

Guide to the Changes in Corporate Governance as it relates to the Sarbanes-Oxley Act of 2002

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I. Introduction

A. Statement of Purpose

In response to a number of major corporate scandals such as Enron, Tyco International, and World Com, Congress enacted Sarbanes-Oxley Act of 2002 (hereinafter “SOX”) which expanded various obligations associated with corporate governance. Subsequently, the United States Securities and Exchange Commission (hereinafter “SEC”) put out regulations to enforce the ideals of SOX. With the enactment of this legislation, positions in corporations such as the Corporate Governance Officer have become more prevalent. This guide is intended to serve as a starting point to help attorneys, directors, and officers understand the aspects of business a Corporate Governance Officer will need to stay abreast of in such a position. For example, if an officer or board member is taking on a Corporate Governance Officer and needs to define the role; or if an attorney is interviewing for a Corporate Governance Officer position at a corporation and would like to have a general idea of what they will be expected to govern and stay current on. This guide is geared toward those who are not familiar with the formal aspects and intricacies of corporate governance or SOX.

The organization of this guide is set out to provide general background what corporate governance is, how it is regulated today, then how one can keep current on these regulations. Most sections will have a “Researching” portion which will list resources for accessing necessary provisions of or materials on the topic of that section and provide tips to assist in researching. Certain materials within this guide can be located in the Saint Louis University School of Law’s Omer Poos Library and those materials will be followed by call number indicators. Example: (SLU LAW: KJ0000)

B. What is Corporate Governance?

Corporate governance is generally about oversight and pro-activity by a corporation’s officers and board of directors. Corporate governance is not the same as “formation” of the corporation as it relates more to maintenance. Most of the legal ramifications for failures in corporate governance will create liability for the Chief Executive Officer (hereinafter “CEO”), the Chief Financial Officer (hereinafter “CFO”), and other members of the board of directors.

A Corporate Governance Officer would not likely be monitoring compliance with corporate governance of executives, but rather educating the CEO, CFO and the board of directors on compliance measure necessary for the company. They would likely go to the board of director’s meetings, make reports, possibly do some management auditing, and help generate ideas for new compliance programs or modifications of existing compliance programs. Some of the aspects of corporate governance that might concern the Chief Governance Officer include director independence, director’s exercise of fiduciary duties of care, loyalty, and good faith, selection of corporate officers and senior management, review of SEC filings, implementation and enforcement of compliance and auditing measures, and general service as a check or balance for the officers of the organization, including the CEO.

Corporate governance is primarily a matter of state law, however, Congress has enacted measures such as the Securities Act of 1933, the Securities Exchange Act of 1934, and SOX, which preempt state law in some instances and effect publicly traded corporations as well as listing companies like the New York Stock Exchange (hereinafter “NYSE”) and NASDAQ. Further, the SEC oversees key participants in the securities world by setting and enforcing various regulations.

II. Primary Sources of Law

A. State Law

All states have a business code which governs the corporations incorporated in that state because traditionally corporate governance was primarily a matter of state law. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 101 (1991). In recent years, Congress has enacted more heavy-handed legislation on corporate governance imposing additional requirements as well as civil and criminal penalties. In some instances, federal legislation like SOX preempts state law. Federal Securities laws like SOX only deal with disclosure requirements effected to protect investors, but some state laws deal with the quality of the investment and are often referred to as “Blue Sky Laws.” The name Blue Sky is a spoof on “pie in the sky” investments.

Most states adopt their own version of the Model Business Corporation Act (hereinafter “MBCA”) or model their business codes after Delaware. More than 60% of corporations are incorporated in Delaware, due to their favorable franchise tax structure and extensive case law on corporate matters, which is why the Delaware structure is so often used in other states. Though it is not as favorable to corporations as Delaware, New York’s case law and business code are also used as a persuasive standard or frame of reference. Only a few states have enacted their own versions of SOX, but there are several state statutes related to the Act.

Researching: One of the more favorable ways to access a state business code is online through the secretary of state’s website and/or the state legislature’s website since it is free of charge. However, some of the print sources and databases like Lexis and WestLaw offer the codes in the annotated form which will provide the researcher with case citations, West Key Numbers, and secondary sources to reference.

