

Sarbanes-Oxley Section 307 Domestically and Abroad: Will Section 307 Lead to International Change?

Scott H. Mollett¹

I. INTRODUCTION

The enactment of the Sarbanes-Oxley Act (the “Act”) was a seminal event in American securities regulation. Prompted by the spectacular collapse of Enron and other corporate scandals, the Act further developed the United States’ shareholder-oriented corporate governance mechanisms: a more independent, accountable board, and more technical proficiency in the auditing of company financials. The new regulations contained in the Act substantially restructured the accounting and finance industries, in addition to increasing the number of penalties available against company executives. The Sarbanes-Oxley Act also initiated a subtle but significant change in the regulation of corporate attorneys, specifically for those attorneys working in publicly-controlled corporations.² The mandatory reporting of fraud within the corporation, contained in Section 307 of the Act, at a minimum, reemphasized the proper duties of a corporate attorney. Some commentators have indicated, though, that the changes are indicative of the drastically different role played by modern corporate lawyers and regulation of lawyers as gatekeepers, rather than advocates, of their clients.

While the vast majority of items included in Sarbanes-Oxley were requirements for auditors and the board of directors, Section 307 addressed the ethical responsibilities of a securities lawyer.³ Section 307 broadly permit-

1. Scott Mollett, Associate, Simpson Thacher & Bartlett; J.D., Stanford Law School, 2008; Non-Degree Masters, Kobe University, 2004 (Fulbright Scholar to Japan); B.A., Dartmouth College, 2003.

2. The changes required by the Act are limited to lawyers working for public corporations. However, these requirements were not unprecedented nor are they so limited in scope—As discussed infra, similar rules existed in many states prior to SOX and much of the new regulation has been applied to *all* lawyers under the American Bar Association’s Model Rules.

3. 15 U.S.C. § 7245 (2002). Section 7245 is entitled, “Rules of Professional Responsibility for Attorneys,” and states:

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule-

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the is-

ted the Securities Exchange Commission (the "SEC") to regulate the minimum professional standards of those lawyers practicing before it. In particular, it "contain[ed] specific and mandatory duties, [and] required, rather than merely permitted, that lawyers for public companies must act when they have evidence (not the impossible-to-establish knowledge) of material illegal activities, or breach of fiduciary duty. There was no requirement that they learn about the misconduct in connection with their legal services."⁴ This requirement is notable for several reasons. First, the regulation of attorneys has generally been handled at the state level. Second, the Act has implication for the attorney-client privilege, a privilege doggedly protected by the state bar associations.⁵

Indeed, Section 307 was interpreted as a possible shift in the role played by corporate attorneys, from a gunslinger or zealous advocate, to the role of a gatekeeper. Section 307 recognized that corporate attorneys play some role in the ex-ante processes necessary to orchestrate fraud. For example, outside corporate counsel provided good-standing opinions for Enron that were necessary for the special purpose entities used to perpetrate the fraud.⁶ On a larger scale, it is argued that due to the complexity of transactional law, attorneys are a necessary and knowledgeable component of corporate action.⁷ These concerns were manifested in Senator John Edwards's decision to offer an amendment to the Act in 2002, thereby requiring corporate counsel to report wrongdoings 'up-the-ladder.'⁸

The eventual implementation and enforcement of Section 307 has raised an issue as to the extent that corporate attorneys have become gatekeepers. Gatekeepers are "'independent professionals who serve investors by preparing, verifying, or assessing disclosures [and corporate documents], and who are thus in a position to prevent corporate misconduct by withholding their consent.' Although the party it watches typically pays the gatekeeper as a watchdog, the gatekeeper's credibility is founded on the fact that it is pledging its reputational capital."⁹ Corporate attorneys have generally tried to adhere to the zealous advocate description, endeavoring to accomplish the client's request. Yet, the nature of relationship is not as clear as with a sin-

suer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

15 U.S.C. § 7245 (2002).

4. Peter C. Kostant, *Sarbanes-Oxley and Changing the Norms of Corporate Lawyering*, 2004 MICH. ST. L. REV. 541, 549.

5. Peter J. Henning, *Sarbanes-Oxley Act 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323, 334 n.26 (2004).

6. Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1239-43 (2003).

7. *Id.* at 1253.

8. Henning, *supra* note 9, at 336.

9. Christoph Pippel, *The Lawyer as Gatekeeper: Is There a Need for a Whistleblowing Securities Lawyer? Recent Developments in the US and Australia*, 16 BOND L. REV. 96, 97 (2004) (quoting John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC [2003]*, 103 COL. L. REV. 1293, 1297).

gle client - duties run to the general corporation and the shareholders, even at the expense of individual employees. In addition, there has been a significant increase in the employment of in-house corporate attorneys, who may be biased by their personal interest in the firm. These circumstances have led to the discussion of a corporate attorney as a gatekeeper, rather than an advocate. At this extreme, a corporate attorney's role is not to make things happen, but rather the exact opposite.

This Article will deal generally with the international significance of Section 307 and whether it signifies a change in the role of a corporate attorney. One area that Sarbanes-Oxley could significantly affect the ethical responsibilities of corporate attorneys internationally is the broad influence of United States capital markets. In 2005, the London Stock Exchange had the largest percentage of foreign-owned firms at 24%, in contrast with only 17% of the New York Stock Exchange (the "NYSE").¹⁰ Larry Ribstein has argued that the Act punctuates the evolution of securities laws and indicates (1) a shift from disclosure to substantive regulation of corporate governance, (2) a deterrence of foreign firms from listing in the United States, and (3) flight of foreign firms could affect United States regulation.¹¹ Thus, whether countries will emulate the Act's system is debatable, which raises concerns about whether Section 307 will actually affect attorneys or if the market participants will avoid the requirements.

Similarly, there are concerns about whether ethical regulations will have a practical effect. One commentator has argued that "no one can legislate for ethics and integrity, and instead, that there must be a system of trust in place."¹² This argument does run counter, though, to research that indicates that corporate ethical codes do improve ethical behavior.¹³

A second question concerns whether foreign participants in the American capital markets, who are subject to the Act, will actually comply with the Act's requirements in a meaningful way. Section 307 is a relatively weak provision; its efficacy is dependent on a responsive board of directors, in addition to the expectation that attorneys will knowingly participate in high-level company operations. In examining cultural differences, one commentator noted that "the word accountability does not exist per se in most romance languages, Hebrew, or Russian, and it is often translated as responsibility. The literal translation in Spanish is 'to report' (*rendir cuentas*)."¹⁴ Thus, whether a corporate attorney committed to serving the corporation and

10. Ruth V. Aguilera, *Corporate Governance and Director Accountability: an Institutional Comparative Perspective*, 16 BRIT. J. MNGT. 39, 50 (2005).

