

Chapter 7

The Sarbanes-Oxley Act and Foreign Private Issuers

Kevin W. Kelley¹

Partner
Gibson, Dunn & Crutcher LLP

7.1 The circumstances leading to the enactment of the Sarbanes-Oxley Act

Looking back now to the circumstances that led to the enactment of the Sarbanes-Oxley Act of 2002 (“Sarbanes”), we must recall the breathtaking extent of the corporate abuses and the failures of some of the largest US public companies that spawned Sarbanes. The year before its enactment witnessed the collapses of, among others, Enron, Global Crossing, Adelphi, Tyco, Qwest, and WorldCom. At the core of each of these spectacular failures was significant accounting and financial reporting fraud and, in some cases, abuse of corporate authority by senior executives. During the same period, one of the then Big Five accounting firms, Arthur Andersen, collapsed, in large part as a result of its role at the centre of a number of these accounting failures.

Given the extent of the fraud, committed at the highest level of US corporate governance, and the harm to US shareholders – many of whom lost their life savings in the companies they worked their entire careers for – there should be little wonder the US Executive, Congress, the major stock exchanges and the SEC promptly put into effect a series of reforms that has become known as “Sarbanes”. It was essential to restore public confidence in the US public securities markets by improving the integrity of its financial reporting system. Prosecuting the perpetrators after the fact was simply not good

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enough to avoid reoccurrences of the type of abuses then filling the headlines. When signing Sarbanes into law, President Bush referred to it as “the most far-reaching reforms of American business practices since the time of FDR.”

While enacted to address what were essentially domestic US abuses, Sarbanes applies to all “issuers”, including foreign private issuers. In addition, Sarbanes’ provisions relating to auditor oversight and independence apply to all accounting firms, including non-US accounting firms that audit foreign private issuers with securities registered in the US. The application of Sarbanes to foreign private issuers produced strong reactions from foreign executives and national regulators. Given often conflicting legal and regulatory regimes, the extra-territorial application of Sarbanes has produced some of the most challenging areas of interpretation and implementation for the SEC and the companies subject to its provisions.

In the years since Sarbanes was enacted we have seen a marked decline in public offerings and new listings by foreign private issuers in the US. Many point to Sarbanes and complain of “excesses” in the legislative and regulatory measures. Readers are reminded of the seriousness of the abuses that preceded Sarbanes, not in an effort to justify all of its measures, nor to belittle the serious issues raised by applying Sarbanes to foreign private issuers who find themselves subject to a broad range of new regulations in the US. Instead, the environment surrounding its enactment is recalled to help non-US issuers and their advisors in particular to appreciate the serious problems addressed.

This chapter summarises the most significant of Sarbanes’ provisions and addresses in particular the application of Sarbanes to foreign private issuers. It is not exhaustive in its coverage, as there are multi-volume treatises that address the full range of Sarbanes. This chapter also focuses on recent developments, notably on the recent extensions for foreign private issuers of the deadlines for management and auditor reports under Section 404 of Sarbanes. The chapter concludes by suggesting that it may be time for the SEC, and ultimately Congress, to reconsider the balance between protecting the integrity of US financial reporting and encouraging access to US public securities markets by foreign private issuers.

7.2 Sarbanes – applicable to all foreign private issuers

Sarbanes applies to issuers, including foreign private issuers:

- (a) whose securities are listed on a major US securities exchange;
- (b) with securities registered because their equity securities are held by more than 500 record holders worldwide and 300 or more record holders in the US;
- (c) required to file because they conducted a public offering in the US and continue to have 300 or more record holders in the US; and
- (d) who have filed registration statements for public offerings in the US.

Sarbanes does not apply to “voluntary” filers, Rule 12g3-2(b) exempt companies and Schedule B issuers.