- **Feature:** Only a few states have enacted their own versions of SOX, but there are several state statutes that relate to SOX and WestLaw has developed a 50 State Survey that helps identify these regulations. The 50 State Surveys are under State Materials and the Database is called “SURVEYS.” Statues related to SOX will be in a survey called “SOX.”
- **Print:**
 - The MBCA is printed by the American Bar Foundation in annotated for, currently titled “*Model Business Corporation Act Annotated Third Edition.*” (SLU LAW: KF325.1234 .M62 1960)
 - Delaware General Corporate Law is printed by Lexis in annotated form, currently titled “*Delaware Corporation Laws Annotated.*” (SLU LAW: KFD213.A3323 A2 1970)
 - New York’s Business Corporation Laws is printed by West in annotated for, currently called “*McKinney’s Consolidated Laws of New York Annotated.*” (SLU LAW: KFN5030 .A4)
- **Online:**
 - Delaware General Corporate Law can be accessed at the Secretary of State's website (<http://delcode.delaware.gov/title8/index.shtml#TopOfPage>).
 - WestLaw Database: DE-ST-ANN
 - Lexis Database: DE - Delaware Code Annotated
 - New York’s Business Corporation Laws can be accessed at the State legislature’s website (<http://public.leginfo.state.ny.us/menugtf.cgi>)
 - WestLaw Database: NY-ST-ANN
 - Lexis Database: NY - New York Consolidated Laws Service

B. Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002 (15 U.S.C. §§ 7201 et seq.) was introduced to the House on February 14, 2002 as a House Resolution sponsored by Representative Michael G. Oxley. After being referred to the House Committee on Financial Services and the Subcommittee on Capital Markets, the Resolution became Pub. L. No. 107-204 on July 30, 2002 when it was signed by President Bush. Now SOX is located in various sections of the United States Code (hereinafter “USC”).

Some of the major goals of the legislation were to reform corporate governance and accounting for publicly traded companies, increase responsibility of CEOs and CFOs by imposing civil and criminal penalties, and to extend the statute of limitations for securities fraud suits from two years after discovery of the facts constituting a violation to five years from the actual violation.

A focal point of SOX, as it relates to corporate governance, are the requirements imposed on auditing committees. SOX demands the auditing committee be composed exclusively of independent directors. Another important feature of SOX, as it relates to corporate governance, is its directing the SEC to implement further regulations on disclosure required for public companies. This feature is discussed in Section I, Subsection C of this guide. Nothing in SOX is intended to alter a shareholder’s ability to bring a derivative action which has been evidenced by the case law discussed in Section I, Subsection D of this guide.

Researching:

- **Feature:** One of the more favorable and cost effective ways to learn about the legislative history would be through THOMAS, though this information will also be located on databases like Lexis Congressional as well. THOMAS is named after former President Thomas Jefferson and is a free comprehensive source for legislative history which can be found at <http://thomas.loc.gov>. A quick way to access SOX in particular is to browse by the public law number or the statute at large number. The USC citation will not be helpful here.
- **Print:**
 - Statutes At Large will contain the actual text of SOX under Public Law Number “Pub. L. No. 107-204” and Statute at Large Number “116 Stat. 745.” (SLU LAW: KF80 .S36)
 - The United States Code will contain the actual text of SOX were it was codified in various sections. General citation 15 U.S.C. §§ 7201 et seq. (SLU LAW: KF62 2006 .A2 2008)
 - United States Code Annotated and the United States Code Service will also have SOX in print. (SLU LAW: KF62 .W4 and KF62 1972 .L38, respectively). Both are helpful in researching SOX because of the annotations of case law and secondary sources.
 - The Practitioner’s Guide to Sarbanes-Oxley Act published by the American Bar Association is a looseleaf resource with the text of SOX located in the third volume of set.
- **Online:** Most online sources will allow access to the text of SOX using the citations above.
 - Lexis: Simply going to “Get a Document” and search by citation will display the text and Lexis’ United States Code Service will provide annotations.
 - WestLaw: Sarbanes-Oxley Act of 2002 is listed on the Popular Names table of the “USC” database and will show each USC for each section of the Public Law. West also accesses the United State Code Annotated which will provide annotations including Key Numbers.
 - Lois Law: The public law number and statute at large can be used here as well. There is also a popular names table within the “Statutes and Acts” United State Code Database which can be accessed through the quick links or by adding text to that search box.
 - GPO Access: Again, the public law number or statute at large number can be used.
 - SEC Website: SOX text is available at <http://www.sec.gov/about/laws/soa2002.pdf>.

