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GATEKEEPERS, DISCLOSURE, AND ISSUER CHOICE

HILLARY A. SALE*

Disclose, disclose, disclose. Disclose or abstain, disclose or no registration, disclose or be subject to litigation. The securities laws and regulations are full of talk about disclosure that is often mandated by specific regulations detailing what type and amount of disclosure is necessary or mandated by case law making it unacceptable for company officials to tell part, but not all, of the story.

Disclosure is the choice made by the Congress in 1933—a choice to force substantive corporate change only indirectly and thus away from direct substantive or merit-based securities regulation; a choice away from too much interference in state corporate law. Despite 70 years of such lawmaking, the papers on this panel address, again, whether and how the securities laws should address disclosure, and whether issuers should have a choice in the disclosure regime that regulates them.

Disclosure by itself is not the goal of our securities regulation scheme. The goal is quality disclosure to inform shareholders and would-be shareholders. Any debate, then, about issuer choice must address how one measures whether the regime will evaluate the quality of the disclosures within it. In the United States regime, market facilitators are charged with measuring quality, so to speak. Those facilitators, or gatekeepers, are supposed to vet offerings, and their reputations are supposed to serve as the check on their thoroughness. Those gatekeepers, lawyers, accountants, and investment bankers, are, however, the people that let us down in the last decade. Thus, even if we put to one side the problems with the likelihood of success of a competitive securities regulation regime, like path-dependence, any such regime must still address, at least in part, gatekeepers and their role in interpreting information for the market. These are the issues on which I intend to focus.

In an issuer choice world, issuers would choose the regime in which they want to register their securities.¹ In theory, investors, largely institutional

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1. See, e.g., Merritt Fox, *Optimal Regulation Areas for Securities Disclosure*, WASH. U. L.Q. (forthcoming 2003); ROBERTA ROMANO, *THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION* (AEI 2002); Stephen J. Choi, *Promoting Issuer Choice in Securities Regulation*, 41 *VIR. J. INTL. L.* 815 (2001).

ones, could choose not to invest in companies who select a “bad” or inadequate securities regime or could at least demand to pay less for the securities. The geographic restrictions that now exist, prohibiting, for example, companies selling non-U.S. registered securities from selling those securities in the U.S., would presumably no longer exist. But, just as any regime would likely adopt some form of mandatory disclosure, those other regimes would likely still depend on market facilitators or gatekeepers to review and digest information about the issuer as part of the price-setting mechanism.

Under the U.S. federal system of regulation, the gatekeepers are the ones charged with reviewing the merits of the offering or other transaction. In an offering, for example, the merits review occurs mainly in the pre-filing and waiting periods. Several gatekeepers are involved, including accountants, lawyers, and investment bankers. After the Enron scandal, no one doubts that the gatekeeper accountants failed the market.² Although they have received less press, it appears that the lawyers and investment banks also failed the market. Enron’s lawyers at Vinson & Elkins were reportedly involved in the structuring of the now infamous partnership deals and were unwilling to listen to warnings about the “dubious nature” of those deals.³ The lawyers also apparently did tell in-house counsel of the fears they had about Enron deals, and when “rebuffed by Mr. Fastow,” they repeatedly refrained from speaking to other senior executives or the Board.⁴ The Board, however, was the designated client. Other law firms have also been implicated.⁵ The investment banks are subject to criticism as well. For example, one investment bank, Merrill Lynch, reportedly fired its analyst who angered Enron officers by rating the stock neutral.⁶ It did, however, keep the Enron business.⁷

2. See, e.g., Powers Report, Feb. 1, 2002 (noting that Andersen signed off on treatment of Chewco and LJM1 transactions led to Nov. 2001 restatement and billed Enron \$5.7 million beyond regular audit fees for advice in connection with those transactions alone).

3. See *Law Firm Reassured Enron on Accounting*, WALL ST. J., Jan. 1, 16, 2002, at A18.

4. Ellen Joan Pollock, *Lawyers for Enron Faulted Its Deals, Didn't Force Issue*, WALL ST. J., MAY 22, 2002, at A1.

5. See, e.g., Otis Bilodeau, *Enron Probe Examines Firms' Roles*, Legal Times, Mar. 11, 2003 (describing bankruptcy examiners' second report on Enron and noting that reports issued by several law firms were problematic, including reports from Akin Gump Strauss Hauer & Feld, McKee Nelson, Andrews & Kurth, and Vinson and Elkins).

