Spring 2016

Notable Governance Failures: Enron, Siemens and Beyond

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Seminar Paper

On the Topic of

“Notable governance failures: Enron, Siemens and beyond“

As Part of the Global Research Seminar between
Goethe-University Frankfurt am Main and
University of Pennsylvania Law School

Comparative Corporate Governance

Held by
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Winter term 2015/2016

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List of abbreviations

AG	Aktiengesellschaft
AktG	Aktiengesetz
Art.	Artikel
BB	Betriebs-Berater
BFuP	Betriebswirtschaftliche Forschung und Praxis
BGBl.	Bundesgesetzblatt
BT-Drucks.	Bundestagsdrucksache
BVerfG	Bundesverfassungsericht
BVerfGE	Bundesverfassungsgerichtsentscheidung
CCZ	Corporate Compliance Zeitschrift
CDC	Corporate Disciplinary Committee
CEO	Chief Executive Officer
DB	Der Betrieb
DOJ	Department of Justice
DPA	Deferred Prosecution Agreement
ECFR	European Company and Financial Law Review
e.g.	exempli gratia
EU	European Union
EUBestG	EU-Bestechungsgesetz
EUR	Euro
FCPA	Foreign Corrupt Practices Act
GCGC	German Corporate Governance Code
HGB	Handelsgesetzbuch
i.c.m.	in connection with
IntBestG	Gesetz zur Bekämpfung internationaler Bestechung
JuS	Juristische Schulung
KK	Kölner Kommentar
KWG	Kreditwesengesetz
NJW	Neue Juristische Wochenschrift
no.	numero
NStZ	Neue Zeitschrift für Strafrecht
NZBau	Neue Zeitschrift für Baurecht und Vergaberecht
NZG	Neue Zeitschrift für Gesellschaftsrecht
para.	Paragraph
OECD	Organisation for Economic Co-operation and Development
OWiG	Ordnungswidrigkeitengesetz
RIW	Recht der internationalen Wirtschaft
SEC	Securities and Exchange Commission
sent.	Sentence
SOX	Sarbanes-Oxley Act
StGB	Strafgesetzbuch
StPO	Strafprozessordnung
US	United States

USA…………………...	United States of America
USD…………………...	US-Dollar
vol. ……………………	volume
WM……………………	Wertpapier-Mitteilungen
WpDVerOV…………...	Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen
WpHG………………...	Wertpapierhandelsgesetz
ZIP…………………….	Zeitschrift für Wirtschaftsrecht
ZIS…………………….	Zeitschrift für Internationale Strafrechtsdogmatik
ZRP……………………	Zeitschrift für Rechtspolitik

Notable Governance Failures

A. Introduction

A corporation steers a delicate course, tasked with maximizing returns for its investors while playing within a complex web of regulation. The structural characteristics of a modern corporation, where a board of directors manages the company for passive shareholders, necessitates internal processes that provide for the stability of not only the corporation but also that of the capital markets in which the corporation competes. How these internal processes should optimally look is, at best, murky and has been the subject of endless debate. Corporate governance "best practices," however, are often developed in the wake of a corporate scandal that rocks public trust in the capital markets. Scandals, in turn, may signal changing approaches to "best practices." Additionally, given that governance concerns the internal processes of a corporation subject to varying governmental regulation, what constitutes a good corporate practice may in fact depend on a particular jurisdiction's legal structure and policies.

This paper examines two notable governance failures—the Siemens bribery scandal in Germany and the United States and the Enron accounting scandal in the United States—and compares the regulatory responses of the two jurisdictions. It starts with a discussion of the Siemens scandal and a survey of Germany's relevant anti-bribery regulation in Part B. Part C examines the Enron scandal and the U.S. regulatory response. Finally, Part D discusses the differences between Germany's and the United States' regulatory responses to the scandals and the effects that they had on subsequent corporate behavior.

B. The Siemens Scandal

I. Introduction

Recently there was the annual shareholders' meeting of Siemens AG (Jahreshauptversammlung) on the 26th of January 2016. *Joe Kaeser*, the current president and CEO of Siemens, proudly presented quite reasonable figures for the first quarter of the fiscal year in 2016.[1] When Siemens found itself at the center of the biggest corruption case in German economic history 10 years previously, no one would have ever thought that Siemens would still be in business, let alone playing such an outstanding role nationally as well as internationally again. How Siemens managed to undergo this scandal and use it as a catalyst for the total reorganization of the firm will be discussed, among other things, in the following paragraphs. The aim of this paper is to point out that through a good working corporate governance and civil society governance, coupled with reasonable regulations and most importantly, a lived ethical culture in the firm, governance failures such as the one at Siemens can be prevented.

After describing the bribe and corruption scandal of Siemens, which due to reasons of space, does not lay claim to completeness at all, this paper undertakes the task of examining the relationship between compliance and Corporate Governance, their legal basis and Siemens's newly established compliance system. Thereafter as the main focus will be how corruption can be combated in the best way. For this purpose, the legal situation in Germany before and after the scandal will be illustrated. In the conclusion will be shown an interest in any suggestions for repressive and/or preventive reform measures. This is to point out that even though this topic is very much related to criminal law, the author of this paper is trying not to address that area in detail.

II. The bribe and corruption scandal of Siemens (2006-2008)

1. Record

a) Investigations of public authorities

[1] Hauptversammlung der Siemens AG am 26. Januar 2016, 5.

The Siemens corruption scandal is the biggest economic scandal in the history of the German Federal Republic.[2] The Public Prosecution München I (Staatsanwaltschaft) originally initiated criminal investigations against Siemens due to an anonymous complaint, as well as rogatory letters from Switzerland and Italy because of the suspicion of embezzlement leading to the detriment of the Siemens AG (Aktiengesellschaft).[3] It was alleged that approximately 20 million EUR had been discharged out of the business area of the corporation and used for bribe payments.[4] According to reports from the press, Siemens-employees are believed to have used the embezzled money to get more jobs abroad. For example, it was likely used to acquire the license to set up the safety system for the Olympic Games in Athens 2004.[5] Moreover, in Africa and other parts of the world, it was only possible to get orders with underhand payments.[6] On the 15th of November 2006, 250 public officials and 23 public prosecutors conducted searches at the company and employees` private homes in Munich, Erlangen and Austria.[7] In doing so, they confiscated between 200 and 300 files with current business documents, around 36000 files with older documents and also an enormous amount of material data.[8] However, only later did the full extent of the scandal become apparent. In the final results this case reached a dimension of around a billion EUR in embezzlements: *Peter Löscher*, the chairman of the Siemens AG, announced on 8th November 2007 during Siemens' yearly press conference that dubious payments in the amount of 1.3 billion EUR had been detected.[9]

b) Investigations of the Securities and Exchange Commission (SEC)

Shortly after the raid by the German public authorities in the autumn of 2006, officials in the USA were encouraged to also begin investigating the case in 2007.[10] Here might come up the question of whether or not that is at all possible: European companies, which are listed on the US-American stock exchange, are governed by the US-American securities law and therefore by the SEC.[11] Due to the fact that Siemens has been listed since the 6th of March

[2] Hoeth, Siemens – wohin, 11; Henselmann/Hofmann, Accounting Fraud, 218.
[3] Pressemitteilung 04/06 der Staatsanwaltschaft München I vom 16.11.2006.
[4] Pressemitteilung 04/06 der Staatsanwaltschaft München I vom 16.11.2006.
[5] Manager-Bande verschob Millionensummen ins Ausland.
[6] Ex-Siemens-Mitarbeiter packt aus.
[7] Pressemitteilung 04/06 der Staatsanwaltschaft München I vom 16.11.2006.
[8] Pressemitteilung 05/06 der Staatsanwaltschaft München I vom 22.11.2006.
[9] Weidenfeld, in: Weidenfeld, Nützliche Aufwendungen, 211; Siemens Jahrespressekonferenz 2007.
[10] Arzt, in: Festschrift Stöckel, 15 (17-18).
[11] V. Rosen, BB 2009, 230 (230).

