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To: NYU Law and Economics Colloquium Participants

From: Roberta Romano

I apologize that the cross-references in the footnotes and the pagination of the table of contents are incorrect, and some formatting may be off. The paper is in the midst of the initial stage of the law-review editing process. In addition, there is no table 5 in the draft—it has been moved to the appendix as Table A6, but the text tables have not been renumbered; the references to table numbers in the text are correct. I am looking forward to the colloquium.

Does the Sarbanes-Oxley Act Have a Future?

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Abstract

Although the enactment of the Sarbanes-Oxley Act (SOX) received nearly unanimous congressional support, only a few years thereafter its wisdom was increasingly questioned and its supporters had to stave off attempts to recraft the legislation. The financial crisis of 2008 has sidelined efforts to alter the legislation's most costly provision, as Congress's attention has turned to overhauling the regulatory regime for financial institutions. There is, nonetheless, much to be learned about financial regulation and SOX's future, from a detailed examination of the interplay of the government and private commissions created with an eye to revising the legislation, media coverage of those entities, and congressional responses. That interaction provides a map of political fault lines and assists in forecasting the prospects for recrafting SOX's most costly provision. It also serves as a cautionary tale regarding significant regulation enacted in the midst of a financial market crisis. The ongoing financial crisis has pushed reforming SOX down on the legislative agenda, but SOX's burdensome costs suggest that it might well, in due course, reemerge as a political issue. '

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Table of Contents

I. Introduction	3
II. The Making of SOX and the Subsequent Pushback	9
A. Primer on the Enactment of SOX	10
B. Post-SOX Pushback	15
1. SEC Advisory Committee on Smaller Public Companies	16
2. Committee on Capital Markets Regulation.....	23
3. McKinsey & Co. Study for Senator Schumer and Mayor Bloomberg	27
4. Commission on the Regulation of U.S. Capital Markets for the 21 st Century...29	
C. The Empirical Literature on SOX and Its Relationship to the Reports' Critiques	34
III. The Media and Congress Respond to SOX's Consequences	40
A. The Relation between the Media, Issue Saliency, and Public Policy	41
B. Post-SOX Media Coverage	45
1. Scope of Media Coverage.....	45
2. Coverage of SOX's Impact on Small Firms and Market Competitiveness.....49	
a. Temporal pattern of reporting on criticisms of SOX	50
b. Substantive pattern in the coverage of SOX critiques.	51
3. Coverage of the Commissioned Reports.....	56
a. Coverage of the Advisory Committee.....	57
b. Coverage of the Capital Markets Committee, McKinsey Study and Chamber of Commerce Commission.....	58
4. Saliency of Post-SOX Pushback Reporting.....	61
C. Congressional Responses	67
1. Congressional Activity on SOX	67
2. Votes on Revising SOX	70
a. Senate	70
b. House	80
IV. Prognosis on SOX.....	89
A. The Path of Legislative Revisions	90
B. Prospects for the Recrafting of SOX.....	94
1. The Prospective Impact of Changes in the Political and Economic Environment...95	
2. Predicting SOX's Revision by a Model Focused on Congressional Characteristics...9	
C. A Thought Experiment: If Revised, What Is the Most Probable Shape of Revision of SOX?.....	102
D. Market Competitiveness Concerns	110
E. A Lesson of SOX: The Need for Sunset Provisions.....	112
V. Conclusion	113

“There is no way in a million years we will move to an insane regulatory system like Sarbanes-Oxley.”²

I. Introduction

The history of federal securities regulation can best be broadly characterized as one of episodic expansion of regulatory scope within a disclosure regime. The regulatory approach that the landmark federal legislation of the 1930s took is one of disclosure. In contrast, most U.S. states’ securities laws had prohibited the sale of securities not meeting state regulators’ approval. Congress periodically has revisited the scope of federal regulation. The greatest expansion occurred in the 1960s, when federal regulation was extended to stocks traded over the counter and to cash tender offers.³ In the 1970s, Congress enacted legislation requiring public companies to maintain accurate books and records in the wake of the revelation of U.S. companies’ questionable payments to foreign officials.⁴ Then, in the 1980s, Congress increased sanctions for insider trading after a series of high profile insider trading cases involving hostile takeovers.⁵

² Martin Graham, overseer of AIM, the London Stock Exchange’s market for small firms, quoted in Carrick Mollenkamp & Alistair MacDonald, *English Lesson: Uncertain AIM: A Hot Market in London Has Its Risks Too—Exchange’s Light Regulation Attracts Small Companies But Some Shares Do Badly—Keeping Eye on the ‘Nomads’*, WALL ST. J., Dec. 20, 2006, at A1.

³ Securities Acts Amendments, Pub. L. No. 88-467, 78 Stat. 565 (1964); Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968). The Securities and Exchange Commission advocated these jurisdictional expansions. However, not all of its expansionary efforts have succeeded; for an account of the agency’s failure to obtain jurisdiction over equity derivatives see Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 YALE J. ON REG. 279 (1997).

⁴ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977).

⁵ Insider Trading Sanctions Act, Pub. L. No. 98-376, 98 Stat. 1264 (1984); Insider Trading

By the 1990s, however, the regulatory imperative took another turn, as Congress focused on class actions and enacted legislation restricting private civil litigation for securities violations.⁶ That legislation reinforced a line of Supreme Court decisions, originating in the 1970s, in which the Court raised the bar for private plaintiffs seeking to recover damages for federal securities violations. The Securities and Exchange Commission (“SEC”), by contrast, has sought to overturn court decisions restricting private securities litigation.⁷

Following spectacular corporate failures in 2001 and 2002, Congress once again expanded the reach of federal regulation with the enactment of the Sarbanes-Oxley Act (“SOX”).⁸ SOX increased the regulation of accounting firms as well as of issuers by creating a new regulator for the accounting profession, the Public Company Accounting Oversight Board (“PCAOB”), and by imposing governance mandates on public companies. The corporate governance requirements include CEO and CFO attestations of internal controls and financial statement accuracy, mandates regarding audit committee composition and functioning, forfeiture of CEO incentive compensation upon issuance of an accounting restatement, and prohibition of executive loans and

and Securities Fraud Enforcement Act, Pub. L. No. 101-704, 102 Stat. 4677 (1988).

⁶ Private Litigation Securities Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995); Securities Litigation Uniform Standards Act, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

⁷ In addition to advocating to Congress to override Supreme Court decisions in the 1990s, see note 7 *supra.*, most recently, in a divided vote, the Commission requested the Solicitor General file a brief supporting an effort to revive secondary liability for securities violations in private lawsuits, which had been eliminated by the *Central Bank* decision. The SEC has advocated this position for over a decade. *Cox, Atkins, Casey Explain Reasons for Diverging on Scheme Liability Issue*, 22 Corp. Counsel Weekly (BNA) 201 (July 4, 2007) [hereinafter *Scheme Liability*]. The vote is discussed further in note 42, *infra*.

⁸ Pub. L. No. 107-204, 116 Stat. 745 (2002).

the purchase of non-audit services from auditors.⁹

A distinctive feature of SOX is its break with the historic federal regulatory approach to require disclosure and leave substantive governance rules to the states' corporation codes. Only a small number of provisions in SOX follow the conventional regulatory strategy of disclosure requirements, and these are decidedly less important in the statute's regulatory schema than the substantive regulations. Even more striking, however, is that only a few years after enactment, widespread dissatisfaction has been expressed over SOX's regulatory cost. In particular, calls for rolling back the most burdensome provisions of SOX occurred with increasing frequency as a series of government- and privately-sponsored commissions endorsed such an approach over 2006 to 2007.

The commissioned reports' recommendations have been informed by two concerns: a disproportionate impact of SOX on smaller public firms, and a perceived weakening in the competitiveness of U.S. capital markets post-SOX. Underscoring those concerns, the reports point, with varying degrees of emphasis, to a significant decrease in the number of new foreign listings and public offerings on U.S. exchanges, and a commensurate increase in foreign delistings and domestic going private transactions. The most plausible reading of the empirical academic literature on SOX lends support to the reports' implication that for many firms, any benefit generated by the legislation may be incommensurate with the cost.

The sea change in the perception of SOX's value and the willingness to advance an agenda

⁹ 15 U.S.C. sect. 7241 (certification of financials); 15 U.S.C. sect. 1350 (criminal liability for knowingly violating certifications); 15 U.S.C. sect. 7262 (internal controls); 15 U.S.C. sect. 78j-1(m) (audit committee independence and functions); 15 U.S.C. sect. 7243 (forefeiture of incentive comp. on restatement); 15 U.S.C. sect. 78m(k) (executive loan prohibition); 15 U.S.C. sect. 78j-1(g) (non-audit services).

of lightening its regulatory burden is astounding given the overwhelming support for the legislation at the time it was enacted. As a result, until the financial crisis of 2008 redirected, indeed consumed, legislators' attention, displacing virtually all other legislative matters, SOX's advocates were increasingly finding themselves in a politically defensive posture, having to justify, and stave off attempts to dismantle, key components of the legislation. Even if the political environment had not altered congressional priorities, SOX's supporters -- who include some key legislators--would be, of course, in a formidable defensive position. It is a daunting task to revise legislation, given the organization of U.S. politics: There are multiple veto points throughout the legislative process, and a supermajority rather than majority can be necessary in the Senate to alter the status quo. The U.S. Constitution requires the approval of both chambers of Congress and the President in order to pass a law; each chamber's rules route bills through subcommittees and then full committees before they can reach the floor for a vote; and under the Senate rules a supermajority of 60 votes is required to invoke cloture and limit debate on legislation.¹⁰ But the widespread criticism of SOX has had a discernible effect, causing the SEC to revisit its implementation in order to take preemptive action that could deflect and drain the energy behind efforts by Congress and business interest groups to revamp the legislation.¹¹

The first Part of the article frames the analysis of SOX by providing a thumbnail sketch of its making: the legislation was enacted in a crisis atmosphere in the wake of a series of spectacular

¹⁰U.S. Const. art. 1, sect. 7; Steven S. Smith et al., *The American Congress* (5th ed. 2007) 34, 208, 212, 221-22.

¹¹ E.g., U.S. Securities & Exchange Commission, "Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities and Exchange Commission, Interpretation," Rel. Nos. 33-8810, 34-55929, 72 Fed. Reg. 35923 (codified at 17 CFR Part 241) (June 27, 2007), see *infra* (discussion of SEC decision to revise guidelines).

accounting frauds at major public corporations. It then introduces the post-enactment policy debate, as framed by reports that call for alteration in SOX's implementation given its burdening of small firms and U.S. capital markets, and the muted response of key legislators and the SEC to those appeals. Subtle focal differences among the reports highlight the differing agendas of those affected by SOX and thus point to where the political fault lines for coalition bargaining are in consideration of SOX's future. The Part concludes with a brief overview of the empirical literature that bolsters the concerns raised in the reports.

The second Part of the article focuses on the responses of the media and of Congress to the critiques of SOX voiced in the commissioned reports. In particular, it analyzes the coverage by leading business journalists and national and regional newspapers of the reports and their critiques of SOX for adversely impacting small firms and U.S. capital markets. The rationale for the inquiry is that it will facilitate gauging the political support for revamping SOX, along with the scope that any congressional initiative might take, as the media seeks to inform and shape the debate: an empirical literature has identified a connection between the saliency with which an issue is covered in the media and changes in public policy. The Part then analyzes congressional responses to the reports and critiques of SOX, including two congressional votes aimed at mitigating the legislation's impact on small firms.

Having sought to gauge the political economy of where we are and how we have gotten here, the final Part provides a prognosis of SOX's future and the impact of the recent financial panic and ongoing economic crisis on those prospects. It begins with a reference to Congress' imposition of internal control requirements in the Foreign Corrupt Practices Act ('FCPA'), which provides a suggestive and helpful template for evaluating SOX's prospects. Paralleling the aftermath of SOX, only a few years after the FCPA's unanimous adoption in 1977, critics contended that the statute

generated significant cost and liability issues, and was adversely affecting the ability of U.S. firms, particularly small ones, to meet foreign competition.¹² In 1988, over a decade after its enactment, the FCPA was revised with the aim of addressing those concerns. That response could be characterized as swift in comparison to the recrafting of other ill-advised financial regulation. For example, the Depression-era Glass-Steagall Act's separation of commercial and investment banking, which is thought to have contributed to the banking debacle of the 1980s, took decades to repeal.¹³

The core lesson to be learned from federal financial market regulation is that modification of poorly conceived legislation can take years, if not decades, to accomplish, despite the best judgment of the academic and business community that the legislation is, in significant parts, profoundly flawed. With that general backdrop, the article then evaluates the possibility of SOX's recrafting. It concludes that, notwithstanding considerable dissatisfaction with SOX, absent either a dramatic change in the political environment, or a successful public campaign to link the costs of SOX to a recessionary economy, it could well take a considerable length of time before SOX's most severe shortcomings are adequately addressed.

In the wake of the financial crisis of 2008, Congress appears to be poised to adopt far-reaching reworking of the regulatory architecture for financial institutions. As I read the

¹² Ronald O. Gray, *The Foreign Corrupt Practices Act: Revisited and Amended*, 29 BUS. & SOC. 11 (1990). The House vote on the conference bill of the FCPA is at 123 Cong. Rec. 38779 (Dec. 7, 1977) (vote of 349 yeas :0 nays, 85 not voting); the House vote on its own bill, and on replacing the Senate bill with its own bill, were voice votes, which are reported as approved at 123 Cong. Rec. 36306, 36308 (Nov. 1, 1977). The voice vote approving the Senate bill is noted at 123 Cong. Rec. 13818 (May 5, 1977); the voice vote in the Senate approving the conference report is noted at 123 Cong. Rec. 38603 (Dec. 6, 1977).

¹³ James R. Barth, R. Dan Brumbaugh, Jr. & James A. Wilcox, *Policy Watch: The Repeal of Glass-Steagall and the Advent of Broad Banking*, 14 J. ECON. PERSP. 191, 192 (2000).

politics, attitudes toward SOX have not been altered by the crisis—after all, SOX's governance provisions did not prevent financial firms' collapse. Rather, SOX has moved down on the policy agenda as congressional priorities have shifted to respond to a financial panic and the most severe economic crisis since the Great Depression. This shift in congressional priorities, in my judgment, makes this article's focus even more timely: the politics of SOX, in which hastily crafted legislation imposes costs incommensurate with the benefits but a cumbersome legislative process renders it difficult to repeal provisions creating a drag on economic activity, should serve as a cautionary tale for those wishing to enact comprehensive financial market reform.

II. The Making of SOX and the Subsequent Pushback

SOX was enacted toward the end of July 2002, a few days after the bankruptcy filing of WorldCom. That event was the culmination of a series of spectacular accounting scandals commencing with Enron's collapse in the fall of 2001. Congress held numerous hearings on Enron's demise, and the legislative response began in March 2002 with the passage of campaign finance reform,¹⁴ a subject far afield from both SOX and the specific circumstances of Enron's decline. The making of SOX took less than half a year, as the initial House committee hearings were held in December 2001 in the wake of Enron's bankruptcy filing, and it was not until March that any hearing focused on a specific legislative proposal.¹⁵

¹⁴ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). For a discussion of how the Enron scandal resuscitated campaign finance reform, see Allan J. Cigler, *Enron, a Perceived Crisis in Public Confidence, and the Bipartisan Campaign Reform Act of 2002*, 21 REV. POLY RES. 233 (2004).

¹⁵ *The Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002: Hearings on H.R. 3763 Before the H. Comm. on Fin. Servs.*, 107th Cong. (2002) (hearings on bill held March 13 and 20, 2002, and on the minority bill April 9). The enacted legislation was the Senate bill, on which no hearing was ever held. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L. J. 1521, 1570 (2005).

A. Primer on the Enactment of SOX

Throughout the time frame in which Congress considered a legislative response to the Enron scandal, the stock market was tanking. The stock market low—which represented a loss of more than one-third of the value of the S&P 500 composite index from the previous year—occurred two days after WorldCom’s bankruptcy filing, while the legislation was in conference after the two chambers enacted different bills.¹⁶ This was also only a few months before the 2002 midterm elections. Not surprisingly, Members of Congress were particularly attentive to market events: the drop in the market spurred the Senate into action. In the floor debate on the bill, Senators referred to the steep market decline as a compelling rationale for legislation.¹⁷ Such a response to a financial crisis is certainly not exceptional. Most securities legislation in the United States, as well as the United Kingdom, has been enacted in the wake of stock market crashes.¹⁸

As the market was collapsing, public confidence in business was also declining, reaching a low point in the June 2002 Gallup public opinion poll, in which only twenty percent of respondents expressed confidence in business,. Over the previous six years the proportion had ranged between 28-31 percent.¹⁹ No doubt the drop in public confidence was related to the drop in the stock market.²⁰ Not surprisingly, the accounting scandals became the subject of a media frenzy, which

¹⁶ Romano, SOX, now in note 24, at 1557-58, 1546-47

¹⁷ Romano, SOX now in note 24, at 1546

¹⁸ Stuart Banner, *What Causes New Securities Regulation? 300 Years of Evidence*, 75 WASH. U. L. Q. 849 (1997).

¹⁹ Gallup polls are compiled in Romano, *supra* note 14, at 1525.

²⁰ The correlation between the S&P 500 composite index and the percentage of the public expressing confidence in business is a significantly positive .55. *Id.* at 1524, n.7.

would appear to have further contributed to a shift in sentiment by increasing the salience of the scandals. From January to July 2002, 471 of 613 business-related news stories on the major network evening news were on corporate scandals, compared to 52 of 489 business stories in the same period the previous year. One hundred ninety-five of the stories connected Congress to the scandals while 188 connected the scandals to the Bush Administration.²¹ Even more to the point, over eighty percent of those news stories looked to government to solve the perceived problem.²² It was not, however, self-evident that legislation would be enacted prior to WorldCom's demise. That firm's failure, however, renewed calls in the media for legislative action and criticism that the Republican party's legislative program was woefully inadequate, that is, not sufficiently regulatory in approach.²³

The House, which the Republicans controlled, had passed a bill in April. The Senate did not begin consideration of legislation until July. The Democrats narrowly controlled the Senate with a bare one vote majority and needed bipartisan support in committee to have any possibility

²¹ The data on media coverage are reported by Karlyn H. Bowman, *Sarbanes-Oxley and Public Opinion After Enron and WorldCom.*, May 4, 2004. www.aei.org/events/eventID.809,filter.all/event_detail.asp, and were compiled by the Media Research Center. Hamilton contends that television news coverage is driven by financial considerations. In particular, he contends that news content is directed at the marginal viewing audience most desired by advertisers: young women. This audience tends to be liberal and more interested in "soft" news, such as human interest stories and stories about crime and the problems of families with children, than "hard" news about public affairs or business. JAMES T. HAMILTON, *ALL THE NEWS THAT'S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS* (2004). The heightened business news coverage related to the scandals, such as the loss of jobs and pensions of Enron employees, would, in fact, seem to fit in the category of human interest stories that appeal to the viewers the networks would seek to attract.

²² Bowman, *supra* note 30.

²³ Romano, *supra* note, at 1556-58, 1567.

for success in enacting a bill.²⁴ Until the WorldCom scandal broke, the Senate ignored the House bill, and the Senate bill was languishing in committee.²⁵ Now spurred into action by the revelation of fraud at yet another large public corporation, the Senate severely limited consideration of the legislation by adopting a cloture motion, which restricts debate time and permissible amendments.²⁶

Indeed, Senate Republicans, who had been criticized in the media for adopting a dilatory strategy, began to press for expedited consideration, calculating that they would fare better in conference and be able to negotiate a bill closer to the House than the Senate one. That was not to be, for shortly after the conference commenced, WorldCom filed for bankruptcy and as one lobbyist put it, “When the WorldCom scandal hit, it became . . . a very different attitude and atmosphere, if not a political tsunami.” Republicans capitulated, fearing further revelations of corporate misconduct and delay in acting on legislation to address the scandals would be

²⁴ The Senate work product is thought to be less partisan than that of the House because Senate rules require a supermajority of sixty percent to end debate and move on legislation, rather than a majority, and the majority party most typically does not have supermajority control, as was the case in 2002. See SARAH A. BINDER, *STALEMATE CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 98 (2003). For more detail on the legislative history described in the previous sentences see Romano, *supra* note , at 1545

²⁵ The Senate Bill was drafted by the liberal Democrat Finance Committee Chairman, Paul Sarbanes, as an alternative to the less intrusive regulatory approach of the House Republicans’ bill. According to a well-accepted and widely used measure by political scientists of legislators’ ideology (the ‘DW-NOMINATE’ score, constructed by Keith Poole and Howard Rosenthal), for the 107th Congress in which SOX was enacted, Senator Sarbanes’ score of -.555 was in the most liberal quintile of Democrats. The scores and a brief explanation of the methodology are available on Poole’s website at <http://voteview.com/dwnl.htm>; for a more detailed discussion of the methodology see KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* (1997).

²⁶ For a more detailed analysis of the legislative process see Romano, *supra* note 14.

politically perilous.²⁷ The conference rapidly concluded with adoption of the Senate bill. It was widely perceived in the media that the motivation for SOX's enactment was the legislators' apprehension over the upcoming election., with the priority focused on definitive action, rather than substantive content.²⁸

The confluence of spectacular financial scandals, a declining stock market, waning public confidence in business, and a media frenzy in an election year resulted in a restricted legislative debate and progressively more lopsided votes in support of greater regulation. Although House Democrats supported their own bill, when it was predictably defeated along party lines, they still voted for the majority's bill.²⁹ And when the bill that emerged from the conference committee was

²⁷ *Id.* at.1567.

²⁸ *E.g.*, David E. Sanger, *Bush, on Wall St. Offers Tough Stance*, N.Y. TIMES, July 10, 2002, at A1 (Reporting on a speech by President Bush, Sanger wrote that "Democrats have now seized on [the need for drastic legislative change in response to accounting scandals] as a critical issue for the November elections" and emphasized how "partisan the battle has become."); Linda Douglass, *World News Tonight* (ABC television broadcast July 24, 2002) (Reporting on the enactment of SOX, Douglass stated "This was a stampede . . . The House Republicans dropped their opposition to this legislation because there was simply too much pressure on them to pass something.") This scenario suggests a totally different behavioral connection between elections and legislation than that of Bryan Jones and Frank Baumgartner. They evaluate the electoral connection only retrospectively, in that they contend that elections only affect legislation enacted in a Congress's first session, as it is the session in which there is legislative turnover (that is, newly elected legislators are seated). BRYAN D. JONES & FRANK R.. BAUMGARTNER, *THE POLITICS OF ATTENTION HOW GOVERNMENT PRIORITIZES PROBLEMS* (2005). As illustrated by SOX, elections can also have a prospective impact on legislation, thereby affecting legislation enacted in the second session, as members act, with reelection in mind, to reassure constituents.

²⁹ The vote was 334-90 in favor of the Republican bill; the vote on the defeated substitute bill of the Democrats was 202-219, and on a final attempt to amend the Republican bill by the Democrats, 205-222. 148 CONG. REC. H1588-92 (daily ed. Apr. 24, 2002) (roll nos. 108-110). Three months later, when the Senate moved on the more restrictive regulatory bill of Senator Sarbanes in place of the House bill, House Republicans introduced a bill to increase criminal sanctions for fraud in response. The vote for that bill was even more one-sided in favor, 391-28. *Id.* at H4693 (July 16, 2002) (roll no. 299).

the Democratic Senate's version, all but three House Republicans voted for it.³⁰ The Senate votes on the bill were all unanimous.³¹ In short, there was overwhelming, bipartisan support for legislation.

An important factor that may have influenced Republicans to support the Democrats' bill was that a key interest group generally identified with the Republican party, the business community, split over the legislation: the Business Roundtable, whose membership consists of the largest corporations, supported the Senate bill, while the Chamber of Commerce, which has many small-firm members, opposed it.³² When core constituents disagree on an issue, there is no obvious side for a legislator to support. With the news media severely criticizing the House bill as being too lax on corporate wrongdoers compared to the Senate bill, the split among key business constituents gave Republicans little reason to fight for their bill and risk alienating other constituents, such as individuals whose pensions and stock portfolios had declined markedly in the wake of the scandals and the market break. But even a unified business community would likely

³⁰ *Id.* at H5480 (July 25, 2002) (roll no. 348) (conference report adopted by vote of 423:3).

³¹ 148 CONG. REC. S6541 (daily ed. July 10, 2002) (roll no. 169); *id.* at S6551 (roll nos. 170-71); *id.* at S6778-79 (daily ed. July 15, 2002) (roll nos. 174-75); *id.* at S 7365 (daily ed. July 25, 2002) (roll no. 192) (conference report adopted by vote of 99:0). The vote on the cloture motion that restricted debate on the bill was also virtually unanimous at 91:2. *Id.* at S6685 (daily ed. July 12, 2002). There were only two split votes, both on amendments offered by Republican Senator McConnell that sought to impose certain disclosure and certification obligations on labor union officers and plaintiffs' attorneys; they received some support from his members of his party but none from Democrats. *Id.* at S6534 (daily ed. July 10, 2002) (roll no. 168) (defeated 55:43); *id.* at S6620 (roll no. 172) (defeated 62:35). Earlier in the process, by contrast, Banking Committee votes on the bill often split along party lines; the final vote approving the bill was 174, with six of ten Republicans voting with the Democrats in favor. Romano, *supra* note 14, at 1556 n.90.

³² E.g., Brian Tumulty, Momentum builds for corporate accounting legislation, Gannett News Service (July 9, 2002) (discussing opposition by Chamber of Commerce to provisions in Sarbanes bill and noting conflict with Business Roundtable's endorsement of the bill's enactment), available in Lexis, news file.

have had insurmountable difficulty in preventing the legislative steamroller favoring Senator Sarbanes' bill, given a distrustful environment toward business and the high public salience of the issue.

B. Post-SOX Pushback

Two key developments have framed the post-enactment debate over SOX. The first is the substantial expenditures firms have incurred to comply with section 404 -- which requires management to certify the adequacy of its internal controls and the outside auditor to attest to management's certification--and the concern that small firms will incur disproportionately large costs when they have to comply with the provision.³³ The second development involves capital market trends suggesting a decline in the New York stock markets' competitive position compared to foreign exchanges, particularly the London Stock Exchange. These developments have been the focus of four commissioned reports.³⁴ Table 1 summarizes the reports' key recommendations,

³³ Small firms have not yet had to comply with section 404: the SEC postponed the section's implementation for "non-accelerated filers," a term that did not appear in any prior SEC rule, but that refers to a firm with a public float of less than \$75 million, given the definition of "accelerated filers" in rule 12b-2 of the Securities Exchange Act, 17 C.F.R. § 240.12b-2 (Accelerated filers' are firms with a public float of at least \$75 million). *See* Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, 68 Fed. Reg. 36,636 (June 18, 2003) (17 CFR Parts 210,228,229,240,249,270 and 274) (compliance date for non-accelerated filers is "first fiscal year ending on or after April, 15, 2005;" compared to June 15, 2004 for accelerated filers); and Extension of Compliance Dates, 69 Fed. Reg. 9,722 (Mar. 1, 2004) 17 (CFR Parts 210,228,229,240,249,270, and 274) (extending compliance date for internal control report to fiscal year ending on or after July 15, 2005 for non-accelerated filers and November 15, 2004 for accelerated filers). The effective date for accelerated filers' compliance was not extended further, in contrast to that for non-accelerated filers, as discussed below.

³⁴ Following those reports, a fifth Commission on Enhancing Competitiveness was created in May 2007 by the Financial Services Roundtable, the trade association for the largest financial services companies, to devise a financial services sector "competitiveness" regulatory agenda and advocate "principles-based" regulation. Press Release, Fin. Servs. Roundtable, Commission on Enhancing Competitiveness (May 23, 2007), <http://www.fsround.org/media/pdfs/CommissiononEnhancingCompetitivenessRelease.pdf>.

particularly those related to SOX, and indicates where they diverge; the discussion that follows focuses on recommendations regarding section 404, which has emerged as the critical point of contention regarding SOX.

1. SEC Advisory Committee on Smaller Public Companies

The SEC Advisory Committee on Smaller Public Companies (“Advisory Committee”) was established in early 2005 by then SEC Chairman William Donaldson, in response to numerous complaints by small firms regarding SOX compliance costs, and in particular, the projected cost of complying with section 404.³⁵ Its mission was to advise the SEC on how to assure that regulatory costs for smaller companies would not be greater than the benefits. The Advisory Committee held public hearings across the country, a decision that undoubtedly generated increased publicity and support for small firms’ concerns. It issued an interim report in August 2005 that recommended further delay in the implementation of section 404 and real-time filing of periodic reports for small firms. The SEC adopted this recommendation, extending the implementation date another year to

Because this commission focused on one sector’s concerns, taking as its premise the competitiveness critiques of SOX of the earlier reports discussed in the text, rather than advancing an independent analysis, it is not included in the discussion.

³⁵ Advisory committees are official public entities whose creation and activities are regulated by federal law. Following the statutory procedure, the SEC Chairman announced his intent to establish an advisory committee in December 2004 and the committee was established when its charter was filed with Congress in March 2005. U.S. SECURITIES & EXCHANGE COMMISSION ADVISORY COMMITTEE ON SMALLER PUBLIC COMPANIES, FINAL REPORT 10 (Apr. 23, 2006), <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf> [hereinafter Adv. Comm. Report]. As the dates suggest, the SEC was aware early on of problems the provision was causing compliant firms and accordingly was expected to cause small firms. The regulations implementing section 404 established a two-tier system of “accelerated” filers (larger corporations, whose market capitalization exceeded \$75 million), which had to comply by the first fiscal year ending after April 2004, and “non-accelerated” filers (small and foreign corporations), for which compliance was deferred an additional year to 2005. *See* note 27, *supra*. The compliance deadline for the non-accelerated group was further deferred to 2006 as the Advisory Committee was being formed.

2007. The report also proposed a new working definition of ‘small’ firms in the bottom 6 percent of total U.S. equity market capitalization (roughly, firms with market capitalization under \$787 million).

The Advisory Committee’s final report was issued in April 2006. Its principal recommendation was to exempt small firms from section 404, the provision requiring management’s evaluation of, and auditor attestation to, the effectiveness of internal controls.³⁶ Although firms fitting into the proposed carve out would have been a small fraction of the market value of publicly traded firms, they would have been large in number: 78.5 percent of public companies.³⁷ The recommendation, which was not unanimous, would consequently have exempted a far larger proportion of firms than those for whom section 404 compliance had been deferred, which amounted to 44 percent of public companies.³⁸

The report emphasized, as a key rationale for the need for exemptive relief, that studies of 404 compliance had found that actual expenditures were wildly in excess of the per firm cost

³⁶ Adding a revenue filter to the market cap definition it had previously proposed for a small firm, the Advisory Committee recommended exemption from section 404 entirely for the smallest firms (microcap firms with revenues less than \$ 125 million and smallcap firms with revenues less than \$10 million) and from the provision’s auditor attestation component for small firms with revenues less than \$250 million (but greater than the revenue ceilings established for complete exemption). Microcap companies are those in the bottom 1 percent of total U.S. stock market capitalization, while smallcap companies are those in the next lowest 5 percent capitalization.

³⁷ Adv. Comm. Report, *supra* note 29, at 5.

³⁸ U.S. Securities & Exchange Comm’n, *Final Rule. Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies*, Release Nos. 33-8760; 34-5492 (Dec. 15, 2006). 71 Fed. Reg. 76580 (Dec. 21, 2006), 17 (CFR Parts 210,228,229,240 and 249). Three of the twenty-one members of the Committee dissented from the recommendation the two members of big four accounting firms and a lawyer who is the managing director of the CFA Center for Financial Market Integrity, a unit of the nonprofit association of investment analysts.

estimated by the SEC to cover compliance (in the millions of dollars versus \$91,000) and that even with a reduction in compliance costs in the second year of operating under the statute, average expenditures were still considerable, particularly for smaller firms (\$900,000).³⁹ Compliance costs for the smallest firms (non-accelerated filers not yet compliant) were expected to be much higher as a percentage of revenue. While not yet having to comply with section 404, audit fees had tripled as a percentage of revenue for smaller public companies from 2000 to 2004 (before and after SOX) and, as the Committee noted, best estimates from the expenditures of already compliant larger firms placed external audit fees at only one-quarter to one-third of section 404 compliance costs.⁴⁰

The Advisory Committee further noted that SOX had introduced additional ongoing

³⁹ The SEC estimated that the average annual internal cost of compliance for section 404 would be \$91,000 over the first three years in its 2003 regulatory release implementing the provision. Adv. Comm. Report, *supra* note 29, at 39. The agency also estimated in that release that small firms would spend only \$35,286 a year on internal controls compliance. Final Rule, Management's Reports on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Release 33-8238 (2003), *available at* <http://www.sec.gov/rules/final/33-8238.htm>. The actual compliance figures noted by the Advisory Committee are from a study commissioned by the big four accounting firms. Lineke Sneller and Henk Langendijk compiled several studies' estimates of compliance costs along with an actual case study, all of which indicate a staggering mis-estimation, by several orders of magnitude, of the cost by the SEC (whether one uses the SEC estimate they report of \$34,300, or the \$91,000 reported by the Advisory Committee). Lineke Sneller & Henk Langendijk, *Sarbanes Oxley Section 404 Costs of Compliance: A Case Study*, 15 CORP. GOV. 101 (2007) .

⁴⁰ Adv. Comm. Report, *supra* note 29, at 34. Several studies, along with surveys by the Financial Executives Institute and the law firm Foley & Lardner, have reported dramatic increases in audit fees, in addition to the Advisory Committee's data derived from an SEC report. *E.g.*, Susan W. Eldridge & Burch T. Kealey, "SOX Costs: Auditor Attestation under Section 404" (2005), *available at* <http://ssrn.com/abstract743285>; James S. Linck, Jeffrey M. Netter & Tina Yang, *The Effects and Unintended Consequences of the Sarbanes-Oxley Act, and its Era, on the Supply and Demand for Directors* (2008), *available at* <http://ssrn.com/abstract902665>; Sneller & Langendijk, *supra* note 33. Throughout the period, the percentage of revenues that audit fees represent for smaller companies is much higher than it is for large companies.

increased expenditures for smaller firms, which, apart from internal controls, were insignificant for large firms. For example, small firms were less likely than large firms to have a sufficient number of independent directors to meet the stock exchange requirements adopted in conjunction with SOX along with SOX's audit committee mandates, and the expenses from an increased board size are recurring.⁴¹ A recent study lends support to the Advisory Committee's contention, as it finds that director compensation costs have risen dramatically, and disproportionately, for small firms post-SOX.⁴²

Besides documenting that small firms would bear far greater costs than large firms, the Advisory Committee further emphasized the disproportionate burden 404 imposes on smaller firms because of their organizational structures and more limited resources, personnel, and revenue to offset implementation.⁴³ In particular, decisional authority is more concentrated in top management of smaller public companies, while their span of control is greater and there are fewer personnel among whom tasks can be segregated to achieve internal controls than would be considered effective under conventional standards.⁴⁴ As a consequence, in contrast to large firms, in small firms, top management directly oversees financial accounting and will be more likely either to catch accounting fraud or to be intimately involved in the fraud by managerial override of controls.⁴⁵

⁴¹ Adv. Comm. Report, *supra* note 29, at 39

⁴² Linck et al., *supra* note 34.

⁴³ Adv. Comm. Report, *supra* note 29, at 23.

⁴⁴ *Id.* at 35.

⁴⁵ *Id.* at 35.

Furthermore, the features that the Committee considered to be the hallmark of small compared to large firm operations—greater fluidity and flexibility of processes and individual tasks that are frequently shifted to meet changing corporate needs as a business grows—render compliance difficult because such firms do not have static processes with well-defined boundaries that can be easily documented in an internal controls system.⁴⁶ Accordingly, in the Advisory Committee’s judgment, the approach of the legislation and its implementation by the SEC, which can be characterized as a ‘one-size-fits-all’ mentality, demonstrated a thorough misunderstanding of what internal controls are appropriate for small firms.⁴⁷

By the time the Advisory Committee completed its study, there was a new SEC Chairman, Christopher Cox, a former Republican congressman who had been a member of the conference committee on SOX. Chairman Cox expressed no interest in repealing any part of the statute for even a subset of firms.⁴⁸ That position would appear to be informed, at least in part, by a desire to craft a response to calls for relieving the regulatory burden that all of the SEC commissioners would support. It is worth noting that the statutory requirement that no more than three of five commissioners be from the same political party had resulted in the previous two Republican Chairmen’s being embroiled in highly divisive partisan votes, which contributed to their failure to retain their positions.⁴⁹ Furthermore, as a legislator, Cox sought bipartisanship, and a hallmark of

⁴⁶ *Id.* at 36.

