Loyola Consumer Law Review

Volume 25 | Issue 4 Article 3

2013

After Ten Years, Sarbanes-Oxley Might Be Statutory Overkill

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I. INTRODUCTION

The start of the twenty-first century brought with it some spectacular corporate accounting scandals: Enron, WorldCom, Adelphia, and Tyco, to name a few. The subsequent congressional hearings investigating the accounting and ethical failures of these companies resulted in a parade of one corporate executive after another claiming they had no knowledge of the massive fraud in their firms. In response to this rapid-fire succession of corporate scandals, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX").[1] It is a statute first introduced by Senator Paul Sarbanes and Congressman Michael Oxley, and signed into law by President George W. Bush in July 2002.[2] The two major problem areas that SOX sought to remedy were personal accountability of corporate managers and that of auditor independence. As a result, SOX created the Public Company Accounting Oversight Board ("PCAOB"),[3] an administrative agency charged with the responsibility of establishing audit standards for publicly traded companies.

In this essay, I will argue that there are some provisions

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[1] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

[2] Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, Jul. 31, 2002, at A1, *available at* Factiva, Doc. No. nytf000020020731dy7v00039.

[3] Sarbanes-Oxley Act of 2002 §101, 15 U.S.C. §7211, (2002).

within SOX that wrongfully make the innocent suffer for the guilty. I will first look at Section 206, which prohibits an auditor from taking a position with a client for at least one year after participating in an audit of that same client. I will next look at Section 203, which requires that an auditing firm rotate its partner if it worked with a specific client for the previous five years. Finally, I will look at Section 304, which requires the Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO") of a publicly traded corporation to disgorge their profits if the financial statements must be restated due to fraud. In doing so, I do not mean to suggest that enacting SOX was unnecessary or unsuccessful; I am merely pointing out that even a right motive can sometimes yield a harshly wrong result.

II. AUDITOR CONFLICTS OF INTEREST UNDER SECTION 206

An auditor has always been required to be independent from the client whose financial records the auditor examines. An auditor cannot be an advocate for the client's position,[4] like an attorney would. An auditor, after examining the client's books, gives a professional opinion as to whether the client's financial statements give a fair representation of the client's financial position.[5] Consequently, the auditor gives external users the assurance that the financial statements are free of any material misstatements or omissions that would perpetrate a fraud on the investing public.[6]

A. The Problem: Lack of Auditor Independence

A very large factor in the high profile cases of accounting fraud was that that auditing firms (and audit partners) enjoyed close relationships with the clients whose records were being audited. This arose from auditing firms offering additional services to the same clients (tax preparation and management consulting, among others).

This practice embedded the large audit firms in deeply incestuous relationships with their clients, impairing their

[4] Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119, 124 (2006).

[5] *Id.* at 125.

[6] *Id.*

independence. As examples, Ernst & Young developed a business partnership with its client, PeopleSoft; some of KPMG's illegal tax shelters, for which it narrowly escaped criminal indictment, were provided to clients and their audit committee members; and both KPMG and PricewaterhouseCoopers owned investments in their audit clients. Auditors also impaired their independence by performing for audit clients non-audit services that generated considerable revenue compared to audit revenue. Impaired independence reduced auditors' reputations as watchdogs, which likely tempted many managers to indulge in accounting aggressions.[7]

As a matter of fact, Arthur Andersen ("Andersen"), Enron's not-so independent auditing firm, received $27 million in tax and consulting fees in addition to $25 million in audit fees. Those fees were paid by Arthur Andersen's highest profile client, Enron.[8]

Sometimes, the relationship between the auditor and the client can be closely personal as well. For example, when the truth of Enron's creative accounting practices came to light, it also exposed the chummy relationship between Rick Causey and David Duncan. "David Duncan and Rick Causey often vacationed together, annually leading a group of Andersen and Enron 'co-workers' on golfing trips to elite courses around the country."[9] Causey was Enron's Chief Accounting Officer, and a former partner at Arthur Andersen, which was Enron's auditing firm; Duncan was Andersen's audit partner who handled the Enron account.[10]

Naturally, when one has a business arrangement

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[7] Lawrence A. Cunningham, *Symposium: Litigation Reform Since the PSLRA – A Ten Year Retrospective: Panel Two: Sarbanes-Oxley Accounting Issues: Too Big To Fail – Moral Hazard in Auditing and the Need to Restructure the Industry Before It Unravels*, 106 COLUM. L. REV. 1698, 1713-1714 (2006).

