

## OVERALL, SARBANES-OXLEY IS GOOD FOR U.S. COMPETITIVENESS

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I am really a better witness rather than a lecturer or a judge, since I am now counsel to one of the most heavily regulated industries on the globe.<sup>1</sup> But while it is true that we are the intended target and sometime-victim of unintended consequences of laws, the truth be told, we like laws. And where they can bring clarity and definition and remove arbitrariness, particularly in maturing economies like the Brazilian, Russian, Indian, and Chinese (BRIC) economies, we are all in favor of it. Thus, we take a slightly contrary view about Sarbanes-Oxley and the progeny around the globe, and we celebrate them, but I want to articulate why.

It is to be sure, however, that unintended consequences should be thought of, and there is a popular Lily Tomlin line: When we were all young and always wish we be somebody someday. Now that we are older, we only wish we would have been a little more specific about it.<sup>2</sup> Now, that is true for every piece of legislation that is passed in the city.

I have to tell you, I was at the Treasury Department when Sarbanes-Oxley was passed and was a material voice in its passage. But as I reflect upon it, of course it is clunky, of course it is costly, of course it is burdensome in application, of course it is sometimes threatening, and indeed it is sometimes unfair. That is all relevant, but it is not defining. And we flatter

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1. See e.g., Miguel Casas, *Bucking the Trend: Growing Number of Banks and Their Ties to the Community Set Northwest Arkansas Apart*, ARKANSAS DEMOCRAT-GAZETTE, Aug. 17, 1997, at 20NWBM (quoting Jim Chessem, Chief Economist at the American Bankers Association, as stating “[b]anking is one of the most regulated industries . . . [t]he regulatory costs are extraordinary . . .”).

2. Brainy Quote, [http://www.brainyquote.com/quotes/authors/l/lily\\_tomlin.html](http://www.brainyquote.com/quotes/authors/l/lily_tomlin.html) (last visited May 20, 2008) (“I always wanted to be somebody, but now I realize I should have been more specific.”).

ourselves as lawyers if we think it is defining when you look at U.S. competitiveness because there are other, much more important dynamics that are operating in the world.

Our business, my business right now is really trying to attract capital through my bank as an intermediary. And what we hear, to be sure, is some discord out there about private litigation in the U.S. and too much complexity in the U.S. regulatory system. But what we presently hear about is the opportunity that abounds abroad, and that is really what the U.S. competitive system is competing against.

When you talk to folks who are looking to start an initial public offering, in Asia for example, there are a couple of important and, I think, interesting things that occupy their minds the most. First, they like to deal in the same time zone. It is as simple as that. If they were trying to choose whether to make an offer in Hong Kong, Beijing, or New York, it is an easy box to check.

Second, they like the idea that the people speak the same language they do. Again, if they are making an offering in Hong Kong and if they are Chinese, it is more attractive to do it there than in New York.

Third, as you all know, there has been an astounding accumulation of wealth around the world,<sup>3</sup> and it is not concentrated in the United States and it is not banked in the United States anymore for security purposes, political or otherwise.

Fourth, the infrastructures around the world to engage in capital market trading have improved exponentially. Indeed, that is not just the case in domestic markets, but increasingly we see the borders breaking down between domestic markets and a convergence and merger of international markets. The New York Stock Exchange's various mergers with European markets is the best example of that.<sup>4</sup> There is a lot of liquidity offered and a lot more transparency that is offered internationally than

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3. See e.g., MERRILL LYNCH & CAP GEMINI, WORLD WEALTH REPORT 2006, at 6 (2007), available at <http://www.ml.com/media/67216.pdf> ("Emerging markets registered strong advances in market capitalization, adding wealth creation in regions such as Latin America, Eastern Europe and Asia-Pacific.").

4. See, e.g., Gilbert Krejiger & Marie Maitre, *Euronext and NYSE Merger Surprise*, BIRMINGHAM POST, Dec. 6, 2006, at 24 ("European regulators yesterday unexpectedly said they have no objections to the proposed \$13.8 billion (£7 billion) merger between Euronext and NYSE—removing a hurdle for the first transatlantic stock exchange.").

there was before. We used to have a monopoly on that. Our system used to have a monopoly on that. We no longer have that monopoly.

Finally, one of the reasons folks came to the U.S. capital markets, and maybe this is really what defined why it was a magnet for so long, is we offered, effectively, premiums on offerings. It will not be one times book value. It will not be five times book. It will probably be between ten and twenty times book, and in some cases and the Internet bubble, of course, fifty times book. But the reason for that is there was a perception not only of liquidity but transparency. And the transparency was compelled and forced by law. The law and good governance actually created a unique premium here in the United States.