⁴⁷ *E.g.*, Adv. Comm. Report, *supra* 29 note at 124,

⁴⁸ See p. 26, *infra*.

⁴⁹ *E.g.*, Lynn Hume, SEC Watchers: Big Changes Possible During President Bush’s Second Term, 350 *The Bond Buyer* 36 (Nov. 4, 2004); Michael Schroeder, Accounting-Board Rift Bodes Ill for SEC, *Wall St. J.* (Oct. 29, 2002), at A4.

his leadership at the SEC had been the pursuit of consensual decision-making, even at the cost of stymieing the agenda of some of his political party's core constituents.⁵⁰

But it also bears noting that Senator Charles Schumer stated at the confirmation hearing on Cox's nomination as SEC chairman that he supported the nomination because Cox was 'pro-regulation' and had stated both publicly and privately that he would not rollback SOX or other regulation adopted under his predecessor's chairmanship.⁵¹ Before the hearing, the Senator had expressed reservations regarding Cox's nomination. Thus a private assurance to Senators that he would maintain the status quo could explain Cox's failure to endorse the Advisory Committee's recommendation.

An additional institutional constraint would likely have informed Chairman Cox's reaction to the Committee's recommendations. He would need to obtain the agreement of the other relevant regulator, the PCAOB, and not just consensus among SEC commissioners, to alter successfully section 404's implementation for small firms. Although the PCAOB board is appointed by the SEC, it would have been a public relations nightmare were the agency to implement a relaxation of audit standards over the Board's objection, particularly in the environment in which Cox was operating, with Democrats in control of Congress. Indeed, newspapers subsequently reported that

⁵⁰ Duncan Currie, *Unmasking Chris Cox*, AMERICAN.COM: A MAGAZINE OF IDEAS, ONLINE (2007), available at <http://www.american.com/archive/2007/march-april-magazine=contents/unmasking-chris-cox>. Cox emphasized his legislative reputation for bipartisanship at his confirmation hearing. When asked by Senator Richard Shelby, the Banking Committee Chairman, whether he was troubled by the agency's lack of consensus on significant regulation, Cox stated that he would undertake to build bipartisan consensus if confirmed. U.S. Senate Banking, Housing & Urban Affairs Comm., *Nominations Hearing* (July 26, 2005), available in Lexis, legis library [hereinafter Sen. Nom. Hearing]. .

⁵¹ Sen. Nom. Hearing, *supra* note 36.

officials at the two agencies had disagreed on how to address business' complaints concerning section 404, and implied that the PCAOB had rejected proposals by Cox to exempt some small firms from some aspects of section 404 compliance.⁵²

An interview with Chairman Cox held the year following the implementation guidelines' revision bolsters the view that obtaining unanimity among the SEC commissioners is an insufficient explanation for why he opposed revisiting SOX. In that interview, Cox disputed 'observations by some that he was driven by consensus,' stating, 'that has been oft repeated, but it's not my approach.'⁵³ Only a few months later, there was such a split vote, in which Cox voted with the two Democratic commissioners against the other two Republicans.⁵⁴

Chairman Cox's response to the Advisory Committee's recommendation was an announcement that the agency would review the implementation of section 404 to reduce the regulatory burden imposed on all companies and would delay yet again the section's

⁵² Carrie Johnson, *Deadlock Broken on Revising Audit Rule: Proposal to Rein in Accounting Costs*, WASH. POST, Dec. 6, 2006, at D01.

⁵³ Stephen Labaton, *Is the S.E.C. Changing Course?*, N.Y. TIMES, Mar. 1, 2007, at C1.

⁵⁴ Chairman Cox and the two Democratic commissioners requested the Solicitor General to file a brief in support of the petitioner's position in a Supreme Court case that sought to overturn the Court's precedent and expand private civil securities litigation, which the other two Republican commissioners opposed. It is possible that in abandoning a consensus strategy, the Chairman's vote was a strategic response to a Democrat-controlled Congress that was pressing the agency to support the petitioner's position, since Congress could make his life miserable through its oversight authority. In explaining his vote to Congress, the Chairman emphasized the desirability of maintaining the agency's prior position on the issue to provide 'certainty' to the market, although he also stated that his vote was not 'reflexively' driven by that precedent. *Scheme Liability*, *supra* note 9. Notwithstanding the SEC's request, the Solicitor General filed a brief supporting the respondent, adopting the position advocated by the Treasury Department, in response to letters by the Federal Reserve Board and the Comptroller of the Currency. Steven Sloan, *Cable TV Suit Has Industry Watching*, 172 AM. BANKER 1 (June 18, 2007). The Supreme Court affirmed the decision, upholding the Treasury Department's position. *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008).

implementation for small and foreign issuers to 2007, with the auditor attestation component being further deferred to 2008. The rationale for rejecting the Committee's recommendation and simply postponing compliance for another year was that by then, new guidance would be in place and the provision's regulatory burden would be reduced, making compliance "doable" for smaller firms.⁵⁵ As will be discussed in Part IV, in my judgment, given the post-SOX auditor regulatory regime, it is questionable whether that the agency's initiative will meaningfully reduce the cost of SOX.

2. Committee on Capital Markets Regulation

In contrast to the Advisory Committee's focus on SOX's regulatory burden on smaller firms, the other three commissioned reports were directed at assessing SOX's impact on the global competitiveness of U.S. firms and markets. The first report to appear was an interim report by the Committee on Capital Markets Regulation ("Capital Markets Committee"), a private group formed in September 2006, whose focus was on "maintaining and improving the competitiveness of the U.S. capital markets."⁵⁶ It produced a report two months later with the assistance of academic advisors and private financial support.

Although a private sector entity, the Capital Markets Committee and its report received considerable attention, no doubt in no small part because it had a perceived government connection. It was, in fact, often interchangeably referred to as the "Paulson Committee" because in the press release announcing the Committee's formation, Treasury Department Secretary Paulson

⁵⁵ See SEC Adopts Management Guidance for Evaluating Internal Controls Under SOX, 5 Corp. Accountability Rep. (BNA) 558 (June 1, 2007).

⁵⁶ COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT vii (2006), available at http://www.capmksreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf [hereinafter CMC Report]. The group consisted of 22 individuals from academia, from the investor, business, and financial communities, and from legal and accounting service providers.

praised its creation, and one of its co-chairs had served as a top executive under Paulson at Goldman Sachs. In addition, its director, a Harvard Law School professor, informed the news media upon the announcement of the Committee's formation that Secretary Paulson had requested a report by November so that the recommendations "could be considered at post-election meetings of Congress."⁵⁷ Their working assumption would have been that the Republicans would continue to control Congress, which, as it turned out, did not occur.

The Capital Markets Committee report began by presenting data indicating that the competitive position of U.S capital markets had significantly eroded: a decline in foreign company initial public offerings (IPOs), an increase in foreign firms' private equity issues, an increase in domestic-going-private transactions and in venture capital exits by private sales rather than IPOs, and a decline in the listing premium for cross-listed foreign firms. It then identified four areas where policy adjustments were needed to address the competitiveness problem, one of which was the implementation of SOX. The report recommended three modifications in section 404's implementation: a redefinition of materiality, increased auditor guidance by the PCAOB to reduce auditors' demands on management, and multi-year rotational testing for low-risk components of internal controls.⁵⁸ As its suggested changes could be accomplished by SEC rule-making, it concluded that there was no need for legislative revision. The report further noted that SEC Chairman Cox reportedly had recommended that the PCAOB adopt the same revised materiality standard.⁵⁹

⁵⁷ Floyd Norris, *Panel of Executives and Academics to Consider Regulation and Competitiveness*, N.Y. TIMES, Sept. 13, 2006, at C3.

⁵⁸ CMC. Report, *supra* note 59, at 19-20.

⁵⁹ CMC Report, *supra* note 59, at 19.

The report minimized section 404 as an issue, placing SOX at the bottom of the list of four competitiveness policy areas requiring attention. It instead emphasized the need for private litigation reform, and in particular, capping auditors' liability. It also called for a comprehensive overhauling of the regulatory process, encouraging the SEC and financial market self-regulatory organizations to use cost-benefit analysis in rule-making and to adopt principles-based, rather than prescriptive, rules. Although reducing auditor liability was an independent agenda item, it has a straightforward relation to SOX: because demands of attesting accountants are thought to drive the bulk of section 404 expenditures, reducing auditor liability could also serve to lower the provision's cost by lessening the attesting accountants' incentive to engage in defensive auditing.⁶⁰ It is therefore possible that relegating SOX to the bottom of the agenda was a political calculation by the Committee regarding what modifications to SOX were politically feasible given a new political reality: by the time the report was released, the Committee was aware not only of Chairman Cox's opposition to legislative revision of SOX, but also that the Democrats would control Congress. Advocating fine tuning SOX through agency rulemaking was regulatory relief that the Republican administration could accomplish on its own.

Although the Capital Markets Committee flatly rejected the Advisory Committee's call for

⁶⁰ To be sure, concerns about auditor liability and the impact of litigation on U.S. firms' competitiveness predate SOX, *see, e.g.*, Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part I: Technique and Corporate Litigation*, 4 AM. L. & ECON. REV. 141, 153 (2002), and would remain even were section 404 repealed in entirety. It should be noted that the Committee's ordering of priorities placed third, and above revising SOX, increasing "shareholder rights." Here, the Committee advocated adoption of many policies sought by activist public pension and labor union funds in proxy proposals on takeover defenses and director elections, along with a proposal those organizations would most certainly not endorse: replacing shareholder litigation with arbitration. Given the grab bag of proposals, the Committee appears to have been seeking to forge a political compromise that would offer something to everyone, within an overarching goal of reducing the regulatory cost of business activity.

small firm exemptive relief, it added a caveat. If, after adopting the report's proposed modifications, the SEC were to find that compliance with 404 was still too burdensome for small companies, then the SEC was advised to seek legislation to exempt those firms from the auditor attestation requirement.⁶¹ The Committee took a less diffident tack, however, to foreign firms' compliance problems. It advocated exempting foreign firms from section 404 if they were subject to equivalent home-state regulation of internal controls.

A plausible inference from the lack of parallelism in approach to small domestic versus foreign firms is that the Committee regarded SOX's impact on capital market competitiveness to be more severe than its effect on small firms. But a more compelling explanation for the difference in approach goes to the rationale for the Committee's formation: the need to improve the competitiveness of capital markets, a principal concern of the stock markets and financial centers.⁶² That definition places front and center the agenda of a different constituency, the stock exchanges, in contrast to that of the Advisory Committee, small firms. In support of this contention is the fact that the Committee's recommendation regarding foreign firms resembles a longstanding position advocated by the New York Stock Exchange ('NYSE'), that foreign issuers should be governed by home regulators, with the expectation that it would improve the NYSE's market position against its principal competitor, the London Stock Exchange, by reducing the regulatory cost of foreign firms' listing in the United States.⁶³

3. McKinsey & Co. Study for Senator Schumer and Mayor Bloomberg

⁶¹ CMC Report, *supra* note 59, at 20.

⁶² CMC Report, *supra* note 59, at ix.

⁶³ See, e.g., James L. Cochrane, *Are U.S. Regulatory Requirements for Foreign Firms Appropriate?*, 17 FORDHAM INT'L L.J. S58 (1994).

At approximately the same time as the Capital Markets Committee was being formed, New York Senator Charles Schumer and New York City Mayor Michael Bloomberg commissioned a study under the auspices of the city's Economic Development Corporation from the consulting firm McKinsey & Company to ascertain why foreign firms were increasingly raising capital outside of New York. McKinsey surveyed executive, investor, consumer, and labor group representatives, and experts in the regulatory, legal, and accounting professions. The McKinsey Study, which is often referred to in press accounts as the "Schumer-Bloomberg Study," was released at a January 2007 news conference at New York's City Hall, attended by both Senator Schumer and Mayor Bloomberg, and the newly-elected Governor, Eliot Spitzer.

The McKinsey Study mirrored the Capital Markets Committee report's diagnosis of the problem: it reviewed data indicating declining U.S. capital market competitiveness and highlighted SOX and litigation as threatening New York City's preeminence as a financial center.⁶⁴ No doubt, given its sponsorship by elected officials, the study was intended to advance an important political objective, that of dramatizing the relative deteriorating condition of a major contributor to New York's economy, and thereby mobilizing support for concerted government action at the local, state, and federal levels to rectify the situation.

The McKinsey Study's solution likewise mirrored the recommendations of the Capital Markets Committee: modifications in the implementation of section 404 to provide clearer

⁶⁴ In addition to the market trends noted earlier regarding IPOs and foreign listings, the study described three additional indicators of a competitiveness problem. European investment banking, sales and trading revenues had risen almost to parity with those in the United States; a larger over-the-counter derivatives market had developed in Europe than in New York; and U.S. financial stock grew at a lower rate than that of other regions. MCKINSEY & CO., *SUSTAINING NEW YORK'S AND THE U.S.' GLOBAL FINANCIAL SERVICES LEADERSHIP 9-13 (2007)*, available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPOR T%20_FINAL.pdf [hereinafter McKinsey Study].

guidance, including a revised definition of materiality, and a ‘top-down’ (that is, management, not auditor controlled) ‘risk-based’ approach. It differed from the Capital Markets Committee in one important respect regarding the qualification offered for small firms’ treatment: the Study recommended that the SEC consider permitting small firms to opt out of section 404 entirely with disclosure of this choice to investors, if the agency’s proposed guidance did not lower small firms’ compliance costs.⁶⁵ It also recommended that the agency consider exempting foreign firms that complied with foreign regulatory regimes receiving SEC approval, paralleling the Capital Market Committee’s position. But in contrast to the Capital Market Committee’s report, the McKinsey Study placed amending SOX at the top of the policy agenda, in a list of items characterized as ‘critically important near-term national priorities.’⁶⁶ Litigation reform was second in the list of priorities, with recommendations to cap the liability of auditors and of foreign firms in proportion to their exposure to the U.S. market, and to promote arbitration in place of securities litigation.

With regard to the recommendation concerning revising SOX, at the press conference held to announce the study’s findings, Senator Schumer stated that the strategy was to take an administrative, rather than legislative, route, because the proposed changes could all be accomplished by SEC rulemaking, without congressional action.⁶⁷ That was so because the Study’s principal recommendation on SOX was in accord with action the SEC had initiated in response to the Advisory Committee’s report, the process of revising guidance on section 404

⁶⁵ McKinsey Study, *supra* note 67, at 20

⁶⁶ *Id.* at 96-97.

⁶⁷ Greg Morcroft, *New York as Financial Center Seen under Threat*, MARKETWATCH, Jan. 22, 2007.

compliance.⁶⁸

4. Commission on the Regulation of U.S. Capital Markets for the 21st Century

In February 2006, the Chamber of Commerce created a commission, the Commission on the Regulation of U.S. Capital Markets in the 21st Century ('Chamber Commission'), to study capital market competitiveness, out of concern over U.S. exchanges' declining share of global capital market transactions. The Chamber Commission understood its charge as to recommend the 'correct balance' for capital market regulation between the competing statutory goals to promote capital formation and to protect investors.⁶⁹ Although established well before the Capital Markets Committee's formation and the commissioning of the McKinsey Study, its report was released after their reports, in March 2007. The Commission spent over a year developing its report.⁷⁰ It

⁶⁸ Proposed interpretive guidance had been issued by a unanimous SEC in December that included in its purview, a risk-based assessment approach and a revised definition of materiality that was also to be adopted by the PCAOB. *Management's Report on Internal Control Over Financial Reporting*, 71 Fed. Reg. 77,635 (Dec. 27, 2006). That release also included a proposed change to the rules implementing section 404, that stated that a management internal control evaluation which followed the steps in the interpretive guidance would be deemed to satisfy section 404's implementation rules. The McKinsey Study's recommendations did diverge from the SEC's proposed guidance in one noteworthy respect: it criticized the proposed revised definition of materiality, despite the definition's tracking of the Capital Markets Committee's suggested drafting. McKinsey Study, *supra* note 48, at 98. The Study's objection was in keeping with criticism expressed by the corporate bar that the revised definition would not reduce compliance costs because it would not alter auditors' incentive to classify insignificant or technical control breaches as material due to liability concerns. *See, e.g., Proposed Definition of Material Weakness May Not Help Lower Internal Control Costs*, Fed. Sec. L. Rep. (CCH) 1 (May 2, 2007).

⁶⁹ COMMISSION ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS 1 (2007), available at http://www.capitalmarketscommission.com/NR/rdonlyres/eozwwsfrqzdm3hd5siogqhp6h2ngxwdpr77qw2bogptzvi5weu6mmi4plfq6xic7kjonfpg4q2bpks6ryog5wwh5sc/0703capmarkets_full.pdf [hereinafter Chamber Report].

⁷⁰ At least one local chamber of commerce undertook its own study without waiting for the national Commission's report. The Greater Boston Chamber of Commerce released a study in March 2006 that advocated revising SOX compliance requirements for small firms, emphasizing

followed the Advisory Committee's format of holding public hearings, no doubt to generate increased public awareness of the issue, and it also met with regulators and government officials.

The Chamber Commission advocated legislation incorporating SOX into the Securities Exchange Act of 1934, in order to clarify that the SEC's exemptive power is applicable to SOX section 404—authority that might otherwise appear to be in question.⁷¹ It advanced this approach as a mechanism to provide flexibility for the agency's implementation of SOX, so that it could vary section 404's requirements for different sized firms and exempt foreign firms.⁷² Notwithstanding the directive to focus on market competitiveness, the Chamber Commission's recommendation meshes better with the Advisory Committee's agenda rather than that of either the Capital Markets Committee or the McKinsey Study, whose solutions minimize a need to tailor requirements for small firms. Advocacy of an approach permitting flexibility in small firms' regulation is consistent with the Chamber's policy position when SOX was moving through the legislative process: the Chamber lobbied at the time for small firms' exemption from provisions restricting auditor services.⁷³

that SOX compliance costs significantly burdened small firms, such as biotechnology and life sciences firms. Chris Reidy, *Study: Sarbanes-Oxley Costs Burden Small Firms*, BOSTON GLOBE, Mar. 1, 2006, at C4. On releasing the study, the Boston Chamber reported that it was endorsed by chambers in other locations with a substantial presence of high tech companies, such as San Francisco, California and Raleigh, North Carolina. *Id.*

⁷¹ Some legal scholars have contended that the SEC's exemptive authority under section 36 of the 1934 Act, 15 U.S.C. § 78mm, is inapplicable to section 404 because Congress did not cast that provision as an amendment to the 1934 Act. *See e.g.*, James D. Cox, *Comment Letter in Response to SEC Release 33-8666* (Mar. 21, 2006), available at <http://www.sec.gov/rules/other/265-23/26523-309.pdf>.

⁷² Chamber Report, *supra* note 72, at 7.

⁷³ Romano, *supra* note 14, at 1565.

To promote its agenda, which also included dramatic reorganization of the SEC, in conjunction with the report's release the Chamber held a summit, which was attended by SEC Chairman Cox and Members of Congress. In a speech delivered at that meeting, Chairman Cox flatly rejected the Chamber Commission's recommendation regarding SOX, stating "We don't need to change the law; we need to change the way the law is implemented, [and] the SEC has all the power and flexibility we need..."⁷⁴ The key Democratic lawmakers present (the chairmen of the committees with jurisdiction over the SEC) concurred with that judgment.⁷⁵

Congressman Barney Frank, the Chairman of the House Financial Services Committee, which has jurisdiction over securities regulation, was more circumspect in his remarks than the SEC chairman. He stated that "Everyone agrees that we should have Sarbanes-Oxley somewhat diminished" and that "if legislative changes are needed to improve section 404, you can have them."⁷⁶ But the more instructive of his statements was that "if [the SEC] need[s] more legislative authority, they should ask us."⁷⁷ Congressman Frank would have been well aware that Chairman Cox would not be knocking on his door, suggesting that his remarks were less than candid.⁷⁸

⁷⁴ Rachel McTeague & Richard Hill, *Cox Opposes Call for SOX Exemptions: Dodd Says Market Concerns are Premature*, 5 Corp. Account. Accountability Rep. (BNA) 266 (Mar. 16, 2007).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ One legal service concluded from this statement that it was "unclear" whether he would defer to Cox regarding the need for legislation. *Hill Watch*, 39 Sec. Reg. & L. Rep. (BNA) 569 (Apr. 9, 2007). The inference is odd, however. In earlier interviews, Congressman Frank indicated that he "ha[d] no interest in rewriting the law" and wanted the SEC "to figure out" how to interpret it less restrictively for small firms, Steven Syre, *Market Cops Taking Heat*, BOSTON GLOBE, Nov. 30, 2006, at D1. In fact, when the House voted to extend for an additional year the deferred

The reaction of Senator Christopher Dodd, Chairman of the Senate Banking Committee, would appear to have been even less receptive to consideration of legislative relief than that of Congressman Frank. Not only did the Senator deny that competitiveness was a pressing matter, but he also cautioned against trying to compete with “growing” foreign markets and engaging in a “regulatory race to the bottom” that “jettison[ed] our legal protections.”⁷⁹ Senator Dodd did, however, express approval of the SEC’s reexamination of SOX’s implementation. A legal service reporter offered the following perspective on Senator Dodd: he would not tamper with SOX in “deference to his close colleague,” Senator Sarbanes.⁸⁰ That interpretation of the Senator’s decisionmaking is plausible, as is the not mutually exclusive, if not more compelling, explanation that maintaining the status quo on SOX would be entirely consistent with his own policy preference: not only has Senator Dodd associated himself with the statute but also his voting record, although it is not quite as liberal as that of Senator Sarbanes, is slightly to the left of the median Democrat, as measured by a widely-adopted score from congressional roll call voting.⁸¹

A factor that surely also informed the two committee chairs’ reactions was the introduction in both chambers a few days earlier of bills that would have revised the implementation rules for

application of section 404 for small firms in June 2007, Frank opposed the extension, referring to Chairman Cox’s statement that legislation was unnecessary, 153 CONG. REC. H 7325 (daily ed. June 17, 2007). Such a position is utterly at odds with the legal service’s assertion that the congressman might support legislation against the agency’s wishes.

⁷⁹ McTeague & Hill, *supra* note 55.

⁸⁰ Hill Watch, *supra* note 58.

⁸¹ Senator Dodd takes credit for the statute on his website: “I’m proud to have helped author this vital legislation.” Christopher Dodd, Statement of Senator Dodd on the 5th Anniversary of the Enactment of Sarbanes-Oxley (July 30, 2007), <http://dodd.senate.gov/index.php?q=node/3998>. For the 107th Congress in which SOX was enacted, Senator Dodd’s DW-NOMINATE score was -.397 whereas that of Senator Sarbanes was -.555, *see* note 20, *supra*.

section 404 and permitted small firms to opt out of its requirements. The House bill had both a Democrat and Republican sponsor, but not the Senate bill.⁸² Senator Dodd could reasonably have thought there to be a negligible chance of any legislative pressure on him to alter his position because with only one Republican co-sponsor of the Senate bill and Democratic control of the chamber, the probability that the bill could gain any traction would have appeared extremely remote. Such a conjecture would be consistent with the political science literature's characterization of congressional cosponsorship as a signal of coalition building. That literature has found that the probability of a bill moving forward in the legislative process is a function of the number of co-sponsors and the proportion of sponsors on the committee with jurisdiction, although neither variable significantly impacts enactment.⁸³

Moreover, as Banking Committee chairman, Senator Dodd was well positioned to block SEC-related bills that he did not support from reaching the floor. Although political scientists have noted that a committee's gatekeeping function is difficult to sustain when a legislative majority desires action,⁸⁴ such an outcome would have seemed far-fetched to any reasonably

⁸² The Senate bill was introduced on March 14, only a day or so before Senator Dodd's remarks at the Chamber's event; the cosponsor, but not the sponsor, was a member of the Banking Committee. The bill's second, and only other cosponsor, also a Republican, signed on a few days afterward.

⁸³. See, e.g., Rick K. Wilson & Cheryl D. Young, *Cosponsorship in the U.S. Congress*, 22 LEG. STUD. Q. 25 (1997). Although Congressman Frank did not use the SEC's position as a shield as did Senator Dodd, the calculation regarding the House bill's prospects would not differ significantly from that of the Senate, in view of that literature. A plausible explanation why Frank did not feel a need to invoke the SEC's action for framing his position, compared to Senator Dodd, is that the majority party generally exercises strict control over legislation in the House, in contrast to the Senate. STEVEN S. SMITH, JASON M. ROBERTS & RYAN J. VANDER WIELEN, *THE AMERICAN CONGRESS*, 234 (5th ed. 2007).

⁸⁴ See, e.g., Keith Krehbiel, *Why Are Congressional Committees Powerful?*, 81 AM. POL. SCI. REV. 929 (1987); and Kenneth A. Shepsle & Barry R. Weingast, *Why Are Congressional*

informed observer at the time the Senator made his remarks. Finally, a benefit of the SEC Chairman's action plan would have been to provide Senator Dodd with a credible explanation for his legislative inaction on a matter of importance to potentially disgruntled constituents.⁸⁵ Moreover, as discussed in Part III, six weeks later, it would also prove to be useful for positioning the issue on the Senate floor.

C. The Empirical Literature on SOX and Its Relationship to the Reports' Critiques

The commissioned reports' questioning of the wisdom of SOX echo the thrust of the empirical research on SOX's impact on capital markets and firms. The following U.S. capital market trends post-SOX, emphasized in varying degrees by the reports, have been identified in the academic literature:

- (i) a decrease in new foreign listings;⁸⁶
- (ii) a decline in IPOs;⁸⁷
- (iii) an increase in going-private transactions;⁸⁸ and

Committees Powerful?, 81 AM. POL. SCI. REV. 935. (1987).

⁸⁵ In his landmark study of Congress, Richard Fenno notes that for the vast majority of votes, legislators are not constrained by constituent preferences and can vote "as they wish," provided that they can satisfactorily explain their votes to constituents. RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 151 (1978). Senator Dodd's response was, to be sure, a meager answer to the problem as perceived by the business community. Yet it still provided the Senator with a plausible explanation of his position: he was voicing support for the position of the agency's Republican Chairman, who ostensibly was seeking to address the issue.

⁸⁶ *E.g.*, Joseph D. Piotroski & Suraj Srinivasan, *Regulation and Bonding: The Sarbanes-Oxley Act and the Flow of International Listings*, 46 J. ACCT. RES. 383 (2008); Craig Doidge, George A. Karolyi & Rene M. Stulz, *Has New York Become Less Competitive in Global Markets? Evaluating Foreign Listing Choices Over Time*, ECGI Finance Working Paper No. 173/2007 (2007).

⁸⁷ *E.g.*, Luigi Zingales, *Is The U.S. Capital Market Losing its Competitive Edge?*, ECGI Working Paper No. 192/2007 (2007).

(iv) an increase in firms going “dark,” that is, deregistering but not eliminating all public shareholders.⁸⁹

A further finding related to the second and third trends but not mentioned in the reports is that, post-SOX, in order to realize growth opportunities, there appears to have been an increase in small firms being sold to private firms, rather than to public ones.⁹⁰

In addition, both empirical research and survey data document an increase in director costs and audit fees post-SOX, particularly for small firms, and correspondingly, an increased cost of being public post-SOX.⁹¹ For example, Linck, Netter, and Yang find a large increase in total director compensation for small firms in the interval around SOX (from 2001 to 2004), going from \$2.35 to \$3.19 per \$1000 sales (a 36% increase). Furthermore, Iliev compared firms at the

⁸⁸ E.g., Stanley B. Block, *The Latest Movement To Going Private: An Empirical Study*, J. APPLIED FIN., Spring/Summer 2004, at 36; Ellen Engel, Rachel M. Hayes & Xue Wang, *The Sarbanes-Oxley Act and Firms’ Going-Private Decisions*, 44 J. ACCT. & ECON. 116 (2007); Ehud Kamar, Pinar Karaca-Mandic & Eric L. Tally, *Going-Private Decisions and the Sarbanes-Oxley Act of 2002: A Cross-Country Analysis*, Rand Working Paper Series No. WR-300-2-EMKF (2008).

⁸⁹ Christian Leuz, Alexander J. Triantis & Tracy Yue Wang, *Why Do Firms Go Dark? Causes and Economic Consequences of Voluntary SEC Deregistrations*, 45 J. ACCT. & ECON. (forthcoming 2008).

⁹⁰ Kamar et al., *supra* note 68.

⁹¹ Linck et al., *supra* note 34; Peter Iliev, *The Effect of the Sarbanes-Oxley Act (Section 404) (2007)*, available at <http://ssrn.com/abstract/983772>; Foley & Lardner, *The Cost of Being Public in the Era of Sarbanes-Oxley (2006) (survey)* available at http://www.foley.com/files/tbl_s31Publications/FileUpload137/3420/ndi%202006%20public%20study%20FINAL.pdf; see William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of “Going Private”*, 55 EMORY L.J. 141 (2006) (reviewing estimates of increased cost of being a public company post-SOX, and data on increased going-private transactions); Christoph Kaserer, Alfred Mettler & Stefan Obernberger, *Has the Sarbanes-Oxley Act Reduced the Adverse Selection Cost of Going Public?* (2008), available at <http://ssrn.com/abstract/1147138> (finding legal and audit fees for small firm IPOs significantly increased post-SOX and total flotation costs decreased post-SOX for large firms but not for small firms).

threshold of having to comply with section 404 to those firms that stay just below the threshold. He finds that audit fees are more than double for compliant firms at \$800,000, compared to fees of \$370,000 for firms that did not have to comply.⁹² Additional evidence that SOX's cost does not outweigh the benefits for small firms is a finding in several studies that small firms appear to deliberately avoid coming under section 404 by maintaining their market capitalization and revenues below the threshold.⁹³ Moreover, although the findings of several event studies of the impact of the statute's enactment on stock prices conflict—depending on the event dates selected, there was either a positive or negative price effect⁹⁴—when the price effects for small firms are separately analyzed, the studies find that those firms experienced negative price effects.⁹⁵ This

⁹² Iliev, *supra* note 71; Linck et al., *supra* note 34. Iliev's finding is consistent with Block's estimate that the cost of being a public company doubled post-SOX from \$900,000 to \$1.95 million. The SEC Advisory Committee reported that external audit fees tripled as a percentage of revenue over the period 2000 to 2004, surrounding the adoption of SOX.

⁹³ Feng Gao, Joanna Shuang We & Jerold L. Zimmerman, Unintended Consequences of Granting Small Firms Exemptions from Securities Regulation: Evidence from the Sarbanes-Oxley Act (2008), *available at* <http://ssrn.com/abstract/1014054>; Iliev, *supra* note 71; Maria E. Nondorf, Zvi Singer & Haifeng You., A Study of Firms Surrounding the Threshold of Sarbanes-Oxley Section 404 Compliance (2007), *available at* <http://ssrn.com/abstract/1004965>.

⁹⁴ For a summary and assessment of the three leading event studies of SOX, see Kenneth Lehn, Sarbanes-Oxley: A Review of the Empirical Evidence and a Proposal for Reform 11-13 (2008) (presentation), *available at*; http://www.frbatlanta.org/news/CONFEREN/08FMC/08FMC_lehn.pdf. Lehn concludes that the selection of event dates is most appropriate in the study by Zhang that finds a cumulative negative stock price effect, because it includes earlier events on which information was released regarding the probability legislation would pass than the two studies finding positive price effects. By not including all relevant dates, the latter studies' positive finding could therefore be an indication that the market had determined the final version was less costly than initially anticipated. *Id.* at 13.

⁹⁵ *E.g.*, Vidhi Chhaochharia & Yaniv Grinstein, *Corporate Governance and Firm Value: The Impact of the 2002 Governance Rules*, 62 J. FIN. 1789 (2007); M. Babajide Wintoki, *Corporate Boards and Regulation: The Effect of the Sarbanes-Oxley Act and the Exchange Listing Requirements on Firm Value*, 13 J. CORP. FIN. 229 (2007).

suggests that investors anticipated that SOX would impose a disproportionately high cost, incommensurate with benefits, on those firms.

Neither the post-SOX market trends nor the disproportionate cost burden of SOX on small firms are disputed in the literature. Rather, what is at issue in the literature is whether the observed capital market trends are attributable to SOX or to unrelated, contemporaneous factors, such as improvements in the trading quality provided by foreign exchanges.⁹⁶ For example, Doidge et al. contend that the post-SOX decline in U.S. listings relative to U.K. listings is not due to SOX, because the U.K. increase consists of small, riskier firms listing on London's Alternative Investment Market ("AIM") that would not be able to list on the NYSE.⁹⁷ Other studies, however, identify SOX as contributing to the decline in new listings.⁹⁸

One approach for arbitrating the competing assessments is by reference to the results in another literature that examines the effect of SOX on cross-listed firms. To the extent that those firms are adversely affected by the statute, it suggests that SOX does indeed impact the calculation

⁹⁶ There is no debate in the literature over whether SOX is the source of disproportionately higher compliance costs for small firms; there is simply normative disagreement concerning whether those costs justify exempting small firms from the statutory requirements, or otherwise reducing the scope of their compliance. Given that SOX's disproportionate impact on small firms' compliance costs is not an issue, the remainder of this section is addressed to the literature on SOX's impact on market competitiveness.

⁹⁷ Doidge et al., *supra* note 66.

⁹⁸ *E.g.*, Zingales, *supra* note 67. Piotroski and Srinivasan compare foreign (non-U.S. and non-U.K.) firms' listing choices between U.S. and U.K. exchanges, to focus on the listing choice given that a firm selects a high quality exchange, thereby better controlling for the impact of SOX. Piotroski & Srinivasan, *supra* note 66 (small firms). . They find that the probability of small firms listing in the U.S. declined post-SOX. Their findings differ from those of Doidge et al., *supra* note 66, who also compare U.S. and U.K. foreign listings, because they examine both large and small firms, whereas Doidge et al. examine only large firms, Piotroski and Srinivasan find that the Doidge et al. result holds up only for large firms, whose listing choices were unchanged by SOX.

of foreign firms regarding listing and delisting on U.S. exchanges post-SOX.⁹⁹ There are two strands in the literature on SOX and cross-listed firms: one set of papers examines the stock price effects of events related to the statute's enactment on foreign firms, while the other investigates the post-SOX value of the historic market premium accorded cross-listed stocks.¹⁰⁰

The most comprehensive studies of those effects of SOX on foreign firms have been undertaken by Kate Litvak, who uses a difference-in-difference approach comparing over 1,000 cross-listed firms with matched non-cross listed firms, similar in size and industry, from the same country.¹⁰¹ She finds that the stock price reactions of the paired firms differ significantly, and that the cross-listed firms were negatively affected by SOX.¹⁰² She also finds that the cross-listing premium has declined significantly post-SOX, with the decline larger for cross-listed firms

⁹⁹ As Piotroski and Srinivasan note, listing decisions of foreign firms are a "good indicator" of a specific markets' costs and benefits because those firms can choose from a "wide range of competing alternatives." Piotroski & Srinivasan, *supra* note 66, at 384.

¹⁰⁰ Several researchers have found that cross-listing on a U.S. exchange is related to higher market-to-book ratios, indicating that firms obtain a premium for cross-listing, with one explanation of the effect that the firms are "bonding" themselves to comply with higher U.S. governance and disclosure standards, which investors interpret positively. Lehn, *supra* note 74, at 16-17.

¹⁰¹ Kate Litvak, *The Impact of the Sarbanes-Oxley Act on Non-U.S. Companies Cross-listed in the U.S.*, 13 J. CORP. FIN. 195 (2007) (hereinafter Litvak, *Impact*); Kate Litvak, *Long-term Effect of Sarbanes-Oxley on Cross-listing Premia*, EUR. FIN. MGMT. (forthcoming 2008) (hereinafter Litvak, *Premia*).