2001 on the New York stock exchange[12], they could henceforth be held liable from that time on in the USA for corruption crimes that they were committing abroad.[13]

c) Internal corporate investigations

The management of Siemens decided early on to conduct its own internal investigations along with cooperating with the one from the public authorities. For that purpose, on the 15th of December 2006, Siemens hired the international law firm *Debevoise & Plimpton*.[14] *Gerhard Cromme*, the chairman of the audit committee, announced the following at the general business meeting on the 25th of January 2007: "The mandate for *Debevoise & Plimpton* provides a complete and independent investigation."[15] The law firm should examine whether there had been an infringement against anti-corruption regulations and start an independent evaluation of the compliance and the control system of Siemens.[16] Due to the size of the corporation, in the accounting year of 2006 Siemens employed around 475.000 employees and acted worldwide in 190 countries[17], the dimension of this investigation was immense to say the least. According to Siemens the operations of *Debevoise & Plimpton* included among other things: 1750 interviews with Siemens-employees and further persons, 800 informative discussions with employees to obtain background information, 88 million electronic documents, 14 million sighted documents, 38 million analyzed financial transactions and 10 million reviewed bank records.[18] Furthermore, in October 2007, Siemens offered an extensive amnesty program for their current and former employees in order to motivate them to disclose any further possible corruption cases.[19] Provided that employees cooperated voluntarily and completely, Siemens agreed to waive a unilateral termination of employment policy as well as any claims for retribution from said employees in return.[20]

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[12] Erklärung der Siemens AG bezüglich des Abschlusses der Verfahren in München und in den USA vom 15. Dezember 2008, 10.
[13] Hoeth, Siemens – wohin, 33.
[14] Gebhardt/Müller-Seitz, in: Organisation und Umwelt, 39 (66).
[15] Hauptversammlung der Siemens AG am 25. Januar 2007, 3.
[16] Wolf, Der Korruptionsfall Siemens, 15; Henselmann/Hofmann, Accounting Fraud, 218.
[17] Erklärung der Siemens AG bezüglich des Abschlusses der Verfahren in München und in den USA vom 15. Dezember 2008, 4.
[18] Erklärung der Siemens AG bezüglich des Abschlusses der Verfahren in München und in den USA vom 15. Dezember 2008, 5.
[19] Wolf, Der Korruptionsfall Siemens, 16.
[20] Weidenfeld, in: Weidenfeld, Nützliche Aufwendungen, 210-211.

2. Fines and skimming off excess profits (Gewinnabschöpfungen)

Siemens was able to reach an agreement with the German and American authorities in a timely manner. In October 2007 the district court München I (Landgericht) imposed a fine in the amount of 201 million EUR (1 million EUR is the highest possible fine according to § 130 para. 3 sent. 1 OWiG[21] as well as 200 million EUR by way of skimming off excess profits, §§ 30 para. 3 i.c.m. 17 para 4 OWiG[22]) against the former Siemens-telecommunication-division *"Com"*.[23] The court reached the conclusion that a former chief executive bribed foreign public officials together with other persons for the purpose of obtaining various orders between the years of 2001 and 2004. The basis of the aforementioned decision was due to 77 verifiable bribery cases in Nigeria, Russia and Libya.[24]

On the 15th of December 2008, it was announced that the proceedings against Siemens in Munich as well as in Washington D. C., were completed.[25] The Public Prosecution München I issued them a fine of 395 million EUR, due to violation of the supervisory duties according to §§ 30, 130 OWiG.[26] In the US, Siemens was found guilty of a willful breach of FCPA-provisions by knowingly failing to maintain a proper system of internal accounting controls and keeping required records.[27] Siemens and three subsidiaries implicated in the scandal accepted a fine in the amount of 450 million USD.[28] In addition, a civil proceeding by the SEC, which had been initiated due to violation of FCPA-provisions, culminated in fines to the amount of 350 million USD (skimming off excess profits).[29] The damage could have been drastically worse if Siemens had not agreed to cooperate with the SEC.[30] In total Siemens had to pay more than 2.6 billion USD to clear its name: 1.6 billion USD in fines and fees in Germany and the United States as well as 1 billion USD for their internal investigations.[31] The penalties in the end were considerably less than had been expected.[32]

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[21] Gesetz über Ordnungswidrigkeiten, as of May 13, 2015, BGBl. I 1987, 602.
[22] Gesetz über Ordnungswidrigkeiten, as of February 19, 1987, BGBl. I 1987, 602.
[23] Siemens Ad-hoc Meldung nach § 15 WpHG, 1.
[24] Wolf, Der Korruptionsfall Siemens, 9, 13.
[25] Weidenfeld, Nützliche Aufwendungen, 216.
[26] Staatsanwaltschaft München I in dem Ordnungswidrigkeitsverfahren gegen die Siemens AG, 1.
[27] United States District Court for the district of Columbia, Department's Sentencing Memorandum, 10.
[28] United States District Court for the district of Columbia, Department's Sentencing Memorandum, 10.
[29] Weidenfeld, in: Weidenfeld, Nützliche Aufwendungen, 216.
[30] Wybitul, BB 2009, 606 (606).
[31] Henselmann/Hofmann, Accounting Fraud, 220.
[32] Gebhardt/Müller-Seitz, in: Organisation und Umwelt, 39 (67).

3. Individual prosecutions

Several individual Siemens' employees also received separate fines for their role in this bribery, including the former CEO, as well as the Chairman and members of the Supervisory and Managing Boards. They were charged by the Munich prosecutors for neglecting their supervisory duties.[33] In addition to this, the company also sought damages from those employees at fault.[34] These proceedings drew to a close at the end of 2009, when six former Siemens' executives were ordered to pay nearly 20 million EUR in compensation.[35] It is thought that they had knowledge of the slush funds and they had been warned about the company's regulatory failings but didn't take any actions to eliminate them.[36] The single largest individual sanction was handed to long-serving former Siemens chairman, *Heinrich von Pierer*, who was forced to pay back 5 million EUR. Through this payment the corruption affair has been ended for *Heinrich von Pierer* in Germany. That being said, at the end of last year legal proceedings against him and former managers at Siemens were initiated due to bribe payments in the context of the digitalization of the Greek telephone network.[37] However, it is questionable whether these proceedings are even legal, since they might infringe upon the European legal principle "ne bis in idem"[38], which forbids being punished twice.