For the most part Sarbanes does not exempt, nor does it extend to the SEC the authority to exempt, foreign private issuers from its reach. There has been little political will at any level to appear “soft” on the application of these important measures designed to avoid the reoccurrence of past abuses. In 2003, the SEC commented that, “the importance of maintaining effective oversight over the financial reporting process is relevant for listed securities of any issuer, regardless of its domicile.”²

7.3 A broad range of new requirements – limited relief for foreign private issuers

Following is a summary of the most significant provisions of Sarbanes and the rules and regulations promulgated thereunder. These provisions affect important areas of corporate governance, auditor oversight, executive officer certifications and public disclosure. This summary focuses on areas where the application of these

² Final Rule: Standards Relating to Listed Company Audit Committees, Rel. Nos 33-8220; 34-47654 and IC-26001 (9 April 2003).

rules requires special considerations for foreign private issuers, or where their application has been modified through limited exemptions or transition rules for foreign private issuers. Over the years, the SEC has worked hard to adapt accommodations in the most significant cases of conflict with foreign corporate law, listing rules and accounting practices.

7.3.1 New corporate governance rules

7.3.1.1 Audit committee

Although the New York Stock Exchange Listing Standards exempt foreign companies from many of the exchange's corporate governance requirements, these companies are now required to comply with the SEC's audit committee rules.

Audit committees must:

- (a) consist entirely of independent members;
- (b) hire and oversee the issuer's independent auditors;
- (c) establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters;
- (d) have authority to engage independent counsel and other advisors; and
- (e) have access to appropriate funds.

The "independence" requirements imposed on audit committee members are detailed and restrictive. In short, independence prohibits an individual from receiving any form of compensation from the issuer (other than in his or her capacity as a board member) and the individual may not be an "affiliated person" with the issuer. These rules are often difficult to satisfy when applied to non-US issuers which, for example, may be owned by a controlling group or family or which may be controlled by or affiliated with a governmental shareholder.

Responding to conflicts between the US audit committee rules and local legal requirements and corporate governance standards outside the United States, the rules provide certain exemptions for foreign private issuers. The two most important areas of relief involve:

- (a) an expanded definition of permitted members of an audit committee; and
- (b) alternative structures established under foreign law that provide an exemption from the audit committee's oversight and independence requirements.

Furthermore, the SEC's audit committee rules state that they are not intended to conflict with local legal rules that require, for example, that such matters be discharged by an issuer's shareholders or board, or a governmental entity or tribunal. Where these conflicts are present, the audit committee must satisfy the relevant Sarbanes requirements only to the fullest extent permitted by local law (e.g., by making recommendations or exercising advisory powers).

As applied to foreign private issuers, one of the most important areas of SEC relief from the audit committee rules has been to permit a board of auditors (or similar body) created under local law to act in lieu of an audit committee. Foreign private issuers relying on a board of auditors are exempt from the audit committee independence and oversight requirements, provided the board of auditors satisfies the following criteria:

- (a) has been established as required by home-country legal or listing provisions;
- (b) is required to be separate from the board of directors;
- (c) is not elected by management;
- (d) does not include an executive officer;
- (e) is subject to independence standards established by home-country legal or listing provisions; and
- (f) is responsible, in accordance with home-country legal or listing requirements or the issuer's governing documents, to the extent permitted by local law, for the appointment, retention, and oversight of the auditors.

7.3.1.2 Prohibition on loans to executives

Sarbanes makes it illegal for any issuer, directly or indirectly, including through any subsidiary, "to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or

equivalent thereof) of that issuer.” Sarbanes grandfathered extensions of credit maintained by the issuer on the date of its enactment, as long as there is no material modification to any term of such extension of credit after the date of Sarbanes. Beyond that, there is no materiality or other exception to this prohibition.

7.3.1.3 Code of ethics for senior financial officers

The SEC has adopted disclosure rules requiring each issuer (including foreign private issuers) to disclose in its annual report whether or not, and if not, the reason why not, the issuer has adopted a written code of ethics applicable to the principal executive officer, principal financial officer and controller or principal accounting officer, or persons performing similar functions. The SEC has suggested that foreign private issuers disclose waivers on Form 6-K, but does not require it, and at a minimum such disclosure is required in annual reports on Form 20-F.

7.3.1.4 Forfeiture of certain bonuses

Sarbanes provides that, “if an issuer is required to prepare an accounting restatement due to the material non-compliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws,” the CEO and CFO of the issuer must reimburse the issuer for any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the SEC (whichever is first) of the financial document embodying such financial reporting requirement, and any profits realized from the sale of securities of the issuer by such officer during that 12-month period.