¹⁰² Litvak, *Impact*, *supra* note 81. Li also finds that cross-listed firms, especially those that would have to comply with the statute, were negatively affected by the enactment of SOX. Xi Li, *The Sarbanes Oxley Act and Cross-Listed Foreign Private Issuers (2007)*, available at <http://ssrn.com/abstract952433>. He further finds that foreign firms delisting post-SOX experience positive stock returns, in contrast to the negative returns experienced by foreign firms delisting pre-SOX.

required to comply with the statute.¹⁰³ These data suggest that SOX negatively impacted foreign firms, and are consistent with interpreting the decline in foreign listings as related to SOX.

A limitation of studies of listing trends that reject SOX as a cause of the relative decline in U.S. market share of foreign firms is that they focus solely on large firms and do not distinguish across firms by size.¹⁰⁴ When foreign firms' choices are separately analyzed by firm size, researchers find that SOX affected the listing decisions of small firms: those firms were more likely to list in the United Kingdom after SOX.¹⁰⁵ SOX also had a negative impact on small U.S. firms' listings.¹⁰⁶ The legislation, accordingly, adversely affected U.S. exchanges through the loss

¹⁰³ Litvak, *Premia*, *supra* note 81. Using non-paired samples, Zingales, *supra* note 67, also finds a decline in the cross-listing premium post-SOX, while Doidge et al., *supra* note 66, using a longer pre-SOX period than Zingales, do not. There is, however, no compelling reason why the comparative pre-SOX period should be the ten-year period beginning in 1990 that Doidge et al. select, rather than the five-year period selected by Zingales, which had the advantage of being a more comparable time period to the post-SOX period under study. Both papers use the same post-SOX period, 2003 to 2005.

¹⁰⁴ *E.g.*, Doidge et al., *supra* note 66.

¹⁰⁵ Piotroski & Srinivasan, *supra* note 66. Of course, the studies only examine foreign firms that have listed on an exchange; if firms chose not to list on a U.S. exchange or engaged in private placements in order to avoid SOX, the studies will underestimate the statute's deleterious effect. There would also appear to be a differential effect of SOX based on country of origin: the firms less likely to list were from more developed countries with higher quality corporate governance. *Id.* Those firms also experienced higher negative returns upon SOX's enactment and greater declines in cross-listing premia. Litvak, *Premia*, *supra* note 81. Because large firms' listing choices appear not to be similarly affected, Piotroski and Srinivasan note that the economic significance or long-run economic impact of the loss of small firms is an "open question." Piotroski & Srinivasan, *supra* note 66, at 419.

¹⁰⁶ Studies finding small domestic firms' probability of delisting increased post-SOX are Engel et al., *supra* note 68; Leuz et al., *supra* note 69; and Kamar et al., *supra* note 68 (examining firms exiting the public market by means of acquisitions). In addition, Robert Bartlett finds that a greater number of small firms going private post-SOX did not maintain public debt, which would have continued to subject them to securities regulation, including section 404, than did so pre-SOX. The reverse was true for large firms. Robert Bartlett, *Going Private but Staying Public: Reexamining the Effect of Sarbanes-Oxley on Firms' Going Private Decisions*, 76 U. CHI. L. REV.

of small firm listings. The contraction in investing opportunities has, no doubt, adversely affected U.S. investors as well, as they would have to bear currency risk and the other transaction costs of investing abroad rather than domestically in order to invest in such firms. In sum, a fair reading of the empirical literature investigating U.S. capital market competitiveness post-SOX indicates, at a minimum, that the statute has impacted the stock exchanges' competitiveness due to losses of small firm listings. Those are also the firms that have been shown to encounter the greatest proportionate operating cost increase due to SOX, in the literature documenting the changing cost of being a public company post-enactment.

III. The Media and Congress Respond to SOX's Consequences

Corporate scandals can make good copy for the media, and the media frenzy surrounding the 2001-2002 corporate accounting scandals most surely helped fuel the political dynamic that produced SOX. One measure for gauging the political climate for revisiting SOX is the frequency of news coverage of the legislation's critiques, such as the concerns expressed in the commissioned reports over SOX's impact on small firms and market competitiveness. This approach is informed by a political science literature finding, across policy and geographical space, that legislators and agency officials respond to issues whose salience is heightened by the media.

A. The Relation between the Media, Issue Saliency, and Public Policy

A theoretical and empirical literature examining the relation between media coverage and government policies suggests that the media can and does influence policy outcomes by affecting an issue's salience. That thesis is derived from agency models in which citizen-principals are imperfectly informed about actions of their agents (elected officials and civil servants). In the

(forthcoming 2008).

models' setup, the news media provides information that alters an issue's salience and thereby facilitates citizen monitoring, resulting in the government's adoption of policies that citizens prefer.¹⁰⁷ There are also models in which news coverage of elected officials' positions affects both election and policy outcomes by shifting the salient issues in an election, as politicians focused on reelection adopt policies preferred by voters.¹⁰⁸

Empirical studies lend credence to the models' plausibility, finding a significant correlation between issue saliency in the media (proxied by, for example, newspaper circulation or article word counts) and the implementation of government policies, or election outcomes.¹⁰⁹ Moreover,

¹⁰⁷ Timothy Besley, et al., *Mass Media and Political Accountability*, in *THE RIGHT TO TELL: THE ROLE OF MASS MEDIA IN ECONOMIC DEVELOPMENT* (2002), <http://miranda.worldbank.catchword.org/vf1110093/cf14/nw1/fm'docpdf/rpsv/bk/wb/9780821352038/v1n1/s1/p11>; see also KEN KOLLMAN, *OUTSIDE LOBBYING PUBLIC OPINION & INTEREST GROUP STRATEGIES* (1998) (proposing a signaling model in which interest groups use the media and other strategies to mobilize constituents in order to demonstrate an issue's salience to policymakers).

¹⁰⁸ Besley et al., *supra* note 110.

¹⁰⁹ For example, Andrew Yates and Richard Stroup find that the U.S. Environmental Protection Agency (EPA) is more likely to cancel a chemical's use as a pesticide when there is greater news coverage about the chemical, controlling for the chemical's actual risk as well as interest group lobbying over the chemical's registration. Andrew J. Yates & Richard L. Stroup, *Media Coverage and EPA Pesticide Decisions*, 102 *PUB. CHOICE* 297 (2000). In Yates and Stroup's model of agency decisionmaking, media coverage increases issue salience and affects public opinion, which creates pressure on the agency to respond to politicians who want to be on the right side of a salient issue from their constituents' perspective. In addition, Claudio Ferraz and Federico Finan find that Brazilian mayors identified as corrupt by preelection random audits by the national government are more likely to lose reelection campaigns when there is a local radio station, which can transmit the news to voters. Claudio Ferraz & Federico Finan, *Exposing Corrupt Politicians: The Effect of Brazil's Publicly Released Audits on Electoral Outcomes*, IZA Discussion Paper No. 2836 (2007), available at http://www.iza.org/index_html?lang=en&mainframe=http%3A//www.iza.org/en/webcontent/personnel/photos/index_html%3Fkey%3D3028&topSelect=personnel&subSelect=fellows. The implication of these studies for SOX is that the SEC and members of Congress would be more likely to revisit SOX as salience concerning its cost increases, particularly prior to an election campaign.

the relation identified in the studies between issue salience and policy and election outcomes is robust, controlling for factors known to affect outcomes.

One of the more relevant studies examining the relation between media salience and public policy finds that Indian state governments increase public food distribution in response to shocks in food production caused by droughts or floods, the higher the regional language newspaper circulation (as opposed to that of national newspapers written in Hindi or English), as well as the higher the level of voter turnout and of political competition.¹¹⁰ The study considers regional language newspapers to be a proxy for issue salience, because they are most likely to report on local conditions and to be read by local citizens, as compared to national newspapers. The study characterizes the channel from the media to public policy -- here, food distribution--in terms of the electoral connection: by informing the public of social protection problems--droughts and floods--, the media increases politicians' incentive to respond out of concern for "their election chances," as responsive officials are more likely to be reelected.¹¹¹ Hence by increasing the salience of an issue, the media affects policymaking as well as election outcomes and thereby renders government more accountable to the citizenry.

Studies of local media coverage of Members of Congress suggest that a similar dynamic is at work in the United States as the one identified in the study of Indian state elections. Congressional staffers report that they hear more from constituents on issues mentioned in the local media than issues that are not. In addition, greater local media election coverage increases

¹¹⁰ Timothy Besley & Robin Burgess, *The Political Economy of Government Responsiveness: Theory and Evidence from India*, 117 Q.J. ECON. 1415 (2002).

¹¹¹ *Id.* at 1446.

citizens' awareness of candidates' positions.¹¹² Furthermore, in areas with greater media coverage of congressmen—areas where more of a newspaper's subscribers are within one congressional district -- voters are not only more informed about their representatives, but also more likely to vote, and, correspondingly, their congressmen are more likely to pursue constituents' interest, in that they are less likely to engage in partisan voting, and more federal money flows into their districts.¹¹³

Analogous to droughts and floods in India, SOX can plausibly be characterized, for small firms especially, as an exogenous shock that imposed large unexpected costs on doing business and encouraged some to seek alternatives to being public companies. Because small firms are ubiquitous, such an adverse impact of SOX would implicate important local economy concerns, whose coverage in local media could impact electoral outcomes. The India and congressional coverage case studies further suggest that there could well be a differential effect on legislators' responsiveness from coverage by regional versus national newspapers of SOX's adverse impact. For instance, a legislative or regulatory response should be more probable if regional or local, rather than national, newspapers carry SOX stories related to small firm costs.

A cautionary note is, however, in order, regarding the efficacy of the policy outcome to be

¹¹² R. DOUGLAS ARNOLD, CONGRESS, THE PRESS, AND POLITICAL ACCOUNTABILITY 229-31, 239-40 (2004); DANIELLE VINSON, LOCAL MEDIA COVERAGE OF CONGRESS AND ITS MEMBERS THROUGH LOCAL EYES 174 (2003).

¹¹³ James M. Snyder, Jr. and David Strömberg, Press Coverage and Political Accountability, 29, NBER Working Paper Series, Working Paper No. 13878 (2008), available at <http://www.nber.org/papers/w13878>. The measure relating a newspaper's circulation in terms of the boundaries of a congressional district is referred to as its "congruence" and is discussed further in part III, *infra*; partisan voting measurements involve comparisons of the representatives' DNOMINATE scores, see note x, *supra*, to the party's vote share in the district and alternatively by how frequently the representative votes with the majority of his or her party's leadership. Snyder and Strömberg, *supra*, at 22.

expected from heightened salience of SOX, which goes to the heart of the rationale for democratic governance. It does not necessarily follow that the media's placing SOX critiques in the public spotlight will cause the legislation to be revamped for the better. In the business regulation context, salience has proven to be a double-edged sword. To the extent the public feels antipathy toward private enterprise or individuals of means, or is poorly informed about the workings of the economy,¹¹⁴ salience could, in fact, alter SOX for the worse, as legislators respond to popular opinion by imposing costly and ineffective regulation on business. Contrary to conventional wisdom, then, low salience could perversely produce a higher quality policy outcome from the perspective of social welfare, because in such a scenario, SOX would be modified in response to the judgment of better informed individuals.

B. Post-SOX Media Coverage

1. Scope of Media Coverage

Media coverage of SOX's impact was investigated using three sources: national newspapers, regional newspapers, and leading business journalists' columns. The research design uses print rather than electronic media for two reasons. First, the electronic media tends to follow, not lead, print reporting.¹¹⁵ Second, the probability of coverage of SOX-related issues would be

¹¹⁴ BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER* (2007). However, such a possibility may be overstated. In a study seeking to explain when major federal legislation is revised, Forrest Maltzman and Charles Shipan find that public mood, measuring whether the public favors a more liberal, activist government, is not a significant explanatory factor in a statute's amendment. Forrest Maltzman & Charles R. Shipan, *Change, Continuity, and the Evolution of Law*, 52 AM. J. POL. SCI. 252, 262 (2008). That study is not a conclusive response to Caplan's thesis because it does not control for the direction of the legislative revision, i.e., whether it expands or contracts regulation.

¹¹⁵ ARNOLD, *supra* note 91, at 4, 60. In keeping with this observation, internet coverage of business regulation by the leading blogs of corporate law scholars follows print media coverage, although on occasion, internet bloggers have led the national news media with regard to issues

lower for the electronic media. That is because newspaper readers can select which articles to read giving newspapers the advantage of being able to service multiple audiences in contrast to network news programs, whose viewers have no choice of which stories they see while watching a specific network. Thus newspapers can afford greater, and more detailed, coverage of issues that appeal to a narrower audience than the one that network news advertisers target.¹¹⁶ Three national newspapers were tracked: the *Wall Street Journal* (“WSJ”) and the *New York Times* (“NYT”), the second and third largest U.S. daily papers respectively, along with the *Washington Post* (“Post”).¹¹⁷ Four regional newspapers were also tracked: the *Birmingham News*, *Boston Globe*, *Houston Chronicle*, and *San Francisco Chronicle* (“SF Chronicle”). Those newspapers were chosen to provide geographical, as well as ideological, diversity in coverage.¹¹⁸ In addition, three of the

arising during political campaigns.

¹¹⁶ HAMILTON, *supra* note 18, at 137-38.

¹¹⁷ The position of the Post has fluctuated, with the papers fluctuating around it in the rankings circulating in much larger metropolitan areas (Chicago, Los Angeles and New York). For circulation and ranking data over the past several years see Audit Bureau of Circulation, available at <http://www.accessabc.com> (2007 data); Infoplease, available at <http://www.infoplease.com/ipea/A0004420.html> (2006); and the Knight Foundation, available at <http://www.powerreporting.com/knight/top200.html> (2005 data). I group the Post with the national newspapers for the following reasons. First, it is based in the capital and hence much of its ‘local’ coverage is national in scope. Second, although the percentage of total circulation that is national—that is, outside the D.C. metropolitan area—is small compared to that of the New York Times (10% compared to 50%), it has been much higher than that of the Los Angeles Times, the newspaper with consistently higher circulation than the Post, Lisa George & Joel Waldfogel, *The New York Times and the Market for Legal Newspapers*, 96 *Am. Econ. Rev.* 435, 436 (2006) (less than 1% of L.A. Times’ total circulation is outside of California), as is the popularity of its website, Hamilton, *supra* note 18, at 197-98. Finally, the Post is published where members of Congress and their staff reside for at least some part of the year, and therefore it is likely to exert greater influence nationally than its circulation might otherwise suggest. Indeed, the Post is conventionally included in lists of the ‘elite’ press, along with the other two national newspapers I surveyed. See David L. Paletz, *The Media in American Politics*, 2d ed. 71-72 (2002),

¹¹⁸ According to a measure of ‘media slant’ that indexes a newspaper’s political ideological

papers have substantial circulation, although their circulation is an order of magnitude smaller than the national papers.¹¹⁹

Six prominent business columnists writing for national newspapers and periodicals were tracked separately from their newspapers: Alan Abelson (Barrons), Holman Jenkins and Alan Murray (WSJ), Gretchen Morgenson and Floyd Norris (NYT) and Allan Sloan (Newsweek).¹²⁰

The rationale for tracking journalists apart from their newspapers is a literature suggesting that elite media can set the agenda for other media outlets, in which information and viewpoints diffuse

slant in coverage based on the relative use of phrases identified from congressional debates and calculated for 417 newspapers, in the most comprehensive effort to generate such a measure, the Boston and San Francisco papers are on the left of the political spectrum and the Birmingham and Houston papers are on the right, with respective slant measures of .424, .403, .462, .489. Matthew Gentzkow & Jesse M. Shapiro, Data pack accompanying *What Drives Media Slant? Evidence from U.S. Daily Newspapers* (2006), available at www.nber.org; paper available at <http://faculty.chicagogsb.edu/matthew.gentzkow/biasmeas052507.pdf>. This slant measure places the *SF Chronicle* as more Republican-leaning than only 6% of the 417 newspapers from which the measure is derived, and the *Houston Chronicle* as more-Republican leaning than approximately 64% of those papers. The slant measures of the national newspapers also reach across the political spectrum and match the regional newspapers' measures and intuition: the NYT and Post are on the left and equivalent to the *Boston Globe*, whereas the WSJ ranking is on the right and similar to the *Houston Chronicle*. See *infra* Table 3. Given the similarity in coverage reported in Table 3, Gentzkow and Shapiro's measure of ideological slant would not appear to have affected the extent of reporting on SOX.

¹¹⁹ Most recent circulation figures and population estimates are provided in Table 3, and have remained fairly constant over the past few years, with the *Houston Chronicle* being in the top ten U.S. dailies, the *Boston Globe* and *SF Chronicle* being closely ranked in the next ten, and the **Birmingham News**, considerably smaller, but in the top 100. The circulation data, and ranks over the last three years are from the Audit Bureau of Circulation, *supra* note 132, Infoplease, *supra* note 132, and the Knight Foundation, *supra* note 132. The Birmingham News was selected, despite its small circulation, because along with providing desirable ideological and geographical diversity, one of the Enron-era accounting scandals concerned a local firm, HealthSouth, which offered the possibility of examining whether the presence of a scandal affected a newspaper's coverage of SOX-related issues.

¹²⁰ A seventh journalist, Carol Loomis (Fortune), was also tracked but the search identified no articles by her touching on any relevant topic pertaining to SOX.

across the media.¹²¹ Distinguishing across the three media sources should help ascertain how, if at all, elite media influence the regulatory apparatus pertaining to business and financial markets. The editorial page of the WSJ, the leading business newspaper, was also separately tracked and included in the leading journalist category, as it is a national editorial page that is thought not only to possess a distinctive editorial voice but also to wield clout, specifically when it comes to the economy and business.

The individual journalists and WSJ editorials were tracked from January 2001, well before Enron collapsed and SOX was enacted, in order to ascertain whether there was any prior discussion of the need for the substantive provisions of SOX that were enacted in response to the scandals.¹²² There was none. Although many components of SOX, such as, increasing the independence of the board and of auditor, had been advocated by commentators and interest groups many years before SOX's passage, those issues were not in the public eye prior to Enron's implosion.¹²³ The absence of news stories by prominent business journalists discussing such

¹²¹ WERNER J. SEVERIN & JAMES W. TANKARD, JR., *COMMUNICATION THEORIES: ORIGINS, METHODS AND USES IN THE MASS MEDIA* 232 (5th ed. 2001). One of the studies identifying intermedia influence summarized by Severin and Tankard found that the columns of the NYT reporter on the 1972 presidential campaign beat were used by other reporters to determine what to emphasize in their coverage of the campaign.

¹²² The search used to identify the SOX-related newspaper articles in the three media sources is described in the Appendix.

¹²³ Romano, *supra* note 14. For example, the national journalists wrote only two articles that referred to directors, or board independence, before SOX's enactment, and both were straight news analysis by Gretchen Morgenson reporting on the NYSE's consideration of a proposal to split the position of board chairman and CEO (which was not adopted), and its adoption of a rule to require a majority of the board to be independent, on April 5, 2002 and June 6, 2002, respectively. These proposals were the Exchange's response to Enron. In contrast, over a year after SOX was enacted, from 2004 to 2005, Morgenson wrote nine columns on boards, most of which were calls to increase board independence, and almost all of the other columnists wrote at least one column on board independence in the post-SOX period.

governance proposals pre-enactment reinforces the characterization that the legislation was hastily cobbled together in a crisis atmosphere by well-positioned policy entrepreneurs who had Senator Sarbanes' confidence. Sox's principal provisions and their financial consequences did not receive even a semblance of public airing or of serious deliberative consideration.¹²⁴

¹²⁴ Romano, *supra* note 14. Robert Prentice and David Spence take issue with my characterization of SOX's enactment, asserting both that the legislative process I described critically is standard fare and that, were the legislation to have been crafted in a more deliberative fashion, business would have captured the process and produced a statute that would have been contrary to the public interest. Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise is the Received Wisdom?*, 95 GEO. L.J. 1843 (2007). They are mistaken on both counts. First, they are mistaken about the role of business in the legislative process; their analysis is informed by a dated literature. As Mark Smith elaborates in his comprehensive study of business lobbying, when business "wins" in a deliberative process over controversial regulation, it is because the public supports its position and not because of legislators' capture by business. MARK A. SMITH, *AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS AND DEMOCRACY* (2000). Similarly, Sarah Binder notes that the ability of interest groups to influence legislation—either facilitating or blocking passage—is overblown, reporting that the most comprehensive study of interest group lobbying finds no evidence that lobbying by business groups, even when not opposed by other groups, affects the probability of legislation's passage. BINDER, *supra* note 19, at 31. Second, Prentice and Spence's assertion, that a more deliberative legislative process would be invisible and thereby enable business to conspire with legislators to produce legislation against the public interest, is a fantasy. The trial bar and labor union and public pension funds possess significant political influence, and are as active as business organizations, if not more so, behind the scenes in the legislative process, as recently illustrated by their sophisticated campaign of lobbying legislators, the SEC, and even the Supreme Court, over litigation discussed in note 41, *supra*. See Kara Scannell, *Big-Money Battle Pits Business vs. Trial Bar*, WALL ST. J., Oct. 9, 2007, at A1. Consistent with that example, Frank Baumgartner and colleagues, in a comprehensive study of policy change, find that in the vast majority of cases, the resources arrayed on both sides are in equipoise. That is to say, the involvement of "resource rich" organizations such as the Chamber of Commerce mobilizes the matching of resources of opponents. Frank R. Baumgartner et al., "Policy Outcomes" in Lobbying and Policy Change, Who Wins, Who Loses, and Why 20 (chapter 11) (manuscript 2008) available at http://www.personal.psu.edu/frb1/Advocacy_July_19_2008.pdf We simply do not know what the answer to the counterfactual would have been from a more deliberative and reasoned legislative process, nor, of course, do Prentice and Spence offer any evidence for their claim that the position taken by firms on proposed regulation is necessarily at odds with investor welfare and the public good. Third, SOX's frantic enactment is not standard fare: prior major financial market regulation, such as the federal securities legislation in the 1930s and the FCPA of 1977, were drafted after several years of congressional hearings and agency investigation into financial scandals.

2. Coverage of SOX's Impact on Small Firms and Market Competitiveness

Tables 2-4 indicate the scope of the coverage of the two core issues on which the critique of SOX has centered: an adverse impact on capital market competitiveness and disproportionately high costs for small firms. There are three core findings. First, not entirely surprisingly, press coverage mentioning critiques of SOX steadily increased over the surveyed period, while references to Enron receded. Second, market competitiveness issues tend to receive far more attention than small firms' costs, although many of the untabulated stories (the "Total SOX" line in the tables) report on SOX compliance costs, an overlapping concern. Third, and most intriguing from a political economy perspective with regard to forecasting SOX's future, regional newspapers have directed significantly more attention to small firm costs than to market competitiveness issues, relative to the coverage of national newspapers and journalists.

a. Temporal pattern of reporting on criticisms of SOX. The initial articles critiquing SOX appeared two years after SOX's enactment, not surprisingly at about the time when large firms had to implement the internal controls attestation required by section 404. The steady increase in coverage of the SOX critiques over the surveyed period is consistent with both firms' continuing to find SOX compliance onerous, and the progression of reports on the burdens imposed on public

There are other inconvenient facts concerning the legislative process that Prentice and Scott do not get straight in their attempt to rationalize the lack of deliberation regarding SOX's governance provisions. For example, they incorrectly assert that House Democrats did not discuss governance provisions because the Republicans controlled the debate, and hence that my criticism of the absence of deliberation on the governance provisions in SOX is inapposite. But as noted in my earlier article, the Democrats did not discuss the SOX governance provisions on the chamber floor because their bill did not contain those governance provisions, which were add-ons in the Senate bill, and not because Republicans employed House rules to prevent consideration of such proposals. Romano, *supra* note, at 1551. Following the admonition often attributed to Senator Daniel Moynihan, Prentice and Scott are most certainly entitled to their opinion regarding the merits of SOX's substantive content, but not to their own facts.

firms by the statute.

The reporting on SOX critiques does not, however, fit a pattern of agenda setting by elite media. There is no evidence of a pattern of diffusion of coverage from either national journalists or national newspapers to regional newspapers.¹²⁵ In fact, the overwhelming number of articles (over 90 percent) reporting on SOX critiques in regional newspapers had no temporal relation to a national journalist's columns.¹²⁶ Similarly, over half of the regional newspapers' reporting on SOX critiques had no temporal connection to national newspaper coverage, and there was no gap in timing for another third (that is, regional newspapers published articles on the same day as national papers).¹²⁷ In my judgment, regional newspapers' editorial choices on SOX can therefore best be characterized as affected by unfolding events and not as set by the elite media's agenda as studies of news coverage of social issues have found.¹²⁸ This finding provides an additional rationale for examining regional as well as national newspapers' coverage of SOX to obtain a better gauge of the

¹²⁵ A more detailed comparison of the sequence of coverage of the three media sources is provided in the Appendix. For convenience, the slice of the media in the sample consisting of the six leading business journalists and WSJ editorials will be referred to henceforth as "national journalists."

¹²⁶ In addition, none of the regional newspapers published or referenced any of the national journalists' SOX-related columns, although they did, on occasion, carry other columns by the journalists, or reference them.

¹²⁷ As discussed in the Appendix, many of the articles in the regional newspapers were obtained from wire services or other newspapers. Because the wire stories are typically published in a regional newspaper one day after they appear on the wire, it is possible that regional newspapers' selection of wire service articles is made in response to reading a story in a national newspaper. However, in my judgment, that explanation is not plausible. As detailed in the Appendix, which examines coverage by the Associate Press wire service, the regional newspapers were not only highly selective in publishing stories from the wire, but also, a large number of the wire service stories preceded, or were unrelated to, the timing of a national newspaper story.

¹²⁸ The news coverage in the research identifying intermedia influence were drugs and a presidential campaign. SEVERIN & TANKARD, *supra* note 100, at 232.

prospect for legislative action.

b. Substantive pattern in the coverage of SOX critiques. The most suggestive pattern in the post-SOX coverage is a notable difference in relative emphasis between the elite press (national journalists and newspapers) and regional newspaper reporting on the two principal critiques of SOX. As indicated in Tables 2-3, national journalists and national newspapers pay more attention to market competitiveness than small firm costs, while regional newspapers referred about equally to the two lines of criticism and thus comparatively more frequently to costs borne by small firms.¹²⁹ In 2005, when coverage of SOX critiques began, national newspapers published more stories on small firm costs than on market competitiveness compared to national journalists. But thereafter the newspapers' reporting mirrored the journalists' greater coverage of market competitiveness issues, and the difference in reporting across the elite media sources is

¹²⁹ The difference in coverage is statistically significant: a cross-tabulation of the type of critique by type of paper (aggregating counts for regional versus national papers) has a chi-square of 9.2 which is significant at .002. The cross-tabulation is also significant if the coverage of the regional newspapers is compared to that of the journalists, or to that of the national newspapers and journalists combined, chi squares respectively of 4.4 (significant at .04) and 9.9 (significant at .002). As discussed in the Appendix, there is some overlap in the issues involving small firm costs and market competitiveness, which requires caution when making comparisons. For example, articles discussing the increased cost of an IPO or being a public company due to SOX are classified in the market competitiveness critique category, although most firms that would undertake an IPO are small and the statute's adverse impact on IPOs affects small firms' cost of doing business. But the comparison is even starker across news sources if the market competitiveness stories without any foreign firm or market reference are excluded, because most of the national press stories had a foreign firm or market angle, whereas that was not the situation in the regional papers. The respective chi-squares (probabilities in parentheses) of the cross-tabulation of critiques where the market competition stories include only those with a foreign firm or market reference, are 11.4 (.001) for regional versus national newspapers, 6.7 (.01) for journalists, and 12.6 (.000) for national newspapers and journalists combined. Accordingly, whatever the measure, the relative coverage differed significantly across the regional and national media.

insignificant.¹³⁰

A difference in perspective across regional and national newspapers, informed by financial considerations, regarding what are the most important business issues to report to readers would seem to provide a straightforward explanation for the observed difference in coverage. Small firm issues have a local dimension, as small firms typically comprise the largest number of businesses in a locality, and their issues would therefore be of greater relative interest to regional than national newspaper readers. Such a local connection would be encountered throughout the country, as small firms are ubiquitous. In support of this conjecture, there is no difference in relative coverage of small firm costs and market competitiveness issues across regional newspapers, indicating that a paper's geographic location did not affect the balance accorded the critiques.¹³¹ A difference in coverage across regional and national newspapers, but not among regional papers, that reflects differences in what issues resonate with national and regional newspaper readers is consistent with observed industry responses to competition: regional newspapers increase their emphasis on local stories to maintain a subscriber base when a national newspaper enters their market.¹³²

¹³⁰ The cross-tabulation of article type for national papers versus journalists is not significant, whether or not non-foreign referenced stories are included in the market competitiveness article total (chi-square values of .0001 and .04, respectively). These findings suggest, as the text points out, that any discrepancy in issue coverage across the two groups was extremely short-lived. A possible explanation of the shift in national coverage is that the newspapers' perception of the national SOX story shifted in conjunction with the publication of the committee reports, moving from small firm costs to capital market competitiveness, the focus of the three latter commissioned reports.

¹³¹ A chi-square test of the cross tabulation of article type against the four regional newspapers is insignificant (chi square of 1.4, probability of .72 using all market competitiveness articles or chi square of .4, probability of .94 excluding articles with no foreign reference).

¹³² George & Waldfogel, *supra* note 95 (discussing regional newspapers' coverage changes when a national newspaper entered its market as indicating differences between regional and national newspaper audiences).

National journalists would be less focused on matters of local import rather than those having broader national implications and therefore more likely to view global market competitiveness as an issue demanding greater attention than small firms' operating costs. Of course, straitened financial circumstances of small firms can have significant national implications, as they are an important source of new employment and innovation. But such an effect due to SOX is not easily quantified. It is noteworthy that none of the committees or other organizations expressing concern over the issue have even attempted to estimate such an impact, in contrast to the many quantifying losses to stock exchanges and the financial services industry from foreign capital market competition. It is conventional wisdom in media research that the press is best able to affect the public agenda when issues are concrete rather than abstract.¹³³ An additional explanation, then, for national journalists' failure to attend to small firm costs as an issue of importance to the national economy is that the payoff in terms of influencing and informing the policy debate would have been perceived to be higher from reporting on the issue with a more concretizable national economic impact—market competitiveness.

A declining trend in IPOs or foreign listings is also of particular importance to stock exchanges and the financial services industry, whose profitability is in no small part affected by such transactions. That financial sector is heavily concentrated in New York, where the national journalists' publishers and two of the national newspapers are headquartered, providing a compelling, complementary explanation for competitiveness to be a particular focus of their attention. One in nine jobs in New York City is in the financial services industry and that sector

¹³³ SEVERIN & TANKARD, *supra* note 100, at 228-29.

generates over one-third of the city's business tax income.¹³⁴ At 15 percent of the gross city product, the industry is second only to real estate in importance.¹³⁵ Editors and reporters for those newspapers would no doubt be attuned to this specific competitiveness issue because it is of substantial interest, and importance, to their readers.¹³⁶ This contention is buttressed by the contrasting reporting of the non-New York based national newspaper in the study, the *Washington Post*. As Table 3 indicates, the Post published far fewer stories on market competitiveness than either the NYT or WSJ, and had a lower ratio of market competitiveness to small firm cost stories, paralleling the regional newspapers' coverage. In fact, the Post's coverage cannot be distinguished from that of regional papers, whereas both the Post and the regional newspapers' reporting differs significantly from that of the NYT and WSJ.¹³⁷

¹³⁴ McKinsey Study, *supra* note 48, at 10.

¹³⁵ *Id.*

¹³⁶ For instance, slightly over half of the NYT's circulation is national, with the New York metropolitan area accounting for the rest. Because the WSJ is the leading financial newspaper, historically forgoing publishing when the stock exchange is closed, reporting on the stock exchanges' financial condition would be expected to be of particular interest to its readers.

¹³⁷ It is not immediately apparent how the Post's inclusion confounds the analysis described in the body text. Crosstabulations by article type, small firm and market competitiveness (all or foreign-only stories) of the three national newspapers indicate that their relative coverage is indeed different, and the source of the difference among the three papers is the reporting in the Post. Namely, the crosstabulations of article type are statistically significant at less than 5 percent only when the Post is compared to the NYT and WSJ (chi-squares of 6.3 and 9.3 with the comparison between small firm costs and, respectively, all market or foreign-only competitiveness stories), or when the Post is compared to the NYT and WSJ stories combined (chi-squares of 5.1 and 7.3, for the respective comparisons). Other permutations comparing the coverage of the three national newspapers are not significant. Moreover, the crosstabulation of stories in the Post compared to the regional newspapers is insignificant, whereas it is significant when both the NYT and WSJ are compared to the regional newspapers for the market and foreign-only competitiveness stories (respective chi-squares and probabilities of 12.3, .000; and 15.3 .000). By contrast, crosstabulations of the stories across the regional newspapers are insignificant, indicating that their coverage is indistinguishable.

The differential coverage of issues relating to the SOX critiques by regional newspapers compared to the New York-based national newspapers has important ramifications for predicting how Congress and the SEC will respond to SOX, as well as for understanding recent congressional votes. Earlier mentioned studies of local media coverage of Members of Congress and the media impact study of Indian state elections imply that coverage by regional newspapers have electoral consequences.¹³⁸ This suggests that mitigating SOX's burden on small firms—the issue mentioned relatively more often by regional newspapers—would have a higher likelihood of moving onto Congress' agenda than improving market competitiveness, counter to what might be inferred from examining solely the New York-based national newspapers' coverage. In addition, the probability of a political response would be expected to increase as elections draw near, as legislators, seeking to improve their electoral prospects, will be more attentive to issues of concern to their constituents, whose priorities are picked up in regional newspapers. Accordingly, Members of Congress up for reelection should be more attuned to small firm costs than those not up for reelection or those with safe seats. Such hypothesized behavior is, in fact, observed in the data.¹³⁹

Moreover, if market competitiveness issues are voiced in the political arena, we would expect legislators whose constituents are employed in the financial services industry, such as legislators from the New York metropolitan area, to raise them most forcefully, given the focused coverage on those issues of the New York-based national newspapers. New York public officials' sponsorship of the McKinsey Study illustrates this point.

¹³⁸ See note 90, *supra*. The study of Brazilian city elections mentioned in note 89 *supra*, similarly implicates the importance of local media outlets, although it examined the impact of local radio stations and not print media.

¹³⁹ See the discussion in Subsection III.C.2, *infra*.

3. Coverage of the Commissioned Reports

The news coverage of the commissioned reports generally received less coverage than the SOX critiques, although reporting on the critiques and reports is highly correlated.¹⁴⁰ In addition, the coverage of the four reports varies considerably, and in particular, the focus of reporting differs significantly across news sources, often tracking the differences in emphasis accorded the SOX critiques.

a. Coverage of the Advisory Committee. The Advisory Committee's work product received the greatest attention of the four reports, which is to be expected as it was government-sponsored and the first organization to issue a report critical of SOX. Although its creation and activity was noted by all of the newspapers, it was ignored by the national journalists save one, Floyd Norris.¹⁴¹ This pattern parallels the journalists' overall inattentiveness to SOX's imposition of costs on small

¹⁴⁰ As a shorthand expression, the text refers to articles referring either to an entity issuing reports or to a report as articles referencing a report. The pairwise correlations for the different types of articles (small firm costs, market competitiveness, foreign firm competitiveness references, total all SOX critiques, and committee reports) range .82 and .94, all significant at less than 5 percent. In addition, as indicated in Tables 2 and 3 and the Appendix, there is considerable overlap in the report and critique counts. In particular, articles referring to the Capital Markets Committee and McKinsey Study often discussed market competitiveness, and such articles are counted for both types of references. Similarly, articles referring to the Advisory Committee often discussed small firm costs. The fact that the number of articles referencing market competitiveness is higher than that for committee reports when overlaps are disregarded, in aggregate and for journalists and newspapers separately, supports the contention that the committees received less coverage than the critiques. In addition, more than half of the references to committee reports are overlaps whereas the proportion is under one-third for market competitiveness references. The proportion of overlaps for small firm cost references is closer to that of the Advisory Committee, over half for most news sources, and the number of non-overlapping small firm cost references is about equal to those for the Advisory Committee, reflecting, in part, the lesser attention paid to small firm issues by the national press.