4. Reorientation of the firm

As a result of the corruption scandal Siemens undertook extensive personnel and structural reorganization measures.[39] For reasons of space this paper does not go into the individual personnel measures undertaken by Siemens; however, it is noteworthy to mention that several coworkers whom the public prosecution was investigating have been suspended or dismissed and that the governing board has been reduced in number and completely replaced.[40] In terms of structure, Siemens renewed its entire compliance system. In the following paragraphs the structural renewals, in particular those concerning compliance, shall be examined.

a) The relationship between Compliance and Corporate Governance

Before pointing out the relationship/difference between compliance and Corporate Governance it is crucial to mention what both terms actually mean.

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[33] Wolf, Der Korruptionsfall Siemens, 13.
[34] Weidenfeld, in: Weidenfeld, Nützliche Aufwendungen, 214-215.
[35] Staatsanwalt erhebt Anklage gegen Ex-Siemens-Vorstand Ganswindt.
[36] Siemens to sue former top executives.
[37] Prozess gegen frühere Siemens-Manager in Athen beginnt.
[38] Mestmäcker/Schweitzer, in: Mestmäcker/Schweitzer, Europäisches Wettbewerbsrecht, § 22, para. 69.
[39] Wolf, Der Korruptionsfall Siemens, 14.
[40] Wolf, Der Korruptionsfall Siemens, 14.

The term Corporate Governance cannot easily be translated[41] but it can be understood as the following: "Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs."[42]

Compliance refers to the fulfillment of, and adherence to, legal provisions and regulatory standards.[43] It can be understood as an internal corporate management of risk which aims to identify, analyze and control internal corporate risks.[44] Since the revision of the German Corporate Governance Code (GCGC) on the 14th of June 2007, the term "compliance" is legally defined in clause 4.1.3. GCGC as follows: "The Management Board ensures that all provisions of law and the enterprise's internal policies are abided by and work to achieve their compliance by group companies (compliance)."

This shows that both terms are mostly congruent and only differ through their respective perspectives. Corporate Governance outlines the perception of the regulators whereas compliance outlines the perspective of those being regulated (affected companies).[45] It should be further noted that compliance is an essential element of Corporate Governance[46] and it includes all the measures to ensure that rule-consisting Corporate Governance is attained. Therefore, both are mutually dependent upon one another as compliance has to be seen as a component to achieve the goals of Corporate Governance and visa versa.

b) Legal basis of compliance (Germany)

Already from the translation of the term compliance ("Einhaltung, Befolgung des geltenden Rechts") it can be concluded that the applicable law is the cornerstone for all areas of compliance.[47] Following, the individual rules which refer to compliance in some way are going to be highlighted.

aa) §§ 30, 130 OWiG

§§ 30, 130 of the so-called Administrative Offenses Act (Gesetz über Ordnungswidrigkeiten; abbr.: OWiG) are of central importance for compliance.[48] § 130 para.

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[41] v. Werder, in: Hommelhoff/Hopt/v. Werder, Handbuch Corporate Governance, 5.
[42] Clarke, International Corporate Governance, 2; v. Werder, in: Hommelhoff/Hopt/v. Werder, Handbuch Corporate Governance, 4-5.
[43] Meyer, CCZ 2014, 113 (113); Hauschka, in: Corporate Compliance, § 1, para. 2.
[44] Hauschka, in: Corporate Compliance, § 1, para. 4; Fuchs, in: Wertpapierhandelsgesetz, § 33, para. 3.
[45] Hauschka, in: Corporate Compliance, § 1, para. 2.
[46] Berndt/Hoppler, BB 2005, 2623 (2627).
[47] Hauschka, in: Corporate Compliance, § 1, para. 21.
[48] Moosmayer, NJW 2012, 3013 (3014); Theile/Petermann, JuS 2011, 496 (497-500).

1 OWiG is even known as "compliance-facts (Tatbestand)".[49] In general, § 130 OWiG causes administrative liability if in a corporation the management negligently or willfully omits its duties of supervision.[50] § 30 OWiG enables the assessment of a fine against corporate bodies and associations of individuals provided that their representatives committed a crime or an administrative offense.[51] The purpose of § 130 OWiG is to close threatening gaps by the sanctioning of enterprise related breach of duties.[52] § 130 OWiG however this is not a mandatory rule (Pflichtnorm), but a liability rule (Haftungsnorm).

bb) German Corporate Governance Code

The aim of the German Corporate Governance Code (Deutscher Corporate Governance Kodex; abbr.: GCGC) is on one hand to present the main features of the German Corporate Governance-model in a compact form, and on the other hand it is to set standards, additionally to the applicable law, of good and responsible management.[53] The term compliance is mentioned four times in the GCGC, namely in the articles 3.4, 5.2 and 5.3.2 GCGC[54], and is defined in article 4.1.3, as "(t)he Management Board ensures that all provisions of law and the enterprise's internal policies are abided by and works to achieve their compliance by group companies (compliance)."[55] It should be noted though that the GCGC has no legal force (Gesetzeskraft) and so only contains recommendations for the self-commitment of corporations.[56]

cc) German Stock Corporation Act

According to § 91 para. 2[57] of the German Stock Corporation Act (Aktiengesetz; abbr.: AktG), "the management board shall take suitable measures, in particular surveillance measures, to ensure that developments threatening the continuation of the company are detected early."[58] With regard to its wording § 91 para. 2 AktG does not state which exact surveillance measures (Überwachungssystem) are to be imposed.[59] Some people[60] take the view that hereby a comprehensive economic risk management is meant. The prevailing

[49] Withus, CCZ 2011, 63 (64).
[50] Rogall, in: KK-OWiG, § 130, para. 1.
[51] Rogall, in: KK-OWiG, § 30, para. 1.
[52] Rogall, in: KK-OWiG, § 130, para. 4.
[53] V. Werder, in: Deutscher Corporate Governance Kodex, 1st preamble, para. 82, 83.
[54] Deutscher Corporate Governance Kodex in the version of May 05, 2015.
[55] German Corporate Governance Code, 6.
[56] Hauschka, in: Corporate Compliance, § 1, para. 23.
[57] Aktiengesetz, as of December 22, 2015, BGBl. I 1965, 1089.
[58] German Stock Corporation Act (Aktiengesetz), English translation, 40.
[59] Blasche, CCZ 2009, 62 (63).
[60] Säcker, NJW 2008, 3313 (3315); Strieder, BB 2009, 1002 (1004).

opinion[61] though requires only an early warning and monitoring system. This prevailing opinion is preferable, as the demand for a comprehensive economic risk management would infringe upon the freedom of organization of the corporations according to Art. 14[62] of the German constitution (Grundgesetz).[63] Further, such a determination would contradict the management discretion (Leitungsermessen) of the board.[64] The same applies to § 93 para. 1 sent. 1 AktG, where "the members of the management board shall employ the care of a diligent and conscientious manager."[65] The management needs to make sure that no one is acting illegally in their corporation.

dd) § 25a KWG

§ 25a[66] of the German Banking Law (Gesetz über das Kreditwesen; abbr.: KWG) obligates an institution to follow certain organizational duties. According to § 25a para. 1 sent. 1 KWG, the supervising institutes must have a proper business organization which ensures that the relevant legal provisions are observed. It includes in particular an appropriate and effective management of risk.[67]

ee) § 33 para. 1 WpHG i.c.w. § 25a KWG

With the adoption of § 33 of the German Securities Trading Law (Wertpapierhandelsgesetz; abbr.: WpHG), the main features of compliance have been found for the first time in a legal provision.[68] § 33 WpHG[69] creates an obligation for investment service enterprises (Wertpapierdienstleistungsunternehmen) to accomplish reasonable organizational structures.[70] The general organizational duty was concretized on the 20th of July 2007 in the §§ 12, 13 of the regulation for concretization of the code of behavior and organizational requirements for investment service enterprises (Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen; abbr.: WpDVerOV).[71] Therefore among others, a

