

## SOX Under Fire

By Amy E. Wong

The fate of 2002's Sarbanes-Oxley Act is uncertain. In addition to the recent corporate scandals that have undermined SOX's effectiveness, the Act has been under legal fire. The nonprofit think tank Free Enterprise filed a lawsuit on Feb. 7 against the Public Company Accounting Oversight Board (PCAOB).

They claim that SOX violates the Constitution's mandated separation of powers. Their argument is that the Accounting Board, created under SOX, violates the separation of powers doctrine in two major ways: Congress cannot control its budget, and the President cannot appoint or remove any of its members.

PCAOB's funding comes from the fees they collect from publicly traded companies. Its members are appointed by the Securities and Exchange Commission, an independent federal agency. The pro-business litigating team—which includes Kenneth Starr, Viet Dinh, and Michael Carvin—assert that the Accounting Board wields unchecked power.

After several high-profile corporate debacles, Congress created the PCAOB to replace the accounting industry's own regulators, giving it subpoena and disciplinary powers.

Mallory Factor, chair of the Free Enterprise Fund, said in an Associated Press article, that SOX is "Stalinist." He asserts that the Accounting Board has "massive unchecked power."

Carvin also contends that SOX is written in such a way that it is difficult for the SEC to remove Accounting Board members and control any other of their actions.

If PCAOB is found to violate the Constitution, then the Sarbanes-Oxley Act will be nullified.

In the wake of 2002's corporate scandals, SOX was imposed upon corporations in an effort to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws."

SOX has forced lawyers—both in-house and outside counsel—to report any material violations of security laws to the general counsel. If lawyers feel that the GC is not actively responding to the violations, they are obligated to report their concerns to the federal authorities. If not, lawyers can be barred from practicing law before the SEC.

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With their increased responsibilities, in-house lawyers have been trying hard to strike a balance between working as a business facilitator and a law enforcer—often at the expense of being distrusted from co-workers and ostracized from key issues.

The Sarbanes-Oxley Act requires in-house attorneys to take on watchdog responsibilities. However, recent corporate scandals illustrate the Act's ineffectiveness.

On Jan. 20, a Chicago Tribune article shows that in-house attorneys are still entangled in corporate scandals. Last week in Chicago, Patrick Fitzgerald announced an indictment against Siemens Medical Solutions U.S.A. Inc. and two of its employees. They were indicted in a fraud scheme to win a \$49 million Cook County Contract.

Ellen Roth, the in-house attorney, has been charged with fraud. She allegedly drafted false documents, committed wire fraud and mail fraud, and made false statements to the FBI.

According to Fitzgerald's indictment, "SMS relied on Roth to ensure legal compliance with the applicable ordinances."

On Jan. 26, Daniel Adkins, general counsel for Xpress Pharmacy Direct, was indicted for allegedly helping an Internet pharmacy illegally obtain and hide narcotics.

According to the Associated Press, Federal authorities say that Adkins deceived legitimate pharmacies into supplying narcotics for over 72,000 illegal prescriptions, making about \$20 million in sales by selling products over the Internet and telephone. The indictment also alleges that Adkins helped the company's founder, Christopher Smith, hide narcotics when authorities started their investigation.

Adkins was charged with conspiracy, unlawful distribution of controlled substances, wire fraud, and misbranding drugs. He could face up to 20 years in prison and a \$250,000 fine if convicted of wire fraud.

The Sarbanes-Oxley Act pressures in-house attorneys to prevent corporate malfeasance. However, scandals are still occurring. What measures, beyond those dictated by SOX, should be taken to prevent future fiascos? What role should in-house attorneys play in the corporations they work for?

Boeing's General Counsel Doug Bains addresses these pertinent questions. In a speech in Orlando, Florida, Bains pointedly asked Boeing executives, "Was there a culture of win at

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any cost?" Bain enumerated all severe sanctions against Boeing, told them about possible indictments by U.S. attorneys, and then assessed the damages to exceed \$5 billion.

Boeing representative, John Dern, told the Seattle Times that Bain's purpose was not to predict legal outcomes but to scare his audience into caring about ethics. Dern said, "There was a feeling that it was vitally important for people to understand the worst-case potential for what could happen to the company."

Dern continued, "We are working hard to promote a culture where people feel like they can raise issues formally and they trust the system."

Boeing needs, he said, "an ethics system that is working every day and uncovering issues."

Dern also addressed a survey that revealed how Boeing employees, including lawyers, are intimidated by management, saying, "Those are troubling numbers. And numbers that we are working to lower."

In his speech, Bain reminded more than 260 other Boeing executives that 15 company vice presidents have already resigned or been incarcerated for violations that range from expense-account fraud to sexual harassment. Bain's point: "We just cannot stand another major scandal."

Bain, a senior vice president himself, added, "Our jobs as the leaders of this enterprise is to establish a culture that ensures there is no next time."

There are major problems in many corporate infrastructures. In an attempt to fix these problems, the Sarbanes-Oxley Act imposed a set of restrictive mandates that have been proven quite ineffective. Bains, a legal and business leader of the corporate world, argues that the problems stem from "a culture of win at any cost" and management intimidation. The remedy to corporate malfeasance, Bains contends, rest in a revitalized corporate ethics system.