C. Subsequent Regulations by the SEC

The United States Securities and Exchange Commission (SEC) was created by the Securities Exchange Act of 1934 and the Securities Act of 1933. The Commission is a civil law enforcement agency designed to restore investor confidence in our capital market by providing those investors with adequate and reliable disclosures. The SEC is comprised of 5 Commissioners and a staff of attorneys, accountants, and other specialists. To enforce regulations the SEC does file suit against corporations and individuals.

Several sections of SOX directed the SEC to produce final rules on issues and the Commission has adopted several rules and regulations to help enforce the requirements of SOX with reporting mandates.

Researching:

- **Feature:** The best place to go to research the SEC final rules and regulations is the SEC website (<http://www.sec.gov/>). There is an article released on by the SEC that summarizes the rules adopted as a result of SOX. This article can be accessed at <http://www.sec.gov/news/press/2003-6.htm>. Further links to all SEC rulemaking and reports issued after SOX can be found at <http://www.sec.gov/news/press/2003-6.htm>.
- Print:
 - Federal Register: All of the final rules and regulations adopted by the SEC have been published in the Federal Register.
 - The Code of Federal Regulations (hereinafter “CFR”) will also have those regulations.
 - The Practitioner’s Guide to Sarbanes-Oxley Act published by the American Bar Association also has a listing of the SEC rules and releases related to SOX located in volume three.
- Online:
 - The Federal Register can also be accessed online through Lexis, WestLaw, Lois Law, HeinOnline, GPO Access, and some administrative agency websites.

D. Case Law

Any discussion of SOX will be within a shareholder derivative suit or an SEC action. Currently, there are no United States Supreme Court cases giving a thorough discussion of SOX. There are Circuit Court decisions discussing narrow sections of SOX, but because securities litigation is done on a case by case basis and all encompass a fact intensive analysis searching for case law in a litigation situation will also be fact intensive. As discussed in the Section II, Subsection A of this guide Delaware and New York case law may be persuasive where a jurisdiction is dealing with an issue of first impression under SOX. Case law can also be found using West Key Numbers and Lexis Core Terms discussed in Section III, Subsection C of this guide.

Feature: <http://www.sec.gov/about/annrep.shtml>

All SEC annual performance and accountability reports have a “Significant Enforcement Actions” section. This is important because all of the significant SEC litigated cases related to SOX will be included in the reports and these are the cases the SEC will rely on in enforcing their regulations.