[61] Bunting, ZIP 2012, 357 (358); Hüffer, Aktiengesetz, § 91, para. 8; Pahlke, NJW 2002, 1680 (1681-1682).
[62] Grundgesetz, as of December 23, 2014, BGBl. III 1949, 100-1.
[63] Helmrich, NZG 2011, 1252 (1253); Theusinger/Liese, NZG 2008, 289 (290).
[64] Helmrich, NZG 2011, 1252 (1253); Theusinger/Liese, NZG 2008, 289 (290).
[65] German Stock Corporation Act (Aktiengesetz), English translation, 40.
[66] Kreditwesengesetz, as of November 20, 2015, BGBl. I 1998, 2776.
[67] Braun/Wolfgarten, in: Kreditwesengesetz, § 25a, para. 4.
[68] Fuchs, in: Wertpapierhandelsgesetz, § 33, para. 3; resolution and report of the financial committee, BT-Drucks. 12/7918, 105.
[69] Wertpapierhandelsgesetz, as of November 20, 2015, BGBl. I 1998, 2708.
[70] Fuchs, in: Wertpapierhandelsgesetz, § 33, para. 1.
[71] Fuchs, in: Wertpapierhandelsgesetz, § 33, para. 10.

responsible compliance-representative is to be appointed, of which whose tasks are described under § 12 para. 4 WpDVerOV[72].

c) Legal obligation for all corporations to establish a compliance-organization?

As shown above compliance is legitimately anchored in different rules. Therefore, the issue arises as to whether a general legal obligation for all corporations to establish a compliance-organization can be derived from these rules. The view that is occasionally expressed in the literature is that the organizational duties (compliance-organization) are the result of the company law (§ 130 OWiG and some other professional rules).[73] Indeed there is no legal obligation to establish a compliance-organization for all corporations, but this obligation can be derived out of the above-mentioned rules by way of analogy (Analogie).[74] This view seems not to be persuasive. An analog application (analoge Anwendung) requires an unintended gap in the law (planwidrige Regelungslücke) as well as a comparable situation of interests (vergleichbare Interessenlage).[75] For this reason, an analog application fails because there is no comparable situation of interests for all corporations.[76] It does not appear appropriate if corporations with very few employees, and so with a different complexity of their requirements, are forced to establish a compliance-organization.[77] Such a high and costly "burden" would hinder their daily business and/or even threaten their existence. For this reason, a legal obligation for all corporations to establish a compliance-organization does not exist under German law.

Nevertheless there are situations where there is a legal obligation to establish a compliance-organization for German corporations, namely if they are listed on the American stock exchange (like Siemens) and thus governed additionally by the US-American regulations.[78] This means that the Sarbanes-Oxley Act (SOX) is applicable and therefore there is the legal duty to establish a compliance-organization.[79] For instance, referring to section 404 SOX, the management is responsible for the establishment and maintenance of an appropriate internal control system. Further, the FCPA obligates firms to have an efficient

[72] Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen, as of November 20, 2015, BGBl. I 2007, 1432.
[73] Schneider, ZIP 2003, 645 (648-649).
[74] Schneider, ZIP 2003, 645 (649).
[75] Rauhut, JuS 2009, 289 (297).
[76] Hauschka, ZIP 2004, 877 (878).
[77] Hauschka, ZIP 2004, 877 (878); Fleischer, NZG 2014, 321 (329).
[78] See B. I. 2).
[79] Hülsberg/Kühn, in: Compliance, Aufbau – Management – Risikobereiche, 6, para. 230.

compliance system.[80] This however, is not the case anymore for Siemens, as it was delisted from the American Stock exchange on the 16th of May 2014.[81]

d) The compliance system of Siemens

Now, having seen what compliance stands for and where it is derived from, the compliance system of Siemens itself shall be discussed. The present compliance system of Siemens originated in the years 2007 and 2008, in response to the criminal investigations of the public prosecution Munich, the SEC and the US Department of Justice.[82] The compliance organization of Siemens is now considered exemplary.[83] At the "core"[84] of the Siemens compliance program are the Business Conduct Guidelines (Code of Conduct) which came into force on the 18th of July 2001[85] and were adopted in a revised form in January 2009.[86] They contain the central compliance regulations (Verhaltensvorgaben)[87] and are binding for all their employees worldwide.[88] Further, they include rules about precise requirements for complying with competition law and anti-corruption law, for handling donations, for avoiding conflict of interests, for prohibition of insider trading and for protecting company assets.[89] The compliance system is based on the three pillars, "Prevent", "Detect" and "Respond".[90]

The action level "Prevent" consists of the "Compliance Helpdesk "Ask Us"", a contact point for all questions in regard to the theme of compliance.[91] The informants-system "Tell Us" is an element of the next pillar "Detect" and offers employees and other stakeholders of the enterprise an anonymous way to report compliance infringements.[92] They can even refer to the external ombudsman of the enterprise.[93] The sanctioning of compliance-infringements and the company-wide case trackings are the supporting elements of the third pillar "Respond".[94] For this purpose the Corporate Disciplinary Committee (CDC) was established, which assesses wrongdoings of members of the management and makes binding recommendations.[95]

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[80] Partsch, The Foreign Corrupt Practices Act der USA, 40.
[81] Delisting New York Stock Exchange, 1.
[82] Moosmayer, Compliance, para. 362.
[83] Siemens hat aus Schmiergeldskandal Lehren gezogen.
[84] Pohlmann/Moosmayer, in: Stober, Korruptionsprävention als Herausforderung, 64.
[85] United States District Court for the district of Columbia, Statement of offense, 10.
[86] Siemens Business Conduct Guidelines, Januar 2009, 1.
[87] Pohlmann/Moosmayer, in: Stober, Korruptionsprävention als Herausforderung, 64.
[88] Siemens Business Conduct Guidelines, Januar 2009, 3.
[89] Siemens Business Conduct Guidelines, Januar 2009.
[90] Compliance Bericht Siemens 2014, 138.
[91] Pohlmann/Moosmayer, in: Stober, Korruptionsprävention als Herausforderung, 66.
[92] Pohlmann/Moosmayer, in: Stober, Korruptionsprävention als Herausforderung, 68.
[93] Pohlmann/Moosmayer, in: Stober, Korruptionsprävention als Herausforderung, 68.
[94] Pohlmann/Moosmayer, in: Stober, Korruptionsprävention als Herausforderung, 69-70.
[95] Pohlmann/Moosmayer, in: Stober, Korruptionsprävention als Herausforderung, 69.

5. Interim conclusion

Having got a broad insight into the scandal and its aftermath with the enormous settlement paid by Siemens, two points have become notable. Firstly, even if it has been the biggest German corruption case in history, the corporation itself received no criminal prosecution and has just been fined instead. Secondly, the extensive and efficient collaboration of the entire Siemens workforce, coupled with the creation of the current established compliance system, made it possible that the scandal could be solved in a relatively expedient amount of time. However, the question, "How could such a scandal happen?" is still not answered yet. The following pages will give a more substantial answer to this question.