¹⁴¹ Greater descriptive detail about the national media's coverage of the commissioned reports is provided in the Appendix, because some of that reporting included personal attacks on individuals associated with the reporting entities or their sponsors, and not simply substantive objections, a journalistic style followed on occasion by the elite press that did not appear in any of the regional papers.

firms, which was the Advisory Committee's focus.

All of the regional newspapers reported on the Advisory Committee, consistent with the ubiquity and local character of small firm issues, although the *SF Chronicle* referred to it more frequently than the other regional papers. The substantially greater coverage of the Committee by the *SF Chronicle*, compared to the other regional papers, could be a function of the legislation's impact on the large number of startup firms in the Bay area—small companies that would be particularly concerned about section 404 costs.¹⁴²

The content of the regional newspapers' articles on the Advisory Committee, however, typically consisted of passing references to its formation and news briefs mentioning its recommendation to exempt small firms from SOX (with the exception of some of the stories taken from wire services). The value of such reporting would at first glance appear trivial, given the total lack of depth to the coverage. But media researchers contend that even cursory reporting can be informative. For example, monitoring theories of the media evaluate content on how well it alerts citizens to issues relevant to their own or the public's welfare, rather than its accuracy or detail and characterize individuals as scanning, rather than reading closely, their information environments in order to make decisions or take political action.¹⁴³ It is therefore altogether possible, if not

¹⁴² Consistent with that explanation, a much higher proportion of the *SF Chronicle's* articles in the market competitiveness critique category concerned the adverse impact on the cost of going public for domestic firms, and did not reference foreign firms or markets, than did those of the other regional newspapers. Only 42% of *SF Chronicle* stories are foreign-only market competitiveness stories compared to over 60% for the other regional newspapers. The chi-square of 2.7 for a cross-tabulation of foreign-only to non-foreign-only market competitiveness stories for the *SF Chronicle* against the other regional newspapers is, however only marginally significant at 10%.

¹⁴³ John Zaller, *A New Standard of News Quality: Burglar Alarms for the Monitorial Citizen*, 20 POL. COMM. 109 (2003).

probable, that brief or passing references to the Advisory Committee in regional newspapers could have functioned in such a manner.

b. Coverage of the Capital Markets Committee, McKinsey Study and Chamber of Commerce Commission. When viewed in conjunction with reporting on the Advisory Committee and the SOX critiques, four patterns appear in the coverage of the three commissioned reports whose recommendations focused on capital market competitiveness, compared to that on the Advisory Committee. These patterns involve differences in coverage of the reports across media sources, and in their relative coverage of the SOX critiques.

First and most interesting, underscoring the pivotal importance of the preferences of a newspaper's readers in informing a newspaper's content, the Post's coverage of the commissioned reports equaled that of the critiques, in contrast to all of the other newspapers, whose coverage of the critiques by far exceeded that of the reports.¹⁴⁴ This pattern is intuitively understandable: the business of the national government is local coverage in the District of Columbia, and the reports and their issuing entities all had a government connection.¹⁴⁵

Second, the national journalists' coverage of the reports replicated their reporting on the SOX critiques, in that, they all covered the Capital Markets Committee, which focused on market competitiveness issues, and not the Advisory Committee report.

Third, the format of the regional newspaper treatment of the reporting commissions

¹⁴⁴ The crosstabulation of article type (reports versus critiques) for the Post against all of the other newspapers is statistically significant (chi-square of 6.8, $p < .01$).

¹⁴⁵ Additional anecdotal evidence of the distinctive political-beat focus of the Post is that it was the only newspaper of those surveyed to publish stories about Bush advisor Karl Rove's ownership of Enron stock during the coverage of the Enron accounting scandal.

differed between the Advisory Committee and the other three.¹⁴⁶ Whereas Advisory Committee coverage was, in general, highly schematic, providing little information, half of the articles covering the other reports provided information on the rationales along with criticisms of the recommendations. Several institutional factors could have contributed to the difference in coverage. The Advisory Committee operated over a substantial time span and in public view. It issued several reports to which the SEC responded, a process lending itself to squib reporting, as its deliberation moved forward. By contrast, the Capital Markets Committee did not operate in public and produced a report only a few months after its formation, with no incremental activity that would benefit squib reporting. In addition, those papers' readers may well have been more familiar with the small firm cost issues addressed by the Advisory Committee than with the market competitiveness issue raised by the Capital Markets Committee Report, and the newspapers may have adjusted their reporting accordingly.

Fourth and finally, the national newspapers' editorial posture toward SOX mirrored the divergent views of their journalists regarding the Capital Market Committee's recommendations and the competitiveness critique.¹⁴⁷ . The WSJ published several editorials that were critical of

¹⁴⁶ The more lopsided coverage of the Advisory Committee by the *SF Chronicle* than the other regional papers reflects the fact that a larger number of its articles on small firm costs also referred to the Advisory Committee, compared to the overlap of articles on market competitiveness and the other reports, as discussed in the Appendix and tabulated in Table A1. Of course, this was an editorial choice: most of the Advisory Committee coverage was in wire service stories, and those services' coverage was not as lopsided as the paper's. For example, four of nine *SF Chronicle* articles referencing the Advisory Committee were Associated Press ('AP') stories. During the sample period, the AP coverage of the Advisory Committee was slightly lower than that of the other three committees (22 versus 27 articles, excluding repeated articles), and the *SF Chronicle* did not run any of the AP articles referencing the other three committees. The Appendix provides a more detailed analysis of regional newspapers' selective use of external sources in their reporting on the SOX critiques.

¹⁴⁷ Two journalists (NYT and Post) expressed skepticism over the rationale for the

SOX, whereas NYT and Post editorials, while conceding that some “tweaking” of SOX to recalibrate the most onerous provisions would be valuable, opposed any large-scale changes to the legislation.¹⁴⁸

The variation across national journalists which tracked the newspapers’ editorial pages, along with more frequent one-sided reporting on the commissioned reports by the NYT compared to the WSJ, suggests that a newspaper’s overall political orientation influences the tone and content of reporting on SOX, although ideology has no bearing on the frequency of SOX coverage.¹⁴⁹ Of course, reporting differences in political ideology do not imply media manipulation of the public.

Committee’s work and recommendations, that SOX had caused a decline in U.S. stock markets’ competitiveness; one (WSJ) expressed credence in that view; and a fourth (WSJ) considered SOX a drag on the domestic economy and the Committee’s focus on stock exchange competitiveness a political tactic to garner support from influential New York Democrats.

¹⁴⁸E.g. NYT “The Corporate End Run, Nov. 12, 2006, p. 11 (section 4), NYT, Holding the Line, Jan. 2, 2007, p. A16; Post, Fine-Tuning Finance, 6/9/05, at A20; Post, “Not Just Bad Apples,” May 26, 2006, p. A20.

¹⁴⁹ The difference in balanced reporting across the two papers is discussed in the Appendix. The rate at which the different SOX critiques were covered is similar across newspapers with substantial differences in ideological slant: correlations between the media slant measure and the number of SOX critique stories (in total or by type), are not statistically significant. However, the number of newspapers containing stories in which tone or critical content can be compared is too small to be able to compute a meaningful correlation between qualitative coverage and media slant. Consistent with other researchers’ findings, *see, e.g.,* Gentzkow & Shapiro, *supra* note 97; HAMILTON, *supra* note 18, newspaper ownership also does not appear to determine coverage, as there is no systematic relation in coverage by the commonly-owned papers in the sample. The *Boston Globe* is owned by the NYT and their media slant measures are quite close, but the pattern of coverage of the papers differed significantly across the SOX critiques: crosstabulations of critique story type, small firm costs against market competitiveness (including or excluding non-foreign referenced articles) are significant, with respective chi-squares, probabilities in parentheses of 5.5 (.02); and 7.2 (.008). By contrast, the *Houston Chronicle* and *SF Chronicle* are owned by the same firm (Hearst), and have sharply different media slant, but there is no significant difference in their coverage of critique story types (the chi-squares of the crosstabulations of small firm cost against market competitiveness articles, all or foreign-references only, are, respectively .004 and .22).

Rather, as the media research literature suggests, media slant is most plausibly interpreted as reflecting the policy preferences of a news outlet's readership.¹⁵⁰

4. *Saliency of Post-SOX Pushback Reporting.* What should be made of the steadily increasing post-enactment coverage of SOX critiques and related stories, including the commissioned reports, during the period under study? More concretely, does that trend suggest that the coverage of the critiques has reached a level of salience sufficient to spur legislators and other political actors to respond? Tables 2-4 provide one benchmark of salience, the number of news stories in the national and regional newspapers containing a reference to Enron post-SOX. From the perspective of such a benchmark, the coverage of the SOX critiques would appear to be inconsequential. It might therefore seem indisputable to characterize the SOX pushback as not having reached a level of resonance with the press, or visibility to the general public, to affect the prospect of rolling back SOX's strictures.¹⁵¹

The fever pitch coverage of all matters related to Enron may not, however, be the most appropriate benchmark for ascertaining whether the critiques being leveled against SOX have reached sufficient salience for legislative action. It would be a mistake to expect the critiques of SOX to reach the intensive coverage accorded to Enron's fall. The media literature suggests that newspaper content reflects readers' taste for information, and the drama and human interest stories surrounding Enron's collapse were much more fascinating to the public, regardless of ideological

¹⁵⁰ Gentzkow & Shapiro, *supra* note 97; HAMILTON, *supra* note 18.

¹⁵¹ The comparison between the counts of articles on Enron and those on SOX critiques and commissioned reports should be made with care: as noted in the Appendix, a large number of the articles in the 'Enron' tallies are not even tangentially related to the company's collapse, as the term has entered the vernacular. But even if the count of articles referencing Enron post-SOX is reduced by a large factor, the number of articles reporting on the SOX critiques and commissioned reports would still be a fraction of the Enron count for all of the newspapers.

commitment, than impersonal reports of the declining number of NYSE-listed foreign companies or the increased cost of internal control audits.¹⁵² Moreover, a study examining the impact of media coverage on U.S. citizens' knowledge of public policy facts (such as, what groups were covered by a Presidential health care initiative) found that once an issue received some coverage, additional media attention did not increase that knowledge.¹⁵³ From this perspective, the level of reporting on the SOX critiques may well have met a threshold to inform public opinion on the issues.¹⁵⁴ Finally, studies of Indian state and Brazilian city elections found a positive correlation between election outcomes and measures of local media presence, rather than actual story content.¹⁵⁵

That literature identifying a policy impact in the U.S. and other countries from a threshold

¹⁵² For an analysis relating the increase in "soft" news, such as human interest stories, on television news programs to the preferences of the audience most valuable to advertisers, young women, see HAMILTON, *supra* note 18.

¹⁵³ Jason Barabas and Jennifer Jerit, Estimating the Causal Effects of Media Coverage on Policy-Specific Knowledge, 53 Am. J. Pol. Sci. 73, 79-80 (2009) (finding after some-number not identified - coverage, additional coverage of 10 or more stories did not significantly increase the knowledge of policy facts among surveyed members of the public, where the mean coverage was approximately 2 stories, with a standard deviation of 1, and "high" coverage—which did not impact knowledge - was deemed to be two standard deviations above the mean).

¹⁵⁴ A study of EPA pesticide decisions found that the impact of newspaper coverage on regulatory action was nonlinear, such that decisions were affected only when coverage reached a certain threshold. Yates & Stroup, *supra* note 89, at 310. It is not possible to infer what such a threshold would be for SOX critiques from the Yates and Stroup study. That study uses article word counts to measure coverage but does not specifically identify the threshold number of words at which they found coverage "high" enough to impact regulators' decisions. But its finding parallels the finding in the Barabas and Jerit study, *supra* note 192, that found a nonlinear effect, using article counts, on the public's learning about policy proposals.

¹⁵⁵ Besley & Burgess, *supra* note 90; Ferraz & Finan, *supra* note 89. The Indian state elections study used newspaper circulation figures. The correlation between newspaper circulation and the number of articles on small firm cost, as well as all SOX critiques, is positive and significant at 1%. These correlations support drawing inferences to this paper's data from that study's findings, which relate only to circulation figures and not to news content.

level of media coverage suggests the possibility that the number of stories critiquing SOX—or referring to the reports critiquing SOX—was sufficient to raise the saliency of the issue to the public, and contributed to the SEC's eventual strategic regulatory retreat. As the pace of news coverage on the SOX critiques accelerated, almost tripling from that of the previous year, the agency proposed revising its interpretive guidance of section 404 at the end of 2006, even though it did not exempt small firms as the Advisory Committee recommended.¹⁵⁶

Of course, interest group activity undoubtedly also influences the policy agenda, independent of media attention to an issue. There is a well-established literature on how

¹⁵⁶ See Management's Report on Internal Control over Financial Reporting, 71 Fed. Reg. 77,635 (Dec. 27, 2006). Although that action did not address the market competitiveness issue concerning SOX, at the same time as proposing the revised implementation standard, the SEC proposed easing foreign firms' ability to delist, and thereby avoid SOX. See Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, 72 Fed. Reg. 1384 (Jan. 11, 2007). Both rules became effective in the spring of 2007. At a recent conference, the SEC's Chief Accountant reported that approximately 2/3 of European companies had deregistered, comparing the current number of registered issuers to that five years ago. *SEC Official Says Fewer Companies Coming to U.S. Markets in Registered Forum*, 40 Sec. Reg. & L. Rep. (BNA) 777, 778 (May 12, 2008). Moreover, as discussed in Part IV the SEC thereafter took other action directed at improving market competitiveness, eliminating for many foreign firms the requirement that their accounting statements be reconciled to U.S. accounting principles. Steven Marcy, *SEC Ends GAAP Reconciliation for Reports Meeting IASB-Issued IFRS*, 5 Corp. Accountability Rep. (BNA) 1134 (Nov. 16, 2007). Craig Doidge, Andrew Karolyi and Rene Stulz examined the stock price reaction of fifty-nine firms that deregistered in the month following the 2007 rule relaxation; it was insignificant. Craig Doidge, Andrew Karolyi & Rene Stulz, *Why do foreign firms leave U.S. equity markets? An analysis of deregistrations under SEC Exchange Rule 12h-6*, Ohio State University Fisher College of Business Working Paper 2008-03-013 (2008). They view this data as proof that SOX did not adversely impact market competitiveness, on the contention that for there to have been an adverse impact, the abnormal return on deregistration must be significantly positive. But if deregistering provides new information about a firm's financial state, for example, that the costs of SOX will be greater than expected future cash flows, then that would lower investors' expectations regarding future profitability, offsetting any positive effect from avoiding SOX. Of course, the data do not actually fit with their positive assessment of SOX, nor their contention that competitiveness is not an issue. If the cost of SOX was less than its benefit or other benefits from a U.S. listing, then they should have found a significantly negative price effect upon deregistration.

concentrated costs and dispersed benefits can result in small numbers of organized individuals disproportionately influencing policy.¹⁵⁷ The SEC's revised guidance could be a response to the lobbying of adversely affected firms quite unrelated to news coverage. However, it is quite possible, if not probable, that media coverage worked in tandem with lobbying by affected parties by increasing public awareness of the issue, to spur legislators to press the agency to react, even if its response may well have been more symbolic than real. The two influence channels—media reporting and interest group lobbying—are not, in practice, distinct. The political science literature indicates that interest groups often use the media to increase the salience of an issue to persuade legislators of the issue's importance to a broad segment of the public beyond the group's members, thereby moving the issue up on the policy agenda.¹⁵⁸

Media reporting can also accelerate organizational efforts to lobby for legislative change by causing individuals to mobilize around collective interests and by highlighting common problems and potential solutions.¹⁵⁹ That channel could be particularly important in the SOX context for small business owners to obtain information and to organize politically more effectively, to the extent that they are not connected with a local chamber of commerce that would be a source of such information.

These scenarios of the relation between media reporting and interest group activity are in accord with a well-recognized mechanism spurring legislators' action. Congress has been characterized as preferring to engage in regulatory oversight by a fire alarm, rather than a police

¹⁵⁷ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

¹⁵⁸ KOLLMAN, *supra* note 87.

¹⁵⁹ HAMILTON, *supra* note 18, at 243.

patrol approach, in which members respond to information from constituents' complaints about agency actions (the constituents "pull" a fire alarm), rather than actively investigate an agency (legislators "sniffing" for a fire) on their own.¹⁶⁰

An additional measure of the salience of the SOX critiques involves post-SOX editorials and commentary on the statute. Paralleling the coverage of all other post-SOX issues, Table 4 shows an increase in articles opposing revising SOX, which indicates that only three years after SOX, journalists and editorial writers supportive of the statute felt the critiques had made sufficient inroads to require an editorial response. Of the newspapers examined, only the WSJ editorialized unequivocally for revamping SOX. Not only did many national journalists voice opposition to such a course of action, but also several newspapers advocated against any broad rollback of the statute, at the same time as endorsing some revision of section 404.¹⁶¹

Although the media's near consensus for retention of the status quo, with possibly minor cosmetic tweaking, would appear to suggest that congressional effort to revamp SOX might be out of step with public opinion, the impact of the media on public opinion is subtle and can be difficult to gauge. Public opinion does not mechanically conform to the view of newspapers informing it on an issue. A newspaper, for instance, can provide a balanced account of arguments for and against a particular policy, or a very one-sided account. Yet readers can come away convinced that one side is correct, or that the side whose perspective was ignored is correct, either due to the

¹⁶⁰ Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 2 AM. J. POL. SCI. 165 (1984).

¹⁶¹ Editorials opining that some tweaking of SOX was necessary along with opposing any broad scaling back of the statute are not counted in the table row as "advocacy against revising SOX." There is no row in Table 3 for criticism of SOX because WSJ editorials are tabulated in Table 2, and none of the other newspapers expressed similarly unqualified opinions regarding the need to revamp the statute.

implausibility of arguments or the perceived credibility of the arguments' proponents.¹⁶²

Accordingly, even while editorializing in the legislation's defense, coverage of the SOX critiques could ironically have the effect of shifting public opinion against the legislation.

It is also probable that the declining references to Enron observed in Table 4 indicate that the scandals that produced SOX are fading from public perception, and with it a political environment that did not permit a careful evaluation of its regulatory costs and benefits. Such a change in circumstance would provide further reason for legislators to discount more readily the prevailing media view on SOX. Indeed, concern over such a possibility would appear to have prompted several articles in which journalists sought to inject an Enron-like boost for retaining SOX, by attempting to tie it to the scandal of the day involving stock option backdating.¹⁶³

C. Congressional Responses

Paralleling the newspaper coverage, legislators paid little attention to SOX until 2005. But from 2005-2007, as summarized in Table 6, bills were steadily introduced to reduce compliance costs, particularly for small firms. There was also an uptick in hearings on SOX, as indicated in Table 7. In addition to bill introductions and hearings, there have been three floor votes. The gradual movement through the legislative process of SOX-related initiatives conveys legislators' heightened sense of unease with regard to SOX, evincing a distinct shift in sentiment and breakdown of support in the five years following its unanimous enactment.¹⁶⁴

¹⁶² Yates & Stroup, *supra* note 89.

¹⁶³ *Holding the Line*, N.Y. TIMES, Jan. 2, 2007, at A16 (editorial); Lincoln Steffy, *Sarbanes-Oxley Stifling? Say It With a Straight Face*, HOUS. CHRON., Dec. 22, 2006 (Business section) at 1; Ben Stein, *So Many Millions, So Little Body Armor*, N.Y. TIMES, Jan. 7, 2007 (section 3), at 3.

¹⁶⁴ The impact on this trend of the subprime mortgage crisis and subsequent credit crunch

1. Congressional Activity on SOX

The regional newspapers' greater relative attention to small firm issues is replicated in legislators' reactions to SOX's impact. Legislators are far more focused on the concerns of small business regarding SOX than on capital market issues. As indicated in Table 6, the trend of increasing efforts at legislative recrafting began prior to the imminent need for legislative action in 2007 when the SEC's deferral of section 404's applicability to small firms was about to expire: for instance, four of the bills introduced in the 109th Congress (2005-06) would have exempted small firms or banks. Not surprisingly, the pace increased as the expiration date approached, as six such bills were introduced in the first session of the 110th Congress (2007). Although the vast majority of bill sponsors and co-sponsors were Republicans, who are in the minority, their numbers are substantial.¹⁶⁵

In addition, Table 7 highlights the quickened pace of congressional hearings on SOX, from one self-congratulatory hearing a year after its adoption held by one of its namesakes, Representative Oxley, to a number of hearings over the succeeding two years in which legislators increasingly voiced concern regarding SOX's cost. These hearings coincided with the increased media attention given to the SOX critiques and are consistent with political scientists' findings that

is discussed in Part IV.

¹⁶⁵ Adjusting for overlapping sponsorship and cosponsorship, ninety-three legislators signed on to the eight bills introduced in 2007. This is a noteworthy development because, as earlier noted, cosponsorship is viewed as a signal of voting support. *See, e.g.,* Wilson & Young, *supra* note 62. As discussed in the following Section, that was indeed the case, as the vote on SOX in the chamber with higher cosponsorship rates across more numerous bills achieved a majority, although the form of the proposal was also more modest—postponing SOX's implementation for small firms rather than permanent exemption.

the priorities and attention of the public and Congress are strongly correlated.¹⁶⁶ Finally, Members of Congress have engaged in a variety of other activities short of legislation to express their dissatisfaction with the SEC's lack of responsiveness to small businesses' complaints regarding SOX. For example, both chambers' committees on small business wrote to the SEC to request a further delay in the implementation of section 404 for small firms beyond 2007, and to provide them with compliance cost estimates.¹⁶⁷

In addition to the constituent connection of small firms being located in all districts, evident in regional newspapers' post-SOX coverage, a plausible contributing factor to legislators' focus on SOX's impact on small firms is that public opinion in the United States has historically been decidedly more solicitous of "small" rather than "big" business. For instance, support levels differ significantly across opinion polls when questions use the phrase "big business" instead of "business" or "small business."¹⁶⁸ A call for rolling back regulation whose costs unduly burdened small firms would therefore better resonate with the public than a broad-based statutory revamping addressed to the concerns of all firms or stock exchanges.

An increase in the number of bill introductions could be thought of as a proxy for the

¹⁶⁶ In a comprehensive political agenda study spanning fifty years of data, Bryan Jones and Frank Baumgartner find that the proportion of congressional hearings on an issue is highly positively correlated with the issue the public identifies as the "most important problem facing the nation." JONES & BAUMGARTNER, *supra* note 23, at 255-60.

¹⁶⁷ Letter to Christopher Cox, Chairman, SEC (June 6, 2007), <http://sbc.senate.gov/lettersout/070606-SEC-Sarbanes-OxleySection404Ltr.pdf>; Letter to SEC on Section 404 of the Sarbanes-Oxley Act (March 9, 2007), at <http://www.house.gov/smbiz/democrats/letters/March9-SOX-404-Ltr-FINAL.pdf>; Letter to SEC on Section 404 of the Sarbanes-Oxley Act (June 11, 2007), at <http://www.house.gov/smbiz/democrats/letters/sox-letter-2.pdf>.

¹⁶⁸ SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND* (rev. ed. 1987).

likelihood of legislative action and thus as a measure of political salience. For example, the Commodity Futures Trading Commission Act,¹⁶⁹ which reorganized futures trading and opened the way for the development of financial derivative products, was enacted after five years of a steady increase in bill introductions.¹⁷⁰ Common sense would also suggest that an increasing number of bills could spur a preemptive response by other political actors, such as the SEC in this case, in the direction desired by legislators, to ward off a risk of enactment of legislation potentially even less desirable from the agency's perspective.

A similar dynamic is at work in the increase in the number of hearings, which require greater support among influential legislators for action than a bill introduction: at least the committee or subcommittee chair must support a proposal for a hearing, compared to any one member's ability to introduce a bill. The literature finds a positive correlation between the holding of hearings, and in particular an increasing number of hearings, on a subject and statutory enactments, leading political scientists to conclude that hearings are not simply exercises in 'symbolic politics.'¹⁷¹ That is an observation, again, no doubt, that other political actors would factor into their decisionmaking. The SEC's decision to revise the guidelines for implementing section 404 would seem to reflect such a calculation. Chairman Cox's reversal of his position

¹⁶⁹ The act amended numerous sections in 7 U.S.C.; Pub. L. 93-463 (1974).

¹⁷⁰ Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 YALE J. ON REG. 279 (1997). An alternative view of bill introductions is that they are instances of symbolic politics, position-taking activity that pleases constituents by expressing judgmental support, without having any real consequences; such activity is considered as important for reelection as producing results, given the diffusion of responsibility across the government for making policy. See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61-71, 132-34 (1974).

¹⁷¹ JONES & BAUMGARTNER, *supra* note 23, at 262.

concerning the timing of the section's implementation for small firms would appear to be a further example of agency action to head off legislative action.¹⁷²

2. *Votes on Revising SOX*

a. Senate. In April 2007, the Senate considered a bill entitled the "America Competes Act,"¹⁷³ which had broad bipartisan support: it authorized several billion dollars for research in science and technology and math and science teachers. Although the majority did not have SOX in its sights when advancing the legislation, it was characterized as directed at "maintaining competitiveness." That led Senator Jim DeMint, the sponsor of a bill that sought to reduce the cost of SOX, to offer up his bill's key component—a provision exempting small firms from section 404 unless they chose to be covered—as an amendment consonant with the America Competes Act's stated objective.¹⁷⁴

Senator DeMint's amendment involved the SEC, a matter within the jurisdiction of the Senate Committee on Banking Housing and Urban Affairs ("Banking Committee") while the bill under consideration had originated in a different committee. That key fact undoubtedly explains the Senator's adoption of an amendment strategy. The Senate's liberal amendment process makes it

¹⁷² See *infra* note 187.

¹⁷³ S. 761.

¹⁷⁴ The amendment was cosponsored by three Republican Senators, two of whom had cosponsored the original bill. The bill, S. 869, exempted small firms from section 404, while permitting them to opt in to its requirements, along with instructing the SEC on the development of a materiality standard. Upon its introduction in March, the bill had been referred to the Senate Banking Housing and Urban Affairs Committee, 153 CONG. REC. S3124 (daily ed. Mar. 14, 2007), which had taken no action on the bill. The Senate does not require amendments to be germane to a bill under consideration, but in introducing his amendment, Senator DeMint noted that it was related to the bill, being directed at improving U.S. competitiveness. 153 CONG. REC. S4874 (daily ed. Apr. 24, 2007).

one of a few available techniques for circumventing a committee.¹⁷⁵ Senator DeMint's bill had made no progress in the Banking Committee since its introduction in March. When the amendment was introduced, Banking Committee members objected and its consideration was postponed to provide the committee an opportunity to review the amendment and discuss it on the floor, as it was the committee with subject matter jurisdiction. When time came to resume discussion on the DeMint amendment, Senators Dodd and Shelby, the Chairman and Ranking Member of the Banking Committee, respectively, offered a competing amendment that procedurally took precedence.

The Dodd-Shelby amendment was a resolution consisting of a set of findings regarding SOX, and a 'Sense of the Senate' directed to the SEC. The findings included an expression of the importance of small business and U.S. capital markets, along with the assertion that section 404 had 'enhanced corporate governance' and 'increased investor confidence.'¹⁷⁶ The resolution further found that both the SEC and PCAOB had determined that the implementation of section 404 had imposed 'unnecessary and unintended' cost burdens on small firms and noted that the agencies were nearing completion of the implementation standard's revision. The final finding referred to the SEC Chairman's statement that there was no need to change the law. The resolution then concluded with a 'Sense of the Senate' that the SEC and PCAOB 'should complete promulgation of final rules implementing section 404.'¹⁷⁷

¹⁷⁵ WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 245 (7th ed. 2007). The approach could be viewed as a variant of the venue-shifting strategy that worked in the House, as discussed *infra* note 196 and accompanying text.

¹⁷⁶ 153 CONG. REC. S4891 (daily ed. Apr. 24, 2007).

¹⁷⁷ *Id.* at S4892.

The strategy informing the Dodd-Shelby amendment is transparent: by offering legislators, as Senator Dodd put it, an “opportunity to express [their] concerns” and to “send a message” that “we care about this,” it would sap support from the DeMint amendment.¹⁷⁸ That is because a legislator could oppose the DeMint amendment but still express support for small business by voting for the Dodd-Shelby amendment. Moreover, doing so was consistent with the SEC Chairman’s perspective, who, as Senator Dodd pointedly noted, was “President Bush’s appointee,” presumably in an appeal for bipartisan support.¹⁷⁹ Senator Shelby elaborated on the reason why he supported the amendment: the purpose was to provide the SEC a “limited opportunity to deliver” more cost-effective regulation for small firms, and that the Banking Committee would “closely” oversee that the SEC did so.¹⁸⁰

The Dodd-Shelby amendment was unanimously adopted. , Senator DeMint responded to Senators Dodd and Shelby’s move by stating that he would support that amendment while noting that he disagreed with some of the amendment’s findings. He then urged his colleagues to vote for his amendment as well, emphasizing that the “Sense of the Senate” provision maintained the status quo with no guarantee that the agency would ameliorate the regulatory cost for small firms, especially since for five years it had done nothing, in his view, along those lines.¹⁸¹

With the unanimous vote recorded on the Dodd-Shelby amendment, the discussion turned

¹⁷⁸ *Id.* at S4895 (remarks of Sen. Dodd).

¹⁷⁹ *Id.* This reference would appear to have been a rather opportunistic display of bipartisanship by the Senator, as it is improbable that his position would have been different had Cox not have made such a statement, given his other remarks at the Chamber summit discussed *supra*.

¹⁸⁰ *Id.* at S4896 (remarks of Sen. Shelby).

¹⁸¹ *Id.* (remarks of Sen. DeMint).

to the DeMint amendment. Senators Dodd and Shelby spoke briefly against the amendment, Senator Dodd contending that the agency, and not Congress, was the relevant body to resolve the issue, and Senator Shelby disapproving of the “timing” as being premature.¹⁸² Rather than permit a vote on the DeMint amendment, however, Senator Dodd moved to table it. The motion to table carried by a vote of 62 to 35 (3 Senators not voting as they were not present). All but one Democrat voted for the motion to table, along with 14 Republicans.¹⁸³ This second prong of Senator Dodd’s successful strategy to defeat the DeMint Amendment, conversion of a substantive vote into a procedural one, is a well recognized Senate maneuver to avoid a controversial vote. As an experienced legislative strategist, Senator Robert Byrd, has cogently put it:

“A motion to table is a procedural motion. It obfuscates the issue, and it makes possible an explanation by a Senator to his constituents, if he wishes to do so, that his vote was not on the merits of the issue. He can claim that he might have voted this way or that way, if the Senate had voted up or down on the issue itself. But on a procedural motion, he can state he voted to table the amendment, and he can assign any number of reasons therefor, one of

¹⁸² *Id.* at S4897 (remarks of Sen. Shelby). One of the most vocal opponents of the amendment, Senator Kerry, was not actually present; he entered a written statement expressing his objections into the Congressional Record. Senator Kerry was the Chairman of the Senate Committee on Small Business and Entrepreneurship and had introduced a bill offering his own solution to small businesses’ concern over SOX, provision of federal government funding to small businesses to help underwrite the cost of compliance. That bill is not included in Table 6, as it did not propose any alteration in SOX. In addition, as previously noted, Senator Kerry and the ranking member of the committee wrote a letter to the SEC requesting an additional year of delay for the application of section 404 to small firms. *See* note 155, *supra*.

¹⁸³ *Id.* at S4899 (Vote No. 139). It is noteworthy that the Democrat who opposed tabling the DeMint amendment was Louisiana Senator Mary Landrieu, who was up for reelection in 2008 and was considered the only vulnerable Democratic incumbent. She had won her seat in 2002 by a narrow margin of 3 percent in a runoff election, required by Louisiana law because no candidate had received a majority in the election. She retained her seat in 2008 with 52 percent of the vote, avoiding a runoff.

which would be that he did so in order that the Senate would get on with its work or about its business.’¹⁸⁴

Senator Byrd’s explanation resonates with another electoral calculation that surely also informed Senator Dodd’s decisionmaking. An influential group closely associated with the Democratic party, the AFL-CIO, had sent a letter to Senators Dodd and Shelby urging them to oppose the DeMint amendment for being ‘anti-investor,’ and citing SEC Chairman Cox’s opposition to legislation to revise SOX.¹⁸⁵ Senator Dodd’s effort to avoid legislators’ having to go on the record against the DeMint amendment would therefore serve a dual purpose. By voting for the Dodd-Shelby amendment, which acknowledged small firms’ plight by exhorting the SEC to act promptly, Senator Dodd and other members could appear to be responsive to the union’s lobbying

¹⁸⁴ OLESZEK, *supra* note 161, at 234.

¹⁸⁵ AFL-CIO, Legislative Alerts, ‘Apr. 24, 2007: Letter to Sens. Jim DeMint (R-S.C.) and Chris Dodd (D-Conn) on DeMint’s amendment to the America COMPETES Act (S.761)’ *available at* <http://www.aflcio.org/issues/legislativealert/alerts/upload/DeMint20070424.pdf>. This is not as odd an object of union lobbying as it might seem at first glance: over the past decade, unions have become the predominant activist institutional investor, replacing public pension funds as the most frequent sponsor of shareholder proposals on corporate governance, although they would appear to have mixed motives as investor advocates. Empirical research suggests that they employ this strategy to further workplace goals and not solely to maximize share prices, notwithstanding assertions to the contrary. *See, e.g.,* Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1033 (1998) (examples of union activism targeting firms involved in organizing, collective bargaining or other labor disputes); Ashwini K. Agrawal, *Corporate Governance Objectives of Labor Union Shareholders* (2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285084 (union voting support for election of directors varies with organizing activity and representation). Besides firm level activism, unions have frequently coordinated with Democratic legislators and SEC commissioners to promote their activist investor agenda by means of regulation, examples being Representative Frank’s introduction of a bill to require shareholder votes on executive pay, and SEC commissioners Roel Campos’ and Harvey Goldschmid’s push for shareholder nominations under SEC proxy rules.

by maintaining the strictures of the statute,¹⁸⁶ while simultaneously having a shield from a possible political backlash by small business constituents.

Senator Shelby's joint sponsorship of the Committee Chairman's amendment was, in all likelihood, not prompted by the AFL-CIO's position.¹⁸⁷ For him and other like-minded Banking Committee members, the Dodd-Shelby motion would leave greater control over the fate of SOX in their hands, positioned as the Senate's watchdogs of the SEC. In addition, the motion would produce the outcome preferred by the SEC Chairman, in whom they would be apt to have confidence given the committee's oversight relation with the agency.¹⁸⁸ Of course, Chairman Cox's view that legislation was unwarranted would also be a helpful talking point for cooling out any potential backlash from small firms for Republicans as well as Democrats. But what is most striking is that over two-thirds of the Republicans did not follow Senator Shelby's lead and instead opposed the motion to table, expressing support for a vote on the DeMint amendment.

This vote was the initial indication of substantial, albeit along party lines and not a chamber majority, legislative support for amending SOX to relieve small firms' costs.¹⁸⁹ Although the

¹⁸⁶ As mentioned *supra* note 61, Senator Dodd takes credit for helping to craft SOX on his website.

¹⁸⁷ On the AFL-CIO's ranking of Senators' voting support of the union's positions, Senator Shelby's 2007 score was 21% (lifetime score of 37%), compared to Senator Dodd's score of 100% (91% lifetime).. The vote on the motion to table the DeMint amendment was not included in the union's list of key votes for the session. See AFL-CIO 2007 Senate Scorecard, available at http://www.aflcio.org/issues/legislativealert/votes/upload/senate_final_07.pdf.

¹⁸⁸ Although a majority of the Republican Banking committee members voted against tabling Senator DeMint's amendment, the four who voted to table it made up a sizeable proportion—29 percent—of the Republicans who did so.

¹⁸⁹ A vote against a motion to table is, of course, not identical to a vote in favor of the substance of the amendment to be tabled. But it is reasonable to infer that the thirty-five Senators opposing the motion to table in this case would also have voted for the amendment.

wording of the unanimously adopted competing resolution expressing an endorsement of SOX indicates that the statute still possesses considerable support in Congress, the votes on the motion to table would suggest that were Republicans to regain control of the chamber, a provision cutting back on SOX's reach might well carry. This is a remarkable development given the unanimous endorsement of SOX in the Senate just five years earlier.