[8] William O. Fisher, *Lawyers Keep Out: Why Attorneys Should Not Participate in Negotiating Financial Numbers Reported by Public Company Clients,* 2010 B.Y.U. L. REV. 1501, 1519, n.57 (2010) (It was "reported that in the year 2000 Andersen was paid [by Enron] audit fees of approximately $25 million and nonaudit fees of approximately $27 million.").

[9] Matthew J. Barrett, *In the Wake of Corporate Reform: One year in Life of Sarbanes-Oxley – A Critical Review Symposium Issue: "Tax Services" as a Trojan Horse In the Auditor Independence Provisions of Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 463, 484 (2004).

[10] Harvey Gilmore, *This is Not a Symposium on How to Commit Fraud – But, if it Were. . .*, 11 J. BUS. & SEC. L. 199, 217 (2011).

commingled with personal friendships, it could lead to a potential situation where a person may have to choose between doing his job right and potentially alienating his friend. "An auditor who suspects errors or misstatements, whether intentional or not, must choose, perhaps unconsciously, between harming a known individual and likely the auditor's own self-interest by questioning the accounting, or injuring faceless others by failing to object to the possibly incorrect numbers. Such biases only grow stronger as personal relationships with the client's management, sometimes former auditing colleagues, deepen."[11]

B. The Solution: Sarbanes Oxley Section 206

Section 206 (1) of SOX provides the following:

> It shall be unlawful for a registered public accounting firm to perform for an issuer any audit service required by this title, if a chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for the issuer, was employed by that registered independent public accounting firm and participated in any capacity in the audit of that issuer during the 1-year period preceding the date of the initiation of the audit.[12]

In order to ensure that there is complete independence from the client, Section 206 of SOX expressly prohibits an auditor from taking any accounting related job with that same client if the auditor recently participated in an audit of that client *in any capacity*.[13] The statutory cooling off period requires that the auditor wait for a minimum of one year after concluding the audit before taking an accounting job with the client.[14]

C. One Potential Injustice of Section 206

For purposes of Section 206, what does the phrase "in any capacity" really mean? In the normal sense, participating in an audit in any capacity refers to an auditor checking various

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[11] Barrett, *supra* note 9, at 484. *See also*, Max H. Bazerman, George Lowenstein, and Don A. Moore, *Why Good Accountants Do Bad Audits*, 80 HARV. BUS. REV. 97, 100 (2002).

[12] Sarbanes-Oxley Act of 2002 §206, 15 U.S.C. §78k(f) (2002).

[13] *Id.*

[14] *Id.*

aspects of a client's financial practices. The auditor will look at things like the client's general ledgers, bank reconciliations, cancelled checks, tax records, and payroll records, among others.[15]

If one takes the phrase "in any capacity" literally, then it means just that . . . *anything* that an individual does within the scope of an audit can now trigger Section 206 to that person's detriment. For example, an accountant who is working on his very first audit might just make tick marks in the daily audit plan to show that everything on that day's schedule has been accounted for. Or there might be someone whose only function is to file paperwork. Or, there might be a rookie accountant who is on an audit as an observer, and his job is to get coffee and doughnuts for the rest of the team.

If "in any capacity" is taken literally, Section 206 lends itself to this unjust result: For example, I am young accountant who takes a job in the audit department of a public accounting firm. I work with the firm for six months, and I actually participate in an audit. I was never in any kind of executive decision-making capacity whatsoever. My only audit duty is to look at the client's cancelled checks to make sure that they are countersigned by both the controller and chief financial officer, pursuant to the client's internal control policy. I go through a sample of 1000 checks, and I find that each check has both required signatures, which I properly document and report to the audit partner. This is my only exposure to doing audit work.

A short while later, the client offers me a job in the client's tax department, and I love doing tax work much more than I liked auditing. I would prepare income tax returns, sales tax returns, and property tax returns (as I actually did in my accounting days). As such, my immediate supervisors would be the controller and chief financial officer. Not only would I be a mid-level employee who would not be in a financial oversight position, but because of my doing primarily tax work, I would also have limited contact with my new employer's external auditing firm.

Unfortunately, this would be a pipe dream for me precisely because Section 206 precludes me from taking the tax job with the client. As I see it, this is grossly unfair to those similarly situated young accountants starting out who have not yet found their professional niche.

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[15] *See* Gilmore, *supra* note 10, at 215.

This unfortunately cripples young accountants who not only cannot freely make career choices but are effectively forced into retroactively paying for corporate misdeeds that happened while they might have been undergraduates (or younger). And, those same professionals starting their careers who are now foreclosed by Section 206 from pursuing viable career opportunities have no remedy to fix their predicament. This is just wrong!