6. See Charles Gasparino & Randall Smith, *Merrill Defends Ties to Enron Before Congress*, WALL ST. J., JULY 31, 2002, at C1; Richard A. Oppell, Jr., *Merrill Replaced Research Analyst Who Upset Enron*, N.Y. TIMES, July 30, 2002; Randall Smith & Anita Raghavan, *Congress Probes Merrill-Enron Deals*, WALL ST. J., July 30, 2002, at C1.

7. See *id.*

What is the problem? In the 1990s, management, venture capitalists, lawyers, investment bankers, and accountants took companies public that probably would not have made the public offering cut in earlier decades. Too many of these market participants were focused on the short run. The motives of those people, greed according to Alan Greenspan, overwhelmed whatever gatekeeping functions they were supposed to be providing.⁸

The greed manifested itself in conflicts. And, those conflicts abound. The lawyers had equity investments in their clients.⁹ So did the venture capitalists, the investment banks, and the analysts themselves.¹⁰ The accountants faced other conflict problems, including client capture due in part to the provision of other non-accounting services.¹¹

These problems are not unique to the U.S., making gatekeeping problems part of any issuer-choice debate. For example, in Germany, Deutsche Bank is under investigation for reiterating a buy rating on Deutsche Telekom stock one day and then selling 44 million shares of that stock the following day.¹² In Great Britain, the role of analysts in U.S. investment banking and their conflicts of interest prompted the British Financial Services Authority to review the work of analysts in its banking industry.¹³ Although the Authority determined that the problems facing the U.S. were not as widespread in England, its report states that many more stocks there receive positive ratings than appears appropriate based on real values.¹⁴ The gatekeeping problem, then, is not confined to the U.S. market and remains an issue for any discussion of issuer choice.

8. Testimony of Chairman Alan Greenspan, Federal Reserve Board's Semianual Monetary Policy Report to the Congress, available at <http://www.federalreserve.gov/boarddocs/hh/2002/july/testimony.htm> (last visited July 17, 2002).

9. See John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 406 (2002).

10. See Jill E. Fisch & Hillary A. Sale, *The Securities Analyst as Agent: Rethinking the Regulation of Analysts*, 88 IOWA L. REV. 1035 (2003) (providing background information on analyst and investment-banking pre-offering equity interests in companies).

11. See Jonathan Macey & Hillary A. Sale, *Commodification, Independence, and Governance: Preliminary Observations on the Demise of Professionalism in the Accounting Profession*, 48 VILLA. L. REV. 101 (forthcoming 2003).

12. See Sam Scott Miller, *Chaperoning Analysts: Procedure to Manage, Minimize, and Disclose Conflicts*, 34 SEC. REG. & L. REP. 879 (June 3, 2002) (noting that German regulators were investigating Deutsche Bank for selling 44 million shares of Deutsche Telekom one day after publicly restating its "buy" rating).

13. See Financial Services Authority Discussion Paper 15, *Investment Research: Conflicts & Other Issues* (July 2002) (paper on file with author) (noting that U.S. problems had to date been less noticeable in London, but recognizing that analyst recommendations were systematically more positive than justified by market performance and suggesting improved policing of analysts and investment banks).

14. See *id.*

In theory, of course, the gatekeeping issues are not overly problematic for issuer choice if the market discounts for them. The U.S. market apparently did not do so in the 1990's. The choice to bring certain companies to market and to engage in creative and risky accounting maneuvers was occurring for years before March of 2000. The market did not, however, reject those risky accounting or investment bank pricing decisions. For example, Enron was creating Special Purpose Entities to move its debt off its balance sheets, a fact that was disclosed in its SEC filings.¹⁵ Yet, the market continued to evaluate its securities at well above the value resulting from full disclosure.¹⁶

The choices Enron was making were very complex and, thus, arguably, problematic to disclose in detail.¹⁷ But the market's failure to adjust for these disclosures when some, including Professor Macey have argued that the information was available,¹⁸ raises serious questions about whether the market is sufficiently informationally efficient to process information necessarily a part of any issuer choice debate, including information about which issuers choose "bad" regulatory regimes and which issuers choose the "good" ones.¹⁹

Professor Macey raises these issues in his paper by asking who are the listeners and are they listening?²⁰ His point is straightforward—the listeners are as important as the disclosers.²¹ He focuses, however, not on investor listeners, but on the intermediary listeners/gatekeepers. Those market facilitators are the demand side of the market equation. And the breakdown in their roles²² raises serious questions about the overall efficacy of our securities regulatory regime. It also raises questions about the efficacy of our mandatory disclosure system—another aspect of the U.S. regime that would presumably be part of any securities regime.²³

The mandatory disclosure system depends on both the disclosers and the listeners. Disclosers are subject to mandatory rules, largely arising from the

15. See Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity* (working paper, Dec. 19, 2002) (discussing complications of disclosure obligations in complex transactions like Enron's special purpose entities).