11. Larry E. Ribstein, *International Implications of Sarbanes-Oxley: Raising the Rent on US Law*, 3 J. CORP. L. STUDIES 299, 300 (2003).

12. Aguilera, *supra* note 10, at 40.

13. Jang Singh et al., *A Comparative Study of Contents of Codes of Ethics in Australia, Canada, and Sweden*, 40 J. WORLD BUS. 91, 93 (2005).

14. Aguilera, *supra* note 10, at 44.

the market would be able to influence their domestic corporate culture is also debatable.

These questions and examples should indicate some of the concerns associated with the interpretation of Section 307 overseas. Section 307 could cause a significant change in the responsibilities of a corporate attorney in the United States. It increases the regulation of attorneys and adds a new plank in the platform of United States capital markets' integrity. The fundamental question is whether the image of an attorney established by Section 307 will become an international norm. This paper will argue that the conception of an attorney as a gatekeeper has too many variables to draw a universal conclusion. This is not necessarily due to Section 307, but rather to a myriad of bodies, including both stock exchanges and domestic state bar associations that are requiring additional gatekeeper functions and the resistance faced in many jurisdictions.

Part II of this paper will examine the Sarbanes-Oxley Act in detail, including the actual language and academic criticisms. Part III will some of the major differences between the United States and other countries and provides examples that undermine some of the assumptions required for Section 307 to function properly. Part IV will examine some of the areas where corporate attorney behavior can be regulated, with an eye towards how additional regulations can and have been imposed. The paper will then end with a conclusion.

II. THE SARBANES-OXLEY ACT

Prior to the Act, the regulation of public companies was dependent on a disclosure system and the occasional placement of restrictions on stock exchange rules. This system is summarized by Larry Ribstein who commented that, "[f]ederal securities regulation in the United States for 70 years has been explicitly based on the fundamental principle that the law regulates what issuers must say about their companies and not the types of firms or securities that may be sold."¹⁵ Similarly, William O. Douglas, a former Securities Exchange Commission ("SEC") Chairman and United States Supreme Court Justice, commented that "[a]ll the Act pretends to do is to require the 'truth about securities' at the time of issue and to impose a penalty for failure to tell the 'truth about securities' at the time of issue."¹⁶

Enron showed the limitations of this perspective with chiaroscuro clarity. At least on paper, Enron had a state-of-the-art corporate governance system featuring an audit committee composed solely of independent directors and chaired by a Stanford Business School professor.¹⁷ Indeed, corporate gover-

15. Ribstein, *supra* note 11, at 301.

16. *Id.* (quoting W.O. Douglas & G.E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 171 (1933)).

17. Kostant, *supra* note 4, at 542.

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nance reforms in the 1990s were dominated by the *voluntary* employment of best practices of corporate governance by companies such as General Motors.¹⁸ Thus, the Enron crash indicated that despite these efforts, there was some significant failure in American corporate governance.¹⁹

The American response was an airing out of relations with accounting firms and the reinforcement of the board structure. Christoph Pippel noted that globally, “[r]eforms in corporate governance . . . have focused primarily on the strengthening of independent directors, introduction of audit committees, and reforms concerning the audit profession.”²⁰ The reforms that the Act imposed on auditors and corporations were far-reaching and included changes to the composition of corporate committees, provisions for codes of ethics, and other mandatory changes.²¹ Moreover, the Act imposed new federal regulations on securities attorneys.

In some ways, these regulations represent genuine change: historically federal regulation of attorneys has been minimal and fraught with conflict. In contrast with other advisors to a publicly traded company, such as accountants and securities dealers, attorneys are the only group regulated by “guild-like” private state bar associations.²² These bars resisted federal regulations and protected attorneys’ traditional privileges, such as the attorney-client privilege. From this perspective, increased federal regulation is a new direction for federal involvement in the legal profession. On the other hand, Section 307 and the implementing rules, do not differ dramatically from rules proposed by the American Bar Association (the “ABA”) itself and implemented in certain state professional codes. Moreover, the effect of laws will always be limited by the consistency of their enforcement: Even where laws have been in place “empirical evidence shows that state bar authorities have not enforced ethics rules against large commercial law firms.”²³

Perhaps the greatest significance of Section 307, and the Act in general, is social rather than legal. Susan Koniak commented that, “lawyers are trained to believe their clients, and to argue all colorable defenses, so they seldom, if ever, ‘know’ that illegality is occurring.”²⁴ Section 307 directs the spotlight on this behavior and places attorneys on notice that their duties run to the

18. E. Norman Veasey, *State-Federal Tension in Corporate Governance and the Professional Responsibilities of Advisors*, 28 J. CORP. L. 441, 442 (2002-2003).

19. Aguilera, *supra* note 10, at 43. Aguilera has belabored this point a little more, noting that “empirical evidence on the link between prescribed good governance and economic returns is rather thin.”

20. Pippel, *supra* note 9, at 97.

21. Veasey, *supra* note 18, at 443. Chief Justice Veasey noted that major changes included: (1) the composition of the board of directors; (2) the composition of the audit, compensation and nomination/governance committees; (3) some of the activities and requirements of the board and its committees (e.g., executive sessions and evaluations); (4) detail on definitions of independence of directors; and (5) reporting and certification requirements of the CEO and the CFO. *See also* Ribstein, *supra* note 11, at 303 (providing an extensive, rule-by-rule list of changes implemented by Sarbanes-Oxley).

22. John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1303 (2003).

23. Pippel, *supra* note 9, at 104.

24. Koniak, *supra* note 6, at 1247.

company rather than the managers. This position may indicate a cultural shift towards legal responsibility in a way that heavy-handed regulations might not have.²⁵ This change may be best indicated by anecdotal evidence, including one commentator stating that “[h]aving served on the board of public companies since 1993, [she] has watched the culture of boardrooms change from golf games, cigars, and fancy dinners to meetings that begin at 6 a.m. and intense pressure to submerge oneself in ever-changing accounting and governance regulations.”²⁶

The remainder of this portion of the article will focus on four areas. First, state regulatory powers prior to the enactment of the Act will be discussed, including a short discussion of some of the ABA’s attempts to regulate member attorneys. The second section will examine the text of the Act as applicable to attorneys and the Model Rules applicable to all lawyers. The third section will discuss several of the arguments against the regulation. The final section will discuss some alternative approaches that have been proposed.

A. REGULATORY POWERS PRIOR TO SARBANES-OXLEY

The Act was not the beginning of regulatory powers over securities attorneys. Rather, the SEC has had limited powers over securities attorneys since the Securities Exchange Act of 1934. Similarly, attorneys have always been subject to regulations promulgated by their respective state bar association. However, a description of the limited powers exerted over corporate attorneys by the SEC and state bars prior to the Act by the SEC and state bar associations should go some way in explaining why the Act was considered a major change.