D. Another Potential Injustice of Section 206

Let us assume that Jane Doe (fictitious) is a Certified Public Accountant ("CPA") who is an audit partner at Deloitte and Touche ("Deloitte"). Jane has been with the firm for the past 12 years, and has been an audit partner for the past four years. Jane has developed an unassailable, sterling reputation within the accounting profession, her clients speak very highly of her, and her performance evaluations are outstanding. Over the years, she has participated in the audits of several high profile Deloitte clients, including AT&T, Cablevision, IBM, General Electric ("GE"), and Citigroup.

Jane was the lead auditor when Deloitte audited GE in February 2012. Jane had audited GE on more than one occasion, and there is absolutely no question of her integrity or her professionalism. She always maintains a professional demeanor and there is no question of her independence from her clients. In addition, we will also assume (for purposes of this discussion, and I have no reason to believe otherwise) that GE's internal controls and accounting practices give an absolutely accurate picture of the firm's financial condition.

On July 1, 2012, the CEO of GE offers Jane the position of CFO, at a salary of $1 million per year, plus bonuses and stock options. Unfortunately for Jane, through no fault of her own, she cannot accept GE's job offer precisely because of the provisions of Section 206. I believe that this is a grievously unfair, unjust result. While it is true that Section 206 seeks to strengthen auditor independence, I strongly believe that Section 206 wrongfully penalizes innocent people and innocent firms.

First, I believe that Section 206 wrongfully prevents a person in Jane's position from making a living consistent with her academic and professional credentials. What happens if this was a once in a lifetime offer for Jane's dream job? She is now cut off from it because Section 206 is, as I see it, a strict liability section. Strict liability means "liability without fault."[16] If we apply strict liability to a situation like this, it means that one does not need to prove that Jane was negligent in accepting the offer, or that she acted in bad faith, or committed *any* malfeasance. The mere fact that Jane accepted the offer within one year of her auditing General Electric is enough for Section 206 to step in and keep her from taking the job.

Secondly, what does Jane do in the interim? Once Jane's partners at Deloitte find out about her offer from GE, they probably would not be too happy. The partners could conceivably vote her out of the partnership, thus constructively (and actually) firing her. If she were a staff accountant who wasn't yet a partner, the firm most likely would have fired her. If GE truly wants Jane and is willing to wait for her, the company could give her a signing bonus equal to her annual salary, making it worthwhile for Jane to wait out the one year period before actually starting work. A less realistic possibility would be for Jane to start working for the company immediately, for the same salary, but at a much lower job than CFO. Imagine the next CFO working for the firm in the interim as a mailroom clerk, or receptionist, or executive secretary. Obviously, these are jobs far beneath Jane's professional skill set. Otherwise, Jane's only other alternatives would be to look for a job in another CPA firm, or a corporation that she last audited more than one year ago, or look for a job at Wendy's putting salt on french fries. Admittedly, my Wendy's reference here is an extreme example, but it also points out a potentially absurd result because of Section 206. Sadly, this is a situation people in Jane's position would be forced into as a result of Section 206.

Thirdly, I am unconvinced that the one year requirement is necessary. If the client is above board, and the auditor was both competent and independent in performing the audit, I cannot think of a better marriage than an upstanding auditor going to work for an equally upstanding, transparent client. For me, this is a clear case of both parties having nothing to prove, and more importantly, *even less to hide*. In my opinion, there are not many people that a firm could hire better than an auditor who recently audited the firm and already *knows* that the financial statements *are* legitimate. The firm would be getting an employee whose competence, professionalism, and veracity are proven.

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[16] BLACK'S LAW DICTIONARY 1422 (6th ed. 1991).

It is very unlikely that there would be a reverse situation where an auditor missed red flags that would have uncovered a fraud and then goes to work for that same firm later on. The auditor takes a job with the client as the controller, and while working as the controller, he notices many accounting irregularities that he missed while he was the client's lead external auditor. When he reports the irregularities to his superiors, they notify him that he has a choice: either restate the financial statements and expose himself and his former firm to malpractice liability, or just keep quiet and go along. Unfortunately, he is now forced to choose between a bad option and a worse option.

Of course, if something like that was to happen, the guilty parties must suffer the consequences. While I understand that the rationale for Section 206 is well-meaning, I believe for the reasons stated above that it is overbroad to the point that it wrongly condemns honest, current practitioners for the "sins of the fathers," so to speak. Additionally, Section 206 completely disregards the fact that there are honest, diligent professionals who maintain their independence at all times.