III. Combating of corruption

The containment of corruption can only succeed if a broad consensus in the society exists about the detriment of corruption, and if within the public opinion lies the desire to proceed against it. Nevertheless, for the combating of corruption legal regulations are indispensable in serving to punish those who gain an advantage by the use of it.

1. What does corruption mean?

Corruption can be defined from a social as well as legal point of view. Although there is no uniform term for corruption, it can be seen ethically and morally as behavior in which individuals with public or private tasks gain improper and unfair benefits at the cost of the general public.[96] Within the German criminal code (Strafgesetzbuch; abbr.: StGB) the term corruption is not explicitly used.[97] Under corruption, in a narrower criminal law sense is to be understood as, among others, the bribery (Bestechlichkeit) and corruption (Bestechung) in commercial practice according to §§ 299, 300 StGB[98].[99]

2. Legal situation in Germany

In order to see how the rules/regulations for combating corruption have been developing, it is worth looking at the legal (mainly criminal) situation in Germany before and after the scandal.

Since mid-1995 corruption has been proscribed not only internationally, but also increasingly nationally.[100] By decreeing the law on the fight against corruption

[96] Bannenberg, in: Wirtschafts- und Steuerstrafrecht, chapter 12, para. 4.
[97] Bannenberg, in: Wirtschafts- und Steuerstrafrecht, chapter 12, para. 5.
[98] Strafgesetzbuch, as of December 10, 2015, BGBl. I 1998, 3322.
[99] Bannenberg, in: Wirtschafts- und Steuerstrafrecht, chapter 12, para. 5.
[100] Transparency International Deutschland, Nationaler Integritätsbericht Deutschland, Januar 2012, 24.

(Korruptionsbekämpfungsgesetz) in 1997, the criminal offenses, among others, for granting and accepting an advantage (Vorteilsannahme und -gewährung) with regard to officials (§§ 331, 333 StGB), have been aggravated.[101] With this important modification of the penal provisions against corruption, a change in the public's perception took place.[102] Even the laws against the bribery of foreign officials for the acquisition of public orders have been substantially strengthened. Prior to this change, at the national level it was still usual practice to punish only the bribery of Germany's own (national) officials; whereas the bribery of foreign officials was common practice and used as a legitimate means to acquire public orders abroad.[103] Case in point; bribes abroad were tax-deductible in Germany until 1998.[104] In this regard, the Foreign Corrupt Practices Act (FCPA) of the USA is an exception, which already punished the bribery of foreign officials since 1977.[105] US-driven efforts to reach that level of protection worldwide led to the OECD-Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997.[106] The convention came into force on the 2nd of February 1999[107], and was implemented in Germany through the law on combating international corruption (Gesetz zur Bekämpfung internationaler Bestechung; abbr.: IntBestG).[108] In addition, for the implementation of European and international guidelines, Germany legislated the EU Bribery Act (EU-Bestechungsgesetz; abbr.: EUBestG) in the year 1998.[109] On the 22nd of August 2002[110] the third paragraph of § 299 StGB was inserted into the aforementioned Act, with the result that by law the prohibition of bribery and corruption was extended to the entire foreign competition.[111] Nevertheless there have been some anti-corruption conventions which Germany has signed, but not ratified and implemented.[112] Even the draft of a criminal law amendment act[113] for increasing the corruption criminal law, which was presented in the Bundestag on the 4th of October 2007,

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[101] Gesetz zur Bekämpfung der Korruption, as of August 13, 1997, BGBl. I 1997, 2039.
[102] Bannenberg, in: Wirtschafts- und Steuerstrafrecht, chapter 12, para. 2.
[103] Prieß, NZBau 2009, 587 (587); Weidenfeld, in: Weidenfeld, Nützliche Aufwendungen, 10-11.
[104] Pelz, WM 2000, 1566 (1566-1567); Bannenberg, in: Wirtschafts- und Steuerstrafrecht, chapter 12, para. 1.
[105] Partsch, The Foreign Corrupt Practices Act der USA, 2-3.
[106] BT-Drucks. 13/10428.
[107] Gesetz zu dem Übereinkommen vom 17. Dezember 1997 über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr, 1.
[108] Gesetz zu dem OECD-Übereinkommen vom 17.12.1997 über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr, as of September 10, 1998, BGBl. II 1998, 2327.
[109] Gesetz zu dem Protokoll vom 27. September 1996 zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften, as of September 10, 1998, BGBl. II 1998, 2340.
[110] Gesetz zur Ausführung des Zweiten Protokolls vom 19. Juni 1997 zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften, as of August 22, 2002, BGBl. I 2002, 3387.
[111] Fitz/Wiedlich, RIW 2005, 423 (425).
[112] For instance, the additional protocol to the criminal law convention of the year 2003 and the convention of the United Nations against corruption from 2003.
[113] BT-Drucks. 16/6558.

has never been passed.[114] All in all the German criminal code, referring to corruption, made due to the implementation of strong differentiating international minimum requirements an increasingly unsystematic impression (especially for crimes with a foreign dimension).[115] Last year though, on the 26th of November 2015[116], the law on combating corruption came into force and substantially changed the corruption criminal law.[117] In particular the new amendment in § 299 StGB states that not only the unfair preference in competition (unlautere Bevorzugung im Wettbewerb) is punishable, but also the simple infringement towards the principal (Geschäfstherr). Thus criminal liability loopholes (Strafbarkeitslücken) have been closed, but there is still some critique about the principal's model (Geschäftsherrenmodell).[118] Overall though, the legal situation over the past 20 years has been changed noticeably in the right direction. However, no regulatory change to German law has been implemented as a direct result of the Siemens scandal. The current situation is the result of a gradual process of reforms.

3. Reform measures – repressive or preventive?

Having seen the legal situation, especially from the criminal law side, the question of how corruption can be combated in the best and most effective way arises. Is it best combated in a repressive or in a preventive manner? Can the situation be improved through some reform measures? In the following paragraphs the aforementioned questions will be addressed.

a) Repressive Measures

aa) Implementation of a corporate criminal law?

This discussion started in November 2013, with the draft of the implementation of a corporate criminal law.[119] Under the German criminal code only natural persons (and so no corporations) can be punished even if they are acting on behalf of a corporation.[120] A sanctioning of corporations for employees' wrongdoings happens through a fine according to § 30 OWiG – as seen in the Siemens case.[121] One of the proponents' reasons to implement a corporate criminal law is the fact that the prosecution of administrative offenses underlies the principle of appropriateness (Opportunitätsgrundsatz). This means that there is no duty for the

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[114] Strafrechtliche Korruptionsbekämpfung.
[115] Wolf, NJW 2006, 2735 (2735-2736).
[116] Gesetz zur Bekämpfung der Korruption, as of November 20, 2015, BGBl. I 2015, 2025.
[117] Dann, NJW 2016, 203 (203).
[118] Hoven, NStZ 2015, 553 (556-557).
[119] Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden.
[120] Grützner/Jakob, Compliance von A – Z, keyword: Unternehmensstrafrecht.
[121] Grützner, CCZ 2015, 56 (56).

authorities, like in the criminal proceedings (§ 152 para. 2 StPO[122]), to prosecute.[123] Another is that the OWiG does not promote compliance efforts for the corporations.[124] Further corruption should be seen not only as an administrative offense, but as a crime[125], and therefore "real penalties" should be introduced. Critical voices argue that sufficient possible sanctions already exist;[126] for example, in the year 2013, § 30 OWiG[127] was modified that from now on, a fine of 10 million EUR could be imposed.[128] Also, the maximum fine can be extended in cases of skimming off excess profits.[129] So corporations do get a reasonable fine according to their wrongdoing. Additionally, an implementation of a corporate criminal law would contradict the principle of guilt which is only possible relating to natural persons.[130] Thus it does not seem to be necessary to implement a corporate criminal law since corruption can be combated just as effectively with the (possibly adapted) OWiG. Criminal regulations should stay the "ultima ratio".

bb) Corruption register?

