement proceedings had been brought and what settlements in these cases looked like. Ms. Banoff used an Appendix to chart the results of her examination. Significantly, she found that all fifteen issuers had filed registration statements and each was sued; thirteen of them were the subjects of government attention, and five filed for bankruptcy. Of the fifteen who were sued, section 11 claims were involved in only six, and ten of the cases have been settled. Ms. Banoff concluded that section 11 is a valuable provision that can be used if we think gatekeepers should play an important role in deterring fraud.

Ms. Beecher-Monas discussed the role of the audit committee (regarding corporate financial disclosures) in light of cognitive psychology's findings about small group decision making. She ultimately concluded that Sarbanes-Oxley's audit committee solution is not necessarily going to be successful in solving the current problems with financial disclosure because the dynamics of small group interactions demonstrate the problems with making the audit committee the ultimate enforcer, and Sarbanes-Oxley ignores the context of the decision-making process. She brings up several important points in relation to the context of decision-making, including the existence of the risky shift, group polarization, cognitive dissonance, and individual bias. These factors result in difficulty achieving accountability, therefore making the internal far less reliable than it may seem. Ms. Beecher-Monas suggests that corporations should be permitted to devise the type of internal controls that are suitable for their circumstances because Sarbanes-Oxley fails to present a system that will have a significant effect on deterring or preventing corporate misconduct.

Mr. Doty discussed the changing landscape of corporate governance. Many of the recent proposals from the NYSE and the NASD intend to encourage proactivism by committees by having independent committees. An effect of this new proposed independent system had been an awareness of legal responsibilities. The idea of professional responsibility will have a new effect on the positions of the CFOs and the audit committees, and the goal will be to find effective, active people to fill these important positions. Along with these changes comes the potential for lawyers to have a positive influence, especially as people become more aware of responsibility and liability, as committees will/should be more open to the guidance of strong legal advice.

Mr. Shulman discussed market regulation and transparency and focused on the bond market and the NASDAQ market. The main goal of the NASD was to bring transparency to the bond market. The idea behind transparency is that if you show investors what is happening in the bond market, the investors will do the regulation through their decision-making. Additionally, the regulators will be able to see what is going on in the markets and can set their policy based on this information. One of the problems with the market as a whole is that although there is transparency and competition, it is very fragmented and this can be harmful to the process of effective regulation.