7.3.1.5 Improper influence on conduct of auditors

Officers and directors, and persons acting under their direction, are prohibited from coercing, manipulating, misleading or fraudulently influencing the auditor of the issuer’s financial statements “if that person knew or should have known that such action could, if successful, result in rendering” the issuer’s financial statements materially misleading. These rules do not provide any exemptions for foreign private issuers.

7.3.2 Additional Disclosure Requirements

7.3.2.1 Regulation of use of Non-GAAP financial measures

Regulation G governs the use of “non-GAAP financial measures”. If any company with securities registered with the SEC publicly discloses non-GAAP financial measures or includes them in an SEC filing, the company must provide a quantitative reconciliation of such non-GAAP financial measure to the most directly comparable GAAP financial information. Regulation G applies to foreign private issuers.

Non-US issuers are exempt from Regulation G, however, if:

- (a) the securities of the issuer are listed or quoted on a securities exchange or inter-dealer quotation system outside the US;
- (b) the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with US GAAP; and
- (c) the disclosure is made by or on behalf of the issuer outside the US, or is included in a written communication that is released by or on behalf of the issuer outside the US.

This exemption is available even if the written communication is released in the US at the same time, US journalists have access to the information, the information appears on company or other websites (so long as those websites are not targeted to US persons), and following its release outside the US the information is included in a report on Form 6-K submitted to the SEC.

Non-GAAP financial information that would otherwise be prohibited by Regulation G is permitted in a Form 20-F filing if the information is required or expressly permitted by the home country standard-setter that is responsible for establishing the GAAP used in those financial statements and is included in the issuer’s annual report or financial statements used in its home country jurisdiction or for distribution to its security holders.

7.3.2.2 Off-balance sheet arrangements and contractual obligations

The SEC has adopted rules requiring enhanced disclosure regarding off-balance sheet arrangements and contractual obligations, which

apply to reports on Form 20-F filed by foreign private issuers that are required to include a Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"). They also apply to registration statements on Forms F-1, F-3 and F-4. These new rules do not apply to Form 6-K reports. The rules require an issuer to disclose off-balance sheet arrangements in a separately captioned subsection within the MD&A. An issuer can disclose contractual obligations, aggregated by category, in an MD&A location that the issuer deems appropriate.

The SEC has clarified that these disclosures should focus on the primary GAAP financial statements presented, but the issuer should also consider addressing in the reconciliation discussion the relevant US GAAP treatment of relevant off-balance sheet arrangements.

7.3.2.3 Material correcting adjustments

Sarbanes requires that each financial report that contains financial statements, and that is required to be prepared in accordance with or reconciled to US GAAP, must reflect "all material correcting adjustments" that have been identified by a registered public accounting firm in accordance with US GAAP and SEC rules.

7.3.2.4 Reports on internal controls and procedures (Section 404)

Section 404 of Sarbanes requires foreign private issuers, like US issuers, to include a management report over internal controls, and an auditor's attestation report, in their annual reports. This report must include four specific elements:

- (a) **Management's responsibility.** The report must include a statement explaining that management is responsible for establishing and maintaining adequate internal control over financial reporting.
- (b) **Identify the framework.** The report must include a statement identifying the framework used by management to evaluate the effectiveness of the company's internal control over financial reporting.
- (c) **Assess the effectiveness.** Management must provide a statement as to whether or not the company's internal control over financial reporting is effective. Management also must disclose any material weaknesses in internal controls. If management

identifies one or more material weaknesses, management is not permitted to conclude that the company's internal control over financial reporting is effective. Management may not qualify an assessment that its controls are effective subject to certain qualifications or exceptions.

- (d) **Attestation report.** A statement that the registered public accounting firm that audited the issuer's financial statements included in the annual report has issued an attestation report on management's assessment of the internal control over financial reporting. The attestation must be filed as part of the annual report.

The timing of the first management and auditor reports for foreign private issuers under Section 404 has been extended a number of times by the SEC, most recently in August of 2006. *See* 7.4 below.

7.3.2.5 Audit committee financial expert

Foreign private issuers are required to disclose in their annual reports on Form 20-F whether the board has determined that at least one member of its audit committee is an "audit committee financial expert". If the board is able to make this determination, it must identify the member and confirm that member's "independence". For non-US issuers with two-tiered boards, the non-management board must make this determination, and, for those with a board of auditors, the financial expert must be identified by the board of auditors. If a board is not able to identify a financial expert, it must disclose why it is unable to do so.