Currently the implementation of a nationwide corruption register is planned. The aim of this register is to basically sanction corporations which have violated laws.[131] Under this register corrupt corporations, if found guilty, will be excluded for some time from the awarding of public or other contracts.[132] Though this could prove to be problematic, as with such a penalty corporations will find it very hard to keep their business alive whilst they are banned from being awarded contracts. Taking into account the Siemens scandal it can be concluded that had there been a corruption register, it would have been almost impossible for the firm to find its way back to its former strength as it did. Thus it is crucial that the register, if it is going to be implemented, provides some special limits, to include the following:[133] Firstly, it should include a reasonable time period for the length of exclusion, which should be in relation to the economic benefit the illegally firm took. Secondly, the point of who has access to the register is to be clarified. Information regarding the mere suspicion of a

[122] Strafprozessordnung, as of December 21, 2015, BGBl. I 1987, 1074, 1319.
[123] Mitsch, in: KK-OWiG, § 47, para. 1-2; Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden, 23.
[124] Haubner, DB 2014, 1358 (1358); Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden, 2.
[125] Transparency fordert Einführung eines Unternehmensstrafrechts.
[126] Leipold, ZRP 2013, 34 (34).
[127] Gesetz über Ordnungswidrigkeiten, as of June 26, 2013, BGBl. I 2013, 1748.
[128] Grützner, CCZ 2015, 56 (56).
[129] Grützner, CCZ 2015, 56 (56).
[130] Jahn/Pietsch, ZIS 2015, 1 (2-3); BVerfG June 30, 2009, BVerfGE 123, 267 (para. 364).
[131] Behringer, ZRP 2016, 20 (20).
[132] Lantermann, ZRP 2013, 107 (107-108); Behringer, ZRP 2016, 20 (20).
[133] Behringer, ZRP 2016, 20 (21-22).

corporation being corrupt should not be accessible to the public. This would namely lead to a maybe unjustified effect of pillory for the respective corporation. Thirdly, it should provide for the possibility of an early deletion if the firm is doing "self-cleaning" (compliance).

b) Preventive Measures

aa) The role of Corporate Governance in preventing corruption

(Good) Corporate Governance can even make a contribution towards preventing corruption.[134] "Good Corporate Governance" means having principles such as transparency and accountability at the decision-making level of the firm,[135] as well as a compliance system[136]. The German independent corporate board[137] represents the shareholders' interests which can help in preventing the (sometimes) opportunistic behaviors of the managers.[138] Having integral and transparent corporate boards makes it definitely more enticing for managers to commit to a "no bribe" policy when dealing with public officials who request support with regards to outstanding payments (bribe payments). Further, knowing where the decision comes from and how it is reached (Transparency) underlies the very roots of corporate governance.[139] This transparent system makes bribery in general much harder. Next to good working transparency and accountability, strong codes of business ethics can also guide the behavior of board members, managers and employees and in so doing help to prevent corruption.[140] In short, good Corporate Governance embodies a company's ethical values in all decisions and operations. Further, as previously mentioned, compliance stands for a core element of corporate governance and provides an important anti-corruption system. That being said, compliance does of course not only bring advantages, it too has its points of criticism. For instance, opponents criticize the lack of implementation of compliance in the firms,[141] as well as its rather high costs.

All of the aforementioned principles are almost useless though if they are not "actively lived" by all coworkers from "the tone at the top" which sets the moral tones on behalf of the corporation from the "top" to the "bottom". All in all, the checks and balance system of corporate governance is playing a crucial role in preventing corruption.

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[134] Bachmann/Prüfer, ZRP 2005, 109 (113).
[135] Sullivan, The Moral Compass of Companies, 2.
[136] Bainbridge, The New Corporate Governance, 165.
[137] Adams, Corporate Governance after Enron and Global Crossing, 762; Thomsen, Corporate Governance, 241.
[138] Thomsen, Corporate Governance, 242.
[139] Sullivan, The Moral Compass of Companies, 2; Solomon, Corporate Governance and Accountability, 143.
[140] Sullivan, The Moral Compass of Companies, 19.
[141] Hugger/Röhrich, BB 2010, 2643 (2646).

bb) Other suggestions

Thinking of other measures to prevent corruption, it could be suggested to "reward" corporations which are acting without the use of any corruption. This could be realized for instance through tax reliefs, the offer of premiums for corporations and/or the introduction of not profit-orientated remuneration systems. Instead of strictly punishing a corrupt corporation, it could be wiser to combat the causes of corruption and not simply sanction it after the corruption has occurred. If the above idea was implemented it would then be "easier" for a corporation not to accept bribe offers; and on the contrary, the corporation could report the offeror, whereby getting in return a premium. A further recommendation could be seen in the mitigation or exemption of the fine if the respective corporation makes a voluntary declaration. Such an implementation is already discussed as an amendment of § 30 OWiG.[142]

Another approach could possibly be moving the current German two-tier board structure, which consists of a management board and a supervisory board[143], to come closer to the American one-tier system. Reasoning for this proposal includes but is not limited to the fact that due to the separation of the German two-tier system, the supervisory board, which is responsible for preventing corruption in a corporation, seems to be less informed[144] than it would be under a one-tier system. Consequently, if the change was made, then in theory the supervisory board would be more informed and so could play a better role in controlling the management boards and in so doing could better prevent possible corruption cases. That being said this would also lead to a greater independency of the management whence again, as history shows us, increases the risk of corruption. Looking at former American governance scandals, their one-tier system proved just that. Thus, coming closer to the American two-tier system would not automatically bring an end to the failure of businesses to combat corruption.

c) Statement

Combating corruption is an ongoing and continuous effort. It requires both repressive as well as preventive measures. However, as mentioned above, it is not necessary to implement a corporate criminal law. The OWiG already provides good working tools to combat corruption, though it could be amended in terms of extending § 30 OWiG in such a way to provide better incentives (mitigation of the fine) for firms to establish a compliance system. It can be further noted that a corruption register is a good step in the right direction, as long as it

[142] Gesetzgebungsvorschlag für eine Änderung der §§ 30, 130 des Ordnungswidrigkeitengesetzes, 8, 16.
[143] Monks/Minow, Corporate Governance, 427.
[144] Jungmann, 3 ECFR, 426, 460 (2006).

is used in an appropriate way, related to the respective corporation, and not seen as the sole and exclusive solution for corruption cases. A more efficient method for the firm as well as the economy, is to monitor corporations which attract attention through corrupt behavior. Compliance too can play a very decisive role in combating corruption since it notably provides a system of regulated self-regulation. That all being stated, completely controlling corporations is also not the ideal way to combat corruption. This would mostly hinder corporations in their flexibility and transparency. However, there could be implemented the duty to establish a compliance system for only the “bigger”, in terms of their revenues, corporations. Measures such as offering premiums or tax reliefs, could also play a role in changing the corporations’ awareness concerning corruption. The mentality that nowadays successful businesses are able to run without using corruption needs to arise throughout the corporate world. Therefore, it is crucial that the activity orientation and the norms are internalized and lived by the entire corporation. Overall, the best and most efficient way to combat corruption can be reached through the combination of repressive and preventive measures, but with a major focus on preventive methods.