The vote on the motion to table, albeit procedural, provides a means for inferring which legislators would be most likely to support legislation revising SOX. Table 8 provides univariate comparisons of supporters and opponents of the motion along a variety of state and personal characteristics. It includes measures that serve as proxies for small firm constituents, including the number of business establishments and of local chambers of commerce in a senator's state, along with campaign contributions from the Chamber of Commerce. As a benchmark for constituents who might be affected by capital market competitiveness, the analysis measures the proportion of total campaign contributions raised from individuals and organizations in the securities and investment industries.¹⁹⁰ In addition, the Table provides individual factors that could affect a legislator's responsiveness to constituents (whether the senator was up for reelection in 2008, the margin of victory in the senator's last election, and longevity in office), along with legislative

¹⁹⁰ The number of business establishments is from the 2003 census; the number of local chambers of commerce was obtained from chambers identified in the WorldWide Chamber of Commerce Guide, available at <http://www.chamberfind.com/index.asp>. All of the campaign contributions are for Senators' most recent six-year election cycle, as compiled by the Center for Responsive Politics from Federal Election Commission reports, available at <http://www.opensecrets.org>. Because the Center compiles contributions by sector only for a legislator's top twenty industry contributors, two Republican Senators have zero values for securities and investment industry contributions (one voted for and the other voted against the motion). Campaign contributions were used instead of a geographic indicator variable, as a proxy for a Senator's representation of constituents affected by market competitiveness concerns because all of the Senators from the New York metropolitan area—the region most affected by the issue—are Democrats and therefore not included in the analysis.

positions or activity that could impact a legislator's perspective on the amendment (party leadership position, membership on either the Banking or Small Business committees, and sponsorship or cosponsorship of a deregulatory bill on SOX).¹⁹¹

Paralleling the regional newspapers' focus on small firm costs, Table 8, which displays univariate differences between Republican senators voting for and against the motion to table, indicates an electoral connection contributes to legislators' attentiveness to the small firm issue, as evinced by supporting Senator DeMint's amendment. Republicans who opposed tabling the amendment are from states with a significantly larger number of business establishments and local chambers of commerce, compared to Republicans who voted to table it. In addition, they would appear to have less electoral slack: they had been in office for less time and elected by a significantly smaller margin than Republicans who voted to table the amendment. Finally, senators opposed to tabling the DeMint amendment had received larger contributions from the Chamber of Commerce. It is, however, difficult to attribute much import to the difference in contributions because it may be a function of the closeness of the Senator's election contest, and not simply an index of a higher likelihood of support for chamber concerns. Furthermore, the vote would not appear to have been ideologically driven among Republican Senators: although supporters of DeMint's amendment are more conservative than opponents by a conventional ideology measure which is generated from roll call votes (mean DW-NOMINATE score of .5 for

¹⁹¹ The electoral margin is the difference in votes for between the elected legislator and the largest vote-getting opponent, and was obtained or calculated from states' official election results, or in a small number of instances where official state data were not available, from reports in the news media or Wikipedia. Years in office, age, reelection in 2008, leadership position and committee membership were obtained from each senator's individual pages on the U.S. Senate website, <http://www.senate.gov>. Senators' ideology is measured by the DW-NOMINATE scores computed from roll call votes from the 109th Congress, described in note 20, *supra*.

supporters compared to .42 for opponents), the difference is not statistically significant.

. Table 10 reports the results of a multivariate regression analysis that controls for the characteristics of legislators compared one-by-one in Table 8.¹⁹² Small firm constituent considerations do appear to matter in differentiating Republicans' voting. The number of business establishments is significantly positively related to voting against tabling the amendment, and Chamber contributions are marginally significantly positive. Electoral vulnerability did not affect the votes, however: the only personal characteristic that is significantly associated with support for the DeMint amendment is cosponsorship of a deregulatory bill on SOX.¹⁹³ The significance of variables proxying for small firm constituents in the analysis of the Senate vote is consistent with the media literature's identification of an information channel between regional newspapers, whose coverage reflects the interests of constituents, and elected officials. Namely, Senators responded to the issue regional newspapers' relative coverage suggested would matter most to their constituents, SOX's adverse impact on small firms.

Capital market competitiveness was not totally disregarded in the floor debate on the

¹⁹² A logistic regression with robust standard errors was estimated to predict Republicans' votes on the motion (where the dependent vote variable codes a vote against tabling the amendment as a "1"). Because senators' ideology scores are available only through the 109th Congress, there are no scores for 10 senators (9 Democrats and 1 Republican) who first assumed office in the 110th Congress upon being elected in November 2006. The text discusses the estimation excluding ideology, which includes all voting Republican senators. But as indicated in Table 10, if included, the ideology variable is insignificant, and there is no difference in significance level of any variables across the regressions estimated with or without the ideology variable.

¹⁹³ Of the twelve senators cosponsoring deregulatory SOX legislation in either the 109th or 110th Congresses, only one did not vote against the motion to table, Senator Bond, who had signed on to a bill in the 109th but not in the 110th Congress. This intuitive result is not inconsistent with the literature on cosponsorship finding an absence of correlation between cosponsorship and voting outcomes, *see* note 62, *supra*, as that research examined aggregate, not individual, voting and cosponsorship.

America Competes Act, but the issue was not associated with SOX. A resolution was unanimously added to the bill, sponsored by Senators Schumer and Mike Crapo (a Republican from Idaho who was a member of the Banking Committee and was designated the chairman of a newly created Republican Party Capital Markets Task Force in August 2007), to express the “Sense of the Senate” that U.S. capital markets were losing “their competitive edge.”¹⁹⁴ The resolution referenced the McKinsey Study and urged state and federal regulators to coordinate activities to not adversely affect innovativeness or “impose regulatory costs that are disproportionate to their benefits,” but made no reference to SOX as a target of regulatory action.¹⁹⁵ The omission is probative regarding legislators’ relative weighting of the SOX critiques because this was the same bill as the one Senator DeMint sought to amend to exempt small firms from SOX. It is therefore plausible to conclude that legislators would appear to be more attuned to small firm issues than to capital market competitiveness ones when it comes to thinking about SOX, contrary to what a reader might reasonably intuit from reading solely the New York-based national press or national journalists.¹⁹⁶

¹⁹⁴ 153 CONG. REC. S5064 (daily ed. Apr. 25, 2007). For the creation of the task force and Senator Crapo’s appointment as chairman, see http://crapo.senate.gov/repUBLICAN_capital_markets_task_force.cfm. The task force references both the Capital Markets Committee and Chamber Commission reports, among others, as identifying regulatory problems adversely affecting U.S. market competitiveness.

¹⁹⁵ 153 CONG. REC. S5064 (daily ed. Apr. 25, 2007). At the same time that the resolution instructed Congress to exercise “vigorous oversight” to eliminate excessive regulation, it also admonished legislators to ensure investor protection was not compromised. Hence, similar to the Dodd-Shelby resolution, the resolution on market competitiveness contained conflicting objectives. This suggests that it too was an exercise in symbolic politics in which legislators expressed empathy to constituents’ problems without taking concrete steps to alleviate them.

¹⁹⁶ It seems unlikely that the motivation for the Senate action on SOX, in contrast to that of the House, was a perceived need to act on small firm costs before the 2008 election in response to the SEC’s position that it would not further delay section 404s implementation for small firms.

B. House. The legislative action in the House of Representatives, which was less intricate procedurally than that of the Senate, provides an even more compelling case for the centrality of small firm issues over market competitiveness for legislators. On June 28, 2007, the House passed the 2008 fiscal year appropriations bill for financial services and general government.¹⁹⁷ During the floor consideration, the bill was amended to prohibit the SEC from expending any appropriated funds on enforcing section 404 against small firms (the non-accelerated filers who would otherwise have to start complying with the section by December 2007). The amendment was offered by Representative Scott Garrett, a Republican from New Jersey, and it was adopted by a vote of 267 to 154.¹⁹⁸ It was supported by nearly all Republicans (one Republican voted against it), and a significant number of Democrats (74, equalling 32 percent of the caucus). Two weeks earlier Representative Garrett had introduced a bill, with 42 original cosponsors, to similar effect, that would have imposed a one-year moratorium on small firms' compliance with section 404.¹⁹⁹

That is because, in contrast to the House amendment, neither of the competing Senate amendments was cast in terms of deferring implementation for small firms for another year, as would be expected if doing something for small firms before an election was a pressing concern. Moreover, there was no difference in voting for the DeMint amendment according to whether or not a Senator was up for reelection.

¹⁹⁷ H.R. 2829.

¹⁹⁸ 153 Cong. Reg. H7397 (June 28, 2007) (Roll No. 588).

¹⁹⁹ Small Business SOX Compliance Extension Act, H.R. 2727, 110th Cong., 1st Sess. (June 14, 2007). Representative Tom Feeney, a Republican from Florida, a cosigner of the bill, cosponsored the amendment with Representative Garrett. 153 CONG. REC. H7323 (daily ed. June 27, 2007). By the time of the vote on the amendment, the original bill had 50 cosponsors. Library of Congress, electronic Thomas database, *available at*: <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02727:@@P>. Although only one of the original cosponsors was a Democrat, with 20 percent of the Republicans signing on to the bill at the outset and two more Democrats joining a week later, the House leadership would have been aware of the considerable support among legislators for small firm relief from SOX.

Representative Garrett placed in the record three letters in support of the amendment, one of which was from the Chamber of Commerce.²⁰⁰ Of the organizations that had issued reports critical of SOX, the Chamber is the only one with a lobbying operation, and the amendment was consistent with, albeit far more modest than, its commission's recommendations on section 404. Representative Frank, the chair of the committee with jurisdiction over the SEC, opposed the amendment, and paralleling Senator Dodd's position against the DeMint amendment, noted that SEC Chairman Cox had stated the SEC was "fixing" the problem and that legislation was unnecessary.²⁰¹ The AFL-CIO once again sent a letter opposing the amendment. This time it was widely disseminated to legislators rather than solely to the Chairman and Ranking Member of the Committee with jurisdiction over the SEC.²⁰² When a voice vote on the Garrett amendment was declared to have gone against it, Representative Garrett requested a recorded vote.²⁰³ That vote was postponed at the discretion of the chairman under House rules,²⁰⁴ and when the proceeding on

²⁰⁰ The other organizations advocating a vote for the amendment were the National Taxpayers Union and Property Casualty Insurers Association of America. 153 CONG. REC. H7324 (daily ed. June 27, 2007).

²⁰¹ *Id.* at H7325 (remarks of Rep. Frank).

²⁰² AFL-CIO, Legislative Alerts, "June 27, 2007: Letter to representatives opposing an amendment to H.R. 2829, the FY 2008 Financial Services Appropriations Act, to delay implementation of Section 404 of Sarbanes-Oxley Act for small public companies," at <http://www.aflcio.org/issues/legislativealert/alerts/upload/GarrettFeenyAmendmentToHR2829.House607.pdf>.

²⁰³ 153 CONG. REC. H7327 (daily ed. June 27, 2007).

²⁰⁴ *Id.* (Acting Chairman announced recorded vote postponed under House rule XVIII clause 6). That rule gives the chairman discretion, when the House is deliberating as the Committee of the Whole House, to postpone a request for a recorded vote on an amendment. *See* Rules of the House of Representatives, 110th Congress, 32 (2007), *available at* <http://www.rules.house.gov/ruleprec/110th.pdf>.

the request for a recorded vote resumed the following day, the amendment passed.

The Senate-approved version of the appropriations bill did not include a spending limitation, which, along with other differences in the bills, created a conflict between the chambers. But in testimony to the House Small Business committee in mid-December 2007, SEC Chairman Cox stated that he would propose delaying section 404's implementation for small firms for another year in order to obtain a staff cost-benefit study of the provision that he was commissioning.²⁰⁵ He thus acceded to the House's position regarding deferral of small firms' compliance with section 404, as expressed in the spending prohibition, retracting his prior insistence that implementation not be postponed.

Shortly after Chairman Cox's testimony, an omnibus spending bill was approved by both chambers that included the SEC's 2008 appropriation without the Garrett amendment.²⁰⁶ However, the legislation was accompanied by an explanatory statement, as is common with authorization bills, that had the effect of codifying the postponement by referring to the agency's decision to delay implementation.²⁰⁷ Further underlining legislators' sensitivity to small firms, the

²⁰⁵ Floyd Norris, *S.E.C. Planning to Delay Accounting Rules for Small Companies for Another Year*, N.Y. TIMES, Dec. 12, 2007, at C4. Chairman Cox fulfilled his pledge to the committee with the agency's proposal of an additional year-long extension from complying with the auditor attestation requirement of the statute for non-accelerated filers on February 1, 2008. Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, 79 Fed. Reg. 7450 (Feb. 7, 2008) (to be codified at 17 C.F.R. pt. XXX). The rule was adopted on June 26, 2008. Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, 73 Fed. Reg. 38,094 (July 2, 2008) (to be codified at 17 C.F.R. pt. XXX)

²⁰⁶ H.R. 2764.

²⁰⁷ The proviso read:

'The Appropriations Committees are concerned about the costs that may confront small businesses complying with section 404... Therefore, the Committees are supportive of the recent decision by the SEC to delay an additional year the requirement for an auditor's

report also instructed the SEC to direct its Office of Small Business Policy to serve as an ‘ombudsman’ for small business, ‘to help them face the joint challenge of meeting section 404 compliance deadlines with untested risk-based regulation.’²⁰⁸ The report assigned the Office to solicit comments from small businesses and publicize ‘their concerns within the Commission to assure that the needs of small business are reflected in the Commission’s rules, and in [its] interpretations and guidance.’²⁰⁹

The legislative tactic of instructing agencies regarding specific expenditures outside of explicit statutory language is not as unusual as might appear. There is a rich tradition of nonstatutory directives accompanying budget legislation. Appropriations committees have, indeed, more commonly used this strategy than statutory spending prohibitions to regulate agency action.²¹⁰ Such ‘extralegal techniques’ are not hortatory, but rather have genuine bite.²¹¹

attestation of management’s assessment of internal controls. The Committees understand that the SEC is collecting cost data and will assess the data to determine whether the current guidance and standards, approved in May 2007, pose an unreasonable financial burden on small businesses. The SEC is directed to solicit the views of affected small businesses during this process.”

House Appropriations Comm., Consolidated Appropriations Act, 2008 (Comm. Print on H.R. 2764, Pub.L. 110-161), Division D - Financial Services and General Government Appropriations Act, 2008, 110th Cong., 1st Sess. 905 (2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_house_committee_prints&docid:f39564d.pdf.

²⁰⁸ House Appropriations Comm., *supra* note 256, at. 905.

²⁰⁹ *Id.*

²¹⁰ MICHAEL W. KIRST, GOVERNMENT WITHOUT PASSING LAWS (1969). In the 1970s, when the number of spending limitation amendments or ‘riders’ greatly increased as representatives attempted to force legislative action on social issues that were being blocked in authorizing committees, such as abortion and busing, the rules were altered to limit such amendments and provide greater control to the majority party leadership. OLESZEK, *supra* note 162, at 56.

²¹¹ KIRST, *supra* note 190. The appropriations committees have a range of sanctions to

Appropriations committees prefer them both because they are efficient—~~they~~“reconcile detailed control with administrative flexibility”²¹²—and also because they maintain control over the agency in the appropriations committees rather than the legislative committees with jurisdiction.²¹² The latter feature takes on special significance in the SOX context, as the legislative committees with jurisdiction over the SEC had demonstrated a strong aversion to moving on SOX. The Senate Banking Committee Chairman had already expressed opposition to providing legislative relief for small firms from SOX, and the Chairman of the House Financial Services Committee was of an apparently similar disposition. The appropriations bill maneuver had the effect of boxing in both the SEC and the oversight committees.

The House vote is by far a more intriguing development than the Senate one, not only because it passed, but also because the House Democratic party leadership, along with a majority of the caucus, opposed the amendment and textbook learning suggests that the controlling party exercises far greater agenda control in the House.²¹³ Given that SOX-related bill introductions

apply if an agency ignores a directive included in a committee report or made at a hearing. These include nonstatutory actions such as issuing rebukes to officials in hearings, and undertaking punitive investigations, and statutory actions, such as cutting future funding, adding punitive provisos (objectionable restrictions on use of funds) and use of detailed line items rather than lump-sum appropriations. *Id.* at 73-79. See OLESZEK, *supra* note 162, at 298-300.

²¹² KIRST, *supra* note 190, at 155. Not being a member of the Appropriations Committee, Representative Garrett was not in a position to influence the Agency’s action through the alternative, nonstatutory appropriations oversight techniques. Although he was a member of the Financial Services Committee, the opposition to the amendment by the Chairman, Barney Frank, made plain that the prospect for obtaining small firm relief from the SEC through that Committee’s oversight channel was nil. Accordingly, the amendment in the form of a statutory prohibition on expenditures was his most effective avenue for attaining his objective of small firm relief from section 404’s impending implementation.

²¹³ See, e.g., OLESZEK, *supra* note 161, at 319; SMITH, ET AL., *supra* note 62, at 234. Only one member of the House Democratic leadership voted for the amendment, Tennessee Representative Tanner, who is one of the party’s eight chief deputy whips. Although the

were for all practical purposes a Republican initiative, it would seem to be rather surprising that the House was the chamber in which a SOX restriction passed.

Several differences in the circumstances of the votes in the two chambers, however, would appear to have contributed to the greater level of Democratic support to take action on SOX in the House than in the Senate. First, the House vote on the amendment was substantive, not procedural, so that the import of a negative vote would be more transparent to constituents, rendering party discipline more difficult to enforce. This is significant because research on media coverage of representatives' legislative activities indicates that roll call votes are the most extensively reported activity.²¹⁴ Second, Representative Garrett's amendment's substance was far more modest than Senator DeMin's amendment, as it called for a delay in, rather than elimination of, section 404's applicability to small firms. Third, the SEC's revised guidelines had been released by the time of the House vote and were viewed by many as inadequate for mitigating small firms' costs.

A fourth factor distinguishing the legislative response across the chambers is the support of the Garrett amendment by the chair and a majority of the Democrats on the Small Business committee. Political scientists have noted that a successful strategy of opponents of the status quo is issue expansion by means of venue-shopping, in which an issue is redefined to be within the jurisdiction of a political institution different from the issue's current guardian.²¹⁵ SOX's critics in

amendment process is generally more restrictive in the House than the Senate, SMITH, *supra* note 194, at 219-20, 224-26, the appropriations bill was considered under an open rule, as is the norm for such legislation, OLESZEK, *supra* note 161, at 129. That convention, as well as the support of key Democrats on the Small Business Committee, limited the Democratic leadership's ability to maneuver so as to prevent Representative Garrett's offering of the amendment.

²¹⁴ ARNOLD, *supra* note 91, at 121-22, 154.

²¹⁵ FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993).

the House were able to use this avenue successfully and shift the forum of objections to the statute's financial burden on small firms to the Small Business Committee, whose members, having no ongoing relationship with the SEC, were more receptive to the issue than the members of the congressional committee with jurisdiction over the agency, who were blocking alteration of the status quo. A venue-shifting strategy would not have worked in the Senate because, as earlier noted, the chair of the parallel committee in the Senate opposed the DeMint amendment, and in the legislative maneuvering the committee with jurisdiction was able to retain control of the issue.²¹⁶

Finally, it should be noted that the House's taking action on SOX rather than the Senate is consistent with the political science literature identifying an electoral connection with issue salience: the House is more closely attuned to public sentiment given the biennial election of all members, providing its membership with a greater incentive to be responsive to constituents.²¹⁷ Without the postponement of the statute's applicability that would be effected by the amendment, small firms would have had to begin preparing to meet the statute's auditor attestation requirement prior to the upcoming 2008 election. Consequently, Democrats wishing to demonstrate responsiveness to small business's concerns were left with no other obvious option than to support the Garrett amendment in order to obtain a favorable, albeit modest, resolution of the issue before the election for their constituents.

²¹⁶ Because the Senate Small Business Committee Chair, like his House counterpart, had sought a delay in section 404's implementation for small firms, *see supra* note 155, it is not obvious whether he would have opposed a Senate amendment phrased as a postponement rather than permanent exemption for small firms

²¹⁷ See, e.g., Robert S. Erikson & Gerald C. Wright, *Voters, Candidates, and Issues in Congressional Elections* in Lawrence C. Dodd & Bruce I. Oppenheimer, *Congress Reconsidered*, 7th ed. 91 (2001) (noting that although the same electoral connection impact on representation exists in both chambers, that there is more latitude in Senate voting as the evidence indicates senators respond to the six-year election cycle, moving closer to constituents in the year or two before the senator must run again).

Table 9 provides a comparison of personal and district characteristics across Democrats by how they voted on the Garrett amendment. It is telling, and consistent with the literature's emphasis on an electoral connection, that both greater electoral apprehension and closer connections to small business would appear to matter. Similar to differences across Senate Republicans voting on the DeMint amendment, the House Democrats who voted for Representative Garrett's amendment had been in office significantly fewer years, were more likely to be serving their first term in office, and had been elected by significantly smaller margins. Supporters of the amendment also received more campaign contributions from small business lobbying associations, the proxy used in the House vote analysis for small business constituents.²¹⁸ In contrast to the Republican Senate voters, however, there is a statistically significant ideological difference across the Democrats voting in the House: Democratic supporters of the amendment were more conservative than Democratic opponents, whether measured by the ideology score computed from roll call votes or by membership in the Blue Dog Coalition, a self-identified group of conservative and moderate Democrats.²¹⁹

²¹⁸ The business associations category as defined by the Center for Responsive Politics includes contributions from the U.S. Chamber of Commerce, local chambers, and the National Federation of Independent Business, an "advocacy organization" of small businesses. See <http://www.nfib.com/page/aboutHome>. The contribution data for those organizations were obtained from the Center's website, <http://www.opensecrets.org>. Because the source identifying business establishments does not line up with their location in congressional districts, that variable is not used in the analysis as the proxy for small business constituents. The analysis reported in the text was also undertaken using a dummy variable indicating whether there was a local chamber of commerce (from those identified for the analysis of the Senate vote, *see* note 173, *supra*) in a city in which the representative had an office (identified from the representatives' websites), as an alternative measure of the strength of small business constituents. It was insignificant (unreported regressions).

²¹⁹ As discussed in note 176, *supra*, the DW-NOMINATE scores are available only for legislators who held office as of the 109th Congress, a total of 182 Democrats (49 voting for and 133 against the amendment) and 181 Republicans. Membership in the Blue Dog Coalition was

The ideological differentiation of Democrats' voting on the amendment suggests that many of the provision's supporters represented swing or relatively conservative districts. Those Democrats may well have been apprehensive that they might be subject to a greater electoral threat were they not to support small business on an issue of the day to those constituents. Consistent with such an interpretation, a recent study of local newspaper coverage of Members of Congress found that those whose votes are "out of step" with their constituents receive significantly more, and less positive, coverage, than those who are "in step."²²⁰ A plausible inference is that the House leadership did not wish to enforce party discipline on the Garrett amendment vote, which concerned an issue at the periphery of the party's agenda and could have increased the likelihood of weakening their control of the Chamber.²²¹

Table 10 reports the multivariate regression results for the House Democrats' votes on the Garrett amendment. The data are consistent with the hypothesized electoral connection, and hence, the salience afforded small firm issues in the regional press. Democrats less secure in their seats—more recently elected members or those elected by a narrower margin—were more likely to vote for

identified from its website: <http://www.house.gov/ross/BlueDogs/Member%20Page.html>. Only one member of the Blue Dog Coalition is a member of the Democratic Party leadership, Representative Tanner, who was the only member of the leadership to vote for the amendment.

²²⁰ Brian J. Fogarty, *The Strategy of the Story: Media Monitoring Legislative Activity*, 33 LEGIS. STUD. Q. 445, 459-63 (2008).

²²¹ Maintenance of chamber control is a key concern of party leaders, and a principal approach to doing so is to demand party loyalty on key procedural votes, with the leadership contending that doing so will maintain (or achieve) the party's control. See OLESZEK, *supra* note 161, at 322. The Garrett amendment was not, however, a procedural vote. It is possible that the Democratic leadership perceived their hold on the House to be weaker than their hold on the Senate. A large number of the newly elected Democrats' seats were up in what had previously been Republican-represented districts, where small business constituents' concerns could well be important. The situation in the House contrasted dramatically with that of the Senate, where there were relatively few Democratic seats up for reelection in 2008.

the provision. In addition, those more closely associated with organizations supporting small business—recipients of higher contributions from associations representing small businesses and membership on the House Small Business Committee—were more likely to vote for the amendment.

IV. Prognosis on SOX

Revamping legislation in the United States is conventionally thought to be difficult given the multiple actors and veto points in the legislative process. Still substantial amendments do occur: a recent study found that slightly over half of “major” statutes enacted from 1954-2001 were significantly amended, on average five years after enactment.²²² Casual empiricism suggests, however, that with regard to financial market regulation, Congress does not move rapidly to alter statutes widely perceived to be flawed, and five years would appear to be speedy for a major amendment in this area. That phenomenon bears importantly on evaluating the prospects of SOX’s recrafting and for drawing lessons from SOX for efforts to draft a new regulatory architecture for financial institutions.

A. The Path of Legislative Revisions

The most pertinent template, which provides helpful insight for prognosticating the probability of SOX’s recrafting is the Foreign Corrupt Practices Act (FCPA) of 1977, a statute with a regulatory objective similar to that of SOX, the adequacy of public companies’ internal

²²² Maltzman & Shipan, *supra* note 92, at 258. The list of “major” statutes and “significant” amendments is taken from David Mayhew’s identification of such legislation. *See* DAVID R. MAYHEW, *DIVIDED WE GOVERN PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS 1946-2002*, at 67-69 tbl.4.1 (2d ed. 2005). The Foreign Corrupt Practices Act, which is a statute similar in content to SOX, is not included in the study. Maltzman and Shipan count as amendments only those included in Mayhew’s list of major statutes - those he considered to be “significant” amendments - so as to eliminate technical and minor amendments, noting that virtually all laws experience inconsequential amendment. Maltzman & Shipan, *supra* note 92, at 258.

controls.²²³ Paralleling SOX, the FCPA was adopted with minimal opposition following a high-profile accounting scandal, the revelation that while doing business abroad, hundreds of firms had paid foreign officials hundreds of millions of dollars not disclosed in their financial statements.²²⁴ The FCPA made illegal all but certain *de minimis* payments to foreign officials, including payments to third parties that ended up in government hands, and imposed accurate reporting and internal controls requirements on public companies.

Shortly after the FCPA was enacted, the business community began voicing concern over ambiguity in the statutory language regarding what constituted illegal conduct, and questions were raised about the cost of the new accounting requirements, along with uncertainty in the scope of enforcement. Small firms were the most negatively impacted by the statute, particularly the third-party payment provisions. Because they did not have the resources to operate abroad directly, small exporters used foreign agents and were therefore exposed to liability for actions taken by third parties whom they did not control.²²⁵ A focused effort to revise the legislation began in earnest with the election of President Reagan, as improving U.S. firms' global competitiveness was

²²³15 USC 78dd-1.

²²⁴ A. Fremantle & S. Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L LAW. 755 (1989). There are, however, differences in the enactment environments of SOX and the FCPA which need to be noted. First, the stock market was not in free fall when the FCPA was enacted. There had been a large decline in 1973-1974 during the Watergate crisis, of which the 'sensitive' payments accounting scandal was a part, and thereafter the market trended up, with a minor decline in October 1977 when the statute was being considered. Second, the FCPA was not adopted in the midst of the crisis. When the scandal broke in 1974, Congress requested the SEC to undertake an investigation that took two years to complete, and the legislation was enacted 18 months after Congress received the SEC's report on its investigation. *Id.* at 755. Finally, the FCPA was not considered in an election year. These differences, underscoring the FCPA's lengthier gestation, would all suggest that there would have been greater care and hence most likely fewer unintended consequences—and hence greater stability—to the FCPA than SOX.

²²⁵Gray, *supra* note , at 14.

a core issue of his Administration and revising the FCPA was a priority in that agenda. The departing SEC Chairman attempted to mitigate the objections to the FCPA by releasing a policy statement in January 1981 emphasizing “reasonableness” in implementation and enforcement,²²⁶ a move strikingly analogous to the contemporary SEC’s issuance of clarifying guidance on section 404’s implementation. That effort failed, however, to allay perceived difficulties with the statute.

Immediately after taking office in 1981, the Reagan Administration began seeking congressional amendment of the FCPA, advocating not only redrafting to eliminate uncertainty but also repeal of criminal penalties.²²⁷ Senator John Chaffee, who had introduced legislation to revise the FCPA prior to the election, reintroduced his bill in February 1981, which did not include elimination of criminal sanctions. A similar bill was introduced simultaneously in the House. The Republican-controlled Senate passed Senator Chaffee’s bill (by voice vote) in November 1981, but it stalled in the Democratic-controlled House (where a key legislator, the chairman of the subcommittee with jurisdiction, was adamantly opposed to tampering with the legislation).

Bills to amend the FCPA to resolve business concerns were introduced in each succeeding Congress (1983, 1985, 1987) and a modest revision was finally accomplished as an amendment to omnibus trade legislation in 1988.²²⁸ The amendment revised the FCPA’s accounting and bribery

²²⁶ Foreign Corrupt Practices Act of 1977, 46 Fed. Reg. 11,544 (Feb. 9, 1981).

²²⁷ In contrast to his predecessor, John Shad, the Reagan administration’s nominee for SEC Chairman, supported congressional legislation to revise the statute. J. Gerth, *Shad: Ease Regulations*, WASH. POST, Apr. 6, 1981, at D6.

²²⁸ Fremantle & Katz, *supra* note 203, at 759. By the time it was enacted the bill had seventeen cosponsors, two of whom were Democrats. Although there are references in the literature to the Senate’s having passed another such bill in 1983, *e.g.*, O. Ronald Gray, *The Foreign Corrupt Practices Act: Revisited and Amended*, 29 BUS. & SOC’Y. 11, 15 (1990), I was unable to identify such action in the congressional record.

provisions, addressing business concerns regarding recordkeeping costs and third party payment liability under FCPA. These costs affected all firms but were, as legislators noted in supporting the amendments, especially important to small firms.²²⁹ Although the Republicans by then no longer controlled the Senate, support for recrafting the legislation was so overwhelming that the amendment could not be stopped by its few, albeit influential, Democratic opponents. These opponents included Senator William Proxmire, the Senate Banking Committee Chairman (a leading sponsor of the FCPA) and Senator Timothy Wirth, the former House subcommittee chairman who, after years of successfully bottling up the statute's amendment in the House, had recently been elected to the Senate.

Another apt example of the sluggish course of legislative revision of financial regulation, although further afield from SOX in substantive content than the FCPA, is the Glass-Steagall Act, the New Deal legislation that separated commercial and investment banking. It is instructive that, despite withering critique and efforts to undo the statutory separation, the Act took decades to repeal. Repeal only occurred in the aftermath of the banking debacle of the 1980s, with awareness that the regulatory setup had contributed to the crisis and reduced U.S. banks' competitiveness, and the accumulation of research indicating that banks' combined activities had not been responsible for the 1930s' financial difficulties and that universal banking did not adversely affect the

²²⁹ See, e.g., 134 CONG. REC. S10654 (Aug. 3, 1988) (remarks of Sen. Sanford) (“...the bill brings some much needed clarification to the operation of the Foreign Corrupt Practices Act. This clarification is essential if companies, particularly small businesses, are to behave competitively, but legally, in foreign markets.”); *id.* at S10585 (Aug. 2, 1988) (remarks of Sen. Dixon) (“The only thing that is added [by the conference report regarding the FCPA] is greater clarity. The only thing missing is the chilling effect that currently prevents many small businesses from even attempting to do business overseas.”).

economies of the many nations permitting it.²³⁰

B. Prospects for the Recrafting of SOX

Under what circumstances might SOX be revised, given what can be intuited from the path of the FCPA as well as the congressional responses to the SOX critiques? In brief, if revision is not to take a similarly glacial pace as that of the FCPA, not to say, that of the Glass-Steagall Act, the occurrence of one of two seemingly difficult tasks would appear to be a prerequisite: (1) a seismic shift in the political environment in which the Republican party regained control of the federal government or (2) establishment of a link, in the public mind, and hence the attention of Democratic party legislators, between the need to revise SOX and the solution to a continuing recessionary economy.

1. The Prospective Impact of Changes in the Political and Economic Environment.

The 2007 congressional votes indicate that a decisive majority of the Republican party is willing to revise a key provision of the statute, but only a small number of Democrats, most of whom represent swing districts, are like-minded. If this pattern were to persist, given the multiple veto points in the legislative process, the Republicans would seem not only to need to regain the executive branch but also to recapture both chambers of Congress to ensure that revising SOX moves up on the legislative agenda. That scenario would suggest that revision would not occur, at best, until after the next presidential election given the Democrats' control of both the executive and legislative branches following the 2008 election.²³¹

²³⁰ Barth, Brumbaugh & Wilcox, *supra* note 12. Prior to repeal by the Gramm-Leach-Bliley Act of 1999, banking regulators had chipped away at the separation. *Id.* at 196-97.

²³¹ It is instructive that the Democratic Party's 2008 election platform advocated expansion of government spending programs to improve competitiveness, rather than deregulation, and its

Despite a Congress controlled by Democrats, the FCPA was revised under the Reagan Administration.. As earlier mentioned, that revision took years to accomplish, along with a fortuitous event, the departure from the House to the Senate of a key Democrat, Timothy Wirth, But there was broader bipartisan support for FCPA revision in the Senate early on, compared to the Senate support for revising SOX, as a bill to amend that Act had passed the Senate without opposition by Democrats in the first year of the Reagan Administration. In addition, the legislators who led the opposition to amending the FCPA were the statute's sponsors; one might therefore expect that the retirement of ,Senator Sarbanes and Representative Oxley, would have eased the way for amending the statute. However, individuals closely associated with the statute's namesakes, who, in all likelihood,are committed to maintaining the statute in its current form, are still in positions of influence, and could restrain other legislators who might otherwise be receptive to tweaking SOX. Members of Senator Sarbanes' staff, for instance, continue to work for Congress, and one has been appointed to the PCAOB, which, as earlier noted, can impede SEC efforts to revise SOX.²³²

specific proposal for small business made no reference to SOX. 2008 Democratic Party Platform, available at <http://www.presidency.ucsb.edu/ws/print/php?pid=78283> (website visited Sep. 1, 2008). In addition, President Obama voted to table the DeMint amendment when he was a Senator, along with virtually all other Democrats. It should be noted that the Republican party platform also made no reference to SOX, but it did include a plank advocating elimination of frivolous litigation as a means of improving U.S. competitiveness, a priority mentioned in three of the commissioned reports, (those of the Chamber Commission, Capital Markets Committee, and McKinsey & Co.) 2008 Republican Platform, available at <http://www.gopplatform2008.com/2008Platform.pdf> (website visited Sept. 2, 2008).

²³² See *SEC Taps Former Sarbanes Aide To Fill Vacancy on Auditor Oversight Panel*, 40 Sec. Reg. L. Rep. (BNA) 920 (June 9, 2008) (former chief counsel of the Senate Banking Committee, who had worked under Senator Sarbanes on the Committee for fifteen years, appointed to PCAOB board by SEC Chairman Cox); and *supra* note 39 and accompanying text (disagreement between the SEC and PCAOB said to have prevented the SEC from exempting small firms from at least part of section 404). Senator Sarbanes' staff retention of positions on the

An exogenous factor affecting whether any revision would be accomplished without Republican political control is the state of the economy. If the deteriorating state of the economy in conjunction with the financial crisis could be linked in the public's mind to SOX, then it could be politically perilous for legislators of any party to oppose its revision, even though experience would suggest that congressional activity in response to economic declines or crises often produces the precise opposite—an increase, not decrease, in regulation.²³³ Concerns most salient to the public during a downturn, such as deteriorating employment or wages, and in the current crisis, declining housing prices, would seem to be problematic for drawing a link between SOX and economic hard times. None of those concerns are easily connected to the position of small firms and stock exchanges being adversely affected by SOX.