III. AUDIT PARTNER ROTATION UNDER SECTION 203

Section 203 of SOX provides the following:

> It shall be unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner (having primary responsibility for the audit), or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the five previous fiscal years of that issuer.[17]

In financial accounting, one of the generally accepted accounting principles is consistency. Consistency means that "a company uses the same accounting principles and methods from year to year."[18] If a business, along with its accountants, honestly conducts its affairs the same way every year and is successful every year, it only makes sense to stick with what works. As the

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[17] Sarbanes-Oxley Act of 2002 §203, 15 U.S.C. §78j-1 (2002).

[18] JERRY J. WEYGANDT ET AL., ACCOUNTING PRINCIPLES, 274 (10th ed. 2010).

old adage suggests: "If it ain't broke, don't fix it."[19]

Similarly, if you have an honest company along with an honest, and independent auditing firm, and the result is a competent, professional audit and reliable, trustworthy financial statements, I do not see much sense in putting a time clock on a good business relationship of veracity and integrity. Thanks to Section 203, a firm is now required to change its audit partner every five years. Again, I believe this is overreaching.

I see a couple of potential problems with Section 203. First, if we take a literal reading of the statute, it becomes illegal for the same partner to lead audits with the same client for more than five consecutive years. If that is the case, this presents a possible scenario where the partner and client can agree after the fifth year that the partner will step aside in year six, and then take the reins again in years 7 through 11. Conceivably, the partner and the firm can have this kind of arrangement in perpetuity where the partner "takes a year off" every so often and then comes back. I do not know exactly how ethical this kind of arrangement might be, but I do not see anything in the statutory language that would make this arrangement illegal, either.

Next, I also see Section 203 as an unfair constriction of the freedom to create a contract. In its most basic form, a contract is an agreement for which the law gives a remedy.[20] "I will do A for you and you will do B for me." In the auditor-client relationship, the auditor will examine various financial aspects of the client's business and the client will pay the auditor for the service provided. That is their contract. As in any transaction, if the bargained for exchange is satisfactory on all sides, the contracting parties would conceivably want to do business again in the future. This is no different in the auditor-client relationship, which by necessity is to be an arm's length relationship. Obviously, I'm not talking about a buddy-buddy relationship like Enron's Causey and Andersen's Duncan, or a situation where a member of the client's management is having a romantic affair with a member of the audit staff. The compromise of auditor independence in those types of situations goes without saying.

In the typical arm's length relationship between the

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[19] *See, e.g.*, THE FREE DICTIONARY, *at* http://idioms.thefreedictionary.com/if+it+ain't+broke,+don't+fix+it.

[20] *See, e.g.*, ROGER LEROY MILLER & GAYLORD A. JENTZ, FUNDAMENTALS OF BUSINESS LAW 153 (8th ed. 2010) ("A contract is an agreement that can be enforced in court.").

auditor and client, the auditor doing an honest, thorough, and professional job is what will often result in a repeat engagement, and a good working relationship between the parties. Most often, the thing that brings clients back every year is doing satisfactory work and not being a yes-man always telling the clients what they want to hear. There is any number of good, long standing contractual relationships where the professionalism and competence of the parties involved are not compromised, such as the principal-agent, lawyer-client, doctor-patient, employer-employee, and trustee-beneficiary relationships. The auditor-client relationship should be no different.

I can imagine the outcry that would result if a federal law was enacted that every person had to change his or her doctor every five years. The very idea of having one's proctologist, oncologist, cardiologist, OB-GYN, etc. on a statutory rotation basis is nothing short of asinine.

For example, a patient with a chronic disease has been going to the same doctor for ten years. This doctor has performed surgery on this patient several times and knows this patient's history like the back of his or her hand. Without this doctor the patient could have died ten years ago, but they have not, because the patient trusts they are in good hands. The same goes for a client. Clients do not want to be tossed around to a new auditor every couple years who does not know who the client is and what the client has been doing. Clients want to trust their auditors are competent and thorough. With audit rotation, it limits these possibilities and causes more harm to all parties involved.[21]

Thanks to SOX, this is the very same thing that the law is requiring of auditing firms and their clients. I believe this result is just as ridiculous.