16. See, e.g., Powers Report, Feb. 1, 2002, at p. 2-3 (describing Enron's restatements due to SPE's and concomitant decline in stock and eventual bankruptcy).

17. See *supra* note 15.

18. Jonathan R. Macey, *A Pox on Both Your Houses: Enron, Sarbanes-Oxley and the Debate Concerning the Relative Efficacy of Mandatory versus Enabling Rules*, 81 WASH. U. L. Q. 329 (2003).

19. See Rebecca Smith, *The Analyst Who Warned About Enron*, WALL ST. J., Jan. 29, 2002, at C1 (describing one analyst who told his clients in August, 2001, that they should sell their Enron securities "at all costs").

20. See Macey, *supra* note 18.

21. See *id.*

22. See generally Jack Coffee, *It's About the Gatekeepers Stupid*, 57 BUS. LAW. 1403 (2002).

23. See Romano, *supra* note 2 at 29-30.

issuer disclosure provisions adopted in and pursuant to the 1933 Act. Until recently, the gatekeepers were, however, largely self-regulated through their reputations, their competitors, the market, and their own rulemaking. These intermediaries are “mechanisms of market efficiency” as defined in Reineer Kraakman and Ron Gilson’s piece by the same name.²⁴ The design of the U.S. system is in part premised on the existence of intermediaries, and they are key to the assumptions about the functioning of an efficient market. Congress chose a disclosure regime that presumes mandated disclosure will prompt truth telling. Gatekeepers are to ensure issuer truth-telling because they will review and cleanse issuer information. Their reputations and the competition for the offering work will ensure that they do their jobs—whether they do so as accountants signing off on audited financials or as investment bankers/analysts opening up the doors of capital to the issuers. What we now know about Enron, and many other companies, is that the gatekeepers did not do their jobs.

Accordingly, any debate about whether the U.S. should reconsider its unilevel regime, opting instead for issuer choice, through either competitive federalism²⁵ or an international system,²⁶ must address the gatekeeping concerns. In 1933 Congress made a clear choice away from rewriting state substantive corporate law.²⁷ Instead, it chose to prescribe a disclosure-based

24. Ronald Gilson & Reineer Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1983).

25. See generally Romano, *supra* note 2 (arguing for competitive federalism); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998).

26. See Stephen Choi & Andrew Guzman, *Portable Reciprocity: Rethinking the Reach of U.S. Securities Regulation*, 73 S. CAL. L. REV. 983 (1998) (advocating choice of regulatory regimes for issuers).

27. The legislative history reveals that Congress intended to force substantive change, but only through disclosure.

Accordingly, the registration of false information under the bill makes not only the issuer, but the directors who sign, civilly liable for return of the money which the purchaser paid for the security.

If a director can excuse himself by saying that he has in good faith relied upon an accountant's statement, or the statement of some other person, then the investor will continue in the same position for which the Nation is struggling to extricate him. It has been stated in prospectuses repeatedly that the information given is believed by the company to be true, but not guaranteed. But it is the issuer who is in position to learn the facts, not the public.

This phase of the law will have a direct tendency to preclude persons from acting as nominal directors while shirking their duty to know and guide the affairs of the corporation. Upon the discharge of this duty the public and stockholders rely in good faith. We cannot but believe that many recent disastrous events in the investment world would not have taken place if those whose names have appeared as directors had known themselves to be under a legal, as well as a moral responsibility to the investing public.