Prior to the Sarbanes-Oxley Act, the Securities Exchange Commission possessed limited powers to penalize lawyers. Corporate attorneys practicing before the SEC were subject to penalties under the anti-fraud provisions Securities Exchange Act of 1934 prior to Sarbanes-Oxley. Under Rule 102(e), the SEC could suspend or disbar attorneys who have engaged in improper professional conduct.²⁷ A prior conviction for a violation of either a federal securities law or state ethics rule, however, was necessary for the SEC to utilize Rule 102(e).²⁸ As one might expect, the necessity of having a prior conviction has limited the usefulness of Rule 102(e) as a means to compel good behavior.²⁹

25. See generally Kostant, *supra* note 4 (arguing that Section 307 “may represent a turning point for the norms of corporate practice because it may change the ‘social meaning’ affecting lawyer actions”).

26. WALL ST. J., June 21, 2004, at R4.

27. Pippel, *supra* note 9, at 103.

28. *Id.*

29. Similarly, the CEOs and CFOs of companies did have to sign the annual 10-K, plus the quarterly 10-Q for the CFO, and could be held liable if they knew statements were false.

Similarly, the state bars associations have traditionally been able to regulate their attorneys, including specific regulations for attorneys representing corporate clients. However, the recognition of duties owed to corporate clients by state bars has lagged. One major omission was the absence of a clear statement that the corporate client was the company itself, at least until recently. Early codes of conduct for attorneys, including the ABA's Canons of Professions Responsibility of 1908 and the Model Code of Professional Conduct of 1969, provided "virtually no guidance for the special problems of representing the corporate client."³⁰ The only model of a client was a living individual, one who was more similar to the manager who actually hired the attorney. The Model Rules of Professional Conduct adopted in 1983 (the "MRPC") did include 'entity' clients in Rule 1.13. Yet, even in 1993, the ABA's Working Group on Lawyers' Representation of Regulated Clients reported that attorneys had no duty to report known misconduct to their corporation's board of directors, once again distorting the duty owed to the corporation.³¹

The MRPC are exactly that, model rules. State implementations of the MRPC have varied somewhat and have often implemented provisions that remedy some of the failings of the national model. For example, forty-one state codes included an exception to Rule 1.6 permitting disclosure of client confidences "when necessary to prevent the client from perpetrating a massive, damaging fraud using the lawyer's services."³² Unfortunately, this exception was explicitly rejected by the ABA when proposed by the Ethics 2000 commission.³³

30. Peter C. Kostant, *Exit, Voice and Loyalty in the Course of Corporate Governance and Counsel's Changing Role*, 28 J. SOCIOECONOMICS 203, 213 (1999).

31. *Id.* at 214. This somewhat damning paragraph does not present the entire story as the ABA has been actively debating the appropriate role for corporate attorneys. For example, there have been proposals to permit an exception to Model Rule 1.6, the rule pertaining to the confidentiality of client information and which would allow an attorney to reveal criminal financial fraud that were considered and subsequently rejected in 1983, 1991 and 2001. Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1, 6 (2003). In addition, the ABA created the Ethics 2000 Commission with "a mission to evaluate the MRPC and to recommend changes, where necessary, to modernize and strengthen the state-based regime of lawyer ethics." Veasey, *supra* note 18, at 442.

32. Kostant, *supra* note 30, at 214.

33. The new MRPC implemented after Enron does place restraints on attorney action. The big distinction between the SOX-mandated rules and the ABA Model rules is that the SOX rules are handled by the Commission and apply to lawyers practicing before them. "One could see the SEC Rule as providing the content that the ABA Model Rule lacks by specifying the mechanism by which the violation must be reported to a higher authority." Jenny E. Cieplak & Michael K. Hibey, Note, *The Sarbanes-Oxley Regulations and Model Rule 1.13: Redundant or Complementary?*, 17 GEO. J. LEGAL ETHICS 715, 718 (2004). Model Rule 1.13 applies to all attorneys and therefore effectively extends the up-the-ladder reporting requirement to all attorneys. In contrast with the SEC Rules, the standard for action used under the MRPC is substantial harm. The MRPC also permits an attorney to reveal information, regardless of Rule 1.6, to the extent the attorney believes it is necessary to prevent injury to the company. Rule 1.13 has received its fair share of criticism including comments that the Model Rules "promote lawyers working as "uncritical" servants of senior managers." See Kostant, *supra* note 4, at 544.

B. IMPLEMENTATION SECTION 307

Following the collapse of Enron and other corporate scandals that took place during that time, the Act was implemented to create new requirements for corporate practitioners. These changes duplicated many of the previous state-level reporting requirements. The rules implementing Section 307 make these duties mandatory for practitioners before the SEC and make other alternative reporting mechanisms available.

Section 307 of the Act required the SEC to create rules “requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty.”³⁴ If the chief legal officer or other superior ignored this notification, Section 307 required the attorney to notify the audit committee or board.³⁵ Section 307 was implemented in Rule 205.3, which requires up-the-ladder reporting, alternative reporting mechanisms, and provided for noisy withdrawals, although this last rule was not implemented.

Rule 205.3(b) of the SEC Rules defines how a lawyer must engage in up-the-ladder reporting.³⁶ The up-the-ladder reporting requirement requires an attorney to report material violations of the applicable law to the CLO and/or CEO. In addition, the rule defines if and when an attorney must continue to make notifications further up-the-ladder, even to the board of directors if necessary.³⁷ Reporting becomes necessary when there is “credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.”³⁸ This standard has been criticized for both being phrased in the double negative, and the flexibility allowed by the use of words such as “credible” and “material.” The double negatives are considered indicative of the SEC’s desire to establish a new objective standard for attorney behavior.³⁹ Further, others criticize the rule for failing to establish any new ground and ultimate-

34. 15 U.S.C. § 7245 (2002).

35. *Id.*

36. § 205.3 of the SEC Implementation of Standards of Professional Conduct for Attorneys, is entitled “Issuer as Client,” and provides in pertinent part:

(b) Duty to report evidence of a material violation.

(1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

§ 205.3 of the SEC Implementation of Standards of Professional Conduct for Attorneys, effective on Aug. 5, 2003, available at <http://www.sec.gov/rules/final/33-8185.htm>.

37. Pippel, *supra* note 20, at 110.

38. § 205.2(e) of the SEC Implementation of Standards of Professional Conduct for Attorneys.