IV. Conclusion

Coming back to the former question, “How could such a scandal happen?”, it can be concluded that many factors played a decisive role in this damaging bribery scandal. One factor was the change in the legal situation, particularly in regards to the bribery of foreign officials. Previous to the scandal Siemens was not deterred by the changes to German law and so carried on regardless, bribing foreign officials. These bribes stemmed from other problems concerning this notable failure, namely the rather bad Corporate Governance of Siemens in terms of accountability and transparency as well as its lack of use of the Code of Conduct in practice. Last but not least, due to the enormous responsibility and pressure Siemens had regarding their employees, “it was about keeping the business unit alive and not jeopardizing thousands of jobs overnight.”[145] *Peter Löscher*, a former chief executive of Siemens, said in July 2007 that instilling an ethical corporate culture "is a marathon for us, not a sprint. The important thing for us is that compliance becomes part of management culture internationally, from top to bottom and back again."[146] All the more surprising is that what he said actually came true as Siemens established throughout this scandal an exemplary working compliance system, and has used the crisis as a new start, necessarily combined with a good Corporate

[145] At Siemens, bribery was just a line item.
[146] New Siemens chief says he'll recover ethical culture.

Governance. If this Siemens case brought about anything good, it is that it has moved the problems of corporate corruption from obscurity and into the public awareness. The businesses, the government and civil society would as a whole do well to work together and in doing so reduce the risk of any further cases of corruption.

Insofar as it remains to be seen how Volkswagen will deal with its emissions scandal, and if they can also use it, as Siemens did their scandal, to restructure their current Corporate Governance system into a good working Corporate Governance.

C. The Enron Scandal

The fall of Enron in the early 2000s not only bankrupted a major New York Stock Exchange (NYSE) listed corporation and brought down one of the "Big Five" accounting firms but also marked a major shift in how the United States and Corporate America values corporate governance. The scandal's fallout spanned over ten years, resulting in the criminal indictments and convictions of Enron's corporate officers and its accounting firm, Arthur Andersen, and the introduction of the Sarbanes-Oxley Act in 2002.

I. Enron's Plummet from Grace

In the 1980s and 1990s, the Texas-based Enron Corporation expanded its traditional business (transmitting and distributing electricity and natural gas in the United States) to include a marketplace for commodities (including energy, broadband communications, pulp and paper) and risk management services. The expansion allowed Enron to operate a virtual marketplace for buyers, sellers and transporters to enter transactions. Given the frequent short-term price fluctuations in the commodities markets, Enron also offered risk management services to its market users by buying and selling derivatives of those commodities transactions. So exciting and seemingly successful were these expansions, that *Fortune* magazine labeled Enron one of the most innovative companies in the world in December 2000.[147] By December 2001, however, the company had entered Chapter 11 bankruptcy, becoming the largest bankruptcy in U.S. history at that time.[148]

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[147] Nicholas Stein, "The World's Most Admired Companies," *Fortune*, Oct. 2, 2000, http://archive.fortune.com/magazines/fortune/fortune_archive/2000/10/02/288448/index.htm.
[148] *Enron Fast Facts*, CNN (Apr. 26, 2015) (last accessed Feb. 1, 2015), http://www.cnn.com/2013/07/02/us/enron-fast-facts/.

Enron's plummet from grace began on October 16, 2001, when the company announced a $544 million charge against earnings related to transactions with a partnership created and managed by Andrew Fastow, Enron's CFO, and a corresponding $1.2 billion reduction in shareholders' equity related to those transactions. While such an announcement might not have devastated the company on its own, within a month, Enron's prospects plunged into free fall when it announced that it was restating financial statements from 1997 through 2001 because of accounting errors that had been made with respect to transactions with other partnerships managed by Enron employees (including Fastow). These accounting errors had resulted in gross overstatements of Enron's reported net income (e.g. by $248 million out of a total $893 million in 1999)[149] and reported shareholder equity and large understatements of the company's reported debt. Enron also disclosed in its announcement that Fastow had received over $30 million from transactions between his partnerships and the company.[150] These announcements destroyed the market's confidence in the company, sending it into Chapter 11 bankruptcy, and prompted investigations by the Securities Exchange Commission ("SEC") in 2001 and U.S. Department of Justice in 2002.[151]

In the wake of the company's bankruptcy, a number of key executives were prosecuted by the Justice Department on charges including conspiracy, insider training, fraud and money laundering. For instance, Fastow pled guilty to conspiracy to commit securities and wire fraud and admitted that had conspired to manipulate Enron's public financial reports and enriched himself.[152] Enron founder and CEO Kenneth Lay was convicted of conspiracy, wire fraud and securities fraud, while Enron CEO Jeffrey Skilling was convicted of conspiracy, wire fraud, insider trading and making false statements to auditors.[153] Fastow and Skilling ultimately served or are serving time in federal prison;[154] Lay passed away before he could be sentenced.[155]

[149] William C. Powers, Jr. et al., *Report of Investigation by the Special Investigation Committee of the Board of Directors of Enron Corp.*, 3 (Feb. 1, 2002) (hereinafter *Powers Report*).

[150] Fastow's transactions had actually been disclosed in the company's SEC filings in the past, but Fastow's name and position within the company and the amount of remuneration he received had not been revealed until this announcement.

[151] *Enron Fast Facts*, *supra* note 2.

[152] *Former Enron Chief Financial Officer Andrew Fastow Pleads Guilty to Conspiracy to Commit Securities and Wire Fraud, Agrees to Cooperate with Enron Investigation*, FED. BUREAU OF INVESTIGATIONS (Jan. 14, 2004), https://www.fbi.gov/news/pressrel/press-releases/former-enron-chief-financial-officer-andrew-fastow-pleads-guilty-to-conspiracy-to-commit-securities-and-wire-fraud.

[153] Federal Jury Convicts Former Enron Chief Executives Ken Lay, Jeff Skilling On Fraud, Conspiracy and Related Charges, DEP'T. OF JUSTICE (May 25, 2008), http://www.justice.gov/archive/opa/pr/2006/May/06_crm_328.html.

[154] *See* Kate Murphy and Alexei Barrionuevo, *Fastow Sentenced to 6 Years*, N.Y. TIMES (Sep. 27, 2006), http://www.nytimes.com/2006/09/27/business/27enron.html?fta=y; *Former Enron CEO Jeffrey Skilling*

II. Creative Accounting

While theories have been advanced about what led to Enron's ultimate downfall, including that Enron had bet wrongly on the market[156] and failed to accurately hedge against risk taken on by its derivatives trading, it can be universally agreed upon that Enron engaged in creative accounting that cast a glossy sheen on numbers disclosed to investors and engaged in self dealing transactions.