Senate Comm. on Banking and Currency, S. Rep. No. 73-47 (1933), reprinted in 2 J. S. Ellenberger & Ellen P. Mahar, 2 Legislative History, Securities Act 1933, at 5 (1973).

system of federal securities law that applies only to certain companies.²⁸ Once subject to the SEC's jurisdiction, these companies must comply with its disclosure-based regulations. The gatekeepers were supposed to make the merits cut, so to speak, and the statute created duties, subject to liability, to ensure substantive merits review. For example, the accountants are supposed to review the numbers and some percentage of the underlying contracts and other documents to ensure that management-provided numbers are accurate. The investment bankers are supposed to perform their own form of due diligence. And, despite the lack of specific statutory liability, the lawyers are supposed to do the same. With all of these gatekeepers, firms like Enron should not have been able to hide the truth from the market for so long. But, they did.

The Sarbanes-Oxley Act ("Sarbanes-Oxley") is Congress's attempt to address the gatekeeping concerns. And, interestingly, it does so not by keeping the federal government out of state substantive law or allowing the states to take larger roles or create their own securities regulatory systems to compete with the federal regime, but by shifting the debate to one about how much larger the federal government's role in substantive corporate regulation should be. As a result, Sarbanes-Oxley makes it clear that Congress believes that investors want more than just mandatory disclosure, and right now, more is not issuer choice. Congress decided that what investors, or at least voters, want is direct federal regulation of corporate policy and governance. Delaware has been sidelined—at least for the time being.²⁹ Congress has jumped in with some very strong provisions, though, of course, only time will judge their efficacy.

Professor Macey refers to these provisions as facilitating the market through contract enhancement.³⁰ The provisions address many of the gatekeepers' roles. Some call for direct federal intervention in corporate governance—the exact position that Congress declined to take in 1933.³¹ For example, Sarbanes-Oxley creates an entirely new structure for regulating accountants, eliminating the form of self-regulation that existed in the past and creating new corporate governance structures, like specific audit

28. Companies subject to federal securities regulation have either securities listed on a national securities exchange or \$1 million in assets and 500 security holders.

29. See Mark J. Roe, *Delaware's Competition*, (working paper on file with author) (arguing that age-old arguments about race to the top or bottom are misconceived because Delaware's main competition is with federal government).

30. See Macey, *supra* note 18.

31. See Robert B. Thompson & Hillary A. Sale, *Securities Law as Corporate Governance: Reflections Upon Federalism*, 54 VAND. L. REV. (forthcoming 2003) (describing focus of securities laws on disclosure and substance only through disclosure).

committee powers, to address management/auditor capture issues.³² These provisions directly regulate a formerly self-regulated gatekeeping group.

Sarbanes-Oxley also regulates lawyers, another one of the gatekeeping groups that seems to have fallen down on the job. There remains room for considerable discussion about how and whether we did our jobs well, but whatever the outcome of that discussion, Sarbanes-Oxley creates, as a matter of federal law, mandatory whistleblowing obligations for us. The whistleblowing provision addresses what the lawyers refused to do themselves—it creates obligations to report on the lawyer’s clients. The provision also arguably forces a duty of care on partners who, due to the rise in the LLP structure and concomitant elimination of vicarious liability, arguably lack the incentive to monitor their peers early or well enough to catch client/capture problems.³³

In part, these reforms also address the increasing dominance of corporate officers in today’s large and complex companies³⁴ and regulate corporate governance directly, rather than relying on disclosure mechanisms to do so indirectly. For example, Sarbanes-Oxley creates specific roles for audit committees and provisions for whistleblowers and legal counsel and attempts to decrease the conflicts between auditing and other services from auditors. In making these changes, Sarbanes-Oxley strengthens the duties of boards of directors over officers, directly regulates corporate governance, and further enlarges the federal securities regime.

The Act, however, largely ignores one key set of gatekeepers—investment bankers. Although the investment-banking problems may be harder to address as corporate governance problems, for the most part, Sarbanes-Oxley simply does not address them. To be sure, Section 501 prescribes increased regulation of analysts, but the regulations need not come through the SEC. Sarbanes-Oxley leaves the self-regulatory organizations potentially in charge. Those organizations have shown themselves to be unwilling to self-regulate or enforce their regulations. Yet, somehow, unlike the accountants who are now going to be governed by the accounting board, and unlike the lawyers, who neglected to impose ethical limitations on themselves and will now face federal ethical limitations, the investment banks have managed to escape the expanded securities law regime.

32. See Macey, *supra* note 18; see also Macey & Sale, *supra* note 11; see also Jonathan Weil, *Enron’s Auditors Debated Partnership Losses*, WALL ST. J., Apr. 3, 2002, at C1 (describing how accountants at Andersen knew of growing losses but “continued to bend” to Enron executive wishes not to make those losses public).