III. Secondary Sources

A. Treatises

- **Feature:** There is a slender soft back volume of “Briefly...Perspectives on Legislation, Regulation, and Litigation” called *The Sarbanes-Oxley Act of 2002: A Summary*. The author, Thomas G. Bost, is a former partner at Latham & Watkins and law professor at Pepperdine University. This text offers an extremely concise explanation of the scope of SOX through the eyes of an expert. These types of concise explanations are why treatises would be good place to begin researching SOX. Although the citation is moderate, where an individual is just attempting to get an overview of SOX in a time sensitive situation, this source can be incredibly helpful. (SLU LAW: K1423.Z9 B75 2003)
- All Aspects:
 - *Corporate Governance: Law and Practice* (2004) is published by Matthew Bender & Company, Inc. and generally edited by Bart Schwartz and Amy L. Goodman. This treaties gives an overview of the history and sources of corporate governance and a discussion of current and future trends. There is also expert advice on developing and disclosing required corporate governance guidelines, including sample guidelines and a comprehensive chart comparing US company guidelines with best practices. This publication is available online at Lexis.
 - *Securities Enforcement: Counseling and Defense* is published by Matthew Bender & Company, Inc. and generally edited by Kenneth B. Winer and Samuel J. Winer. This treaties speaks directly to litigation with chapters about disclosure, subpoenas, testimony, privilege, discovery, SEC enforcement, state enforcement, criminal prosecutions, insurance, settlement, and remedies. This publication is available online at Lexis.
 - *Corporate Governance* (2003) is published by McGraw-Hill Executive MBA Series and authored by John Colley, Jacqueline Doyle, George Logan and Wallace Stettinius. This book is general and makes many legal conclusions without citations. However, Chapter 11, How Directors Get Into Trouble, is a exceptionally practical and common sense discussion that would make a great framework for any compliance training session involving directors. (SLU LAW: HD2741 .C77462 2003)
- Scope of SOX:
 - *Essentials of Sarbanes-Oxley*: (2007) This text is printed by Wiley and authored by Sanjay Anand who is a highly regarded exert in corporate governance. It is particularly helpful because it breaks down specific portions of the Act such as 103 and 201 for auditors. Further the book also talks about strategy for complying with SOX. (SLU LAW: KF1446.A315 A83 2007)
 - *Sarbanes-Oxley Act in Perspective*: (2002) This is a book is published by Thomson West and begins with a research guide. If an individual has a little more time this source may be helpful, however, it is not really a prospective because it was published not long after SOX and looks to have been an analysis before many of the SEC regulations that substantially affect the act were implemented. Further this source refers the reader to the WestLaw Database frequently. However, there is a thorough analysis of the legislative history. (SLU LAW: KF1423.Z9 S25 2002)
 - *The Sarbanes-Oxley Act of 2002 With Analysis*: (2002) This is a publication by Lexis and strikingly similar to the text above, but without a thorough analysis of the legislative history. However it is much more succinct. (SLU LAW: KF1423.Z9 S32 2002)
- Criticisms of SOX: There are several texts that do more of an analysis from a business perspective and offer some criticism of SOX.
 - *Icarus in the Boardroom: The Fundamental Flaws in Corporate America and Where They Came From* (2005) from Oxford University Press, authored by David Skeel (SLU LAW: HD2785 .S437)
 - *The Sarbanes-Oxley Debacle* (2006) from AEI Press, by Henry Butler and Larry Ribstein (SLU LAW: KF1446 .B88 2006)

B. Encyclopedias

*After looking to treatises for an overview Encyclopedias will aid in issue spotting by identifying the necessary legal elements of a derivative action.

Feature: 18A Am. Jur. 2d Corporations by Thomson West (SLU LAW: Law Reference KF154 .A4)

This volume of American Jurisprudence deals with several issues relating to corporate governance and going through the table of contents would direct a Corporate Governance Officer through an overview of possible casualties. For example § 929 deals with proxy statement disclosures and the duties of officers and directors are laid out, §1185 deals with the election of directors, and §2204 deals with duties in conjunction with takeover attempts.

18 C.J.S. Corporations by Thomson West

This volume of Corpus Juris Secundum is much like the volume above and deals with several issues relating to corporate governance and going through the table of contents would direct a Corporate Governance Officer through an overview of possible casualties.

Encyclopedia of Private Equity & Venture Capital by VC Experts

5.3.4: Fiduciary Duty in Corporate Governance. Though fiduciary duty actions are decided on a case by case basis, this section of the encyclopedia will be helpful in identifying the elements that make up a good breach of fiduciary duty claim with references to case law.

6 Am. Jur. Legal Forms 2d Ch. 74 by Thomson West (SLU LAW: Law Reference KF170 .A542)

This chapter contains various forms related to the management and operation of a corporation which would help a Corporate Governance Officer draft documents for the company. Many of the forms have to do with formation, but there are some forms for maintenance such as: 767.3 which deals with the purpose, composition, and duties of the Nominating and Corporate governance committee and 970.1 which deals with corporate governance guidelines.