IV. Possibility Of Required Audit Rotation

Recently, the PCAOB has entertained thoughts about requiring auditing firms be rotated every few years.[22] While I agree that the PCAOB is rightly concerned about audit failures

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[21] Amy Kennedy, *Audit Rotation is Not Beneficial in the Long Run*, http://pcaobus.org/Rules/Rulemaking/Docket037/070_Amy_Kennedy.pdf.

[22] *See generally* Public Corporation Accounting Oversight Board, *Concept Release on Auditor Independence and Audit Firm Rotation,* PCAOB Release No. 2011-006 (August 16, 2011). http://pcaobus.org/Rules/Rulemaking/Docket037/Release_2011-006.pdf.

and the lack of professional skepticism,[23] I am not wholly convinced that changing auditing firms every few years is a viable option.

First, similar to my above discussion about changing audit partners every five years, I believe that the PCAOB's thought about changing audit firms every few years is a bit draconian. Again, if a client has a good working relationship with its auditor, and the end result is transparent, reliable financial statements where no one's integrity or professionalism is at issue, I do not see the harm in continuing that relationship for the foreseeable future.

Another legitimate argument against seemingly endless auditor rotation is the idea that the client has to perpetually go back to square one in showing a new auditing firm the ropes. "The argument that auditor change disrupts the company whose accounts are being audited has more substance. A new set of people arriving at every audit location and having to learn the ropes is likely to be a bit disruptive to well-oiled routines."[24] I do not see the efficacy of clients playing "musical chairs" with their auditors every few years.

Next, SOX has been unambiguous in prohibiting auditing firms from providing non-audit services to the same clients for whom they are doing audit work.[25] If a large part of the problem was that supposedly independent auditing firms provided tax, business consulting and other services to the audit clients, Section 201 of SOX did away with that problem. The general perception was that auditing firms used their audit work for their clients as a hook to sell their non-audit services to those same clients.

In my opinion, it is precisely because SOX drew a bright line between the acceptable and prohibited services that auditors can now provide for their clients. In other words, Section 201 has already removed the pressure for auditors to do non-audit work for their audit clients. Therefore, in my opinion, the idea to rotate auditing firms is overbroad.

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[23] *Id.* at 6.

[24] Eric Tracy, *Arguments Against Auditor Rotation Appear Desperate*, ACCOUNTANCY AGE, (June 11, 2012), *available at* http://www.accountancyage.com/aa/opinion/2183068/arguments-auditor-rotation-appear-desperate.

[25] Sarbanes-Oxley Act of 2002 §201, 15 U.S.C. §78j-1 (2002).

V. DISGORGEMENT OF PROFITS UNDER SECTION 304

Section 304 of SOX provides the following:

> (a) ADDITIONAL COMPENSATION PRIOR TO NONCOMPLIANCE WITH COMMISSION FINANCIAL REPORTING REQUIREMENTS- If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the CEO and CFO of the issuer shall reimburse the issuer for—
>
> (1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and
>
> (2) any profits realized from the sale of securities of the issuer during that 12-month period.[26]

Section 302 places the ultimate responsibility for the veracity of a corporation's financial information on the CEO and CFO.[27] Thus, the CEO and CFO must certify that there are no material misstatements or omissions within the financial statements, are responsible for the company's internal controls, and must promptly report any internal control lapses to the corporation's audit committee.[28] In response to the parade of corporate officers who testified that they were unaware of their companies' creative accounting prior to SOX' enactment, SOX section 302 seems to be an appropriate response imposing strict liability on the CEO and CFO if the company's financial statements are in fact fraudulent.

Section 304, however, requires only the CEO and CFO to disgorge their profits if the financial statements are to be recalculated due to fraud. While it is true that SOX imposes "buck stopping" sanctions on the CEO and CFO in the spirit of management accountability, I'm not wholly convinced that

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[26] *Id.* §304, 15 U.S.C. §7243.
[27] *Id.* §302, 15 U.S.C. §7241.
[28] *Id.*

Section 304 is always fairly applied.

If the CEO and CFO knew, or at least had reason to know that the financial statements were fraudulent, then of course they should suffer the consequences. However, is it fair for the CEO and CFO to take the fall for someone else's defalcation? Obviously, there is an element of risk assumption when one takes a position of a Chief Executive or Chief Financial Officer. What happens if 1) the CEO and CFO perform their jobs competently and in good faith, and 2) there is very little nexus between top management and lower level employees who are actually responsible for the financial statement fraud?

For example, I am a low level accountant for XYZ Company. I report to the accounts payable manager, who reports to the controller, who reports to the CFO. XYZ Company is a publicly traded corporation who generated $600 million in revenue, and netted $140 million in profits. Unbeknownst to my supervisors, I generate fictitious invoices payable to various shell companies, thus embezzling $426,082 from the company. Compared to $140 million, what is a mere $426,082?