It is no longer the case. The regulatory regimes, although not up to snuff to U.S. regimes, have become more mature around the globe, and there is more transparency for offerings in capital market movements around the globe.<sup>5</sup> And with that enhanced transparency and sense of good governance, maybe not to the excessive levels of Sarbanes-Oxley, its capital has migrated or been attracted.<sup>6</sup> Indeed, we handled an offering last week in China for a company called PetroChina.<sup>7</sup> It was 4,000% oversubscribed, and it sold at a Price-Earnings Ratio of 57.<sup>8</sup> That is what you can do now in the world outside the United States without ever getting to the question of whether the law is a drag. Now, of course the law is a drag, but it is not all a drag.

There have been some positive aspects of Sarbanes-Oxley. Some of them are the same reasons why it was passed when I was in the government. First, it did re-orient us back to first principles—an independent board, an independent auditor, a Chief Executive Officer who is willing to sign the bottom line in a certification that says, “I know what my financials mean, and what they mean is what I tell you,” and then finally a CEO who is also going to be held responsible for whether or not there are

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5. See, e.g., Ehtiopis Tafara, *A Race to the Top*, INT'L FIN. L. REV., Sept 2006, at 12–13.

6. *Id.* at 13 (arguing that the adoption of Sarbanes-Oxley has not disadvantaged the capital markets of the United States simply by virtue of the fact that many provisions of Sarbanes-Oxley have been adopted elsewhere).

7. Bei Hu and Ying Hu, *PetroChina Chooses UBS; Goldman replaced for \$5.9 Billion Share Sale*, INT'L HERALD TRIB., June 28, 2007, at 14.

8. Donald Greenlees, *PetroChina Surges in Shanghai Market Debut*, INT'L HERALD TRIB., Nov. 6, 2007, at 13.

adequate controls that support that certification. Those should be no-brainers. And that is Sarbanes-Oxley.

To the extent it is taken further and it has become clunky and has a lot of excesses, that can be tweaked. And in fact, that is the recommendation of the Paulson Report, which is not, of course, to get rid of it, because these good aspects and first principles are articulated, but rather to streamline it and perhaps make it into a Cadillac from the Chevrolet that it is right now.<sup>9</sup>

There is a second reason why Sarbanes-Oxley was good for something like a galactic enterprise like the place I work for, which is that it actually helped us, forced us, compelled us to look inward—and we were not unique in that—to take a look at what our true operational risks were, to see where the banana peels were, to see where our conflicts might be with clients in the way that we navigate to capital markets, and to be compelled to address them. It was actually a therapeutic, productive, and positive exercise.

Now, it is easy for me to say that because UBS can afford that. The small guy cannot afford that. And actually, it turned into a competitive advantage for us because we can afford that. That is a simple truth. And we shared that with the Secretary of Treasury. As a matter of fact, part of my role as general counsel to the company is we do some politicking here in town, and we go to see the Treasury Secretary, and we present our issues. Now the Secretary, who I knew and served, asked my last CEO, what do you think about Sarbanes-Oxley? And he was ready to be hit over the head with a mallet because he asks that question of all CEOs come and he gets a predictable response.

Well, he was floored because we said we think it is great, great for the reasons I articulated to you and great for another reason. We operate in eighty jurisdictions around the globe. Part of my function is not just legal, but I have 1,500 compliance officers that report to me around the globe. There is a huge compliance cost in getting eighty different rules right, and there is a huge compliance cost in getting them wrong. So I had to invest, if you will, eighty-fold over trying to address different laws in different regimes.

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9. *Treasury Secretary Unveils New U.S. Financial Regulatory Blueprint*, THE LAWYER, Apr. 7, 2008, at 10.

What Sarbanes-Oxley has done is begun to act like a magnet, and what is migrating towards its standards—maybe not the highest of its standards—are regimes around the world who actually perceive the principle of good governance as a competitive advantage, the premium I spoke to you about earlier about capital. So it is not totally a bad report on Sarbanes-Oxley. It has had a global affirming impact, but of course, like I said, there is plenty of work to be done to make it streamlined and to make it fair for the smaller enterprise that cannot do what a UBS can do.

To be sure, when you go around the world you do hear a lot of talk about the negative aspects of U.S. legal and regulatory and ethical regimes. Principally, the first thing you hear about is the complexity. That is a natural consequence of our federalism and, if you will, the Eliot Spitzer phenomenon. It is not just the SEC with which I have to deal; it is fifty different states, and the erosion, if you will, of the doctrine of preemption and the view that there are fifty different views of the law and fifty different kinds of behavior that have to be somehow merged into, and harmonized into how you approach the U.S. jurisdiction. So complexity is the first thing that is on their mind.