A number of foreign private issuers have been unable to identify an audit committee financial expert. In some cases this results from a lack of familiarity among the audit committee members with US GAAP, in circumstances where the company's primary financial statements are prepared in accordance with US GAAP. Another circumstance is where none of the members of the audit committee are willing to agree to be designated a "financial expert" for fear of US liability, despite the safe harbour that was promulgated to avoid such financial experts from being exposed to enhanced liability solely by reason of such designation. Concern for US securities law liabilities among foreign private issuers, and their representatives, has been heightened in the post-Sarbanes period.

7.3.3 CEO and CFO certifications

Sarbanes includes two certification requirements each of which must be signed by an issuer's principal executive officer and principal financial officer. The two provisions are not identical, and two separate certificates are therefore required to be filed as exhibits to the Form 20-F.

7.3.3.1 Section 906 certification

Section 906 of Sarbanes, together with rules promulgated by the SEC, requires CEOs and CFOs to furnish written certifications to the SEC as exhibits to each periodic report containing financial statements filed with the SEC pursuant to Sections 13(a) or 15(d) of the Exchange Act. The certifications must state that such report fully complies with such sections and that the information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the company. CEOs and CFOs must provide the certifications with each annual report on Form 20-F (and amendments thereto that include financial statements). Reports on Form 6-K, including reports containing quarterly or interim financial information, do not require Section 906 certifications. Submission of a false certification is subject to criminal penalties.

7.3.3.2 Section 302 certification

Section 302 of Sarbanes, together with rules promulgated by the SEC, requires CEOs and CFOs to certify under sanction of civil and criminal penalties regarding, among other things, material disclosures, fair presentation of financial statements and other financial information and the adequacy of internal financial controls. Section 302 certificates must be included as exhibits to each annual report on Form 20-F (and in any amendments thereto that include financial statements). These certifications do not need to be included in current reports submitted on Form 6-K, even if they include financial statements.

The Section 302 certification contains representations regarding two different types of controls – “disclosure controls and procedures” and “internal control over financial reporting”. Disclosure controls and procedures are designed to ensure that information required to be disclosed by the issuer in the reports filed or submitted by it under the Exchange Act is recorded, processed, summarised and reported

within the time periods specified in the SEC's rules and forms. Internal control over financial reporting is a process designed by, or under the supervision of, the registrant's principal executive and principal financial officers, or persons performing similar functions, to provide reasonable assurance regarding the reliability of financial reporting in the preparation of financial statements for external purposes.

7.3.4 *Enhancement of auditor independence rules*

7.3.4.1 *Independence definition and prohibited non-auditing services*

Pursuant to Sarbanes, the SEC amended its rules relating to auditor independence which now apply to audits of foreign private issuers. Sarbanes' provisions relating to auditor oversight and independence apply to all accounting firms, including non-US accounting firms, that audit public companies in the US.

The rules limit and clarify the scope of non-audit services that independent accountants can provide to their audit clients, generally prohibiting nine categories of services from being provided by the independent auditor:

- (a) bookkeeping or other services related to accounting records or financial statements (including statutory accounts);
- (b) financial information systems design and implementation;
- (c) appraisal or valuation services, fairness opinions or contribution-in-kind reports;
- (d) actuarial services;
- (e) internal audit outsourcing services;
- (f) management functions or human resources;
- (g) broker or dealer, investment adviser or investment banking services;
- (h) legal services; and
- (i) expert services unrelated to the audit.

The SEC's independence rules also include restrictions on business relationships with the auditor and employment relationships with current and former personnel of the auditor. In addition, the rules provide that the lead and concurring partners from the audit firm must rotate after five years and, upon rotation, are subject to a five-year

“time-out” period. Other “audit partners” must rotate after no more than seven years on an engagement and are subject to a two-year “time-out” period. Companies must disclose in their annual reports information related to fees billed during the prior two fiscal years by the principal auditor.

7.3.4.2 Pre-approval of auditor services

All auditing and non-auditing services provided by a company’s auditors must be pre-approved by the audit committee. If a foreign private issuer relies upon a board of auditors, then the board of auditors must assume this function.