24 Am. Jur. Proof of Facts 2d by Thomson West (SLU LAW: Law Reference KF8933 .A42 1974)

71: Proper Purpose for Shareholder's Inspection of Corporate Books and Records

577: Participation by Corporate Officer in Illegal Issuance of Securities

These sections of American Jurisprudence Proof of Facts 2d will help a Corporate Governance Officer determine which elements must be present for a shareholder to use the “tools at hand” (i.e. inspect documents) and which elements will create liability for officers if the regulations of the SEC and SOX are not followed. It will be important for a Corporate Governance Officer to know these elements in order to avoid such liability or to issue spot if litigation arises.

<http://www.encycogov.com/>

This is an online encyclopedia about corporate governance and has specified topics with quick links. The information provided in the quick links is extremely general and difficult to navigate. The search feature is not effective or efficient. The content is produced and edited solely by an investment firm called ViamInvest.

C. Looseleafs and Electronic Sources

*Once a Corporate Governance Officer has an overview of SOX from treatises and has had time to issue spot using encyclopedias looseleafs, electronic sources, and journals will provide a more lengthy explanation of specific issues that have been identified.

Feature: The Practitioner's Guide to Sarbanes-Oxley Act (SLU LAW: KF1446.A312002 P73 2004)

This looseleaf is published by the American Bar Association in a three volume set. The first volume gives an overview of SOX and the SEC disclosure procedure. The second volume discusses SEC conduct rules, auditing and accounting, and Part V is dedicated to the discussion of corporate governance. Chapter 1 of Part V deals directly with the audit committee, which would be particularly helpful to a Corporate Governance Officer. The third value talks about securities markets, criminal sanctions, enforcement, litigation, and houses a resource guide.

*Though electronic sources have been discussed throughout this Pathfinder the following are two particularly helpful and all-inclusive sources available online from providers who also publish looseleafs.

<http://corpgov.bna.com/cglw/>

BNA's Corporate Governance Library is quite comprehensive. The most helpful feature has to be the expert summaries, but there are also links to the text of SOX, Delaware Corporate Law, other Federal securities legislation, the tax code, links to books selected by the editor, and links to its Corporate Governance Report. BNA can be accessed through Lexis as well.

<http://business.cch.com>

CCH's Internet Research NetWork offers a business and finance network and an entire tab of this tool is dedicated to corporate governance. Particularly, there is information geared toward a Corporate Secretary. There is a Corporate Secretary guide that gives information about proxies. A Corporate Governance Officer will work extremely closely with the Corporate Secretary, who prepares most of the SEC filings (10k, 10Q, Proxies) that are not prepared by the CFO, so it will be imperative to understand the nuances of that role.

West Key Numbers:

There is a link to Key Number Search at the top of the WestLaw page. By simply typing in "Sarbanes-Oxley Act" and/or "corporate governance" a researcher will be given the several Key Numbers that would make for a good starting place in finding case law. Further, a Key Numbers can be narrowed by jurisdiction and Key Numbers are often given in WestLaw's annotated version of the USC, the United State Code Annotated. (See 101k640, 101k83, 101kk12.1, 101k310, 101k206, 101k57, 51k2256, and 24Ek6).

Lexis Core Terms:

Lexis Core terms, the most often used in a case can be located within the Case in Brief reports, will be helpful to a Corporate Governance Officer who is looking for case law in litigation to identify terms for a database search. (See business judgment and corporate governance)

D. Journal Articles

The Practising Law Institute's Corporate Law and Practice Course Handbook Series mentions SOX quite often and would be a helpful series for a Corporate Governance Officer to subscribe to in print. This Series is available on WestLaw. Legal Periodicals are a favorable way to search for journal articles, Bar Association Periodicals, and legal newspapers. Online these indexes will allow word searches, but in print indexing is efficient and offered by topic which will allow quick access to SOX.