There is also no self-evident connection between costs imposed by SOX and the cascading credit crunch following the subprime mortgage crisis, an absence of linkage that has a double-edged import. The crisis has not generated a backlash against the critiques of SOX, but will, in all likelihood displace congressional effort to revise SOX by redirecting legislators' attention to matters related to financial intermediaries. The policy agenda appears to be importantly affected by legislators' "selective attention," because of the limits on the capacity of human cognitive processes, which result in individuals' being able to "attend to only limited elements of the

Banking Committee or other legislators' staff would enable them to exert influence on the statute's future by, for example, constraining SEC commissioners' official positions through inquiries in the nomination process requiring expression of support for SOX. I would like to thank Professor Donald C. Langevoort of Georgetown University Law Center for pointing out this connection in remarks at the RIETI International Seminar on Lessons from SOX Act and Perspectives on J-SOX, in Tokyo, Japan on June 25, 2008.

²³³ Romano, *supra* note 14, at 1591-94.

environment at any given time.’²³⁴

Nonetheless, as the economy deteriorates, assisting small firms by reducing SOX’s burdensome costs may well reemerge as an issue. Such a possibility is suggested by an editorial in the *San Francisco Chronicle*, one of whose authors is a prominent, and influential, political entrepreneur, former Republican Speaker of the House, Newt Gingrich. The editorial called on Congress, “with signs that [the] economy is moving toward recession,” to repeal SOX, which was described as “undermining the venture-capital industry in Silicon Valley.”²³⁵ In making its case, the editorial picked up on both the small firm and market competitiveness critiques of the statute.²³⁶

²³⁴ JONES & BAUMGARTNER, *supra* note 23, at 16. The reform proposals variously mentioned have been directed at regulation of the residential mortgage lending process and of financial institutions, or provision of financial assistance to homeowners and to financial institutions. Small firm concerns have appeared in the form of congressional urging of the Small Business Administration (‘SBA’) to increase loans to small businesses. *See, e.g.*, Press Release, House Small Business Committee, Fed and Treasury Provide Assistance to Small Business, (Nov. 25, 2008). News release from House Small Business Committee (Committee chair praising Fed and Treasury’s creating facility to support SBA loans, in response to Committee hearing and letter pressing Treasury to help small businesses having difficulty obtaining loans from the SBA, available in Lexis, news library (searched Nov. 27, 2008) (news release from Committee Chair praising Fed and Treasury’s creating facility to support SBA loans, in response to Committee hearing and letter pressing Treasury to help small businesses having difficulty obtaining loans from the SBA).

²³⁵ Newt Gingrich & David W. Kralik, *Repeal Sarbanes-Oxley*, S.F. CHRONICLE CHRON., Nov. 5, 2008, at B17. A recent oped in the Wall Street Journal coauthored by a Silicon Valley executive and journalist, similarly placed repeal of SOX as the top priority for reviving the economy. Tom Hayes and Michael S. Malone, *Entrepreneurs Can Lead Us Out of the Crisis*, Wall St. J., Feb. 24, 2009, at A15. A subsequent staff opinion column voiced a similar theme, on the current problems for venture capitalists, asserting that SOX had “helped to kill” the IPO market. L. Gordon Crovitz, *Information Age: Too Risky for Venture Capitalists*, Wall St. J. March 2, 2009, at A13.

²³⁶ Gingrich has been involved in the creation of a grass roots organization, American Solutions, that engages in citizen mobilization on a broad range of national issues, and repeal of SOX is a focus of its financial market area activities. See <http://www.americansolutions.com/About/>.

Rallying the venture capital sector to reinvigorate efforts to revise SOX is a strategy in sync with the emergent pattern of media coverage that attracted congressional response. It should also be recalled that the *San Francisco Chronicle* not only ran relatively more stories on small firm costs than stock market competitiveness, but also ran market competitiveness stories that tended to cover the cost of going public for domestic firms, a matter of substantial concern to venture capital, rather than the foreign firm slant emphasized by other papers.²³⁷ Moreover, the concerns of Silicon Valley firms and their venture capitalist financiers are matters likely to generate bipartisan political support from the California delegation.

More importantly, the significance of vibrant small firms for economic growth has deeper implications beyond their immediate impact on the California economy. In a cogently-reasoned book, William Baumol, Robert Litan and Carl Schramm maintain that the crucial factor for economic growth and prosperity are entrepreneurs whose small business enterprises “undertake and commercialize radical or breakthrough innovations” that dramatically increase worker productivity and, accordingly, a nation’s standard of living.²³⁸ They further contend that government policies that encourage the formation and maintenance of such innovative firms are critical for a nation’s material well-being.²³⁹ Their analysis of the entrepreneurial small firm as an important engine of long-term economic growth suggests that, good politics and good policy could, in fact, work in

²³⁷ See note 129, *supra*.

²³⁸ William J. Baumol, Robert E. Litan and Carl J. Schramm, *Good Capitalism, Bad Capitalism, and the Economics of Growth and Prosperity* 85-88 (2007).

²³⁹ Among the policies emphasized as most important for doing so are protection of contract and property rights, including patent law, ease of business formation and exit (bankruptcy law), flexible labor laws, free trade and enforced, but not abused, antitrust laws. *Id.* at 95-121.

tandem,, especially in economic hard times, to recraft SOX.²⁴⁰

2. Predicting SOX's Revision by a Model Focused on Congressional Characteristics

Forrest Maltzman and Charles Shipan have recently sought to predict when major legislation will be significantly revised.²⁴¹ Rather than analyze the legislation's substantive content and the economic environment, their strategy is to focus on general features of the legislation and enacting and post-enactment Congresses to estimate the probability a statute will be amended over time. Maltzman and Shipan's model can be applied to SOX to offer another perspective on the likelihood of its revision.

The two congressional characteristics included in their model to estimate the probability of amendment are whether the President is of the same political party as the majority in either chamber (referred to as "unified" government when the parties are the same and "divided" government when they differ), and the degree of ideological disagreement or differences across the chambers.²⁴² Two variables related to the legislation are also included, a statute's divisiveness

²⁴⁰Baumol et al., in a nuanced discussion, view SOX as an issue that could be a drag on economic growth. In analyzing what needs to be done to ensure that the United States maintains its entrepreneurial edge, they voice concern over SOX's potential disincentive for entrepreneurship by increasing the cost of being a public company. *Id.* at 240, The concern is that SOX could discourage entrepreneurship by "dimming prospects for profitable expansion" were a new firm to prove successful, because the potential returns from the risky enterprise could be significantly lowered: the key financiers of entrepreneurial firms, venture capitalists, will not be able to exit in a public offering, and the founders will not want to see the innovation through by staying with the firm after selling. *Id.* at 240-41, 103. They also believe that policymakers and the public view economic growth as a "cyclical" rather than "structural" problem, and hence would be more likely to consider adapting policies to foster innovation through small entrepreneurial firms in recessionary or crisis times. *Id.* at 272-74

²⁴¹Maltzman and Shipan, *supra* note. Their study includes 262 statutes, enacted from 1954-2002, thus ending in the year SOX was enacted.

²⁴²*Id.* at 260-62. The chamber difference is constructed from the difference between the level of voting support across the chambers on conference reports (identical legislation). These variables are measured for both the enacting and subsequent Congresses, and the chamber difference variable is interacted with time because diagnostic tests indicated that it had

(which refers to how contentious the vote on the statute was) and its complexity.²⁴³ The characteristics of the Congress that enacted SOX are ambiguous for predicting substantial revision: laws, such as SOX, enacted at a time of divided government are more likely to be amended but so are laws with larger chamber differences at enactment (which is not the case of SOX).²⁴⁴ Similarly ambiguous are the results regarding the legislation's characteristics: while both a statute's divisiveness and complexity increase the probability of amendment, only one of SOX's features, its complexity, works in the same direction to be associated with an increased probability of amendment.²⁴⁵

The import for prediction of the post-SOX enactment Congress variables is less ambiguous, but, of course, varies year-to-year: the probability of amendment is increasing over time. Namely, the probability of amendment is lower the greater the subsequent chamber difference (laws are more stable when the chambers are ideologically distinct because it would be more difficult to agree on revision), and the level of chamber differences decreased steadily post-SOX, declining to .057 in 2007 (from almost double at .098 and .093 in the 108th and 109th Congresses,

nonproportional effects. *Id.* at 260.

²⁴³ Complexity is measured by the number of pages of the statute in Lexis-Nexis. *Id.* at 260. Divisiveness is the smaller of the percentage yeas in the Senate or House on the vote on the statute's final enactment. Maltzman and Shipan also estimated a second model, that added to those variables a dummy variable for whether the statute was expiring under a sunset provision, to make sure that such a provision, mandating that a law "be amended or allowed to die," was not driving their results. *Id.* at 263. The dichotomous variable takes on a value of 0 in all Congresses except the one in which the statute will expire without additional action, when the value is 1.

²⁴⁴ *Id.* at 263. The chamber difference for SOX was a minimal .03, which is more than a standard deviation below the mean value in the Maltzman and Shipan study of .06. *Id.* at 261.

²⁴⁵ *Id.* at 262-63. With a value of 99, SOX was not, however, a divisive statute. SOX was above average in complexity -- its page length of 79 is greater than the study's average of 39.9, but that is considerably less than one standard deviation larger (which would be 125.6), and in terms of complexity's marginal effect, a statute "one standard deviation more complex than average is 17% more likely to be amended in the future." *Id.* at 263.

respectively).²⁴⁶ This increasing likelihood of the statute's revision is shown in Table 11, which reports the estimated probability of SOX's amendment obtained by applying the coefficients of Maltzman and Shipan's estimated model to the values of the variables in the post-SOX enactment Congresses.²⁴⁷ As the table indicates, by 2007, the year of the congressional votes on SOX, the estimated probability of amendment increased substantially, from less than 10 percent to nearly one-third. The rising probability of amendment parallels the increasing number of bill introductions and cosponsorships, and hearings related to SOX, and is consistent with the political science literature's finding that an upswing in such congressional activity is correlated with an issue's forward movement in the legislative process.

The Maltzman and Shipan results and the out-of-sample estimates for SOX reported in Table 11 suggest that what happens after a statute is enacted is more important for legislative durability than the conditions at enactment.²⁴⁸ Their findings and the Table estimates, in my

²⁴⁶ *Id.* at 262. This value is below the mean subsequent chamber difference in the study of .08 by slightly more than one standard deviation. *Id.* at 261. The subsequent divided government variable is insignificant, and thus, the probability of amendment is not affected by whether there is unified government (although Maltzman and Shipan expected it to increase in such a setting). Post-SOX, until 2007, there was unified government.

²⁴⁷ In addition to the variables described in the text, the model includes other variables that were statistically insignificant: public mood and court attention. The policy mood variable represents public support for liberal activist government, and was created by James Stimson, who converted public opinion poll data into scores. *Id.* at 262. Values for that variable are available only through 2006. See James A. Stimson, Updated from Public Opinion in America: Moods Cycles, and Swings (2d ed. 1999), <http://www.unc.edu/~jstimson/Mood5206.xls>. The table's estimated probability for 2007 therefore used the mood variable's 2006 value. An estimation was not undertaken for 2008 because, in addition to the missing public mood variable value, the data to compute the chamber difference variable—votes on conference reports identified by the House Final Calendar—is not yet publicly available.

²⁴⁸ This result is consistent with the Eric Patashnik's research on the durability of legislation characterized as major public interest reforms. He finds that these laws' durability is related to the timing of changes in the economic or macropolitical environment, and the making of extensive financial investments by private actors that support the new regime. Eric M. Patashnik., *Reforms at Risk: What Happens After Major Policy Changes Are Enacted* 161-69 (2008).

judgment, lend support to the earlier analysis's emphasis on changing political and economic circumstances as the key to SOX's future.

C. A Thought Experiment: If Revised, What Is the Most Probable Scope of Revision of SOX?

The most readily imaginable short-term congressional action on SOX would seem to be an extension of the postponement of section 404's applicability to the smallest firms. Such a provision would appear to be capable of enactment in the House because the Democrats' pick up of twenty seats is not sufficiently large to affect the margin of victory of the appropriations bill vote, assuming, of course, that the leadership would not seek or be able to block a vote.²⁴⁹ Moreover, reducing business costs is more likely to be a greater legislative concern in a recessionary economy. If the SEC's interpretive guidance on section 404 does not fulfill the stated intention of reducing compliance costs particularly for small firms, the number of Senators willing to support a revision of SOX should be expected to increase as the Senate resolution that trumped the DeMint Amendment expressed the view that the guideline revision would resolve the issue. But it is far from apparent that the level of senatorial support would reach a majority, let alone the magic number of sixty Senators necessary to avoid a filibuster.

In my judgment, the SEC's stated expectation regarding the efficacy of the revised guidance at reducing small firm costs is not realistic. That is because the essence of the implementation cost problem involves external auditors' decisions, and auditors have been loathe to cooperate in implementing a more flexible interpretation of the regulations that would reduce certification

²⁴⁹ The three Democrat incumbents who lost all voted for the amendment, so their replacement by Republicans would not increase the number of 'yes' votes. But not all of the new Democrats, many of whom won in the coattail effects of the Democratic presidential candidate, could be expected to vote with the Democratic majority against revising SOX, if the pattern of voting in 2007 by newly-elected, swing-district Democrats is a guide to future votes on the issue.

costs.²⁵⁰ The accounting firms' comment letters to the SEC's proposed guidance are instructive on this score: their responses suggest that they might not fully cooperate with the stated goal of a more flexible internal controls attestation process.²⁵¹ They would appear to prefer having employees follow mechanical rules and procedures rather than exercise judgment. In addition, as discussed earlier, the accountants on the SEC Advisory Committee notably dissented from its recommendation to exempt small firms.²⁵²

No doubt, a compelling explanation for the cautious reaction of the accounting firms is that they have adopted a decidedly risk-averse approach to liability risk in the aftermath of the Enron and other accounting scandals and resulting collapse of Arthur Andersen. Furthermore, accounting firms have also been principal financial beneficiaries of section 404, and maintenance of a lucrative revenue stream from internal control audits under the existing standard may well be an additional explanation for their resistance to the revised guidance. Of course, if a permanent small firm exemption appeared likely to be adopted, then it is altogether possible that accounting firms might shift tactics and alter their approach to section 404 audits, in an effort to protect future revenue streams by deflecting statutory reform.

A potential wild card in the regulatory hopper for the future of SOX is the SEC staff's study

²⁵⁰ See, e.g., Joseph A. Grundfest & S.E. Bochner, *Fixing 404*, 105 MICH. L. REV. 1643 (2007).

²⁵¹ In comment letters, the firms persistently objected to proposed modifications to loosen audit standards, and advocated that the SEC conform its proposed definitions to more restrictive PCAOB definitions. The accounting firms' comments are at <http://www.sec.gov/comments/s7-24-06/s72406.shtml>, and are summarized in U.S. Securities & Exchange Comm'n, Comments on the Proposed Interpretation: Proposed Rule on Management's Report on Internal Control Over Financial Reporting (2007), available at <http://www.sec.gov/rules/proposed/2007/s72406commsumm.pdf> (websites visited Sep. 2, 2008).

²⁵² See note 32, *supra*.

of the costs and benefits of section 404, which SEC Chairman Cox requested in response to the House's appropriations bill amendment, and which has taken longer to complete than anticipated and is expected to be completed later in 2009. However, it is in the nature of staff reports to rationalize agency policies. Ambiguities in quantifying section 404's benefits, compared to its costs, should, in fact, provide ample room for the staff to support nearly any position the agency wishes to adopt with respect to small firms.²⁵³ In addition, unlike the Federal Reserve whose leadership historically has been economists, or the Commodity Futures Trading Commission which from its origins included economists at the staff and commission level, the SEC has been a lawyer-centered agency with the office of economic analysis an addition to the original organizational structure, whose input historically has not been central in the agency's decisionmaking.²⁵⁴

²⁵³ It should be noted that section 404 may also impose costs that are difficult to quantify, such as increased centralization or bureaucratization of business processes besides the auditing function, or a conservative decisional bias, which may lead to a decrease in firm value. For an effort to theorize, rather than quantify, the presence of such costs, with confirming data on the perception of some such costs in a survey of executives see Nicholas V. Vakkar, R. Preston McAfee and Fred Kipperman, *The Unintended Effects of the Sarbanes Oxley Act of 2002: A Primer for Policymakers* (2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1345475>. Some researchers have found that corporate risk taking decreased post- SOX, which may be one such cost. See Leonce Barger, Kenneth Lehn and Chad J. Zutter, *Sarbanes-Oxley and Corporate Risk-Taking* (2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1104063>; Kate Litvak, *Defensive Management: Does the Sarbanes-Oxley Act Discourage Corporate Risk-Taking?* (2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1120971>.

²⁵⁴ As a former commissioner, Philip Loomis, put it "It's been very hard for us to recruit economists or to figure out exactly how to use them in our kind of work, which doesn't involve the typical, purely economic decision. So we haven't learned how to make the best use of economists, and I think we should improve on that." Susan M. Phillips and J. Richard Zecher, *The SEC and the Public Interest* 111 (981) (providing Commissioner Loomis quotation in 1979 Barrons magazine). In 1965, the agency created an Office of Policy Research headed by a chief economist; a description of the professional staff in the prior year's annual report made no reference to economists. SEC Annual Report 156 (1964). In 1975 the SEC reorganized that office into a Directorate of Economic and Policy Research, later renamed the Directorate of Economic and

A glimpse into the likely outcome of the cost-benefit study can be ascertained from a response to written questions from Senator Carl Levin (who was not on the committee with SEC oversight jurisdiction) by Mary Schapiro on her nomination as the new SEC chair. Schapiro indicated that she would move ahead with implementing section 404 for small firms, although commentators characterized her response as “ducking” the issue.²⁵⁵ That response would suggest that the staff report will be amenable to multiple interpretations and thereby support a conclusion by the commissioners that SOX’s costs are worth its benefits.²⁵⁶ The possibility that the agency

Policy Analysis (‘DEPA’), in order to ‘strengthen [its] capacity for economic research’ and coordinate reports on institutional investors - required by legislation enacted that year - and the effort to develop a national market system. SEC Annual Report 167 (1975). The Office of the Chief Economist was created in 1982, as a separate entity supplementing the DEPA’s work with an academic economist brought in as the chief economist, to “draw increased attention to the fundamental economic issues raised by the agency’s regulatory actions.” SEC Annual Report 58 (1982). This elevation of economic analysis within the agency was an initiative by then SEC Chairman John Shad who, not fortuitously in my judgment, was an investment banker and not a lawyer. Following the stock market crash in the Fall of 1987, the two departments were merged into a new office, the present Office of Economic Analysis, under the leadership of the chief economist. Personal communication to author from Kenneth Lehn, SEC Chief Economist from 1987-91.

²⁵⁵ Malini Manickavasagam, Steven Marcy, and Alison Bennett, SEC Chairman Schapiro Agrees SEC Must Reconsider Key Areas Including Proxy Access, IFRS, 7 Corp. Accountability Rep.(BNA) 124, (Jan. 30, 2009). Ms. Schapiro’s response to the Senator’s inquiry about whether nonaccelerated filers’ compliance with section 404 would be further delayed was: “Right now we have a system where some issuers are complying with 404 and others are still exempt from it. It’s time that we bring uniformity to the system so that investors know what to expect from companies, while being sensitive to the needs of small businesses. I look forward to working with the small business community in making sure they have the tools they need to comply with 404.” Questions from Senator Carl Levin for Mary Schapiro, Nominee to be Chair of the Securities and Exchange Commission January 8, 2009, available at <http://levin.senate.gov/newsroom/supporting/2009/PSI.SchapiroResponses.012209.pdf>.

²⁵⁶ The staff is surveying firms complying with section 404 as part of the study, and the SEC website description of the study’s purpose further suggests that such a finding is not in the sights of the agency’s agenda, as it states: “The analysis of the data collected will help inform the Commission on whether its guidance for management on how to conduct an internal control evaluation. [has] improved implementation of the Section 404 rules by reducing costs while still preserving the rules benefits Spotlight on SEC Survey on Costs and Benefits of Rules

could reach a conclusion in conflict with the most plausible reading of the research on the section's adverse impact on business would not come as a surprise to a student of the agency as the commissioners have a rich history of ignoring empirical research: for example, the agency adopted rules restricting auditors' provision of non-audit services, despite a total absence of data that would support its position in the reports of two agency-commissioned panels.²⁵⁷

An instructive illustration of the dynamic in which staff reports are used by commissioners to bolster their policy preferences is the recent SEC rulemaking seeking to require independent mutual fund boards.²⁵⁸ After the U.S. Court of Appeals for the D.C. Circuit rejected the rule for inappropriate rule-making procedures, the agency responded by swiftly reenacting the rule, supplying a brief staff report in support, which the court once again rejected for being proposed without following proper procedures, and in particular, for not considering the rule's costs.²⁵⁹ The Agency then commissioned a report by the Office of Economic Analysis on the proposed rule, and the staff's obvious dilemma in seeking to satisfy the Commission's policy preferences while remaining intellectually honest is evident in the supplemental memo of the Chief Economist. The memo explained that, despite the absence of empirical support for the rule's premise that independent boards improve fund performance and reduce fees, "the lack of such evidence may be a result of the limits of standard statistical methods in identifying such a relation and is not

Implementing Section 404 of the Sarbanes Oxley Act,
<http://www.sec.gov/spotlight/404survey.htm>.

²⁵⁷ Romano, *supra* note 14, at 1534, 1537.

²⁵⁸ Investment Company Governance, Release No. 26,520, 69 Fed. Reg. 46,378 (Aug. 2, 2004) (17 CFR Part 270).

²⁵⁹ Chamber of Commerce v. SEC, 412 F. 3d 133 (D.C. Cir. 2005); Chamber of Commerce v. SEC, 443 F 3d. 890 (D.C. Cir. 2006).

necessarily indicative of the failure of such a relationship to exist.²⁶⁰ That observation is not itself incorrect, but it avoids dealing with the task at hand, which is for the analyst to provide his or her best judgment given the state of knowledge.

A report on the cost and benefit of section 404 for small firms could likewise advance a conclusion that compliance for small firms might be worth the cost by referencing the difficulty of quantifying benefits, despite the best available empirical evidence that suggests there is a substantial negative tradeoff.. Given the agency chair's statement to Congress, such a conclusion would not be a surprise,.But that would not have to be the report's conclusion for the commission to apply the section to small firms. A staff report that concluded that compliance with SOX has outweighed the benefits for accelerated filers and would impose substantial or excessive costs on as yet noncomplying small firms, would most likely produce a further tweaking of the guidelines in order to accommodate somewhat better the accounting issues related to small firms, without serious rethinking by the commission of the regulatory approach. That result would be consistent with the new Chair's response to the Senate on section 404.

A rulemaking proposal to tinker further with the implementation guidelines in response to the staff report would also have the benefit of enabling Democratic legislators, who are SOX's more ardent advocates, to continue putting off legislative action, following the reasoning of the Dodd-Shelby resolution, that the issue is best left to the SEC. Here, the critical factor would be the response of the electorally most vulnerable Democrats. They might be especially vulnerable in this legislative go-round because the party of the President typically fares poorly in off-year elections, and the timetable for implementation requires small firms to comply before the 2010

²⁶⁰ Siobhan Hughes, *SEC Hits Hurdles in Evaluating Rule — Link Deemed Weak Between Returns, Independent Board*, WALL ST. J., Jan. 4, 2007, at C15.

elections.²⁶¹

There are several reasons for expecting small firm relief to be the most probable, if any, legislative recrafting of SOX in the short-term. Besides the influence on legislators of the constituent connection of small firms being numerous and located in all districts, evident in the relative coverage of regional newspapers of the SOX critiques, as earlier noted, public opinion in the United States has historically been decidedly more sympathetic towards small rather than big business.²⁶² Rolling back regulation whose cost unduly burdens small firms would better resonate with the public than would broad-based reform benefitting large firms and stock exchanges. Benefitting small firms would also be more politically attractive, as the rollbacks could be credibly explained to constituents who might otherwise question the need for statutory amendment.²⁶³ In addition, both parties' campaign platforms expressed support for small business, although the substantive content of neither plank referenced SOX.²⁶⁴ Finally, a recent study of the stability of major legislative initiatives finds that reforms are more likely to be resisted and less likely to "stick" when those adversely affected have not yet made substantial investments in order to adapt to the

²⁶¹ As there are fewer Senate Democrats than Republicans up for reelection in the next election cycle, enactment of small firm relief in that chamber, compared to the House, is still a long shot. In mid-term elections since World War II, the party of the President has not lost any seats in the House in only two midterm elections and in only five in the Senate. Smith, et al. at 80.

²⁶² LIPSET & SCHNEIDER, *supra* note 156.

²⁶³ FENNO, *supra* note 65, at 151 (for the vast majority of votes, legislators are not constrained by constituent preferences and can vote 'as they wish,' provided that they can satisfactorily explain their votes to constituents).

²⁶⁴ 2008 Democratic Party Platform, *supra* note 209; 2008 Republican Platform, *supra* note 209.

new regime and marginal compliance costs are high.²⁶⁵ Because small firms have not yet had to undertake the significant investment in compliance related to the auditor attestation component of the statute, they can be expected to continue to resist implementation and voice opposition to public officials, in contrast to already compliant large firms.

In sum, any possible impetus for small firm relief is more likely to originate in Congress than the SEC, despite the agency's undertaking of a cost-benefit analysis of section 404, , Congress has, in fact, been a driving force of agency consideration of the impact regulations have on small firms.²⁶⁶ The SEC, by contrast, has historically often sought to extend its regulatory jurisdiction over small firms,²⁶⁷ and it would be out of character for it to exempt small firms from regulation on its own initiative rather than in response to an external directive.²⁶⁸ Of course, were the probability

²⁶⁵ Patashnik., *supra* note, at 177.

²⁶⁶ Section 603 of the Regulatory Flexibility Act, Pub.L. 96-354 (1980), amended by Pub. L. 104-121 (Small Business Regulatory Enforcement Fairness Act of 1996), directs agencies to analyze the cost of proposed regulations on small businesses and to consider significant alternatives that would accomplish their stated objectives, while minimizing any significant adverse impact on small entities.

²⁶⁷ The 1964 amendments extending the federal securities laws to small firms traded in the over-the-counter market, *supra* note 3, were enacted at the SEC's request. The changes followed an Agency study indicating that the SEC had initiated more fraud investigations at small firms exempt from regulation than at larger regulated firms, and that unlisted companies' stock prices were more volatile. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 313-14 (1995). The SEC had advocated the extension for many years in reports issued in 1946, 1950 and 1956. *Id.*

²⁶⁸ The creation of the Advisory Committee was, for example, a response to two external impetuses: small firms' complaints about SOX's costs, and business groups' opposition to the SEC Chairman's reappointment because he voted with the Democratic commissioners and against the Republican commissioners in support of a variety of regulatory initiatives. Romano, *supra* note 14, at 1595-96 n.214. Consistent with its historical effort to bring small firms within its jurisdiction, the Agency did not exempt small firms from SOX as the Committee recommended. Moreover, it did not contend, as a rationale, that it lacked authority to do so, as do some commentators, see note x, *supra*.

of enactment of regulatory relief for small firms to increase dramatically, then the SEC could act preemptively and exempt small firms from part or all of section 404 in order to avoid the sting of a legislative rebuke. The Agency's decision to defer the applicability of section 404 to small firms following the House vote prohibiting SEC implementation expenditures is illustrative of such a tactical retreat

D. Market Competitiveness Concerns

The prognosis that small firm relief is the most probable shape that revision of SOX would take is not to say that the market competitiveness concerns raised by the reports of the Capital Markets Committee, McKinsey Study, and Chamber Commission with respect to SOX will be altogether ignored by Congress.²⁶⁹ The New York metropolitan area, which is most negatively affected by this issue and has been severely impacted by the financial crisis, has a Senator in a key congressional leadership position.

However, the rubric of "market competitiveness" is amenable to diverse SEC initiatives. The SEC, for instance, recently abandoned the requirement that foreign firms reconcile their financial statements with U.S. accounting principles, as long as the firms are complying with international accounting standards.²⁷⁰ Although this action does not alleviate the costs of SOX compliance, it undoubtedly will improve U.S. stock markets' relative competitive position, as the substantial expense entailed in reconciliation has long been considered an important reason why small foreign

²⁶⁹ As previously discussed, the America Competes Act also included a resolution, added by unanimous consent, expressing the "Sense of the Senate" that U.S. capital markets were losing their "competitive edge," *see* note 179, *supra*.

²⁷⁰ S. Marcy, SEC Ends GAAP Reconciliation for Reports Meeting IASB-Issued IFRS, 5 BNA Corp. Accountability Rep. 1134 (Nov. 16, 2007); Acceptance from foreign private issuers of financial statements prepared in accordance with international financial reporting standards without reconciliation to U.S. GAAP, Rel. No. 33-8879, 17 CFR Parts 210, 230, 239 and 249 .

firms do not list on U.S. exchanges.²⁷¹ The SEC also held a roundtable to explore the concept of ‘selective mutual recognition’ under which it would cede its regulatory jurisdiction to selected home country regulators of foreign firms listed on U.S. exchanges.²⁷² Such a policy would further aid the New York stock exchanges, as it should reduce foreign firms’ cost of a U.S. listing by eliminating duplicate oversight, such as, the need to comply with different disclosure requirements of the SEC and home regulator. However, it is improbable that the concept of selective mutual recognition will in the near term go beyond the Cox-chaired Commission’s drawing board. The new SEC chair expressed opposition to pursuing an even less expansive international initiative that then Chairman Cox had proposed, that would permit U.S. issuers to comply with international accounting standards rather than U.S.GAAP.²⁷³

But even were Chairman Schapiro more amenable toward promoting international recognition initiatives, it is highly questionable whether she would be able to do much on that front in the immediate future. The SEC’s focus under her leadership will undoubtedly be on enforcement and expanding initiatives under the rubric of ‘investor rights,’ issues of greatest interest to Democrats in Congress as they are advocated by their political allies among unions and public pension funds.²⁷⁴ That is because the agency will be seeking to offset criticism for failing to investigate repeated tips regarding Bernard Madoff’s massive Ponzi scheme over a number of years,

²⁷¹ See, e.g., Cochrane, *supra* note 47.

²⁷² Press Release, SEC Announces Roundtable Discussion Regarding Mutual Recognition, 2007-105 (May 24, 2007) available at <http://www.sec.gov/news/press/2007/2007-105.htm>.

²⁷³ See note 299, *supra*.

²⁷⁴ For example, shortly after her confirmation, Schapiro announced that the agency would move rapidly on rules regarding shareholder proxy access, and appointed a former public pension fund employee as an advisor on the issue., , items of interest to union funds and Democratic legislators, for which she expressed support in her nomination process., Yin Wilczek, Schapiro Carrying through on Promises, Directs Staff to Draft Proxy Access Proposal, 7 Corp. Accountability Rep. (BNA) 307 (Mar. 13, 2009).

and for presiding over the collapse of the investment banking sector.²⁷⁵

E. A Lesson of SOX: The Need for Sunset Provisions

The saga of SOX underscores an important lesson for Congress's impending effort to overhaul comprehensively the regulation of financial institutions: It is far easier to draft legislation in times of crisis that produces unintended consequences and imposes substantial costs on firms, impeding economic growth, than it is to correct such legislative blunders thereafter. That is because the limited time for deliberation, often accompanied by public hysteria, makes it more probable that the causes of the crisis and consequences of decisions will not have been sufficiently understood by policymakers and legislators to be able to ascertain how best to proceed.

The difficulty of revising poorly-conceived financial market regulation, as exemplified by the FCPA and Glass-Steagall Act, underscores the value of including in legislation a sunset provision, a mechanism that forces Congress to revisit periodically and comprehensively what it has done. Such an approach is especially important for legislation drafted in a crisis environment because the subsequent review can be undertaken soberly and with reflection.²⁷⁶ To facilitate the review, Congress should further commission an empirical study of the legislation's effects, to be undertaken by an independent blue ribbon group with expertise in the area.

Mandatory periodic congressional review of crisis-mode legislation may not always result in repeal of poorly thought-out statutory and regulatory provisions, and may, in fact, impose costs

²⁷⁵ *E.g.*, Editorial: SEC: Some Watchdog!, Boston Herald, Dec. 16, 2008, p. 20; Terry Keenan, This Ponzi Scheme is Crème de la Crème, New York Post, Dec. 14, 2008, p. 35; Loren Steffy, SEC Short of Wisdom on Short-Selling, Houston Chronicle, Jul. 18, 2008, p.1 (Business section).

²⁷⁶ For commentators advocating adoption of such mechanisms see, for example, Larry Ribstein, *Sarbox: The Road to Nirvana*, 2004 MICH. ST. L. REV. 279, 297 (2004); Romano *supra* note 14, at 1599-1601.

on doing business by decreasing the certainty of a statute's or implementing rule's duration. This speculation is not particularly plausible as there was no want of innovation in derivatives products, and indeed, those markets flourished, under an agency subjected to a sunset provision.. But even if some investments would be deterred because they would not be completed within the legislation's authorized time frame, the costs of uncertainty generated by a sunset provision would, given a history littered with legislative and regulatory errors, in my judgment, be more than offset by the benefit of forcing Congress to confront early on the adverse unintended consequences of its actions, after a crisis-related panic has subsided ²⁷⁷

V. Conclusion

Although SOX was enacted with near unanimity in 2002, only a few years thereafter, four high-profile commissioned reports critiqued the legislation for having adverse economic consequences for small firms and capital markets. These critiques contributed to increasing media coverage of SOX's impact. As a consequence, they gradually seeped into the political arena.

This Article investigated the reporting on the SOX critiques by national and regional newspapers and leading business journalists to gauge the political climate for revisiting SOX. Examination of the coverage of the SOX critiques yields three core findings. First, reporting on the critiques has steadily increased as media references to Enron have receded, although the term

²⁷⁷ The Commodity Futures Trading Commission was created as a sunset agency, which requires periodic reauthorization, and the reauthorization process has resulted in updating its jurisdiction over derivative products and markets. For example, its authority was altered over the following products in the following reauthorizations: energy products in the 1990 and 2005 reauthorizations, the Futures Trading Act of 1992 and Food Conservation and Energy Act of 2008, respectively; foreign currency products in the 2000 reauthorization, the Commodity Futures Modernization Act of 2000; and futures on individual stocks in the 1980 and 2000 reauthorizations, the Futures Trading Act of 1982 and Commodity Futures Modernization Act of 2000, respectively. For a brief discussion of the costs and benefits of sunset legislation see Romano, *supra* note 14, at 1600-01.

'Enron' has entered the vernacular and its newspaper presence still dwarfs that of the SOX critiques. Second, market competitiveness issues tend to receive greater media attention than small firms' costs, although these concerns are not necessarily mutually exclusive. This reporting pattern is consistent with three of the four commissioned reports' emphasis on market competitiveness issues. Third, and most intriguing from a political economy standpoint, regional newspapers and the *Washington Post*, devoted equal attention to small firm compliance costs and capital market competitiveness issues and hence provided greater relative coverage of small firm costs than did the New York-based national press.

Paralleling regional papers' and the *Washington Post's* greater relative emphasis on small firm costs than that of the New York-centered national press, Members of Congress have focused their attention on the burden SOX places on small firms rather than capital markets. Most of the bills introduced to revise SOX have been directed at small firms' compliance costs, and that issue has been the subject of two congressional votes that convey legislators' sense of unease with the statute. Although the legislative proposals have been sponsored nearly all by Republicans, a provision to defer small firms' compliance with the statute's auditor attestation requirement - the focus of the critiques - passed in the Democrat-controlled House. A procedural motion to consider a proposal to exempt small firms permanently from that provision failed in the Senate, but it was supported by a decisive majority of Republicans. In addition, that vote followed a maneuver by the Senate Banking Committee leadership to consider first a competing resolution, which was unanimously adopted, that recognized the SEC was revising its attestation guidelines to reduce compliance costs.