39. Pippel, *supra* note **Error! Bookmark not defined.**, at 112.

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ly formalizing what should be proper for an attorney and simply reiterating prior rulings.⁴⁰

Rule 205.3(c) established a mechanism for an attorney to report to a Qualified Legal Compliance Committee ("QLCC").⁴¹ If established, a concerned attorney can report to the QLCC and be exempted from further up-the-ladder requirements. The QLCC may be the company's audit committee or include a member of the audit committee and independent directors.⁴²

Finally, proposed Rule 205.3(d) was the so-called noisy withdrawal provision. Subject to much debate, the noisy withdrawal provision would have required an attorney who witnessed continued breaches to resign and report to the SEC. This provision was attacked for damaging the attorney-client privilege and reaching beyond the congressional mandate.⁴³ In the end, the criticisms proved too much and this provision, along with other related provisions, such as 205.3(b)(2) which required the preparation and maintenance of reports pertaining to violations, were eventually rejected.⁴⁴

40. Henning, *supra* note 5, at 339-40.

41. § 205.3 of the SEC Implementation of Standards of Professional Conduct for Attorneys, is entitled "Issuer as Client," and provides in pertinent part:

(c) Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee.

(1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

§ 205.3 of the SEC Implementation of Standards of Professional Conduct for Attorneys, effective on Aug. 5, 2003, available at <http://www.sec.gov/rules/final/33-8185.htm>.

42. Pippel, *supra* note 9, at 113.

43. Henning, *supra* note 5, at 345 ("To say that the legal profession reacted negatively to the proposed "noisy withdrawal" portion of the proposed rule is an understatement. The objections from the private bar focused largely on the SEC reporting requirement for withdrawing attorneys, and advanced two principal grounds: the need to protect lawyer-client confidentiality and interference with the lawyer-client relationship to guard against overreaching or misuse of power afforded by a lawyer independent of the government whose sole goal is representing the interests of the client. The rhetoric used to advance these positions was sometimes a bit overblown, and makes one wary whether the real interest was that of the lawyers seeking to thwart yet another effort at government regulation that would make them more accountable for the representation of corporate clients.")

44. Henning, *supra* note 5, at 325, 345 ("The response from the organized bar to the "noisy withdrawal" proposal was swift and vituperative. References to the hoary role of lawyers as protectors of the innocent and the last bastion of independence from the all-powerful state were brought out to assail the Commission proposal." Similarly, an alternate proposal which would have require the corporation, rather than the attorney, to report the lawyers withdrawal was roundly criticized. This approach was designed to avoid requiring the lawyer to disclose client confidences, but the "bar's response to this proposal was just as negative and the Commission has not taken any steps at this point to implement either form of reporting attorney withdrawal, nor has it mandated any withdrawal requirement for corporate counsel.")

C. CRITICISMS OF ETHICAL REGULATIONS ON ATTORNEYS

Several risks and concerns have arisen since the announcement of the SEC Rules. First, there is criticism that the new laws will cause a break in communications. The argument involves dastardly managers who are unconcerned with the considerably greater liability placed on their shoulders, who will then circumvent attorneys to commit their nefarious deeds. This may even include distributing work between different law firms to minimize the risk of any single attorney putting together pieces at the exclusion of counsel.⁴⁵ This argument has been countered by Susan Koniak who argued that the law is too complex to blindside legal counsel.⁴⁶ Similarly, John Coffee counters that the point of the attorney-client privilege is not simply to protect communications; rather, where disclosure of client confidences is beneficial the law has rolled back the attorney-client privilege.⁴⁷ Plus, anecdotal evidence indicates that there is more conversation between executives and counsel after the implementation of the Act.⁴⁸

Other criticisms have indicated that the new rules indicate a shifting away from the traditional deference to the attorney-client privilege. Of course, the attorney-client privilege does not permit lawyers to help perpetrate crimes, rather they can provide counsel afterwards. The SEC Rules are not a significant departure from this rule. Similarly, the new MRPC simply unifies rules that were present in most states prior to Enron.

D. OTHER APPROACHES

Some academics have proposed other measures to tighten up attorney conduct in these situations. For example, John Coffee proposed, “(1) imposing a due diligence requirement, (2) an independence requirement, and (3) an attorney certification requirement.”⁴⁹ These rules operate to impose minimum standards of conduct on attorneys pursuant to the first two provisions and bring in more reputational capital pursuant to the third provision. Others have proposed increased civil liabilities for attorneys aiding and abetting fraud.⁵⁰

45. Kostant, *supra* note 4, at 550.

46. Koniak, *supra* note 6, at 1253.

47. Coffee, *supra* note 22, at 1308. This leads to the larger question of what sort of communication would be affected by Sarbanes-Oxley. Coffee argues that the average client knows little law and would be dependent upon legal advice for implementing plans, even if illegal. Similarly, Coffee relies on Kaplan and Shavell's comparison of ex ante and ex post communications. They have argued that case for protecting the confidentiality of ex ante communications is far stronger than ex post. However, the watch keeper functions are dependent on ex post communications, which limits the appeal of protecting communications.

48. Cieplak et al, *supra* note 33, at 726.

49. Coffee, *supra* note 22, at 1310.

50. Pippel, *supra* note 9, at 119.

III. THE REST OF THE WORLD

One area that has not been considered adequately is whether the increased regulation of securities lawyers will have an impact on international practice. One-sixth of the New York Stock Exchange listings are foreign companies, and numerous countries take their lead from the United States when implementing their own corporate legislation. Not only does the shareholder-based corporate governance model have considerable relevance internationally, academics are only a few years removed from debating whether all corporate governance was converging on this model.⁵¹ Indeed, Professor Aguilera notes two major ways in which corporate governance has been changing that would support these beliefs.⁵² The main bank model, formerly championed by Japan and Germany, has been in decline and the tenets of patient capital have lost their salience. Similarly, attentive institutional investors have become one major limiting factor for publicly traded companies.

The strength of the shareholder model in the rest of the world has been debated frequently. Commentators have noted that even in the United States the widely dispersed shareholder model is not in the majority,⁵³ and that alternate systems, including main bank systems typical Germany and Japan,⁵⁴ in addition to countries with a high percentage of controlling shareholders have persisted.⁵⁵ Indeed, Aguilera asserts that the differences in international corporate governance are significant enough that the applicability of the standard Berle-Means agency model of corporate governance is somewhat

51. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001). Hansmann and Kraakman asserted that alternative models for corporate governance had failed and that the world was converging on a standard, shareholder-centered ideology. They viewed the dominance of the shareholder-centered ideology among business, government, and legal elites in key areas as a critical pressure. In particular, Hansmann saw the 1) failure of alternative models, 2) competitive pressures of global commerce, and 3) shift of interest group influence in favor of an emerging shareholder class as driving factors in convergence.

52. Aguilera, *supra* note 10, at 42.

53. See generally Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998) (discussing use of 'good law' in common-law and civil law countries).