33. See Macey & Sale, *supra* note 11 (discussing rise of LLP structure and deterioration of partnership incentives to monitor peers).

34. See Greenspan, *supra* note 8.

The investment banks, however, are as much at fault as the other players and have done little to monitor their own conflicts of interest. New York Attorney General Elliot Spitzer's investigations have exposed in detail what the media was reporting for over a decade,³⁵ and what, presumably, the markets ignored. Sell-side analysts were saying anything publicly to hype their employers' companies.³⁶ Privately they were saying the opposite and trading accordingly.³⁷ To be sure, the SRO rules prohibited such stock transactions absent disclosure.³⁸ But, the banks did not bother to keep track of stock ownership, let alone enforce the disclosure rules.³⁹ Instead, they and their clients pressured their employees to give positive reports, rather than to tell the truth.⁴⁰

And, importantly, the investment bank problem goes well beyond analyst conflicts so heavily discussed in the media and referred to in Sarbanes-Oxley. For example, banks have refused research coverage to clients who refuse to hire the bank for an offering, making clients who want coverage captive.⁴¹ The banks have also "sold" their due diligence obligations for other business, resulting in faulty and incomplete disclosures. Consider the role of Salomon Smith Barney ("Salomon") in Adelphia's offerings. Salomon reportedly led Adelphia's \$1.5 billion stock offering and co-managed another \$1 billion stock sale. At the same time, Salomon's parent, Citigroup had serviced \$3.1 billion in loans to a partnership owned by the Rigas family, then in control of Adelphia and now under criminal investigation.⁴² Adelphia was co-borrower on those loans.⁴³ Despite the Salomon/Citigroup connection, the loans were not disclosed.⁴⁴ Moreover, the red flags in the Adelphia financials were apparently sufficient enough that properly conducted due diligence would

35. See, e.g., Michael Siconolfi, *Under Pressure: At Morgan Stanley, Analysts Were Urged to Soften Harsh Views*, WALL ST. J., July 14, 1992, at A1 (describing analyst told by investment-banking counterparts to revise views and reminded that her salary depended on her ability to "attract" investment-banking clients).

36. See Fisch & Sale, *supra* note 10 (describing in detail sell-side analyst conflicts and influence on ratings and investment-banking decisions).

37. See *id.*

38. See *id.*

39. See *id.*

40. See *id.*; see, e.g., Michael Schroeder & Randall Smith, *CSFB Analysts Felt Pressured on Stock Reports*, WALL ST. J., September 6, 2002, at C1 (describing examples of research analysts who felt pressured by their firm not to issue negative reports on clients).

41. See, e.g., Randall Smith & Geeta Anand, *Piper Jaffray is Fined for Research Threat*, WALL ST. J., June 26, 2002, at C1.

42. Deborah Solomon, *Salomon Draws Focus Over Work for Adelphia*, WALL ST. J., June 5, 2002, at C1.

43. See *id.*

44. See *id.*

have raised the question and turned up the answer.⁴⁵ Instead, the result was incomplete due diligence and questions about conflicts.

Citigroup's maneuver to use its lending capacity as leverage to "secure other, more lucrative securities" underwriting business with Adelphia is apparently not uncommon.⁴⁶ Several banks were criticized for similar concerns involving Enron.⁴⁷ Indeed, the investment banks involved with Enron reportedly wore a "number of conflicting hats."⁴⁸ The District Court analyzing the Enron complaint found that the plaintiffs had pleaded facts with sufficient particularity against several banks, denying the motions to dismiss of JP Morgan, Citigroup, Credit Suisse, CIBC, Barclay's, and Merrill Lynch.

Although they were similar, the allegations against each bank had unique twists.⁴⁹ For example, in addition to underwriting securities and providing positive research on Enron, approximately 100 Merrill Lynch executives were reported to have invested more than \$16 million of their own funds in the LJM2 Co-Investment LP. That entity was one of the now infamous and largest off-balance sheet special entities.⁵⁰

Then, there are the two investment bankers at Credit Suisse First Boston that apparently helped design some off-balance sheet entities while serving as directors of those same entities.⁵¹ The entities, of course, allowed Enron to keep the appearance of its debt level low and, accordingly, maintain investor interest in its stock and its credit rating.⁵² JP Morgan allegedly disguised approximately \$5 billion in loans, made just before the end of a quarter, as commodity trades.⁵³

The Enron court also refused to dismiss allegations claiming that Citigroup, Credit Suisse, and CIBC were involved in providing money as "investors" that helped to enable the New Power IPO.⁵⁴ In return, the banks received a "total return swap" guarantee against any loss to be sustained by New Power.⁵⁵ The court also found allegations that Barclay's undisclosed

45. *See id.*

46. *See id.*

47. *See id.*

48. *See* Charles Gasparino & Tom Hamburger, *Congress Broadens Probe of Enron Fall and Wall Street Role*, Mar. 7, 2002, WALL ST. J., at C1.