- ILP indexes – Each volume will cover hundreds of law journals and have a table of cases. In print the index goes back to 1908 and is indexed by author and subject.
 - WestLaw Database: ILP (begins with August 1981)
 - Lexis: Secondary Legal, then Annotations & Indexes (begins with 1978, updated weekly)
 - SLU LAW: Reference K33 .I5
- Current Law Index – Covers hundreds of legal periodicals with materials often used in practice.
 - WestLaw Database: CILP (updated every eight weeks)
 - SLU LAW: K33 .C87
- Legal Resource Index
 - WestLaw Database: LRI (begins with 1980)
 - Lexis: Secondary Legal, then Annotations & Indexes (begins with 1977, updated weekly)
 - SLU LAW: Microfiche Cabinet K33 .I43

Feature: 60 Fla. L. Rev. 589 (SLU LAW: K25.N6)

Confusion and Unpredictability In Shareholder Derivative Litigation: The Delaware Courts' Response To Recent Corporate Scandals by Ann Scarlett of Saint Louis University School of Law. This article gives an in depth case law analysis of fiduciary duties of officers and directors after scandals like Enron and WorldCom. Here the trends of the judiciary are given a close look, particularly Delaware courts. SOX is only mentioned in passing, however, the article was written after the implementation and subsequent SEC rules and regulations, so it would be helpful in litigation.

Feature: 30 Wm. Mitchell L. Rev. 1149 (SLU LAW: K27.I47)

The Sarbanes-Oxley Act and Fiduciary Duties by Lyman P.Q. Johnson and Mark A. Sides. This article speaks directly to SOX and is quite comprehensive in its analysis. This article should be read by every Corporate Governance Officer and speaks directly about SOX's impact on state law.

892 PLI/Pat 39

What Every Law Librarian Needs To Know About Corporate Governance by Linda Demelis. This article is quite comprehensive for an individual looking to get an overview of corporate governance in general. This article does not deal directly with SOX, but addresses case law in depth.

89 Cornell L. Rev. 356 (SLU LAW: K.O75)

Monitoring Corporate Performance: The Role of Objectivity, Proximity, and Adaptability in Corporate Governance by Arnoud W.A. Boot and Jonathan R. Macey. This article is written to address firms that monitor corporate governance and speaks to different theories of monitoring, and would be helpful to a Corporate Governance Officer in identifying different ways to monitor.

IV. Current Awareness

Feature: <http://www.grcg.com/>

GRCG sponsors the Sarbanes-Oxley Institute which has hundreds of members, corporate and academic, and provides them with the latest information and training related to SOX compliance and best practices training. The SOX Institute prescribes industry standards for officers, boards of directors, financial management, accounting, and even human resources management.

<http://www.insidesarbanesoxley.com/>

This website has blogs on the “SOX Board” that discuss nearly every facet of the Act, relevant current and archived news, links computer software, and a Google link to relevant books. The only catch is that registration with the site is required before posting questions on the blogs.

<http://business.cch.com>

CCH’s Internet Research NetWork’s Corporate Governance tab, previously discussed, has a current developments section with a Corporate Secretary’s Guide Newsletter updated semi-monthly, Federal Securities Report Letters updated weekly, and a Securities Compliance Tracker, all of which are searchable. Further, the Securities Law Briefing on corporate disclosure and accounting news updated daily can add a feed to a Google or yahoo homepage by registering.

<http://blogs.law.harvard.edu/corpgov/>

The Harvard Law School Corporate Governance Blog is copyrighted by The President and Fellows of Harvard College, topical, and contributed to by Harvard Law Faculty and Fellows.

<http://corpgov.bna.com/cglw/>

BNA’s Corporate Governance Report located within the Corporate Governance Library is searchable and will have articles about corporations currently having issues related to corporate governance. BNA can be accessed through Lexis as well.

Emerging Issues on Lexis

On Lexis, going into “Corporate” in Area of Law by Topic will give the option of going to “Corporate Emerging Issues.” This database will allow an individual to search, but there is also an index listing of 50 of the latest articles, cases, and analysis of note.

*The Lexis News and Business tab will allow an individual to search for information about SOX in current news and alerts can be set to email daily, weekly, etc. This is one of the favored methods of keeping current with national newspapers and newsletters like the *Wall Street Journal*, *Corporate Financing Week*, and *Corporate Strategy Today*. The same can be done with WestLaw’s WestClips.

VI. Conclusion

There is a massive amount of information available about the Sarbanes-Oxley Act of 2002 and corporate governance as a result. In order to avoid being bogged down it is important to get an overview of what the act encompasses and identify comprehensive sources as this guide has attempted to do.