54. Traditional Japanese corporate governance emphasized stable relations between stakeholders. The traditional Japanese board was dominated by former managers and representatives from important affiliates, banks, and government ministries. Despite an avowed purpose of promoting shareholder wealth, the traditional Japanese board was insider-oriented and led by only a few senior members. Like German firms, the Japanese company was monitored by a statutory auditor, or *kansayaku*. The *kansayaku* was meant to monitor the board's legal compliance and check financial statements. Finally, stock ownership was concentrated, with affiliated firms and banks owning a substantial chunk of a firm's shares. See Christina Ahmadjian & Jaeyong Song, *Corporate Governance in Japan and South Korea: Two Paths of Globalization* 21 (Columbia Business School, Cts. on Japanese Economy and Business, Working Paper No. 221, 2004); Ronald J. Gilson & Curtis J. Milhaupt, *Choice as Regulatory Reform: the Case of Japanese Corporate Governance*, 53 AM. J. COMP. L. 343, 348 (2005).

55. See generally Ronald J. Gilson, *Controlling Family Shareholders in Developing Countries: Anchoring Relation Exchange*, 60 STAN. L. REV. 633 (2007) (discussing how corporate governance mechanisms are used to substitute for poor legal enforcement of shareholder rights and, more generally, "good" and "bad" law).

limited.⁵⁶ Similarly, Ribstein commented that “only certain countries and certain legal systems, notably including the US, are safe for dispersed ownership and efficient capital markets.”⁵⁷

Therefore, it seems unlikely that the United States could enact the Act and corporate attorneys in other countries would simply adjust their business procedures. The United States is not the sole proponent of shareholder-based corporate governance: Britain has also modified their capital market regulations intending to limit the effect of the Act’s regulations.⁵⁸ Similarly, Section 307 makes numerous assumptions that are critical for its efficacy: (1) that attorneys are involved in the corporate actions of a company, (2) that their fiduciary duties run to the board or shareholders, rather than to society or stakeholders, (3) that changing these requirements is constitutionally legitimate, and (4) that regulation of attorneys is the best way to achieve the broader goals of the Act.

It is important to note that attorneys may not have similar fiduciary duties to their clients internationally. For example, much has been made of the general duty to society in Europe.⁵⁹ Similarly, there has been concern that hard regulations are less effective at positively influencing behavior than softer social measures. In an examination of Japanese and Korean executives, both groups agreed that supervisors must show personal integrity to improve company ethics, while codes of ethics were only a secondary consideration.⁶⁰ Even so, codes of ethics do matter as studies have found higher levels of commitment to firms with codes of ethics as well as finding a statistically significant relationship between codes of ethics and the resulting managerial behavior.⁶¹

This article was initially meant to serve as a comparison of ethical regulations on attorneys internationally, but this premise failed to find traction at the research stage. Instead, different conceptions of what role an attorney should play in a corporate transaction, to whom duties traditionally run to and how the government should regulate attorneys, makes even the most basic comparative study impractical. Common-law countries showed some similarities, but the proposed points of comparison, France and Japan, did

56. Aguilera, *supra* note 10, at 41.

57. Ribstein, *supra* note 11, at 314.

58. Aguilera, *supra* note 10, at 42 (“An example of transnational influences is the logic behind the Higgs Review. The US corporate scandals in late 2001 fuelled reactions across the Atlantic by the UK government. According to Jones and Pollitt, the UK ‘wanted to be seen to react quickly to the [US] crisis, but also to head-off potential consequences of US regulation and legislation for companies of British origin which are listed on the NYSE.’”).

59. *Id.* at 43 (stating that the European Union Action Plan ‘Corporate Governance and Company Law,’ designed to harmonize and revise European corporate governance law, sets forth a significantly broader criteria for corporate governance which was “aligned with the broader belief that ‘well managed companies, with strong corporate governance records and sensitive social and environmental performance, outperform their competitors’”).

60. Chong-Yeong Lee & Hideki Yoshihara, *Business Ethics of Korean and Japanese Managers*, 16 J. BUS. ETHICS 7, 19 (1997).

61. Singh et al., *supra* note 13, at 93.

not even glance in the direction of the Act-styled regulation. As such, this part takes a different approach to the question of the significance of increased international regulation over securities attorneys in the United States. First, this section will examine the attorney-client privilege, a touchstone of critics of the Act's amendments internationally. This section will also indicate how different the terrain will be for the Act to germinate overseas. Similarly, the second section will explore some examples relating to the role counsel plays in foreign countries and the strong dissimilarities with the United States example. Section three will examine how the Act has fared in these settings. Finally, the fourth section will examine how antiterrorism laws have proven much successful at establishing the standards that the Act had desired to accomplish.

A. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege was one of the rallying points for critics of the revisions included in the Act's rules. The fundamental role that the attorney-client privilege plays in "the hoary role of lawyers as protectors of the innocent and the last bastion of independence from the all-powerful state" has given the privilege a venerated spot in the legal profession.⁶² Generally, the privilege promotes truthful communications between a client and his attorney. Yet, this logic gleans less brightly on corporate fraud as attorneys' expertise will be necessary to orchestrate a transaction *ex-ante*.⁶³ Section 307 explicitly treads on this privilege to attack a greater evil.

However, whether this debate is of any significance overseas is a quite different question. While the attorney-client privilege has a special prestige in United States jurisprudence, it is an exception to the courts' powers to compel the truth that has not been embraced in every country. Indeed, the notion of an attorney as gatekeeper could already be commonplace in foreign countries or even harder to establish. Similarly, established players such as the ABA might not have nearly as much power in the implementation of domestic politics internationally. A Lex Mundi survey is illustrative of the diversity of foreign interpretations of the attorney-client privilege.⁶⁴ The survey presented "a country-by-country overview of the availability of protection from disclosure of communications between in-house counsel and the officers, directors or employees of the companies that they serve."⁶⁵ While not explicitly focused on an attorney's ability to breach a client's confidential comments, the survey does present some examples of the variety of interpretations of the attorney-client privilege.

62. Henning, *supra* note 5, at 325.

63. Coffee, *supra* note 22, at 1308.

64. Jami de Lou Lex, *In-House Counsel and the Attorney-Client Privilege*, LEX MUNDI (2005).

65. *Id.* at iii.