The second thing that is on their mind is of course expensive private litigation. I do not have to go further into this subject. This is one of the reasons why the Federalist Society was founded.

Third, of course there is a complaint, a common complaint, it is a convenient complaint, that we are too rules-based and not enough principles-based. That is, we have an enforcement regime orientation of our regulations rather than a prudential regime orientation. And it is true, but the impact of that is overstated.

In the BRIC nations, we need regulatory regimes that mature. We need clarity of law. I do not really want to be subject to a principled regime where regulators who themselves are maturing in their sophistication of how to deal with the capital markets are largely free with abandon to define whether what you are doing is right or wrong. It is hard to challenge the arbitrariness or the capriciousness of a regulator under a principles-based regime which gives it the freedom to look at capital markets, for example, in the same manner as the

Supreme Court here looks at obscenity; “I know it when I see it,” and they will tell you when they tell you.<sup>10</sup>

For example, there is a lot of concern today for the proliferation of CFIUS<sup>11</sup>—like modeled regulatory regimes around the world in response, a political response, backlash against Dubai Ports<sup>12</sup> and against the China National Oil Company—Chevron frustrated merger or acquisition,<sup>13</sup> and there is a lot of concern over at the Treasury Department that this proliferation of FDI laws—that is, laws that regulate foreign direct investment—is a bad and adverse development in global capital markets.

I take a totally different view. It is terrific. For the first time, at least I can benchmark a right that I can assert in China if a deal that we have is denied in an otherwise opaque regulatory regime. Actually, legal rules and laws are helpful. They are not adverse if they are intelligent and if they are always subject to remodeling.

There is another part of the dialogue that you hear when you are abroad with foreign clients about why they are averse to coming to the United States, and frankly it is not a legal as much as it is a political sentiment. It is the sense, if you will, the Dubai port sense of xenophobia in America about concern for the increasing potential adverse strategic impact of sovereign wealth funds and the like investing in the U.S.<sup>14</sup> There is concern for

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10. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

11. U.S. Treasury – The Committee on Foreign Investment in the United States (CFIUS), <http://www.treasury.gov/offices/international-affairs/cfius/> (last visited May 20, 2008) (“[CFIUS is] an inter-agency committee chaired by the Secretary of Treasury. CFIUS seeks to serve U.S. investment policy through thorough reviews that protect national security while maintaining the credibility of [the United State’s] open investment policy and preserving the confidence of foreign investors [in the United States] and of U.S. investors abroad that they will not be subject to retaliatory discrimination.”).

12. See, e.g., Bill Condie, *Dubai Delays Taking Control of US Ports*, THE EVENING STANDARD (London), Feb. 24, 2006, at 24 (“Dubai Ports controversial £3.8 billion takeover of P&O Ports hit a fresh snag today with the company saying it will delay plans to take control of six major US ports . . . [d]espite President Bush’s public support for the deal, he has come under increasing pressure, not least from his own Republican supporters, about waving the deal through.”).

13. See, e.g., David R. Baker, *China Walks Away; San Ramon’s Chevron Is the Only Bidder for Unocal*, S.F. CHRON., Aug. 3, 2005, at C1 (“The Chinese oil company seeking to buy Unocal Corp. dropped out of the competition Tuesday, clearing the way for Chevron Corp., the only other bidder, to buy Unocal for \$17.4 billion.”).

14. See, e.g., Roxanna Tiron, *Dubai Threat to Hit Back*, THE HILL, Mar. 9, 2006, at 1 (“A source close to the deal said members of Dubai’s royal family are furious at the hostility both Republicans and Democrats on Capitol Hill have shown toward the deal.”).

the rule of law protecting property rights, and there is concern for discrimination in access to economic opportunity. That is a bad way to be viewed.

To me, that is the number one legal political issue we need to address. We need to have our markets attractive to private and state capital funds because when money gets invested here, and I know this in particular as a derivative of my work on the Terrorist Financing Task Force for the National Security Council, we not only learn more about each other, but our interests become increasingly allied. So, if I had a panacea to the perception of a Sarbanes-Oxley problem, it is simple: maybe we do not need an SEC. What we do need is a law that promotes transparency and the exercise of fiduciary duty. If one has those two principles and one creates a law which is a safe harbor—and it is probably quixotic, is a safe harbor if you fall within those two principles—then we are going to have free capital movements and the U.S. will be competitive again.

I am going to end on one note. We flatter ourselves as lawyers if we think the principal problem is our legal regime. It is not. The simple truth is the world is getting smarter, more competitive, and flatter.