Although I was able to steal over four hundred thousand dollars right under my company's nose, the company's profits are understated because of my fraud. Additionally, the company's employees all receive year-end bonus checks in varying amounts, including the CFO, who receives a $250,000 bonus. Even though I perpetrated the fraud, I even received a bonus of $500.

Assuming my fraud is ultimately discovered, and the financial statements are restated as a result. The CFO, through no fault of his own, has to repay his $250,000 back to XYZ Company. Ironically, Section 304 does not have a similar disgorgement requirement for any employee other than the CEO and CFO. Thus, I the embezzler, would keep my $500 bonus check. Of course, there are many other remedies that the company can pursue against me (both criminally and in tort); I am not suggesting that I could walk away untouched. Just the same, however, I believe Section 304 can produce an unduly harsh, unfair result where the CFO takes the hit for *my* misdeeds. The punishment just does not fit the crime.

If the CFO in this hypothetical can prove by the preponderance of the evidence that he exercised due diligence, and a reasonable investigation would *not* have uncovered my theft, then the CFO should not have to return his bonus to the corporation. As a low level accountant, I probably would not have much contact with the controller, and even *less* contact with the CFO. If there is practically no nexus between myself and the CFO, I cannot see the justification for the CFO being penalized by *my* thievery, especially if the CFO did his job within the rules.

If I have a good working knowledge of my company's internal control devices, I can plan my embezzlement in such a way that I stay within the firm's internal control parameters. As long as I am under the radar, my activities would not raise any red flags during an internal or external audit. Again, I believe that it is grossly unfair for the CFO to take the fall for something that was my own creation that had nothing to do with him.

VI. CONCLUSION

I have shown several examples where certain provisions of the Sarbanes-Oxley statute could unintentionally lead to harsh results. To be fair, the massive corporate accounting scandals the country had been exposed to necessitated a legislative response. As such, I do not suggest that SOX has been a failure. In key areas, I believe that SOX has been successful. First, corporate managers retain the ultimate responsibility for the information submitted to the general public. Secondly, SOX has mandated that auditors just do audit work and nothing else for their audit clients.[29] Thus, SOX has been fairly successful.

Have some people slipped through the cracks and not lived up to the level of professional skepticism?[30] Unfortunately, yes. In those cases, the firms in question were properly sanctioned for their part in their audit failures. That said, can we automatically assume that the professional integrity of all auditing firms is for sale to the highest bidder? I think not. Are all auditing firms "in bed" with their clients? As was seen with Arthur Andersen and Enron, unfortunately some are. However, I believe, perhaps naïvely, that most auditors are not in bed with

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[29] Daniel L. Goelzer, *Auditing Under Sarbanes-Oxley: An Interim Report*, 7 BUS. & SEC. L. 1, 3 (2006).

[30] *See, e.g,* Richard Crump, *Baker Tilly criticised for lack of professional scepticism,* ACCOUNTANCY AGE, (May 10, 2012), *available at* http://www.accountancyage.com/aa/news/2173716/baker-tilly-criticised-lack-professional-scepticism; Michael Foster, *PCAOB Fines Ernst & Young $2 Million*, BIG 4, (Feb. 10, 2012), *available at* http://www.big4.com/ernst-young/pcaob-fines-ernst-young-2-million/.

their clients. What I really take exception to is the unspoken perception that auditors are automatically either compromised or on the take. This is similar to the general perception of attorneys as nothing more than unethical hired guns, which I think is just as inaccurate.

Thus, in the Congressional haste to come up with an appropriate response to Enron, World-Com, Tyco, and the rest, I believe that SOX committed a touch of overkill in the pursuit of accounting integrity. As shown above, this overkill takes the form of unjustly penalizing current professionals for someone else's prior misdeeds. In certain instances, the "punishment" does not a fit the crime. I do not believe that the legislative intent was to impose overly harsh restrictions on financial reporting. Unfortunately though, Sections 203, 206, and 304 lend themselves to certain situations where an individual can suffer inequitable consequences for someone else's misconduct. And adding injury to insult, *the individual forced to retroactively pay for someone else's financial crimes has no legal recourse.* Not only is this unfair, but the fact that these "loopholes" have not been adequately addressed in the ten-plus years of Sarbanes-Oxley's existence guarantees that the hidden unfairness of a supposedly remedial statute will continue unabated.