Auditor services must either be pre-approved on a case-by-case basis, or the audit committee may establish procedures relating to pre-approvals. Pre-approval procedures must be detailed as to the particular services to be covered. The audit committee must be informed of each service, and the pre-approval procedures must not amount to the delegation of the audit committee’s responsibilities to management. If the audit committee establishes a pre-approval policy, the terms of this policy must be disclosed in the company’s annual report.

As is the case with the auditor independence rules generally, the pre-approval rules do not provide for materiality thresholds, nor do they provide an opportunity to cure a failure to pre-approve. As a result, particular care must be taken to assure issuers, especially foreign private issuers and their auditors, are aware of these requirements. Failure to comply can disqualify an auditor as independent, and therefore can lead to significant consequences, potentially necessitating a re-audit of the issuer’s financial statements.

7.3.5 Rules of professional responsibility for attorneys

The SEC has adopted rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before the SEC in the representation of public companies in the United States. An attorney is required to report evidence of material violations of US securities laws or breach of fiduciary duty or similar violations by the issuer, or agents of the issuer, to the chief legal counsel or the chief executive officer. If the counsel or officer does not appropriately

respond, then the attorney must report the violations “up-the-ladder” within the issuer to the audit committee, the board of directors or another committee of the board of directors where that committee is comprised solely of directors not employed directly or indirectly by the issuer.

The rules regarding professional conduct govern attorneys for foreign private issuers. However, the rules do not apply to a “non-appearing foreign attorney”.³ Foreign attorneys practicing outside of the US will not be required to comply with the rule to the extent that such compliance is prohibited by applicable foreign law. In addition, the SEC has limited the definitions to cover only violations of US law.

7.3.6 Whistle blowers

Sarbanes provides protection to individuals who provide information or assist in investigations of alleged securities violations or securities fraud. Public companies and their officers, employees, contractors, subcontractors or agents are prohibited from taking retaliatory acts against employees who provide such information or assist in such an investigation. It is also a crime to retaliate intentionally against any person for providing truthful information to a law enforcement officer relating to the possible commission of a federal offence.

7.4 Section 404 reports on internal controls – SEC extends dates for certain foreign private issuers

For foreign private issuers, as well as US domestic issuers, the Section 404 requirements relating to internal control over financial reporting have been among the most burdensome and have

³ A “non-appearing foreign attorney” must: (a) be admitted to practice in a jurisdiction outside the US; (b) not hold himself or herself out as practicing, and not give legal advice regarding, US federal or state securities laws (except, as provided below, in consultation with a US lawyer); and (c) either: (i) conduct activities that would constitute appearing and practicing before the SEC only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the US; or (ii) appear and practice before the SEC only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other US jurisdiction.

attracted the most widespread criticism. US company experience has demonstrated that the costs and diversion of management time to implement and manage a system of controls complying with the Section 404 requirements has been significant. Certain US companies have adapted the required procedures and now express satisfaction with the process. Others, especially smaller companies, continue to object to the costs, the distraction and the rigidity of the required procedures. Section 404 reporting is credited with increasing, perhaps significantly, the number of restatements of financial statements. It is not clear how many foreign private issuers are yet prepared to comply with all of the Section 404 reporting requirements as the deadlines for foreign private issuers are phased in the coming years.

While large US issuers are now required to comply with Section 404 reporting requirements, on a number of occasions the SEC has extended the deadline for these reports for foreign private issuers. As recently as 9 August 2006, the SEC further extended the dates for many foreign private issuers. The largest of such issuers will be required to produce these reports for the first time in the next 12 months. The applicability of the extensions to individual issuers depends on the status of each as a “non-accelerated filer”, an “accelerated filer” (other than “large accelerated filers”), and a “large accelerated filer”.

7.4.1 *Non-accelerated filers*

A “non-accelerated” filer is an issuer that:

- (a) has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of less than US\$75 million as of the last business day of the issuer’s most recently completed second fiscal quarter;
- (b) has not been subject to the SEC reporting requirements for a period of at least 12 calendar months;
- (c) has not filed at least one annual report with the SEC; or
- (d) is eligible to file its periodic reports as a “small business” issuer.