49. *See In re Enron Corp.*, 235 F. Supp. 2d 549, 638-656 (S.D. Tex. 2002).

50. *See* Gasparino and Hamburger, *supra* note 48, at C15; *see also Enron*, 235 F. Supp. 2d at 696-99.

51. *See* Charles Gasparino & Randall Smith, *CSFB Bankers Served as Directors of Enron Entity*, WALL ST. J., June 5, 2002, at C1.

52. *See id.*

53. *See Enron*, 235 F. Supp. 2d at 695-96.

54. *See id.* at 698.

55. *See id.*

demand of repayment of its investments in off-balance entities provided sufficient evidence of scienter at the motion to dismiss stage.⁵⁶ These alleged conflicts go well beyond the analyst conflicts that have received so much press and regulatory attention. Yet, they are not addressed by Sarbanes-Oxley.

And, that is not the end of the story. There is still the spinning problem. Although under investigation right now, spinning, the practice of providing shares of hot IPOs to CEOs, CFOs, and others in order to gain their companies' investment banking business, has existed for a long time.⁵⁷ Banks have used spinning in combination with laddering, requiring spinnees to buy more shares in the aftermarket, not only to snare business, but also to help meet aftermarket stabilization goals.⁵⁸ Laddering is clearly illegal, but few doubt that it occurred during the 1990s.⁵⁹ Everyone comes out ahead except those who cannot access the IPO and buy only at the inflated aftermarket price.⁶⁰

And, finally, there are the loans made by the investment banks to their clients that have been illegally recognized as revenues. For example, Merrill Lynch has agreed to pay \$80 million to settle allegations that it assisted Enron in improper revenue recognition.⁶¹ Allegedly, Merrill Lynch was involved in helping Enron close two transactions that allowed Enron to recognize revenue from the sale of the entities.⁶² As a result, Enron was able to meet analysts' revenue projections for the quarter in question.⁶³ Although the transactions involved Merrill purchasing assets from Enron, it promptly resold them to Enron in the next year.⁶⁴ Thus, the transactions at issue were really loans, not properly recognized as revenue. As discussed above, the District Court opinion in the Enron securities-fraud, class-action litigation indicates that Merrill Lynch was not alone in its problematic banking behavior. And, importantly, these problems have nothing to do with the analyst issues that have gained media and Congressional attention.

56. *See id.* at 703.

57. *See* Randall Smith & Susan Pulliam, *How a Star Banker Pressed for IPOs*, WALL ST. J., Sept. 5, 2002, at C1; *see also* Therese Maynard, *Spinning in a Hot IPO—Breach Of Fiduciary Duty or Business As Usual?*, 43 WM. & MARY L. REV. 2023 (2002).

58. *See* Randall Smith, *IPO 'Laddering' Case Expands*, WALL ST. J., Feb. 26, 2003, at C1.

59. *See id.*

60. *See id.*

61. *See* Randall Smith, *Merrill to Settle with SEC Over Enron-Related Matter*, WALL ST. J., Feb. 21, 2003, at C1.

62. *See id.*

63. *See id.* at C11.

64. *See id.* at C1.