Generally, jurisdictions in the United States protect internal legal discussions between in-house counsel and the company, while business advice is not protected. In addition, the duties described in this paper also apply.⁶⁶ Similar to other common-law countries, as seen in Canada, the privilege attaches to communications between the solicitor and client or the employees/agents of the client. Basically, there is no difference between in-house and outside counsel.⁶⁷ Similarly, a 'legal professional privilege' applies to communications in Australia.⁶⁸ However, in Japan, the concept of attorney-client privilege does not exist, although certain techniques are available to protect some confidential materials.⁶⁹ In Saudi Arabia, the concept of attorney-client privilege is void if the client violates the Islamic law/Shari'ah.⁷⁰ Like some other jurisdictions, solicitor-class attorneys are distinguished from barrister-class attorneys, with the former not being extended attorney-client privilege. Finally, China does not have a well-established law for attorney-client privilege.⁷¹

These examples demonstrate the varying interpretations of an international attorney's role relative to their client. The difficulty of determining how a foreign attorney can or should deal with Section 307 responsibilities should be apparent. First, certain examples indicate that communications with an attorney would never be protected, while other examples indicate that attorneys have a strict duty to protect confidential information. When the SEC Rules conflict with constitutional rights, there will be considerable consternation on the part of the foreign attorney. Additionally, these examples do not reach the question of whether an attorney's duty runs to the managers or the company as a whole. It is easy to imagine that there is a similar diversity of fiduciary duties and that even in a country where breaching the attorney-client privilege is permissible, referring a matter to the board could be inconsistent with other legal duties.

B. ATTORNEYS IN GENERAL AND IN RUSSIA

The previous section should indicate that some legal concepts undermining Section 307 may not apply in all countries. This section intends to make the conjectures of the previous section more realistic by examining one country in detail. When an article states that in-house counsel plays a larger role in the United States than other countries, noting that half of the corporate ethic codes found in Canada (a reasonable proxy for United States companies) refer to legal counsel, while only 15% of Australian and 8% of Swe-

66. Lou Lex, *supra* note 64, at 73-75.

67. *Id.* at 13.

68. *Id.* at 2.

69. *Id.*

70. *Id.* at 122

71. Lou Lex, *supra* note 64, at 49.

dish refer to counsel, what effect does this preference have in reality?⁷² In particular, a case study of corporate attorneys in Russia will provide several important examples of how the drastically different functions played by legal staff could complicate the application of the Act internationally.

Kathryn Hendley and her fellow authors explored the role of corporate attorneys in Russia, and specifically Western legal institutions have changed the nature of Russian law.⁷³ They found that legal staff was not in short supply but that in-house staff was marginalized within the corporation and relegated to performing routine functions, rather than having involvement in corporate governance or securities issues. Like some of the countries in the previous section, legal practitioners in Russia are divided into two classes, with *advokaty* representing the trial attorneys that were relatively few in number, and *juriskonsul'ty* representing the attorneys working for a company.⁷⁴ The *advokaty* were required to pass a rigorous examination, while their corporate peers were not licensed in any similar fashion.⁷⁵

One fundamental difference was the limited role that attorneys in Russia have played in corporate operations. There was some evidence that in-house attorneys did not perform similar functions to their United States equivalents, as “[Russian managers] were often hard-pressed to see the value their lawyers added.”⁷⁶ Similarly, the survey found evidence that in-house counsel were generally excluded from discussions of financial issues and issues surrounding commercial paper.⁷⁷ They also played a minimal role in regards to various corporate governance questions.⁷⁸ These results contrast with Susan Koniak’s assertion that complicated fraudulent schemes could not occur without attorney assistance.⁷⁹ Yet, by this account, the more complicated a legal transaction, the less likely an attorney is to be involved in Russia. Accordingly, whether a lawyer would ever be able to function as a proper gatekeeper is questionable.⁸⁰

Another issue concerns whether attorneys are even handling legal matters, or whether these matters are being handled by the legal staff, who are more similar to stakeholders than gatekeepers. Legal staff was fairly common at the companies surveyed, with over 80% having employees charged with providing legal advice.⁸¹ However, this exaggerates the significance of attorneys since the study found a “casual attitude” towards attorneys as op-

72. Singh et al., *supra* note 13, at 105.

73. Kathryn Hendley, Peter Murrell, & Randi Ryterman, *Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises*, 26 LAW & SOC. INQUIRY 685 (2001).

74. Hendley et al., *supra* note 73, at 689.

75. *Id.* at 690.

76. *Id.* at 696.

77. *Id.* at 704.

78. *Id.* at 705.

79. Koniak, *supra* note 6, at 1253.

80. Henning, *supra* note 5, at 325.

81. Hendley et al., *supra* note 73, at 690.

posed to laymen with legal experience.⁸² For example, at corporations without formal legal departments, only 67% of the legal staff had law degrees.⁸³ Similarly, *juriskonsul't* had traditionally performed internal mediator functions, resolving disputes between labor and management, although this has changed as tighter allegiance with management has developed.⁸⁴ The notion of representing both a corporation as the client, while maintaining an allegiance to the shareholders, seems like a drastic stretch. Rather, rationalizing away a problem as opposed to taking the company to trial seems the more likely course.

Even outside counsel suffered from these stigmas to some degree. The majority of surveyed enterprises had never employed outside counsel and those that are employed are often used as a supplement to the internal staff.⁸⁵ While these in-counsel have played an important role at certain points, the overall tenor of the article indicates that legal staff played a minor role in most corporate operations in Russia as compared with corporate operations in the United States.

Understanding how Section 307 would apply to a Russian corporation is difficult. On one hand, a superficial understanding of Russia might indicate the strong state could effectively regulate attorney conduct. Yet, these examples may cause one to question how a company, which may adopt all forms of Western corporate governance and list, would avoid the social lapses that hollowed out Enron's corporate governance regime. Even if form is satisfied, is there a culture appropriate to support it?

C. DOES SARBANES-OXLEY MATTER (INTERNATIONALLY)?

There are several reasons to question whether substantive changes in American law will have their intended impact internationally. One major concern centers around the developments designed to improve the quality of American corporate governance that will grow increasingly out of touch with realities in foreign countries. Similarly, there should be concerns that a version of the Act that does not include all of the provisions will not work as expected. For example, Peter Kostant seems unconcerned that Section 307 does not have sharp teeth because it "is part of a new and quite different regulatory scheme," which places liability on the CEO, CFO, and audit committee.⁸⁶ If countries are capable of picking and choosing the components of the Act that make the most sense, will the whole of the rules no longer be greater than the sum of the parts?

82. *Id.* at 691.

83. *Id.* at 692.

84. *Id.* at 700.

85. *Id.* at 697-98.

86. Kostant, *supra* note 4, at 550.

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The international significance of the United States regulatory system should not be underestimated. Listing on American stock exchanges and adhering to American standards is an important asset for companies in countries with a poor rule of law.⁸⁷ Similarly, competition between major capital market hubs such as London and New York has a significant affect on domestic economies. Thus, complications run the risk of ultimately undermining the goal of the Act, which is to restore faith in the capital markets.

