

VIEWPOINT:

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Bracing for side effects of reform

by Michael L. Faltischek

HELP WANTED:

Independent Director

Public company seeks reputable, courageous individual willing to assume independent responsibility and liability for overseeing the actions of management in reporting financial results and assuring proper rewards to management for invaluable services rendered to shareholders. Limited opportunity for insurance coverage. Periodic compensation through modest corporate meals, with limited reimbursement for expenses, in order to maintain independence. Faint-hearted individuals need not apply.

As we learn time and again, every action creates a reaction. History teaches that even the most democratic and lofty ideals underlying revolution usually result in complete reactionary and often totalitarian results.

No one can question the horrific impact on our economy of corporate abuse by companies such as Enron, WorldCom and others that are said to have been the product of out and out chicanery and fraud. No one would suggest that these actions were anything other than totally irresponsible, carried out by people intent upon self-interest and greed. The law has long provided appropriate sanctions and punishment for this type of behavior, and it is unlikely that anyone who has acted improperly will escape the long arm of justice.

The real question becomes what impact the fallout from these misdeeds will have on corporate governance.

The Sarbanes-Oxley Act of 2002, signed by President Bush on July 30, calls for sweeping reforms to combat corporate and accounting fraud. Among other things, the act establishes a new accounting oversight board and imposes new penalties and a variety of higher standards of corporate governance.

The far-reaching changes in federal securities regulation could be the most significant overhaul since the enactment of the Securities Exchange Act of 1934. These changes are profound and will affect every public company, large and small. Members of boards of directors, senior management, accountants, auditors and attorneys are all affected. If public companies do not act quickly to comply, they risk SEC sanctions, civil litigation, the loss of D&O liability insurance and investor backlash.

As with any reaction, it is easy to explain the goal to be achieved. But here, as in all drastic reform efforts, the devil is in the details.

Broad standards of conduct have been suggested. The details remain murky and most are yet to be established. The murkiness will become a challenge for regulators, enforcers and triers of fact as the drama continues to unfold. As the pendulum swings, many will be cut off by its sharp edges, often unjustifiably and often by the sheer cost of compliance.

Typical of this swing of the pendulum is a suggestion from one member of Congress that legislation be adopted that would permit seizure of personal assets of corporate officers and directors merely upon charges of improprieties. This tactic is much like asset seizure provisions to which drug dealers are subjected. Legislation of this type may be appropriate for those who engage in completely forbidden, illegal and morally reprehensible conduct. But one can hardly justify such a drastic sanction when addressing actions by individuals who we ask to perform tasks in a particular way and who may have stumbled while attempting to do so.

At the same time we create new and higher standards, care must be taken to protect those charged with these new responsibilities. Equally important is the need to assure fair and reasonable compensation for the thankless responsibility assumed for the benefit of distant, unknown shareholder beneficiaries. And, in all ways, complete independence for these individuals should be the goal. Without this goal, there is no true way to safeguard the shareholder interests that created the reform movement.

[Michael L. Faltischek](#) is the Firm's Managing Partner. He leads a newly formed Corporate Governance Practice Group that advises clients on the impact of laws affecting corporate governance.

The Corporate Governance Practice Group of Ruskin Moscou Faltischek, P.C. includes highly experienced general corporate, securities, white-collar crime, employment, litigation and alternative dispute resolution attorneys who are fully conversant with this complex landscape and will assist in your timely compliance with these new and difficult legal requirements.

You may contact any of us at 516-663-6600 or via e-mail:

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