The banks have been pressured to settle and reform their practices with respect to analysts, in large measure due to Attorney General Elliot Spitzer's wide-ranging investigations.⁶⁵ But, the amount the banks have agreed to pay to settle those investigations is paltry relative to their earnings during the IPO heyday.⁶⁶ Merrill Lynch paid \$100 million to settle the possible charges against it. The other banks have joined forces for a joint settlement that will total \$1.4 billion, including \$900 million in penalties and \$535 million for independent research and investor education.⁶⁷

By way of comparison, Wall Street research budgets reportedly peaked at double the settlement amount in 2000.⁶⁸ The pretax profits of the securities industry in the late 1990s are estimated to have been \$16.3 billion in 1999 and \$21 billion in 2000.⁶⁹ The number for 2001 was estimated to be \$10.4 billion. And, most of the settlement will be tax deductible, with only about \$450 million falling in the non-deductible fine or penalty categories.⁷⁰ Add to the tax benefits the fact that much of the settlement cost is likely to be covered by insurance payments, and the result in terms of pain is arguably "trivial."⁷¹

Despite all of these problems and the settlements, the investment banks are still primarily self-regulated. Of course, if the investment bankers fail to do due diligence, they can be sued. But the courts and Congress have created significant barriers to the original causes of action, leaving litigation of those claims a diminished enforcement vehicle.⁷² As a result, self-policing remains

65. See Fisch & Sale, *supra* note 36 (describing Spitzer's Merrill Lynch investigation and resulting settlement). At the time this Article went to press, the banks were reportedly settling SEC allegations related to the shareholder claims in Enron. Although the banks did not admit "wrongdoing," Citigroup, Inc. and J.P. Morgan agreed to pay \$305 million and indicated that they had changed their procedures and had adopted some changes designed to increase their responsibility for the accuracy of issuer disclosures. Mitchell Pacelle & Laurie P. Cohen, *J.P. Morgan, Citigroup Will Pay \$305 Million to Settle Enron Case*, WALL ST. J., July 29, 2003, at A1. In addition, Stephen J. Cutler, head of the SEC's enforcement office, stated that the banks were paying the money and make the changes after "'helping to commit a fraud' on Enron's shareholders. *Id.* Of course, whether the proposed changes will result in improved gatekeeping remains to be seen. See *id.* at A2.

66. See, e.g., Randall Smith and John Hechinger, *Former Unit of FleetBoston Receives Fines*, WALL ST. J., Jun. 10, 2003, at C1 (noting that FleetBoston agreed to pay various fines for IPO problems but that only \$5 million of total settlement was attributed to allegedly fraudulent stock research lacking conflict of interest disclosures).

67. See *id.*

68. See Randall Smith & Charles Gasparino, *Analyst Inquiry May Cost Wall Street \$2 Billion*, WALL ST. J., Oct. 28, 2002, at C1.

69. See *id.*

70. See Gregory Zuckerman, *Wall Street's Settlement Will Be Less Taxing*, WALL ST. J., Feb. 13, 2003, at C1.

71. See *id.* (quoting Samuel Hayes, professor at Harvard Business School).

72. See Hillary A. Sale, *Disappearing Without a Trace: Sections 11 and 12(a)(2) of the 1933 Securities Act*, 75 WASH. L. REV. 429 (2000) (describing evolution of common law tracing doctrine).

the primary vehicle for addressing concerns. The self-regulatory organizations, however, have been vilified for their failure to do much, if any, self-policing.⁷³ In the Enron fallout, the organizations have promulgated new rules, again largely focused on analyst issues, but whether they will be better at enforcing them remains to be seen.⁷⁴ The SEC has approved several new regulations proposed by the SROs, but the rules actually do little to eliminate the conflicts that caused the problems.⁷⁵ Instead, the rules and the substantive aspects of the settlements focus largely on disclosure and, mostly, analysts. Whether the disclosure remedy offers much is open to question. After all, if disclosure worked, the newspaper reports going back to the early 1990's should have taken care of the problem. And, of course, the SEC, which has the power to enforce the SRO rules, has declined to do so in the past.

Congress sidestepped. Having ducked the accountant issue in the past, last year Congress stepped up to prescribe direct regulation of accountants.⁷⁶ However, its response to the Enron crisis with respect to analysts was minimal and nonexistent on the other investment banking conflicts detailed above. Given the other substantive changes in Sarbanes-Oxley, the absence of prescriptions for these key market gatekeepers is noticeable.

Why? First, the investment banks have made it clear that they do not want any further regulation, pushing hard to stop any further investigations like those of A.G. Spitzer who has benefited from a unique state law. The banks have stated that they want no more power for state securities regulators post-Enron and post-Spitzer.⁷⁷ This position is not new.⁷⁸ After all, one system is easier to master and dominate.⁷⁹ Indeed, path dependence poses problems for any change in regimes.

and its impact on motions to dismiss); Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537, 583-86 (1998) (detailing evolution of sounds-in-fraud doctrine as applied to strict-liability and negligence-like claims at motion to dismiss stage).