The congressional votes on SOX are quite fascinating, as they evince that the statute's legitimacy has been put into question in the political arena and not simply in the academic

literature. Two central factors bearing on the prospects for SOX's revision are the macropolitical and economic environment. The bulk of support for revising SOX, as reflected in bill sponsorship and the recent votes, has come from the minority Republican party. The Democrats who have supported SOX's revision tend to be more politically vulnerable legislators with small firm constituencies. Given the failure of the Republicans to retain the Presidency and a majority in Congress, it is, in all likelihood, improbable that SOX will be recrafted in the short term. Although the current financial crisis has shifted congressional priorities to consideration of the regulation of financial institutions, thus removing SOX from the short-term political agenda, the statute's recrafting could move up on the national policy agenda even in the absence of Republican political control, if a link could be established in the public's mind between a reduction in the burden of SOX on small firms and mechanisms to jump start a deeply troubled economy.

Tables

Table 1. Recommendations of Reports Commissioned to Examine Impact of SOX.

Entity Issuing Report	Date	Key Recommendations
SEC Advisory Committee on Smaller Public Companies	4/06	<ul style="list-style-type: none"> • Establish system of scaled securities regulation for smaller firms • Exempt smallest firms from 404* • Exempt small firms from 404 auditor involvement* • Clarify scope of loan prohibition to permit indemnification advances, cashless option exercises, split-life insurance and relocation loans • Relax private offering solicitation restrictions • Adopt litigation safe-harbor protocol for accountants <p>*unless and until separate framework developed for small cos.</p>
Committee on Capital Markets Regulation (Paulson Committee)	11/06	<ul style="list-style-type: none"> • Modify implementation of 404 rather than exempt small firms: Redefine materiality; increase auditor guidance to reduce costs; adopt multi-year rotational testing for low-risk components • Exempt foreign firms with equivalent home-state regulation • Reduce auditor liability
McKinsey & Co. Study for New York (Schumer-Bloomberg Report)	1/07	<ul style="list-style-type: none"> • Clarify guidance of 404 implementation: Redefine materiality; risk-based approach • Consider exemption for foreign firms and letting small firms opt out • Reform securities litigation: Reduce auditor liability and promote arbitration
Chamber of Commerce Bipartisan Commission on the Regulation of Capital Markets in the 21 st Century	3/07	<ul style="list-style-type: none"> • Incorporate SOX into 1934 Act (to clarify applicability of SEC's rulemaking and exemptive power to section 404 and other SOX provisions)

Table 2. National Business Journalists' Coverage of SOX, 1/1/01-6/10/07.

Articles referencing	Abelson	Jenkins	Morgenson	Murray	Norris	Sloan	WSJ Ed	Total
Advisory Comm	0	0	0	0	8, 3	0	0; 2, 0	8, 3
Capital Markets Comm	2, 1	1, 0	0	4, 1	4, 1	0	2, 0; 5, 0	13, 3
Chamber Commission	0	0	0	0	0	0	0; 3, 0	0
McKinsey Study	0	0	0	0	0	0	1, 0; 4, 1	1, 0
Market competitiveness+	2, 1 (1){1}	1, 0	0	6, 2 {2}	12, 7	1, 1 {1}	11, 7; 15, 7 {3};{2}	33, 18 (1){7}
Foreign market competitiveness	0	1, 0	0	4, 0	12, 7	0	8, 4; 13, 7	25, 11
Small firm costs	0	1, 1	0	3, 1	4, 1	0	2, 0; 5, 2	10, 3
Advocacy against revising SOX or disparagement of criticisms	4	0	1	5	7	0	0; 3	17
Criticism of SOX or advocacy of rolling back SOX	0	1	0	0	0	0	12; 16	13
Total SOX**	5	3	1	13	29	2	19; 27	72
Need more regulation (written pre- enactment; not included in Total SOX)	3	0	0	6	1	4	0	14
More regulation not needed (written pre-enactment, not included in Total SOX)	0	3	0	0	0	0	2	5
Total surveyed	97	209	399	151	416	66	3,757	5,095

Notes: 'Abelson' ' Alan Abelson, Barrons; 'Jenkins' ' Holman Jenkins, *Wall Street Journal* ("WSJ"); 'Morgenson' Gretchen Morgenson, *New York Times* ("NYT"); 'Murray' Alan Murray, WSJ (from 2/02-12/04 he was at CNBC but continued to write a weekly column for the WSJ); 'Norri's' Floyd Norris, NYT; 'Sloan' Allan Sloan, Newsweek; 'WSJ Ed' *Wall Street Journal* editorial; + 'Market competitiveness' includes references to IPOs or going private transaction numbers, whether foreign or domestic with (#) referring to IPO but not foreign market listing and {#} referring to going private but not foreign firm, and the difference is indicated in the following row under 'foreign market competitiveness'; ** 'Total SOX' includes articles with some reference to costs and/or benefits of SOX, or issues involving internal controls provision and is tallied from 7/22/02, the first business day after Worldcom's bankruptcy filing, when the market dropped dramatically propelling Congress to move decisively on SOX, approving the bill three days later on 7/25, through 6/10/07; articles referencing other SOX issues, such as accounting disclosure,

analyst conflicts of interest, boards of directors and audit committees, are excluded; totals of all SOX-related issues articles, including the excluded topics, for the period 1/1/01-11/1/06 (ending 10/22/06 for Abelson and Murray), compared to articles included in 'Total SOX' from the overlapping time period 7/22/02-11/1/06 are: Abelson 11:3, Jenkins 14:3, Morgenson 51:5, Murray 24:10, Norris 73:25, Sloan 10:2, WSJ Ed 68:15;*** category tallied only through 11/1/06. **Numbers in bold font** are counts of independent author editorials published in the *Wall Street Journal*, and are not included in the counts for the newspaper's own editorials, except in the count of 'Total surveyed.' The counts for the specified referenced topics do not add up to 'Total Sox' because some articles might reference more than one topic (which are double counted) and some articles discussed costs without referencing small firms in particular. *Numbers in italics* are the count of articles for the referenced topic that do not contain a reference to any other specified reference topic; in the market competitiveness category, virtually all overlaps contained foreign firm references, so the italicized count in that category equals the domestic only stories plus foreign stories that do not overlap with another category; the only exception is for Abelson, where the overlap is with a domestic IPO story. Articles were searched in the Lexis and Factiva news databases for the specific papers, using the journalist's name with "byline or by" ("editorial" for the WSJ Ed), and "regulat! or legis!" except for the period 11/1/06-6/10/07, when the Factiva searches (Barrons and Wall St. Journal) were searched only on the reporter's name or "editorial."(n) under WSJ Ed.is the number of independent individuals' "op-eds" appearing in WSJ, identified for the period 12/1/04-6/10/07 in the WSJ newspaper article search in Lexis described in Table 3.

Table 3. Regional and National Newspaper Coverage of SOX, 12/1/04-6/10/07

Articles that reference:	Birming-ham News	<i>Boston Globe</i>	<i>Houston Chronicle</i>	<i>SF Chronicle</i>	NYT*	WSJ*	Wash. Post	Total
Advisory Comm.	1, 0	4, 0	3, 2	9, 3	3, 2	26, 11	12, 7	58, 25
Capital Markets Comm.	0	2, 0; 1, 0	4, 0	1, 1	7, 3	11, 1	9, 5	34, 10
Chamber Comm. (local report)	0	(2, 0)	1, 0	0	2, 0	4, 2	5, 1	12, 3
McKinsey Study	0	1, 0; 1, 0	2, 0	0	5, 0	7, 0	1, 0	16, 0
Market competitiveness+	3, 3	11, 7 (3) {1}; 1, 0	13, 9 (1) {4}	12, 9 (4){3}	35, 27 (2) {3}; 1, 0	84, 70 (10){15}	18, 12 (1) {7}; 2, 2	176, 137 (21) {33}
Foreign market competitiveness	3,3	7, 3	8, 4	5, 3	30, 22	59, 47	10, 5	122, 87
Small firm costs	5, 4	8, 2; 1, 1	9, 6	8, 1	6, 5; 1, 0	25, 9	12, 6	73, 33
Advocacy against revising SOX	0	3; 1	4	0	3	0	2	12
Total SOX **	16	29; 2	51	31; 1	73; 1	166	93; 2	459
Total surveyed***	176	238	352	337	806	1344	632	3,885
All Enron references 7/1/99-7/22/00	1	19	227	14	50	181	32	524
All Enron references: 7/1/01-7/22/02 (1 st)	103 (11/15)	576 (10/26)	2098 (10/17)	621 (10/26)	2122 (9/9)	2152 (10/17)	1449 (10/23)	9,121
All Enron references: 12/1/04-6/10/07	70	140	1373	164	1106	977	756	4,586
Media slant	.462	.424	.489	.403	.426	.485	.426	-
Circulation (rank)	145,655 (73)	382,503 (14)	503,114 (9)	386,564 (13)	1,120,420 (3)	2,062,312 (2)	699,130 (7)	-
Population (rank)	229,424 (80)	590,763 (22)	2,144,491 (4)	744,041 (14)	8,214,426 (1)	n.a.	581,530 (24)	-

Notes: 'SF' San Francisco; 'NYT' New York Times; 'WSJ' Wall Street Journal; 'Wash.Post' Washington Post; *

counts for NYT and WSJ exclude stories tallied in table 2, by national journalists in these newspapers and WSJ editorial page, except for the counts in the row of 'total surveyed'; + 'Market competitiveness' includes references to IPOs or going private transaction numbers, whether foreign or domestic with (#) referring to IPO but not foreign market listing and {#} referring to going private but not foreign firm and the difference is indicated in the following row under 'foreign market competitiveness';** 'Total SOX' includes articles that had some reference to costs and/or benefits of SOX, or issues involving internal controls provision; articles referencing other SOX issues, such as accounting disclosure, accountants' conflict of interest, independent audit committees, or on the specific accounting scandal company fraud trials, are excluded; totals of all SOX-related issues articles, including the excluded topics, for the shorter period 4/1/05-11/1/06, compared to articles included in 'Total SOX' from that same time period are: Birmingham 22:1, Boston 15:5, Houston 53:18, San Francisco 17:7; *** 'Total surveyed' is the total number of articles produced by the lexis searches described below plus the number of articles added to "Total SOX" from reading hard copies of the business sections of the *Birmingham News* and *Houston Chronicle* for the entire sample period 12/1/04-6/10/07. **Numbers in bold font** are independent author editorials, not included in counts for the newspaper, except the count of 'Total surveyed;' WSJ independent author editorials are tallied in table 3 and not displayed in this table. The counts for the specified referenced topics do not add up to 'Total Sox' because some articles might reference more than one topic (which are double counted) and some articles discussed costs without referencing small firms in particular. *Numbers in italics* are the count of articles for the referenced topic that do not contain a reference to any other specified reference topic; in the market competitiveness category, virtually all overlaps contained foreign firm references, so the italicized count in that category equals the domestic only stories plus foreign stories that do not overlap with another category; with four exceptions: for the WSJ, where there is one domestic IPO overlap, and for the *SF Chronicle*, WSJ and *Washington Post*, where there is one each domestic going private overlap. Articles were searched in the Lexis database for each newspaper using the following search: (sarbane w/5 oxley) or section 404 or (conflict of interest w/5 account! or audit!) or (option! w/5 executiv!) or (small w/3 business w/5 cost!) or (small w/3 company w/5 cost!) or (accounting w/3 regulation) or (accounting w/3 legislation) or (transparency w/5 financial statement!). For the regional newspapers, two additional searches were run using the same date restrictions: (small! w/2 public w/2 companies) and (independent w/3 director) or (independent w/3 audit w/3 committee) or (internal w/3 control). These two searches were not run for the national newspapers because they failed to identify any additional relevant stories for the regional newspapers (with one exception, a 12/04 *Houston Chronicle* new squib on the SEC voting to delay implementation on section 404). Because the regional newspapers did not systematically provide the electronic data vendors with published articles from sources other than their own staff due to intellectual property concerns, to identify any additional such stories, counts of those articles for the *Boston Globe* and the *San Francisco Chronicle* were obtained from searches in the newspapers' internal databases that include all published articles, that were kindly run for me by Richard Geiger, the head of the library of the *San Francisco Chronicle*: (sarbane <NEAR/5' oxley) or section 404 or (conflict of interest <NEAR/5' (account* or audit*)) or (option* <NEAR/5' executiv*) or (small <NEAR/3' business <NEAR/5' cost*) or (small <NEAR/3' company <NEAR/5' cost*) or (accounting <NEAR/3' regulation) or (accounting <NEAR/3' legislation) or (transparency <NEAR/5' financial statement*); and Lisa Tuite, the librarian of the *Boston Globe*: "Sarbanes- Oxley"; "small near3 business"; and "accounting near3 regulation." The business sections of the Houston and Birmingham newspapers were read on microform for the entire sample period to identify all non-staff relevant content because the newspapers declined to undertake a search of internal databases; most of such articles in the *Houston Chronicle* were in fact included in the Lexis database. 'All Enron references' are counts of all articles, including letters to the editor, obtained from the following search: "enron and not "enron field" and not "sports" for the indicated dates, many of which articles have nothing to do with Enron; note that Enron's collapse began in the fall of 2001, and SOX was enacted in July, 2002.(1st)' date in parentheses of first story containing "Enron" that reported on the financial problems that led to the company's demise. For this search, only the regional newspapers' content contained in the electronic database was tracked. 'Media slant' is derived from the relative use of phrases in congressional debates by legislators of different political parties as calculated by Matthew Gentzkow, & Jesse M. Shapiro "What Drives Media Slant? Evidence from U.S. Daily Newspapers," Data Pack Distribution Date: Monday, October 30, 2006, available from the NBER. 'Circulation (rank)' is the average total paid circulation for weekday (M-F) editions over the six months ended 3/31/07, provided by the Audit Bureau of Circulations, available at <http://abcas3.accessabc.com/ecirc/newsform.asp>. 'Population (rank)' is the estimated population as of 7/1/06, the most recent estimate, for incorporated places over 100,000, provided by the U.S. Bureau of the Census, available at <http://www.census.gov/popest/cities/tables/SUB-EST2006-01.xls/>.

Table 4. Time Trend in Media Coverage on SOX.

	2002	2003	2004	2005	2006	2007
National business journalists:						
Committee Reports			0	1; 1	17; 7	4; 6
Small firm costs	0	0	1	3; 2	6; 3	0
Market competitiveness+	0	1{1}	4{1}	8; 1{2}	15; 9 {1;2}	5; 5 (1) {2}
Foreign market competitiveness	0	0	3	6	14; 7	2, 4
Advocacy against revising SOX or disparagement of criticisms	0	0	1	3; 1	10; 2	3
Criticism or advocacy of rolling back SOX	2	1	1	4; 2	5; 9	5
Total SOX**	3	2	10	18; 5	32; 16	7; 6
Regional newspapers:						
Committee Reports	-	-	0	6	19	3; 2
Small firm costs	-	-	0	7	21	2; 1
Market competitiveness+	-	-	1 (1)	4 (2) {2}	23 (3) {3}	11; 1 (3) {2}
Foreign market competitiveness	-	-	0	0	17	6; 1
Advocacy against revising SOX	-	-	0	0	3	4; 1
Criticism of SOX or advocacy of rolling back SOX			0	0; 1	0	0
Total SOX**	-	-	8	35; 1	60	24; 2
All Enron references	1240	1226	38 (966)	1782	936	156
National newspapers*:						
Committee Reports	-	-	3	16	50	23
Small firm costs	-	-	2	16; 1	21	4
Market competitiveness+	-	-	4{1}	22;1 (4) {9}	75;1 (7) {11}	36; 1 (2) {4}
Foreign market competitiveness	-	-	3	9; 1	57; 1	30; 1
Advocacy against revising SOX	-	-	0	1	1	3
Total SOX**	-	-	12	91; 1	162; 1	67; 1
All Enron references	1721	1708	86(1323)	1103	1328	322

Notes: The search period begins 7/22/2002 for leading business reporters and 12/1/2004 for regional and national papers (number in parentheses in ‘All Enron references’ for year 2004 is count for all of 2004 for the newspapers). National business journalists are Alan Abelson, Holman Jenkins, Gretchen Morgenson, Alan Murray, Floyd Norris, Allan Sloan, and *Wall Street Journal* Editorial page; regional newspapers are the *Birmingham News*, *Boston Globe*, *Houston Chronicle*, and *San Francisco Chronicle*; national newspapers are the *New York Times*, *Wall Street Journal* and *Washington Post*; * national newspaper counts exclude stories of national journalists tallied in the table, except for the counts in ‘All Enron references.’ ‘Committee Reports’ aggregates references to the four committee reports separately tallied in the first four rows in Tables 2 and 3; + ‘Market competitiveness’ includes references to IPOs or going private transaction numbers, whether foreign or domestic with (#) referring to IPO but not foreign market listing and {#} referring to going private but not foreign firm and the difference is indicated in the following row under ‘foreign market competitiveness’; ** ‘Total SOX’ includes articles that had some reference to costs and/or benefits of SOX, or issues involving internal controls provision, obtained from the Lexis search for newspapers: (sarbane w/5 oxley) or section 404 or (conflict of interest w/5 account! or audit!) or (option! w/5 executiv!) or (small w/3 business w/5 cost!) or (small w/3 company w/5 cost!) or (accounting w/3 regulation) or (accounting w/3 legislation) or (transparency w/5 financial statement!; and for leading reporters, the journalist’s name with “byline or by” (“editorial” for the WSJ Ed), and “regulat! or legis!”. Because the regional newspapers did not systematically provide the electronic data vendors with published articles from sources other than their own staff due to intellectual property concerns, to identify any additional such stories, counts of those articles for the *Boston Globe* and the *San Francisco Chronicle* were obtained from searches in the newspapers’ internal databases that include all published articles, that were kindly run for me by Richard Geiger, the head of the library of the *San Francisco Chronicle*: (sarbane <NEAR/5’ oxley) or section 404 or (conflict of interest <NEAR/5’ (account* or audit*)) or (option* <NEAR/5’ executiv*) or (small <NEAR/3’ business <NEAR/5’ cost*) or (small <NEAR/3’ company <NEAR/5’ cost*) or (accounting <NEAR/3’ regulation) or (accounting <NEAR/3’ legislation) or (transparency <NEAR/5’ financial statement*); and Lisa Tuite, the librarian of the *Boston Globe*: “Sarbanes- Oxley”; “small near3 business”; and “accounting near3 regulation.” The business sections of the Houston and Birmingham newspapers were read on microform for the entire sample period to identify all non-staff relevant content because the newspapers declined to undertake a search of internal databases; most of such articles in the *Houston Chronicle* were in fact included in the Lexis database. Articles referencing other SOX issues, such as accounting disclosure, analyst conflicts of interest, boards of directors and audit committees, are excluded from the ‘Total Sox’ count. The counts for the specified referenced topics do not add up to ‘Total Sox’ because some articles might reference more than one topic (which are double counted) and some articles discussed costs without referencing small firms in particular. ‘All Enron references’ are all articles, including letters to the editor, obtained from the Lexis search: “enron and not “enron field” and not “sports”, many of which articles have nothing to do with Enron. For this search, only the regional newspapers’ content contained in the electronic database was tracked. **Numbers in bold font** are independent author editorials, and are not included in counts for the papers.

Table 6. Deregulatory Bills on SOX.

A. Trend of Deregulatory Bill Introductions, 2003-07

Congress	# Bills	# with Republican Sponsor	# Cosponsors (# Republicans)
108 th (2003-04)	0	0	0
109 th (2005-06)	7	7	146 (125)
110 th (2007-)	8	6	135 (117)

B. Detail on Bills with Provisions to Alter SOX §404

Bill	Short Description	Date introduced	Sponsor's party	Cosponsors (Republicans)
HR 1641	Make section voluntary	4/14/05	Republican	0
HR 2061	Exempt community banks (in community bank bill)	5/3/05	Republican	88 (69)
HR 5405	Make voluntary for small firms; implementation standard	5/17/06	Republican	25 (24)
HR 6416	Exempt certain financial institutions	12/7/06	Republican	0
S 1568	Exempt community banks (in community bank bill)	7/29/05	Republican	4 (4)
S 2824	Make voluntary for small firms; implementation standard	5/17/06	Republican	10 (10)
HR 1049	Implementation standard; no private right of action under 404	2/14/07	Republican	20 (20)
HR 1508	Implementation standards, exempt small firms	3/13/07	Democrat	28 (27)
HR 1550	Exempt certain financial institutions	3/15/07	Republican	0 (0)
HR 1780	Implementation standards, special rules for small firms	3/30/07	Republican	5 (4)
HR 1869	Exempt community banks (in community bank bill)	4/17/07	Democrat	25 (13)
HR 2727	Delay implementation for small firms	6/14/07	Republican	52 (48)
S 869	Implementation standards, exempt small firms	3/14/07	Republican	2 (2)
S 1405	Exempt community banks (in community bank bill)	5/16/07	Republican	3 (3)

Table 7. Hearings on SOX

Congress	# Hearings House	# Hearings Senate
108 th , 1 st sess. (2003)	1	2
108 th , 2d sess. (2004)	2	2
109 th , 1 st sess. (2005)	2	1
109 th , 2d sess. (2006)	7*	1
110 th , 1 st sess. (through 6/2007)	3*	2

Note: * Includes Appropriations committee hearing at which member raises questions about SOX.

Table 8. Summary Statistics: Senate Vote

	Republicans against tabling Demint amendment (34)	Republicans for tabling (14)	Democrats* for tabling (47)
Ideology	.50	.42	-.42 ^a
Small Bus. Comm.	.18	.21	.17
Banking Comm.	.18	.29	.21
Up for election in 2008	.44	.43	.19 ^c
Years in office	12	18 ^a	16
Electoral Margin	.22	.39 ^a	.23 ^c
Age	63	67	61
Leadership position	.12	0 ^a	.11
# Local chambers	53.7	30 ^a	56 ^a
# Establishments	119,526	48,477 ^a	143,219 ^a
Bill cosponsorship	.47	.07 ^a	0
% Bus. PAC contrib.	.82	.85	.56 ^a
% Sec/Invt contrib.	.03	.04	.04
\$ Chamber contrib.	\$2588	\$679 ^a	\$651
Chamber contrib.	.5	.21 ^c	.15

Notes: * Data for Democrats excludes one Democrat who voted against tabling the amendment; also excluded from the table are data for nonvoting legislators (2 Democrats and 1 Republican), and for Sen. Saunders who identifies himself as independent (but the results are identical if Sen. Saunders is included with the Democrats). ‘Ideology’ is the representative’s DW-nominate score, a measure calculated by the legislator’s roll call votes in the 109th Congress, where negative scores are liberal and positive scores are conservative, as computed by Keith Poole & Howard Rosenthal; calculated for 42 Democrats and 33 Republicans for and 14 Republicans against; ‘Small Bus. Comm.’ is a dummy variable for membership on the Small Business and Entrepreneurship Committee; ‘Banking Comm.’ is a dummy variable for membership on the Banking, Housing and Urban Affairs Committee, which has jurisdiction over the SEC; ‘Electoral Margin’ reported is the difference between the elected legislator and the largest vote getting opponent; the margin was also computed where two opponents’ total votes were approximately equal, by subtracting that sum rather than only the leading candidate; the means comparison tests are unchanged across these calculations; ‘Leadership position’ is a dummy variable for 5 Democratic and 4 Republican leadership positions, information available from the U.S. Senate website at http://www.senate.gov/pagelayout/senators/a_three_sections_with_teasers/leadership.htm; ‘# Local chambers’ is the number of chambers of commerce in the state, as identified in the WorldWide Chamber of Commerce Guide, available at: <http://www.chamberfind.com/index.asp>; ‘# Establishments’ is the number of business establishments in the state identified in the 2003 census; ‘Bill cosponsorship’ is a dummy variable indicating whether the Senator either sponsored or cosponsored any SOX deregulatory bill regarding SOX included in table 6A in either the 109th or 110th Congresses; ‘% Bus. PAC contrib.’ is the proportion of PAC contributions from business, ‘% Sec/Invt contrib.’ is the proportion of total funds raised that were from individuals or organizations in the securities and investment industry when that

industry was one of the candidate's top 20 industry contributors; '\$ Chamber contrib.', is the dollar amount of contributions received from the U.S. Chamber of Commerce, and 'Chamber contrib.' is an indicator variable for whether the candidate received a campaign contribution from the U.S. Chamber of Commerce, with all contribution data calculated over the senator's most recently completed six-year election cycle, as calculated by the Center for Responsive Politics, available at <http://www.opensecrets.org>; a ' t-statistic for difference in variable mean, comparing Republican against tabling vs. Republican for tabling, significant at less than 5 percent; — ' t-statistic for difference in variable mean, comparing Republican for tabling vs. Democrat significant at less than 5 percent; c' respective difference in mean significant at 10 percent. T-statistics are calculated using Welch's formula where the variances of the two groups are unequal; except for intra-Republican comparisons for bill sponsorship, leadership positions and proportion of funds raised from the securities and investment industry, and comparisons with Democrats for bill sponsorship and chamber numbers (where without the Welch adjustment the difference was significant at 10 percent), and the comparison with Democrats for the electoral margin (where without the Welch adjustment the difference was significant at 5 percent), there were no differences in statistical significance whether the comparison of means was computed using Welch's formula or Satterthwaite's approximation formula for equal variances in Stata.

Table 9. Summary Statistics: House Vote

	Democrats for (74)	Democrats against (150)	Republicans* (193)
Ideology	-.26	-.45 ^a	.52 ^b
Small Bus. Comm.	.12	.05 ^c	.08
Fin. Serv. Comm.	.14	.18	.17
First elected 110 th Cong. (2006)	.34	.11 ^a	.06 ^b
First year elected	1999	1995 ^a	1996
Electoral Margin	31%	50% ^a	25% ^c
Age	53	58 ^a	55
Blue Dog Coalition	.46	.09 ^a	n.a.
Leadership position	.01	.09 ^a	.05
% Urban district	.70	.90 ^a	.74
Median income district	\$38,605	\$43,769 ^a	\$44,780 ^b
% Bus. PAC contrib.	.48	.52	.81 ^b
% Sec/Invt contrib.	.008	.004 ^a	.005
Bus. Assoc. contrib.	.19	.02 ^a	.65 ^b

Notes: * Data for Republicans excludes one Republican who voted against the amendment; also excluded from the table are data for nonvoting legislators (7 Democrats and 7 Republicans), delegates and the representative for the District of Columbia; 'Ideology' is the representative's DW-nominate score, a measure calculated by the legislator's roll call votes in the 109th Congress, where negative scores are liberal and positive scores are conservative, as computed by Keith Poole & Howard Rosenthal; calculated for 49 Democrats for, 133 Democrats against and 181 Republicans; 'Small Bus. Comm.' is a dummy variable for membership on the Small Business Committee; 'Fin. Serv. Comm.' is a dummy variable for membership on the Financial Services Committee, which has jurisdiction over the SEC; 'Electoral Margin' reported is the difference between the elected legislator and the largest vote getting opponent and for candidates with no opposition but the state included blank ballots in its official results, the blanks were included in the calculation; the margin was also computed ignoring blanks for unopposed candidates, which increases the margin for Democrats against to 52%, and where two opponents' total votes were equal, by subtracting that sum rather than only the leading candidate; the means comparison tests are unchanged across these calculations; 'Blue Dog Coalition' is a dummy variable for membership in the Blue Dog Coalition, a group of conservative and moderate Democrats, information available at the coalition's website at <http://www.house.gov/ross/BlueDogs/Member%20Page.html>; 'Leadership position' is a dummy variable for 17 Democratic and 10 Republican leadership positions, identified by the parties on the U.S. House of Representatives' website at http://www.house.gov/house/orgs_pub_hse_ldr_www.shtml; 110th congressional district variables, '% urban district' and 'median income district,' were obtained from Proximity, at <http://proximityone.com/cd110r1.htm>; '% Bus. PAC contrib.' is the proportion of PAC contributions from business, '% Sec/Invt contrib.' is the proportion of total funds raised that were from individuals or organizations in the securities and investment industry when that industry was one of the candidate's top 20 industry contributors; 'Bus. Assoc.

contrib.' is an indicator variable for whether the candidate received a campaign contribution from the U.S. Chamber of Commerce, National Federation of Independent Associations or a local chamber of commerce; with all contribution data is for the 2006 election cycle, as calculated by the Center for Responsive Politics, available at <http://www.opensecrets.org>; a ' t-statistic for difference in variable mean, comparing Democrat for vs. Democrat against significant at less than 5 percent; — ' t-statistic for difference in variable mean, comparing Democrat for vs. Republican significant at less than 5 percent; c' respective difference in mean significant at 10 percent. T-statistics are calculated using Welch's formula where the variances of the two groups are unequal, but except for the comparison intra-Democrats for presence on the small business committee and the comparison with Republicans for electoral margin (where without the Welch adjustment the difference was significant at less than 5 percent), there were no differences in statistical significance whether the comparison of means was computed using Welch's formula or Satterthwaite's approximation formula for equal variances in Stata.

Table 10. Explaining Congressional Votes.

	House vote	House vote	Senate vote	Senate vote
Ideology	3.98 (2.50)	-	4.1 (4.9)	-
First elected in 110 th cong.	-	1.43 (.67) ^a	-	-
Years in office	-.016 (.04)	-.034 (.04)	.03 (.07)	-.015 (.07)
Age	-.047 (.03)	-.03 (.02)	-.04 (.06)	-.024 (.07)
Small Bus. Comm.	1.97 (.94) ^a	.30 (.91)	-2.6 (1.6)	-2.6 (1.6)
Fin.Serv. or Banking Comm.	-1.12 (.72)	-1.12 (.55) ^a	.7 (1.4)	.87 (1.4)
% Bus. PAC contrib	2.58 (1.7)	2.52 (1.5) ⁻	-2.0 (7.9)	-.36 (7.2)
% Sec/Invnt contrib.	8.13 (12.8)	19.7 (12.8)	-41.4 (45.4)	-55.9 (46.7)
Electoral margin	-2.38 (1.3) ⁻	-3.34 (1.2)	-.09 (1.9)	-.55 (2.0)
Leadership position	-2.1 (.75) ^a	-2.5 (.71) ^a	-	-
Blue dog coalition	.088 (.74)	.864 (.53)	-	-
% Urban district	-2.4 (1.6)	-2.1 (1.1) ⁻	-	-
Median income district	-.00004 (.00003)	-.0001(.00002) ^a	-	-
Up for election in 2008	-	-	.267 (1.0)	-.24 (.86)
Bill sponsorship			1.7 (.81) ^a	1.9 (.82) ^a
# Establishments	-	-	.00004 (.00002) ^a	.0001 (.00002) ^a
# Local chambers	-	-	-.02 (.05)	-.04 (.05)
Bus. Assoc. contrib.	2.08 (.73) ^a	2.4 (.71) ^a	-	-
\$ Chamber contrib.	-	-	.001 (.0003) ⁻	.001(.0003) ⁻
Constant	6.38 (2.1) ^a	4.79 (1.7) ^a	.93 (7.5)	2.4 (7.0)
Number of observations	181	223	47	48
Log pseudolikelihood	-60.8	-86.7	-16.0	-16.6
Pseudo R2	.4192	.3851	.4406	.4270

Notes: The table reports logistic regressions of congressional votes related to section 404's impact on small firms, using only votes of members of the party whose votes split, Democrats in the House (columns 1 and 2) and Republicans in the Senate (columns 2 and 3). Variables are defined in Tables 8 and 9. Robust standard errors in parentheses; ^asignificant at 5 percent; ⁻significant at 10 percent.

Table 11. Predicting SOX's Amendment Over Time

Year (Congress)	Probability of Amendment
2003 (107 th)	.065306
2004 (108 th)	.09295
2005 (108 th)	.127683
2006 (109 th)	.145993
2007 (110 th)	.328294

Note: The Table provides the estimated probability of SOX's being substantially amended in the subsequent 108-110th Congresses using the hazard probability model estimated by Forrest Maltzman and Charles Shipan, *Continuity, Change and Evolution of Law*, Am. J. Pol. Sci. (2008). The model includes the following explanatory variables: divided government at the time of enactment, chamber difference at the time of enactment, divided government in the subsequent year, chamber difference in the subsequent year, public mood, statutory complexity and divisiveness, Supreme Court attention to the statute, and an interaction term between the two chamber difference variables and the log of time since enactment. Divided government is a dichotomous variable for whether the President is of the same party as the majority party in Congress; chamber difference measures ideological differences across chambers as a function of differences in voting support for conference reports; public mood measures whether the public favors "liberal activist" government from opinion poll scores; statutory complexity is measured by the number of pages in lexis, divisiveness is the level of support for the statute measured by the percentage yeas vote in the chamber with the smaller majority coalition, and Supreme Court attention is an indicator variable for whether the Court issued an opinion involving the statute over three years prior to the observation year. The Maltzman and Shipan model was estimated for 262 statutes identified by David Mayhew as major statutes and enacted over the interval 1954-2002. The estimates in the table multiply the coefficients of the Maltzman and Shipan regression by the out-of-sample year values for SOX.

Appendix

1. Newspaper searches

This section of the appendix describes the searches used to identify the coverage of SOX detailed in Tables 2-4. The Lexis news database was searched for stories by individual reporters and WSJ editorials, using a search including the reporter's name (with "byline" or "by") or "editorial" section, respectively; search terms "regulat! or legis!;" and date restrictions from January 1, 2001 to June 10, 2007, with the exception that the Factiva news database was used to search for Barrons and WSJ journalists' stories and WSJ editorials for the period November 1, 2006 to June 10, 2007; that search used solely the journalist's name or "editorial," as the search terms. The reporter Carol Loomis of Fortune was dropped from the study because none of the 20 articles identified in the search were on a SOX-related issue. To identify stories in the regional and national newspapers, the Lexis news database file for the specific newspaper was searched using the following search:(sarbane w/5 oxley) or section 404 or (conflict of interest w/5 account! or audit!) or (option! w/5 executiv!) or (small w/3 business w/5 cost!) or (small w/3 company w/5 cost!) or (accounting w/3 regulation) or (accounting w/3 legislation) or (transparency w/5 financial statement!), and the date restriction from December 1, 2004 through June 10, 2007. Two additional searches were run for the regional newspapers, which were not duplicated for the national papers because they identified no new relevant stories: (small w/2 public w/2 companies); and (independent w/3 director) or (independent w/3 audit w/3 committee) or (internal w/3 control). The additional articles surveyed in those searches are not included in the "Total surveyed" entries in Table 3 to maintain comparability across the sources.

The national and regional newspapers were tracked for a shorter interval than the journalists and WSJ editorials, starting with the month in which the Advisory Committee's formation was

announced, December 1, 2004. Besides the greater feasibility offered by conducting that more focused post-SOX search, the shorter period was chosen for two principal reasons: (1) it coincided with the period of greater coverage of SOX-related regulatory issues by the individual journalists as there was virtually no discussion by journalists of those issues before 2004; and (2) as discussed in the text, the journalists did not write, pre-SOX, on the key regulatory issues that were enacted in the legislation.

In constructing the tables, I focused on the tally of articles the search identified that relate to the policy issues at the top of the contemporary agenda, the costs imposed by the internal controls certification section 404 of the statute, along with articles expressing support or criticism of SOX (although most of those were within that same context) and referring to the four reports and their commissioning organizations that criticized section 404 described in the text, but as the search terms indicate many more issues were tracked, including regulation of the accounting profession, boards of directors and analyst conflicts of interest. The subset of articles expressing section 404 concerns and Sox support or critiques or referring to the reports and commissioning organizations constitute the “Total Sox” tallies in the tables. The total surveyed count is the number of articles produced by the search terms described above.

As a comparative benchmark for analyzing the salience of post-SOX coverage of the reports and their critiques of the statute, Tables 3-4 also include the results of a search for all articles including the word “Enron” for the seven newspapers over three time frames: (1) the time frame in which the SOX stories are tracked, December 1, 2004-June 10, 2007; (2) the period encompassing the Enron scandal, commencing a year before the enactment of SOX, July 1, 2001, through July 22, 2002, which starts shortly after the resignation of Enron’s CEO Jeffrey Skilling, that occurred a few months before Enron’s collapse; and (3) for comparative purposes regarding the relative

coverage of Enron before and after the scandal began, over the one year period July 1, 1999 through July 22, 2000. Because the Houston Astros' home park was named after Enron, a search consisting solely of the term "Enron" included numerous extraneous sports stories. Accordingly, I used a modified lexis search to identify the Enron articles that are tallied in the table: "enron and not 'enron field' and not sports," and the previously noted date restrictions. The search results are an upper limit on news coverage of the Enron scandal, as many of the stories picked up in the search did not concern the company, but were on wholly unrelated matters, such as an individual being mentioned as having worked previously for Enron, or, because the name has entered the vernacular, a columnist or a source compared a situation - favorably or unfavorably to "Enron."