For “non-accelerated” filers (including both domestic issuers and foreign private issuers), the SEC issued a proposed rule to extend the

Section 404 reporting compliance deadlines. If adopted as proposed, the deadlines would be extended as follows:

- (a) management's report would have to be included in the first annual report filed by such an issuer for fiscal years ending on or after 15 December 2007;⁴ and
- (b) the auditor's attestation report on the company's internal controls would have to be included in the first annual report filed by such an issuer for fiscal years ending on or after 15 December 2008.

7.4.2 Accelerated filers (other than "large accelerated" filers)

An "accelerated" filer is an issuer that:

- (a) has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of more than US\$75 million, but less than \$700 million, as of the last business day of the issuer's most recently completed second fiscal quarter;
- (b) has been subject to the SEC reporting requirements for a period of at least 12 calendar months;
- (c) has filed at least one annual report with the SEC; and
- (d) is not eligible to file its periodic reports as a "small business" issuer.

For "accelerated" filers (other than "large accelerated" filers) that are foreign private issuers, the SEC has extended the date for the auditor's attestation report on the company's internal controls which will not now be required until such an issuer files its first Form 20-F for a fiscal year ending on or after 15 July 2007. Importantly, the SEC's final rule on this matter did not extend the compliance deadline for the inclusion of management's report in annual reports. Thus, for "accelerated" filers, management's report still must be included in such an issuer's first Form 20-F filed in respect of fiscal years ending on or after 15 July 2006.

⁴ Because the prior reporting deadline for non-accelerated filers required inclusion of management's report in the first annual report filed on or after 15 July 2007, for calendar-year companies there would in effect be no extension for this component of the Section 404 reporting requirements.

7.4.3 Large accelerated filers

A “large accelerated” filer is an issuer that:

- (a) has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of more than US\$700 million, as of the last business day of the issuer’s most recently completed second fiscal quarter;
- (b) has been subject to the SEC reporting requirements for a period of at least 12 calendar months;
- (c) has filed at least one annual report with the SEC; and
- (d) is not eligible to file its periodic reports as a “small business” issuer.

For “large accelerated” filers that are foreign private issuers, the Section 404 compliance deadlines were not extended by the SEC in August 2006. As a result, both the management’s report and the auditor’s attestation report on the company’s internal controls must be included in such an issuer’s first Form 20-F filed for fiscal years ending on or after 15 July 2006. For many foreign private issuers that are large accelerated filers, these deadlines are very near indeed.

7.5 The future of Sarbanes for the US public markets

Reversing the SEC’s welcoming approach to foreign private issuers entering the US markets in the years preceding its enactment, Sarbanes has most certainly “cooled” foreign private issuer interest in joining the ranks of US public companies subject to its provisions. Positive developments abroad⁵ combined with the increased burdens under Sarbanes have reduced the rate at which foreign private issuers have been willing to access the US public markets for the first time. Although a number of factors are likely relevant, we have seen IPO activity in Europe on the increase in recent years while it has

⁵ For example, the movement toward a more coordinated European capital market and listing regime, the rise of the London Alternative Investment Market (AIM) and the emergence of certain local markets (e.g. the Novo Mercado in Brazil) have facilitated the listings of companies on those markets.

decreased in the US over the same period. Indeed, the burdens of Sarbanes have spawned a high level of interest in re-evaluating the procedures for deregistration by existing US public companies.

The US capital markets remain the largest and most liquid in the world and there have been positive developments in the US markets as well. Sarbanes has played a significant role in achieving its principal purpose of repairing the integrity of the financial reporting system in the US. The Securities Reform Act of 2005 also has provided numerous benefits to issuers, including foreign private issuers accessing the US public markets. While much of the burden in terms of time and expense of adapting to the broad range of new requirements under Sarbanes has been absorbed by many public companies, the chilling effect on new issuers, and particularly foreign private issuers, remains. Certain of the most significant of those burdens (i.e., Section 404 reporting) still need to be addressed by most foreign private issuers.

While there are no assurances of further relief to come from the SEC, or Congress, there may be signs that the political climate in the US is prepared to address certain of the excesses of Sarbanes. Particularly for foreign private issuers, this would be most effective if applied to Section 404 reporting. In a speech at the end of July 2006, the new US Secretary of the Treasury, Henry Paulson, credited Sarbanes and other "corrective measures" as playing a role in the economic recovery. In the same speech, however, Paulson noted, "Often the pendulum swings too far and we need to go through a period of readjustment."