73. See, e.g., Randall Smith & Susan Pulliam, *How a Star Banker Pressed for IPOs*, WALL ST. J., Sept. 5, 2002, at C1 (reporting SRO investigation, with no cases ever brought, of spinning in 1997).

74. See, e.g. Fisch & Sale, *supra* note 36 (discussing new rules on analysts).

75. See *id.*

76. Michael Schroeder & Greg Hitt, *Congress Fought Changes to Accounting Rules Over Past Decade*, WALL ST. J., Jan. 24, 2002, at A20 (reporting that Congress should "shoulder some of the blame" for the Enron mess, because of its repeated refusal to respond to attempts by SEC and others to improve accounting regulation).

77. See Charles Gasparino, *Morgan Stanley Goes to Washington*, WALL ST. J., June 21, 2002, at C1.

78. See Romano, *supra* note 1.

79. See *id.*

And, ties between the securities industry and members of Congress are extensive. Members of Congress have benefited from investment bank largesse. Some members benefited from spinning, receiving IPO shares at the offering price that they were allowed to flip in the market at easy profits.⁸⁰ Indeed, although the settlement addressing analyst issues prohibits spinning, it prohibits spinning only to issuer clients, not to members of Congress or others.

Investment banks are also a “powerful lobbying force.”⁸¹ In 2000, the year of the market crash, securities and investment firms gave \$91.7 million to candidates and parties.⁸² After law firms and retired individuals, they were the third highest givers.⁸³ And, the Washington Post recently reported that six sources, “both Republicans and Democrats” said that members of Representative Oxley’s staff had “suggested that a congressional probe [of the mutual fund industry] might ease up if the trade group complie[d] with their wishes”⁸⁴ to hire a republican lobbyist rather than the democrat the industry has long used.⁸⁵ No decision has been made about whether an ethics probe into Representative Oxley should be commenced, but the matter remains under consideration.⁸⁶ Whether there is a correlation between the gifts and the ties and the lack of attention given to these problems in Sarbanes-Oxley is a subject for another paper; the reality is a lack of effective federal regulation and enforcement, whatever the cause.

In conclusion, it appears that Enron and other corporate crises have sidelined the debate about issuer choice—at least for now. Instead, in Sarbanes-Oxley, Congress passed a set of serious reforms to the federal securities laws. Those reforms increase the role of the federal government in securities regulation and take the first direct steps toward federal regulation of corporate governance. The legislation does not, however, address at least one key group of the gatekeeping regime, investment banks, on which any system of securities governance would depend.

The political clout of the bankers poses a serious hurdle to any system of issuer choice. To date, the bankers have indicated that they prefer to keep the

80. See Christine B. Whelen & Tom Hamburger, *IPO Largess Flowed to Capitol Hill*, WALL ST. J., Jul. 6, 2002, at A4 (Sept. 6, 2002) (listing members of Congress who benefited from investment bank largesse through IPOs in 1990s).

81. See Commentary: Grill Wall Street’s Kingpins Next, BUS. WK., Mar. 25, 2002, available at http://www.businessweek.com/print/magazine/content/02_12b3775007.htm?mz.

82. See *id.*

83. See *id.*

84. See *The Ethics Committee’s Job*, Editorial, WASH. POST, Feb. 28, 2003, at A22.

85. See Jim VandeHei & Kathleen Day, *Oxley May Face Ethics Probe*, WASH. POST, Feb. 26, 2003, at A4.

86. See *id.*

federal regime unified—not to have a double regime. Whether they would support a world in which they can choose between the federal government and a particular state regulator remains to be seen, but their effectiveness with Congress may well indicate that there is no reason for them to want a change. Why lobby fifty states when one Congress is all it takes?

Finally, and, perhaps most importantly, unless the problems with the gatekeeping mechanisms are thoroughly addressed, issuer choice should properly remain off the table. Before we can resolve whether issuer choice is preferable to a unified federal regime, we have to address whether the gatekeepers are doing their jobs—both here and abroad. Without them, the market mechanism on which the theory of issuer choice relies, at least in part, is insufficient to convey to investors accurate information about the choice of regulatory regime and what it might reflect about the issuer in question. To date, at least with respect to investment banking, Congress has chosen not to address at least one of the key facilitators, the investment banks. And, given the infrequency with which Congress makes securities law changes, new legislation making such changes appears unlikely.