There is some overlap in the issues involving small firm costs and market competitiveness that are separately categorized in the tables. Articles discussing the increased cost of an IPO due to SOX are classified in the market competitiveness, rather than small firm cost, category, although most firms that would undertake an IPO are small and hence that is an adverse effect on small firms' cost of doing business. Nevertheless, I adopted that classification because the Advisory Committee report emphasized compliance costs rather than IPO costs as the SOX problem for small firms, whereas the other three reports focused on IPO costs in conjunction with the issue of U.S. stock exchanges' declining global position.

To refine the table's identification of small firm issues, the number of articles included in the market competitiveness count that referred to IPO issues but did not refer to foreign listings are included in parentheses in the tables, and the number of articles that referred to domestic firms going private but not to foreign firms, in brackets in the tables, following the full counts for articles on market competitiveness. In addition, the entries in the tables in the rows labeled "foreign market competitiveness" are the tallies of market competitiveness stories that referred to foreign listings (i.e.,

the parenthetical and bracketed story counts are subtracted from the total counts for market competitiveness stories). These breakouts indicate that the vast majority of articles in the market competitiveness category in national newspapers had a foreign market element, and therefore were indeed covering stock exchange issues regarding competitiveness, rather than small firms' concerns over SOX's costs. This is less dramatically true for the regional papers, where a larger proportion of the competitiveness articles had a solely domestic firm focus. This pattern further bolsters the contention in the text that regional papers placed greater emphasis on small firm issues than the national press. All of the crosstabulation tests for differences in reporting across the newspapers reported in the text are run both including and excluding the domestic-only IPO and going-private stories in the market competitiveness counts.

2. Newspaper article reference counts

The text and tables tally references to specific topics (e.g., SOX critiques and committee reports), and thereby double count articles that reference more than one topic. This approach follows the definition of salience as conspicuousness, which is measured by "frequency counts of an issue's appearance," as that is the approach emphasized in the media literature on agenda-setting.²⁷⁸ But where the result of a statistical analysis changes when only non-overlapping references are tallied instead of all references, the difference is noted in the text.

Table A1 reproduces Tables 2-3 using solely articles devoted to a single referenced topic for the counts, and Table A2 summarizes the types of overlap by newspaper source. Most of the overlaps (87 percent) are between a SOX critique or critiques and one or more of the reporting

²⁷⁸ Young Min, Salma I. Ghanem & Dixie Evatt, *Using a Split-Ballot Survey to Explore the Robustness of the 'MIP' Question in Agenda-Setting Research: A Methodological Study*, 19 INT'L J. PUB. OPINION RES. 221, 223 (2007).

committees. This is because articles discussing committee reports often provided both the recommendation and the underlying rationale. Of twelve overlaps containing both critiques, four also overlapped with committee references. The smallest subset of overlaps (three or 3 percent) consists of multiple committee report references. There are somewhat more (1.2 times) overlaps referencing market competitiveness than small firm costs. There are, of course, many more articles exclusively referencing the market competitiveness critique as well. One explanation for the higher rate of overlap with market competitiveness critiques is that there is a higher number of probable permutations for it because only one of the four committees focused on small firm costs (there are a few overlaps between market competitiveness critiques and Advisory committee references as well as between small firm cost critiques and the other reports, but the numbers are much lower for these overlaps than for overlaps between critiques that match the reports' foci). As a proportion of total references to a critique, the overlap referencing small firm costs is double that for market competitiveness critiques (57 percent versus 26 percent). The pattern is similar across the three different types of media sources.

3. Regional newspapers' use of wire services

Over a majority (62 percent) of the regional newspapers' coverage of the SOX critiques and reports consists of articles pulled from wire services and other newspapers. The range is from 54 (*Boston Globe*) to 89 percent (*Birmingham News*). This proportion is most likely somewhat higher than the percentage of wire stories in a newspaper's total content.²⁷⁹ The proportion also varies by topic: for all newspapers, the proportion of wire stories on small firm costs is higher than the proportion for market competitiveness stories; but if only foreign-referencing market

²⁷⁹ For example, according to the head librarian of the San Francisco Chronicle, about one-third of the paper's content is pulled from other sources.

competitiveness stories are examined, then the relation reverses for two newspapers, and the proportion of small firm cost wire stories is lower (*Boston Globe* and *Birmingham News*).

To examine more closely the relation between the publication of stories across the newspapers and wire services, the same search as run for the newspapers was run in the Lexis Associated Press (“AP”) database. Table A3 provides a comparison of the regional newspapers’ wire service selections to that of the AP, as a benchmark of wire coverage, along with Table A4 that compares AP coverage with that of the national newspapers. The AP and national newspapers’ coverage of the different critiques appears indistinguishable: a crosstabulation of the type of critique (small firm or market competitiveness) published by the national newspapers and AP is insignificant (chi square of 1.0 for all market competitiveness articles, and .24 for foreign-only competitiveness articles).

The regional newspapers did not, however, select articles uniformly from the AP service. They selected a higher ratio of small firm cost stories to market competitiveness stories, compared to those stories’ representation on the wire service. In addition, the crosstabulations of the type of critique comparing AP to regional-selected wire stories (using all regional-selected external sources or AP sources only) are significant, with respective chi squares (probabilities) of 6.85 (.009) and 12.0 (.001), respectively, for all market competitiveness articles and 6.1 (.014) and 9.0 (.003), for foreign-only competitiveness articles.²⁸⁰ The crosstabulations of AP and regional staff stories are

²⁸⁰ The regional newspapers also appear to have differentially selected articles across external sources. Crosstabulating by type of critique and by type of external source (AP or non-AP sources), the difference is significant using all market competitiveness articles (chi square of 4.8, probability .03) and marginally significant using foreign only competitiveness articles (chi square of 2.9, probability .09), compared to small firm cost articles. There were even more small firm cost stories selected from the AP than non-AP sources (despite its greater publication of stories on the competitiveness issue). It is possible that the distribution of articles differs across external sources, with non-AP sources printing more small firm cost stories than the AP, but if that were the case it

insignificant. Thus, regional newspaper editors appear to have used external sources, rather than inhouse staff, to obtain the stories they considered of interest to their readers, suggesting, perhaps, that local reporters' take on SOX replicated that of the national press. The selective pattern of wire service stories therefore contributed to the finding of regional newspapers' greater relative attention to small firm cost over market competitiveness issues compared to national newspapers.

All of the AP stories were published in regional newspapers after they ran on the wire service, with the vast majority being published one day after the story's initial appearance.²⁸¹ Table A5 tabulates the timing of these publications (for the subset of AP-selected stories referencing either a SOX critique or report) in relation to their first appearance on the wire. As the table indicates, when national newspapers reported the same story, the date varied between the same day as the story ran on the wire and the same day it was published in the regional newspaper. Still over one-third of the stories that regional newspapers pulled from the wire were neither previously nor simultaneously picked up by a national newspaper. These data support the contention in the text that regional newspaper editors' selections from the wires are not being influenced by the editorial choices of national newspapers.

4. Temporal Pattern of Reporting

As indicated in the text, no systematic relation exists between the reporting by the national press (journalists or newspapers) and that of the regional newspapers. The supporting analysis

would magnify the apparent nonrandom selection of articles from the AP. If the non-AP sources reported on market competitiveness stories as a higher proportion of SOX coverage than did the AP, then the direction of the regional papers' selectivity of SOX stories (in favor of small firm costs) would be the same across all of the external sources.

²⁸¹ Of the AP-selected stories that referenced either SOX critiques or reports, 18 of 22 were published the following day. This counts as a "2-day after" story the article published in the *SF Chronicle* on Dec. 26, 2006, which ran on the AP wire on both Dec. 24 and Dec. 25, 2006.

follows.

a. National Journalists. Lining up news stories chronologically, there is no diffusion pattern going from the journalists to the regionals. Only two articles published in a regional newspaper followed an article by a national journalist on the same general topic (small firm cost, market competitiveness, etc.) within five days. Moreover, even in those cases the content was entirely different. In one case, the regional newspaper story criticized the McKinsey Study's contention that SOX was adversely affecting U.S. capital, while the national journalist's column (a WSJ editorial) published two days earlier criticized SOX and noted the irony of Senator Schumer's position on SOX in conjunction with his support of the McKinsey Study. The other case was a regional newspaper article reporting on the Advisory Committee's recommendations whereas the national journalist column written two days earlier discussed a congressional study on small firms' being burdened by SOX and noted that the Advisory Committee would release its recommendations soon. In addition, there was a same-day overlap of publication topic in only two instances. Finally, the regional newspapers' reporting on SOX critiques continued apace in the first half of 2007, whereas that of most national journalists did not: coverage of the SOX critiques in the first half of 2007 is 15 percent of the national journalists' total SOX stories (where the count begins as of December 1, 2004), compared to 23 percent of the regional newspapers' totals.

b. National newspapers. Table A6 summarizes the timing of regional newspapers' coverage of SOX in relation to that of the national newspapers. The table resolves ambiguity in favor of classifying regional articles as following national reporting: regional paper articles in the same critique category (e.g., small firm costs, market competitiveness) are classified as following a national paper article even though the content of the articles is completely different. For example, a regional newspaper's story on U.S. firms going public in London published two days after a national

newspaper's story discussing critiques of the Capital Market Committee's finding that SOX contributed to a decline in U.S. markets' competitiveness, is classified as a regional story following a national story, rather than one with no temporal relation. To provide a sense of the extent of such potential misclassification, the number of such stories is indicated in the table by the symbol“*”.* It is substantial (e.g., 6 of 11 market competitiveness stories).

The table further distinguishes the regional stories by whether they were authored by staff or obtained from a wire service or other newspapers. The table uses the regional newspapers' publication dates for all the syndicated stories because I was only able to obtain the actual publication dates for the AP stories. On a few occasions, an article is not identified as originating from a wire service but the reporter in the byline is affiliated with a wire service and had published the same or similar story on the wire; such articles are included in the wire, and not the staff tallies in the table. The key finding here is that a smaller percentage and number of wire stories are published shortly after a national newspaper story than are the internal articles, and the wire stories, it should be recalled, are typically reprinted a day after they appeared on the wire.

In addition to this visual check for diffusion, logistic regressions were estimated to examine the relation between the publication dates of regional and national newspaper articles for each of the two critiques (small firm costs and market competitiveness). The dependent variable is an indicator variable for an article in any of the four regional newspapers and the explanatory variables are lagged variables for the regional and national newspaper articles over the 913 day sample period, from Dec. 1, 2004 to June 10, 2007. In the market competitiveness regressions, first order (one-day), and depending on the number of lags included, second order (two-day) lagged national article variables are significant. In the small firm cost regressions, only the first order lagged national article variable is significant. For both types of articles, likelihood ratio tests indicated that the

national, and not the regional lags, were significant. A reverse model of influence was also estimated, in which the dependent variable was an indicator variable for national newspaper articles, and for both types of critiques, the lagged regional article variables were insignificant.

The finding that national newspaper lagged indicator variables are significant suggests that national newspapers are playing an agenda-setting role, as their stories precede regional stories on a given topic. However, the statistical analysis is complicated by the regional newspapers' use of wire service stories, which creates a built-in lag because those stories are published after appearing on the wire. Because much of the reporting of the SOX critiques relates to unfolding news events, such as the release of a commissioned report, regional newspapers' greater reliance on wire services automatically makes them take longer to report on a specific event compared to a national newspaper, independent of the national newspapers' coverage. That renders the observed correlation suspect (that is, it is, in all likelihood, a spurious finding and not evidence of intermedia influence). To investigate that further, the regressions were rerun for only staff articles. As conjectured, in those regressions excluding the wire service stories, the lagged national newspaper article indicator variables are no longer statistically significantly related to the regional newspapers' coverage.

5. National Press Coverage of the Committee Reports

Most of the articles on the Advisory Committee were short or contained only passing references to the Committee, describing its formation or recommendations. On a few occasions, however, articles by Floyd Norris and the *Washington Post* advanced an opinion on the Committee and its work product. The common strategy in such instances was to question the Committee's composition, and hence its credibility.²⁸² Those articles were highly one-sided, quoting principally,

²⁸² For instance, in his article expressing an opinion on the Committee, Norris' approach was brief and dismissive: "one of the less well-conceived actions by William H. Donaldson.. was to

or solely, critics of the Committee and not providing the Committee's justification for its recommendations.

One might ask why journalists would criticize the Committee for consisting largely of individuals with small business experience when the very point of the SEC's establishing the committee was to obtain input from individuals with exactly that experience and expertise. To be sure, that objection to the Committee's composition was raised by critics of the Committee's recommendations, including former government officials whom the journalists interviewed. But why would journalists consider the objection to be a compelling one? One plausible explanation of the tactic comes from a leading media textbook, which emphasizes that "credibility is the most important thing a communicator has."²⁸³ By questioning the membership of what would otherwise be deemed a "blue ribbon" committee, critics of the Committee's recommendations could undermine the credibility of its work product without ever having to address the merits of its recommendations. The effectiveness of such a tactic is a consideration with which prominent journalists, as well as the individuals whom they were referencing, would be thoroughly familiar.

The WSJ's coverage, by contrast, did not question the Advisory Committee's composition,

appoint an advisory committee on smaller public companies, stocked in significant part with people who profited from selling such shares to the public. . . . The commission needs to consign this report to a basement file cabinet." Floyd Norris, *Why Not Let Companies Ignore a Law?*, N.Y. TIMES, Mar. 10, 2006, at C1. Similarly, both a squib item and an article in the Post described the Committee as "stacked" and "dominated" by small business executives, respectively. The squib contained one assessment of the recommendation, a critic's caustic comment that if firms were so concerned about costs they should reduce executive compensation. *News Summary: An About Face in France*, WASH. POST, Apr. 16, 2006, at F02. The 755 word article devoted one sentence to note small firms found "new legal requirements too burdensome and expensive," and the bulk of space was devoted to discussing the views of critics of the Committee's recommendations. Kathleen Day, *Small Firms Still Want SEC to Give Them a Pass*, WASH. POST, Apr. 13, 2006, at D01.

²⁸³ SEVERIN & TANKARD, *supra* note 100, at 139.

nor did it take explicit positions on the Committee's recommendations. The coverage tended to provide either commentary from both supporters and critics of the Committee's recommendations, or solely the Committee's reasoning.²⁸⁴ The difference in approach across national papers would appear to be informed by differing perspectives: the WSJ, which had less strident and less one-sided coverage, has a business focus. It is also the most conservative of the national newspapers on the media slant measure. But the most plausible explanation for its different reporting strategy is that its

²⁸⁴ In only one of its articles did the WSJ provide greater coverage to critics of the Advisory Committee. In addition, its editorials did not reference the Committee. While no WSJ journalist or editor expressed an opinion on the Committee, it did publish an article by an individual with no newspaper affiliation approving the SEC's rejection of the Committee's proposal to exempt small firms. The articles in the *SF Chronicle* similarly never referred to the Committee's composition and were more balanced, in that, the subset of articles referencing critics of the proposal also recited business' concerns about costs. The reporting of the NYT appears more limited than the other national newspapers, but if the articles penned by Floyd Norris were not separated out, its count would be about the same as that of the Post.

Of the three NYT articles referencing the Committee not written by Norris, one expressed a judgment concerning its report. That article, following a strategy at first glance similar to that of the articles expressing opinions on the Committee by Norris and the Post, questioned the integrity of one of the Committee's co-chairs. It reported that the individual was on the board, and at one time on the audit committee, of a public company that had accounting problems, the implication being that his ethics were questionable and that the Advisory Committee was not serious about addressing accounting fraud. Stephen Labaton, *Panel to Propose Exceptions to Governance Rules*, N.Y. TIMES, Apr. 18, 2006, at C1. The Committee co-chair was quoted in the article as stating that the firm had not engaged in intentional wrongdoing, its stock price had not dropped nor had it been sued, and that he had been vetted by the SEC when appointed. Indeed, there was nothing in the article to suggest that there was even the appearance of impropriety in the co-chair's conduct. It is difficult to fathom why this non-news event was thought to be worthy of print in the first place, except as a calculated attempt to damage the individual's reputation and, by extension, to undermine the Committee's credibility. It is noteworthy that the journalist in question covers legal and regulatory matters for the NYT's Washington bureau, rather than the financial beat, and that his father is a prominent plaintiffs' securities litigation lawyer. A financial journalist would run the risk of losing access to sources for future articles by writing what would be viewed by many as a malicious story. *See, e.g.,* VINSON, *supra* note 91, at 138-39 (examples of local news media not covering gaffes or other negative incidents involving local legislators on whom reporters rely for information compared to nonlocal media that did not use the legislator as a source). By contrast, the criticism of the Committee's composition by Norris and the Post reporters, though unbalanced, did not question any individual Committee member's character. Rather it raised a generic process concern that echoed an objection of the report's critics, including former government officials.

readers would consider it entirely appropriate for a committee examining small firm issues to consist of individuals with substantial experience in owning and operating such businesses, and would wish to have a thorough analysis from all sides on the substantive merits of the issue. As Hamilton emphasizes, seemingly ideological differences in news content across media outlets is typically best explained by differences in their audience.²⁸⁵ Underscoring the distinctive business orientation of its subscribers is the WSJ's far greater coverage, compared to the other newspapers, of every SOX-related topic in Table 3.²⁸⁶

A similar pattern appears in the reporting on the Capital Markets Committee. Articles in the NYT tended not to provide arguments on both sides of the issue when discussing the Capital Market Committee's recommendations, compared to those in the WSJ, which were again more balanced.²⁸⁷ In addition, NYT reporters criticized the composition of the Capital Markets Committee for including business executives and excluding former government officials or shareholder group

²⁸⁵ HAMILTON, *supra* note 18.

²⁸⁶ This pattern is consistent with the opposite level of relative coverage on social issues: a study of media reporting on drugs found the WSJ's coverage was far lower than that of other national media, including the NYT and Post. Lucig H. Danielian & Stephen D. Reese, *A Closer Look at Intermedia Influences on Agenda Setting: The Cocaine Issue of 1986*, in COMMUNICATION CAMPAIGNS ABOUT DRUGS 47, 51 (Pamela J. Shoemaker ed., 1989) (explaining the fact that the WSJ's coverage was the least correlated with other newspapers because its "focus on business news...lessened the newsworthiness of cocaine-related stories").

²⁸⁷ Of three NYT articles that quoted critics of the recommendations, one quoted only critics and one devoted more space to critics; only one devoted equal space to critics and committee members. By contrast, of the three WSJ articles that quoted critics, two quoted equally from both sides and only one was focused on critics—an article reporting on an academic study that disputed the Capital Markets Committee's finding of a decline in the premium of cross-listed stocks that was one of the data points forming the basis for the Committee's conclusion that SOX had adversely affected market competitiveness. The Committee and its finding were only mentioned in passing. None of the NYT articles on the McKinsey Study, however, quoted critics, despite the similarity of its criticisms and recommendations regarding SOX to those of the Capital Markets Committee.

representatives, which mirrored objections expressed by the critics of the Committee whom the journalists consulted.²⁸⁸

The Washington Post, as noted in the text, paid more attention than the other national papers to the reports, undoubtedly because the official status of the Advisory Committee and the close connection between the Capital Markets Committee and prominent government officials made them important objects of interest for its audience. Even more interesting is the fact that the Post also provided the most in-depth coverage of the Chamber Commission Report. It was released at an event in the Capitol at which key political actors—Congressman Frank, Senator Dodd, and Chairman Cox—were present. No doubt their presence at that event and the possibility of gleaning from their remarks what action they might take on SOX explain the Post's interest in the Chamber Commission Report. By contrast, consistent with its Washington, and not New York-based focus, the Post published only one article on the McKinsey Study, which was the subject of several articles in the NYT and WSJ.

All of the national journalists covered the Capital Markets Committee report and ignored the other two committee reports also centered on market competitiveness concerns. A few plausible explanations can be advanced for this selectivity. There was a perception that the Capital Markets Committee's proposals might be placed on the political agenda, given its endorsement by the Treasury Secretary. By contrast, the McKinsey Study originated in New York Mayor's office and national journalists could have concluded that the study was unlikely to move onto the national agenda, even though the Mayor's co-endorsee, Senator Schumer, has an important Senate leadership

²⁸⁸ As with their coverage of the Advisory Committee, the regional newspapers did not voice objections to the Capital Market Committee's composition. Indeed, the *Boston Globe* noted that the Committee "lean[ed] towards Wall Street" but had "reasonable balance" and individuals with "serious credentials." Steven Syre, *Market Cops Taking Heat*, BOSTON GLOBE, Nov. 30, 2006, at D1.

position. A similar conclusion could have been reached regarding the Chamber Commission report, as that Commission did not receive the imprimatur on its formation from a government official as did the Capital Markets Committee. In addition, given the considerable overlap between the three reports, the McKinsey Study and Chamber Commission reports might not have been considered sufficiently ‘new’ to generate additional coverage beyond that accorded to the Capital Markets Committee’s report. Finally, an additional, not mutually exclusive, explanation for the absence of national journalist coverage of the Chamber Commission report could be a perception of the Chamber of Commerce as an interest group whose policy recommendations are lacking in objectivity and therefore not credible.²⁸⁹

²⁸⁹ SEVERIN & TANKARD, *supra* note 100, at 158. Consistent with the conjecture that the Chamber’s credibility was a source of the journalists’ inattention, Gretchen Morgenson had written an article criticizing the Chamber of Commerce as being anti-shareholder because among other activity, it had successfully lobbied Congress to restrict class action litigation and successfully pursued a court challenge to the SEC’s regulation of mutual funds. Gretchen Morgenson & Glen Justice, *Taking Care of Business His Way*, N.Y. TIMES, Feb. 20, 2005 (Sunday Business section 3), at 1. A portion of that article was devoted to questioning the integrity of the Chamber’s president. For example, she questioned the president’s actions as a corporate director for approving “excessive” executive stock option compensation and alleged that he breached his fiduciary duty as a director. He allegedly benefitted his family at shareholders’ expense, profited on an investment in a private company whose board he had joined several years before the company went public, and installed his son, an investment banker, as a director of a subsidiary spun off from a company on whose board the president sat. The article did not provide any evidence that there was anything amiss with the transactions in question. Nothing that Morgenson described indicated wrongdoing, but it fit a story line. By implying that there might be misconduct somewhere, it appears the authors intended to spark an investigation of the president. It should be noted that the reporter and her editors have been sharply criticized by another journalist for adhering to questionable journalistic standards when they published similar stories. Holman W. Jenkins, Jr., *The Times and Reality*, WALL ST. J., Nov. 15, 2006, at A19. Jenkins criticized a Morgenson story for not revealing key contextual facts: she quoted an executive who turned down a stock option bonus stating that his father had told him not to “feel that [he] was worth it”, and omitted to state that his father had been on the Tyco board that had been “dragged through the legal mud” in the prosecution of the Tyco CEO who led a lavish lifestyle at the expense of the firm. As Jenkins noted, those facts were omitted because they would alter the understanding of a quote that otherwise fit the reporter’s “relentless but unanalytical execrations of CEO pay.” He also criticized a front page NYT story by the same reporter that alleged a prominent executive had engaged in insider trading despite an acknowledgment that there was no supporting

evidence for the allegation besides a whistleblowing charge by an SEC attorney—who Jenkins considered to be of questionable credibility - that he was fired because he wanted to question the executive. The NYT editor, in a dismissive response to the Jenkins' piece, appeared to encourage reporting that suggests possible wrongdoing, which could devastate an innocent individual's reputation, without providing corroboration. Bill Keller, *Misrepresented, Insulted and Belittled*, WALL. ST. J., Nov. 22, 2006, at A15.

It should be noted that only one regional newspaper reported on the Chamber Commission, and the *Boston Globe*, which published two stories on a study by the Greater Boston Chamber of Commerce, which focused on SOX's disproportionate impact on small firms, did not report on the national Chamber's report. This suggests a different rationale for the failure of regional newspapers to cover the Chamber Commission than the one offered for the national journalists—an indifference toward the report's subject matter, SOX's impact on market competitiveness, rather than a potential credibility concern regarding the report's author.

[Table A1 here]

Table A2. Overlapping Coverage of SOX Critiques and Committees

Articles that reference:	Abelson	Jenkins	Murray	Norris	WSJ Ed.	BN	BG	HC	SFC	NYT	WSJ	WP	Total
MktComp & CMC	1 (1)	1	2	3	1; 2			1		2	4	2	17; 2
MktComp & McK					0;1		1	2		4	1		8; 1
MktComp & CoC										1		2	3
MktComp & AC				2			1		1		1		5
MktComp, CMC & McK					1		0; 1			1	4		6; 1
MktComp, CMC & CoC												1	1
MktComp, CMC, McK & CoC					0;2						2		2; 2
MktComp, SmF & CMC			1				1	1					3
MktComp, SmF & AC							1						1
MktComp, SmF, CMC & CoC					0;1								0; 1
SmF & AC				3		1	1	1	5	1	14	5	31
SmF & CMC							1	1					2
SmF & local CoC							1						1
SmF, local CoC & AC							1						1
MktComp & SmF			1		2; 2				2 {1}	0;1	2 (1){1}	1 {1}	8; 3
CMC & CoC								1		1			2
CMC,CoC & McK												1	1
Total	1	1	4	8	4; 8	1	8; 1	7	8	10; 1	28	12	92; 10

Notes: The table summarizes the type of overlap across the SOX critiques and committees tabulated in Tables 2 and 3,

which include descriptions of the data, which are abbreviated in this table as follow: ‘BG’ *Boston Globe*, ‘HC’ *Houston Chronicle*, ‘SFC’ *San Francisco Chronicle*, ‘NYT’ *New York Times*, ‘WSJ’ *Wall Street Journal*, ‘Ed.’ Editorial; ‘WP’ *Washington Post*, ‘CMC’ Capital Markets Comm., ‘McK’ McKinsey Study; ‘CoC’ Chamber Commission, ‘AC’ Advisory Comm., ‘MktComp’ market competitiveness, ‘SmF’ small firm costs. Following the convention in Tables 2 and 3, (#) and {#} indicate articles with a market competitiveness overlap that does not contain a foreign market listing or firm reference for IPO and going private references, respectively, and **numbers in bold font** are counts of overlaps for independent author editorials.

Table A3. Regional Newspaper and Wire Service Coverage of SOX, 12/1/04-6/10/07

Articles that reference:	<i>Birmingham News</i>	<i>Boston Globe</i>	<i>Houston Chronicle</i>	<i>SF Chronicle</i>	Associated Press**
Advisory Comm.	1,1,1	4,3,1	3,1,1	9,7,4	22
Capital Markets Comm.	0	2,1,1	4,4,2	1,1,0	15
Chamber Comm.	0	0	1,1,0	0	8
McKinsey Study	0	1,1,0	2,0,0	0	4
Market competitiveness +	3,2,0	11,5,2	13,6,2	12,6,3	75
Foreign market competitiveness	3,2,0	7,5,2	8,5,2	5,4,3	62
Small firm costs	5,5,5	8,4,2	9,6,4	8,6,4	31
Advocacy against revising SOX	0	3,0,0	4,0,0	0,0,0	4
Total SOX*	16,12,8	29,12,5	51,26,13	31, 23, 10	128
Total surveyed	176	238	352	337	2,177

Notes: ‘SF’ San Francisco; + ‘Market competitiveness’ includes references to IPOs or going private transaction numbers, whether foreign or domestic and the difference, leaving solely foreign-listing or firm referenced articles, is indicated in the following row under ‘foreign market competitiveness’; none of the AP non-foreign-referenced competitiveness articles were pulled by a regional newspaper and a total of only three such stories were pulled from any other wire source (1 IPO and 1 going private story by the *SF Chronicle* and 1 going private story by the *Houston Chronicle*). * ‘Total SOX’ includes articles that had some reference to costs and/or benefits of SOX, or issues involving internal controls provision; articles referencing other SOX issues, such as accounting disclosure, accountants’ conflict of interest, independent audit committees, or on the specific accounting scandal company fraud trials, are excluded. The three entries in each cell for the regional newspapers are (1) total stories on the topic; (2) subset of stories taken from wire services or other newspapers; (3) subset of stories from the Associated Press (“AP”) wire service. The subset wire counts are not included in the row ‘Total surveyed’ because, as explained in Table 3, there is no total surveyed count for two papers, the Birmingham and Houston newspapers, for which every daily edition was read for the entire period to identify the external sourced articles. The *SF Chronicle* did not always provide an outsourced article’s reporter’s affiliation; in all but one such case I was able to identify the reporters’ news organization. In a few cases of news briefs, the wire source was not identified (1 for *Birmingham News* and 2 for *Boston Globe*). Articles were searched in the Lexis database for each newspaper and for the AP, using the following search: (sarbane w/5 oxley) or section 404 or (conflict of interest w/5 account! or audit!) or (option! w/5 executiv!) or (small w/3 business w/5 cost!) or (small w/3 company w/5 cost!) or (accounting w/3 regulation) or (accounting w/3 legislation) or (transparency w/5 financial statement!). ** The AP wire service reports continuously throughout a day and that search thereby often produced duplicates of the same story as it was updated or rerun over time. The count for AP stories therefore excludes duplicates, which I defined as articles by the same author with the same date or within two days of the first article’s publication, that have the same title and content, or different titles but minor differences in content. In addition, articles by reporters associated with Dow Jones or the *Wall Street Journal* that were identified in the AP search are included in the AP tallies.

Table A4. Associated Press and National Newspaper SOX Coverage, 12/1/04-6/10/07

Articles that reference	NYT	WSJ	<i>Washington Post</i>	Associated Press**
Advisory Comm.	3	26	12	22
Capital Markets Comm.	7	11	9	15
Chamber Comm.	2	4	5	8
McKinsey Study	5	7	1	4
Market competitiveness +	35 (2) {3}	84 (10) {15}	18 (1) {7}	75 (9) {5}
Foreign market competitiveness	30	59	10	62
Small firm costs	6	25	12	31
Advocacy against revising SOX	3	0	2	4
Total SOX*	73	166	93	128
Total surveyed	806	1344	632	2,177

Notes: ‘NYT’ New York Times; ‘WSJ’ Wall Street Journal; + ‘Market competitiveness’ includes references to IPOs or going private transaction numbers, whether foreign or domestic with (#) referring to IPO but not foreign market listing and {#} referring to going private but not foreign firm and the difference is indicated in the following row under ‘foreign market competitiveness’. * ‘Total SOX’ includes articles that had some reference to costs and/or benefits of SOX, or issues involving internal controls provision; articles referencing other SOX issues, such as accounting disclosure, accountants’ conflict of interest, independent audit committees, or on the specific accounting scandal company fraud trials, are excluded. Article counts for the NYT and WSJ exclude stories tallied in table 2, by national journalists writing for those newspapers and WSJ editorial page, except for the counts in the row ‘total surveyed.’ Articles were searched in the Lexis database for each newspaper and the AP, using the following search: (sarbane w/5 oxley) or section 404 or (conflict of interest w/5 account! or audit!) or (option! w/5 executiv!) or (small w/3 business w/5 cost!) or (small w/3 company w/5 cost!) or (accounting w/3 regulation) or (accounting w/3 legislation) or (transparency w/5 financial statement!). ** The AP wire service reports continuously throughout a day and that search thereby often produced duplicates of the same story as it was updated or rerun over time. The count for AP stories therefore excludes duplicates, which I defined as articles by the same author with the same date or within two days of the first article’s publication, that have the same title and content, or different titles but minor differences in content. In addition, articles by reporters associated with Dow Jones or the *Wall Street Journal* that were identified in the AP search are included in the AP tallies.

Table A5. Publication Dates of Regional's Associated Press Stories on Sox Critiques and Reports

Regional Newspaper	Regional Pub. Date	AP Pub. Date	Any National Pub. Date
<i>Birmingham News</i>	4/22/05	4/21/05	none
	5/17/05	5/16/05	none
	5/9/06*	5/8/06	5/8/06; 5/9/06
	12/12/06*	12/11/06	12/11/06; 12/12/06
	12/14/06*	12/13/06	12/13/06
<i>Boston Globe</i>	11/17/06	11/16/06	none
	11/21/06*	11/20/06	11/20/06; 11/21/06
	12/12/06*	12/11/06	12/11/06; 12/12/06
	12/25/06*	12/24/06	different story 12/22/06
<i>Houston Chronicle</i>	5/9/06*	5/8/06	5/8/06; 5/9/06
	11/21/06*	11/20/06	11/20/06; 11/21/06
	12/3/06	11/30/06	different story 11/30/06; 12/1/06
	12/12/06*	12/11/06	12/11/06; 12/12/06
	12/16/06	12/13/06	12/13/06
<i>SF Chronicle</i>	3/4/05	3/3/05	3/3/05
	9/22/05	9/21/05	9/19/05+; 9/22/05
	4/21/06	4/20/06	4/19/06; 4/21/06
	5/18/06	5/17/06	5/18/06
	11/10/06	11/9/06	different story 11/10/06
	11/26/06	11/24/06	different story 11/22/06; 11/25/06
	12/14/06*	12/13/06	12/12/06++; 12/13/06
	12/26/06*	12/24/06+++	different story 12/22/06

Notes: The table indicates publication dates of Associated Press articles referencing either SOX critiques or reports tracked in Table 3 published in regional newspapers, relative to the date the article appeared on the wire and articles on the same topic appeared in any of the national newspapers tracked in that table. 'AP' Associated Press; 'SF' San Francisco; 'Pub' publication. 'different story' indicates the national newspaper story was on the same topic as the AP story but was completely different in content, e.g., a market competitiveness critique in which the AP story was on the Hong Kong Stock Exchange besting the New York Stock Exchange for new listings because of SOX and the national newspaper story was on venture capital firms considering doing foreign IPOs because of SOX. + AP also ran earlier story on same topic 9/15/05; ++ AP also ran earlier story on same topic 12/12/06; +++ AP reran same story 12/25/06. * Indicates same AP article reprinted in more than one regional newspaper.

Table A6. Regional Newspaper Reporting Day in relation to National Newspaper Reporting Day

	Regional: Staff Story			Regional: Wire Story		
	Mkt Comp	Small	Report	Mkt Comp	Small	Report
Same day	2	0	4	6	10	15
1 day after	1*	0	0	1**	2	1
2 days after	5 (3**)	0	0	0	1**	0
3 days after	1**	0	0	1	1	1
4 days after	1**	0	0	1	0	0
No relation in time	13	9	4	7	7	3

Notes: The table breaks down regional coverage by article SOX critique type, ‘mkt comp’ for market competitiveness critiques, and ‘small’ for small firm cost critiques, and by whether the story was written by the newspaper’s internal staff (‘staff’) or was taken from a wire service or other newspaper (‘wire story’), and then tallies those articles by the date on which they were published in a regional newspaper in relation to the date a story of the same critique type was published in a national newspaper. ‘No relation in time’ indicates a story in a regional newspaper published more than 5 days after any story on a similar critique type was published in a national newspaper, ‘1 day after’ indicates a regional newspaper article was published one day after an article of the same critique type was published in a national newspaper, and so forth. To provide a conservative estimate of the independence of the regional newspapers’ reporting, when there was any possibility that their coverage followed a national newspaper, it was so classified. This is shown in the table by ‘*,’ which indicates a regional story counted as ‘1 day after’ which was in fact published both on the same day and one day after a story of the same critique type was published in a national newspaper; and by ‘**,’ which indicates a regional story of the same critique type published after a national story but with very different content from that of the national story, that is still counted as published a number of days after the national story rather than as no relation in time, where the total number of such stories in a time interval cell is indicated in parentheses, if in that cell there are also other regional articles published after a national story that did have the same content as the national one. On a few occasions an article in a regional newspaper is not identified as coming from a wire service but the reporter in the byline is affiliated with a wire service and had published the same or similar story on the wire previously; such articles are counted as ‘wire’, and not ‘staff’, stories.