One concern that has been alluded to in the previous sections is that the Act conflicts with domestic laws and would not survive in foreign courts. This issue seriously risks modifying the functioning of the Act in foreign countries. In foreign countries, where courts have denied certain aspects of the Act, it may be possible for listed companies to participate on the United States' stock exchanges with considerably lower costs and compliance. These countries may free-ride on the reputation of the stock exchange without complying with the intent of the regulations.

One example includes the difficulties with implementing whistleblower schemes in Europe.⁸⁸ Initially, regulators refused to allow whistleblower schemes in Germany for Wal-Mart and in France for McDonald's and CEAC/Exide Technologies. While the European Union eventually acknowledged the creation of whistleblower systems in the financial arena, previous discussions should indicate the importance of implementing whistleblower provisions. The Russian example indicates that not all of the legal staff at any company are attorneys. Whistleblower provisions might be the most applicable provision to cover an informed legal employee. In addition, in countries with strict attorney-client privilege provisions, whistleblower provisions might be an important alternate route for information to escape the company and provide protection to the whistleblower.

The Act's regulations have also had considerable problems confronting radically different corporate governance systems. In Germany, co-determination board structure relies on a strong stakeholder board to act as a check on the board of directors. The auditor is appointed after nomination and determination of their independence by the stakeholders' board.⁸⁹ This set-up conflicted with Section 301 of the Act, which requires exchanges to bar listings that do not have a wholly independent audit committee.

In response to these conflicts, the SEC mitigated the application of the Act to firms with two-tier boards. Facing problems, twenty-four German corporations complained to the SEC, including DaimlerChrysler and Bayer, while Porsche decided not to list on the NYSE.⁹⁰ The new SEC rule assuaged the concerns of these companies and permitted the Act to move forward. The

87. See Ribstein, *supra* note 11, at 307 (discussing the benefits of 'renting' United States law through the stock market).

88. See John Gibeaut, *Culture Clash*, 92 A.B.A. J. 10 (2006).

89. Ribstein, *supra* note 11, at 308.

90. *Id.* at 324, n.136.

need to cripple the law to comply with foreign requirements, however, should lead to questions about its resilience.⁹¹

D. ANTITERRORISM LAWS EXTENDING REGULATION OVER ATTORNEYS AND OTHER POSSIBILITIES

One aside from this otherwise pessimistic Part deals with the antiterrorism laws that are being enacted internationally. It is interesting to note that the antiterrorism laws are succeeding at achieving the goals Section 307 strives to achieve by making attorneys gatekeepers. One critical observation is that “the abuse of corporate vehicles, in particular for money laundering and tax evasion, has been an issue for more than [sic] two decades. Since the atrocities of September 11, 2001, it has become clear that front and shell companies are also increasingly used for the financing of terrorism.”⁹² The Transcrime Report from 2001 states that “the threshold between [attorneys’] advocacy function and their role as active, though often unwitting, consultants in money laundering operations should be clearly established and consequently regulated.”⁹³

Similarly, the Organization for Economic Cooperation and Development and the Financial Action Task Force (the “FATF”) issued its revised *Forty Recommendations* in 2003. These standards have been recognized by the International Monetary Fund and the World Bank as international standards for combating money laundering and terrorism financing.⁹⁴ The FATF recommendations require customer due diligence and reporting suspicious transactions, similar to a whistleblower provision.⁹⁵

IV. REGULATORY ALTERNATIVES

The previous parts of this article should indicate the difficulty of interpreting the effect of the Act on attorneys working for corporations affected by US regulations, or contemplating listing in the United States. More importantly, it should indicate the limited applicability of laws *like* Section 307, which are firmly tied to a strong and effective regulatory office. Rather, implementation will be dependent on political interests within a given country, external pressure, and the strength of entrenched interests.⁹⁶ For exam-

91. *Id.* at 309 (describing SEC measures designed to accommodate German listed companies).

92. Pippel, *supra* note 9, at 69.

93. Transcrime, Research Centre on Transnational Crime, *Transparency and Money Laundering*, <http://www.transcrime.unin.it/areaa/progetti.dhtml?id=6>, at 133.

94. Pippel, *supra* note 9, at 79.

95. *Id.* at 80-81.

96. See Scott H. Mollett, *Derivative Suits Outside of Their Cultural Context: The Divergent Examples of Italy and Japan*, 42 U.S.F. L. REV. (forthcoming 2009) (analyzing the implementation of derivative lawsuits in foreign legal systems and applying a Teubnerian approach to imported law to argue that political pressure, in addition to minimal entrenched opposition, are critical in successfully importing law and allowing it flourish in a foreign legal system).

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ple, as discussed above, many countries have passed antiterrorism legislation requiring corporate attorneys to reveal confidential information if they suspect wrongdoing. Indeed, there are several areas where regulation other than overt securities regulation has accomplished the goals of Section 307, or even been more effective for domestic circumstances.

This Part will analyze the different ways that corporate attorneys can be compelled to reveal confidences of improper actions by their clients. All of these approaches are utilized in the United States, including securities exchange regulation, self regulation, and increased legal enforcement of laws on the books. The balance of these factors in different countries, though, can and probably will be different than the United States. For example, in a country with high utilization of unaccredited legal staff, strong employee whistleblower protection might be necessary to provide a similar type of protection to shareholders and the corporation. Further, as noted by Aguilera, “[t]he UK tends to rely on soft regulation (following the principle of ‘comply or explain’) to signal what non-executive directors should do, but ultimately leaving it up to individual firms to decide how to innovate corporate governance.”⁹⁷ These different areas will indicate how corporate attorneys will be required to report corporate misdoings, even if US-style securities regulation never applies to them.

A. STATE REGULATION

Increasing state regulation of corporations and proscribing undesirable actions is the most obvious way of affecting corporate attorneys. With the Sarbanes-Oxley Act, the accounting industry was significantly changed, penalties for executives were defined, and new responsibilities for attorneys were placed on the books. However, the implementation of Sarbanes-Oxley should indicate the primary problem with state regulation: legislation is ultimately a product of the political process. Thus, reforms will be subject to the give-and-take between entrenched players and interests.⁹⁸ The failure of an American blue-chip was necessary to overcome political resistance to increased regulation.

The second major problem with increased state regulation is the gap between law on the books and the quality of its enforcement. Even if good law is placed on the books, success will be dependent on how much significance it is given in daily life.⁹⁹ Thus, even if laws are placed on the books that

98. Aguilera, *supra* note 10, at 43.

98. Daniel R. Fischel and Alan Sykes, *Government Liability for Breach of Contract*, 1 AMERICAN L. & ECON. REV. 313, n.9 (1999).. The impediments to implementing change politically have been discussed at length elsewhere. “[M]uch governmental action is best understood as the outcome of successful rent seeking which benefits well organized interest groups at the expense of the public at large, and contracting with the government can be just another form of rent seeking behavior.”

99. See generally Gilson, *supra* note 54.

require corporate attorney disclosure, if no one is held responsible, the laws are moot.

Yet, provided sufficient political effort can be amassed, or path dependency obstructions overcome, state regulation has the potential to shift domestic practice. Pressure can be applied by foreign governments and companies, similarly countries eager to attract foreign investment may be tempted to provide assurances for foreign executives. Legislation, like the Sarbanes-Oxley Act, indicates the wide ranging changes that can be implemented in a determined approach to change the general structure of multiple industries.

B. SECURITIES EXCHANGE REGULATION

A second area to regulate the behavior of listed companies, and ultimately the attorneys who service them, is through listing rules for securities exchanges. Security exchanges compete, increasingly at an international level to attract listings. This competition has lead Aguilera to hypothesize that “the United Kingdom might turn into a global corporate governance regulator since any regulation, code or listing standard endorsed by the London Stock Exchange becomes by default a ‘global gold stand for corporate governance.’”¹⁰⁰ As mentioned by Ribstein, securities exchanges provide a signaling mechanism to investors that a listed company has complied with certain standards - in short, allowing the company to rent the reputation of the exchange.¹⁰¹

In contrast with wholesale regulatory change, regulatory exchange may be more insulated from national political forces. In comparing the forces for increased regulation, the exchanges themselves, eager to protect their key asset, their reputation, will be organized and sophisticated, in contrast to national legislators. Similarly, the opposition, mainly corporations, may not be able to influence decisions as easily as with the democratic process. For example, after the enactment of the Sarbanes-Oxley Act, the American stock exchanges added additional requirements for listed corporations to improve transparency.¹⁰²

100. Aguilera, *supra* note 10, at 40.

101. Ribstein, *supra* note 11, at 307.

102. A simple example, perhaps, but it is stock exchange listing standards post-Sarbanes-Oxley—and not the Act itself—that require all critical corporate governance documents be made available on the company’s website. The NYSE requires that a firm provide access to its corporate governance guidelines, codes of business conduct and ethics, and the charters of its most important committees. The company must disclose availability of this information, with print copies available for free, in their annual proxy statement, or, if they do not file an annual proxy statement, the Form 10-K. The NASDAQ also requires listed companies to publicly disclose charters on their websites. The documents must be posted to the website and stated in the annual report to the SEC, including the web address and which documents are available on the website. For other lists of new, stock exchange requirements, see Veasey, *supra* note 18, at 2; Curtis C. Verschoor, *New Governance Initiatives Have Ethics Component*, STRATEGIC FIN., Nov. 2002, at 22.

C. SELF REGULATION THROUGH PRIVATE BARS

One of the primary methods for regulating attorney action in the United States is through the private, state bar associations. As discussed earlier, state bars have extended reporting requirements to all practicing attorneys in the model rules, and states have implemented their own disclosure requirements for fraud and other illegal information. Unfortunately, self-regulation has had limited effectiveness, as indicated by the ABA's reluctance to implement stricter guidelines.¹⁰³ Still, it is another area where increased regulation of attorneys or voluntary rollbacks of attorney-client confidentiality could be effected, depending on the strength and role of domestic bar associations.

D. LEGAL ENFORCEMENT

The next area where change can be implemented involves legal culture, rather than additions to the books. John Farrar and Christoph Pippel recently examined "the increasing tendency, particularly of English courts, to categorise [sic] illicit uses of the corporation as shams and see whether one can find a better foundation for intervention than this which is consistent with principle."¹⁰⁴ This is similar to the shift mentioned earlier that board meetings have changed from golf outings to all-day discussions of governance. In many places, the issue is not whether there are rules on the books, but whether the existing rules are properly utilized. Shifts in enforcement, whether due to political pressure or a moment of professional introspection, may be sufficient to hold parties accountable. Like the previous sections, changing the rigorousness of enforcement will be subject to different cultural pressures and may provide more fertile ground for change than the previous areas.

E. SUBSTITUTES

One other area that could be used to reveal wrongdoing in foreign countries would be substitutes that attempt to provide similar protections to similarly knowledgeable people. For example, whistleblower protections might be appropriate for a Russian non-licensed corporate legal staff and non-attorneys forced to make serious decisions without legal aid. Here, whistleblower protections might provide an outlet similar to the disclosure required by Section 307. On the other hand, some evidence indicates that trying to

103. Coffee, *supra* note 22, at 1303 ("Such guild-like regulation has little incentive to be aggressive, to fund enforcement, or place the interests of the public above those of its members (as the SEC has complained).").

104. John H. Farrar & Christoph Pippel, *Piercing the Corporate Veil in an Era of Globalization and International Terrorism and the Emergence of the Lawyer as Gatekeeper and Whistleblower*, 16 BOND L. REV. 66, 66 (2004).

create culture that protects market integrity, rather than the reputation of one's company, may be hard to foster.¹⁰⁵

V. CONCLUSION

International examples indicate the limitations that severely hamper the Act and Section 307 internationally. Fundamental components of American law are inapplicable, while others are prone to constitutional challenges. Imagining Section 307 as the harbinger of international change and the corporate lawyer as gatekeeper seems foolhardy at best. Yet, antiterrorism laws show another angle at which the independence of transactional attorneys is now being transformed into gatekeeper duties. Indeed, it indicates one of the many paths that can be used to achieve the similar goal of making attorneys accountable to their ethical obligations rather than simply turning a blind eye. This change may be achieved in any number of ways whether through (1) the political process, (2) stock exchange regulation, (3) self-regulation by the bar, (4) judicial legislation by the courts, or (5) substitutes, such as whistleblower provisions. Regardless of the route and details, there may be reason to believe that gatekeeper functions are becoming more widespread, even if Section 307 will not be performing the heavy lifting.

105. See Gibeau, *supra* note 88, at 10 (“Americans like to elevate whistle-blowers to near folk-hero status, from Daniel Ellsberg, who leaked the Pentagon Papers, to Sherron Watkins, who exposed the Enron Corp. financial scandal that in 2002 moved Congress to pass the fraud-busting Sarbanes-Oxley Act. ... Say *whistle-blower* in Germany, however, and the term most likely conjures up memories of the Gestapo, Adolf Hitler’s secret police. ... So it’s probably no wonder that Germany and France have taken the lead in resisting provisions of the Sarbanes-Oxley that shield from retaliation corporate whistle-blowers who report fraud and other financial irregularities.”); Aguilera, *supra* note 12, at 43 (“[I]t is hard to imagine that firms in Japan might introduce a whistle-blowing hotline”).