According to a report by a Special Investigative Committee commissioned by the Board of Directors (hereinafter, "Powers Report"), Enron had entered financial transactions that were designed to keep assets and liabilities off its balance sheet and maintain the company's credit rating rather than *bona fide* economic objectives.[157] These transactions often involved accounting structures called special purpose entities ("SPEs") and with the blessing of Enron's accountant, Arthur Andersen.[158] Under accounting rules, a company must consolidate its financials with any companies in which it is the majority shareholder. When a company transacts with an SPE, however, it can treat the SPE's financials as an independent outside entity when (1) at least 3% of the SPE's total capital comes from outside equity investors, and that 3% remains at risk throughout the transaction; and (2) the independent owner of the SPE controls the SPE.[159] If those conditions are met, the company may record the profits and gains from transactions with the SPE but exclude the SPE's assets and liabilities from its balance sheet. Taking advantage of this accounting structure, Enron's managers entered into a number of questionable transactions with SPEs that set up the company for its downfall.

1.Chewco Transaction

One such questionable transaction, involving an entity named Chewco Investments L.P. ("Chewco"), gives a sampling of the type of accounting and oversight errors that made up Enron's problems.

According to the Powers Report, Enron was party to a joint venture with the California Public Employees' Retirement System ("CalPERS") called Joint Energy Development Investment Limited Partnership ("JEDI") between 1993 and 1996.[160] Because

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Resentenced to 168 Months for Fraud, Conspiracy Charges, DEP'T. OF JUSTICE (Jun. 21, 2013), http://www.justice.gov/archive/opa/pr/2006/May/06_crm_328.html.

[155] Vikas Bajaj and Kurt Eichenwald, *Kenneth L. Lay, 64, Enron Founder and Symbol of Corporate Excess, Dies*, N.Y. TIMES (July 6, 2006), http://nyti.ms/1Yw8srm.

[156] Enron invested heavily in broadband communications, but the broadband market collapsed.

[157] *Powers Report*, *supra* note 149, at 4.

[158] *Id.* at 5.

[159] *Id.*

[160] *Id.* at 6.

JEDI was a joint venture, Enron could record its gains and losses from JEDI on its income statements but did *not* have to report JEDI's liabilities.[161] In 1997, Enron redeemed CalPERS' interest in JEDI so that CalPERS could invest in an unrelated Enron partnership.[162] To prevent consolidation of JEDI (particularly its debts) into the company's financial records, however, Enron needed a new partner for JEDI. Rather than finding a legitimate outside partner, Enron set up a limited partnership managed by Michael J. Kopper, an Enron Global Finance employee who reported to Fastow, the CFO.[163] As noted in Section C.II above, the financials of an SPE can be left unconsolidated from the related company it transacts with if and only if an independent investor owns at least 3% of the SPE's total equity and controls the SPE. When Chewco and Enron could not locate any outside equity investors, they instead structured Chewco's purchase of CalPERS' JEDI interest using debt rather than equity.[164] Without the outside equity investor, JEDI's assets and liabilities should have been consolidated with Enron's financial records. Nevertheless, Enron failed to consolidate the records, resulting in a significant retroactive reduction in the Enron's reported net income and increase in its reported debt when transaction was reviewed in 2001 by the company and Arthur Andersen.[165]

Enron's handling of the Chewco transaction also stands as an example of Enron's failed corporate governance and management oversight. Enron had a Code of Conduct of Business Affairs that would have required Kopper's role as Chewco's managing partner to be disclosed and approved by Enron's Chairman and CEO before Enron could have transacted with Chewco.[166] In other words, according to Enron's internal processes, this sort of self-dealing transaction had to be submitted to the Chairman and CEO to determine that the Enron employee's participation in the other country would "not adversely affect the best interests of the Company."[167] Nevertheless, the Powers Report did not find evidence that Kenneth Lay, Enron's Chairman and CEO at the time, knew of or approved of Kopper's role in Chewco.[168] Enron had a clear internal policy that was not followed, resulting in management's oversight

[161] *Id.*
[162] *Id.*
[163] *Id.* at 6-7.
[164] *Id.* at 7.
[165] *Id.*
[166] *Id.* at 8.
[167] *Id.*
[168] *Id.*

of a potentially problematic transaction that was most likely not in the company's best interests.[169]

2. The LJM Transactions

While Enron entered into the Chewco transaction without proper approval, some of the transactions the company entered into *with* Board approval nevertheless suffered from important accounting and governance defects. The company entered into business relationships with partnerships managed by Fastow ("LJM1" and "LJM2" or "LJM") with the Board's approval.[170] Although clear conflicts of interest existed, the Board consented to the transactions and implemented a number of policies that it believed could control and mitigate the risks of such conflicted deals. For instance, all LJM transactions had to be reviewed and approved by the company's Chief Accounting Officer, Chief Risk Officer, President and COO.[171] The Audit and Compliance Committee also had to review all LJM transactions annually. While the processes were in place, the Board and Enron management failed to implement. The Powers Report found that the Chief Accounting Officer and Chief Risk Officer did not review the transactions with the scrutiny that the Board perhaps believed was occurring.[172] Furthermore, while Jeffrey Skilling, the President and COO, represented to the Board that he was involved with reviewing the interested transactions, the Powers Report found that he provided nonexistent oversight over Enron's transactions with Fastow.[173] The Board, likewise, asked management few and only cursory questions regarding the transactions.[174] Enron ultimately entered into over 20 transactions that could be generally categorized as "asset sales" or "hedging transactions" with these Fastow-managed partnerships between June 1999 and June 2001.[175]

Broadly speaking, the asset sales Enron entered into consisted of Enron transferring assets to the LJM partnerships in order to manipulate Enron's bookkeeping. While such a transaction—which would remove the asset from Enron's financial report—could be legitimate if the transacting party took on both the risks and benefits of owning the asset,

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[169] Kopper apparently received $2 million in management fees from his involvement with Chewco, but the Special Investigation Committee was unable to determine what Kopper actually did to justify the payment. Furthermore, when Enron repurchased the Chewco interest in JEDI, Kopper negotiated the transaction with Fastow and received a payout of over $10 million because he had invested $125,000 in equity in Chewco in 1997. *Id.*

[170] Fastow was also an investor in these partnerships. *Id.* at 10.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Annual reviews of the transactions involved brief presentations by management and Arthur Andersen without much discussion about the nature and terms of the transactions. *Id.* at 11.

[175] *Id.*

Enron, in at least several cases, agreed to protect LJM against loss.[176] Adding to the questionable nature of the transactions, many of the assets were transferred back and forth between LJM and Enron in the months closely preceding and proceeding the company's financial reporting period.[177] LJM also made a profit on each of these back and forth transactions, regardless of whether the asset's value had actually decreased.[178]

Like its questionable LJM asset sales transactions, the "hedging transactions" Enron entered into with the LJM partnerships were structured so that Enron could manipulate its bookkeeping. While a normal hedge involves reducing the risk in a particular transaction by entering into an agreement with a third party who takes on the economic risk of the value of the first transaction, the Enron-LJM hedges were more akin to a false equity swap. In the typical hedge, if the value of the investment decreases, the third party takes on the loss in value. Enron, however, funded SPEs with its own Enron stock with the LJM partnerships serving as the 3% outside equity holder required for non-consolidation.[179] The SPEs served as Enron's hedging partners. If the value of an Enron investment decreased, the hedging SPE would pay Enron for its losses with Enron's own stock.[180] This allowed Enron to cook its books: the company could record its hedging gains (the value paid to it by its hedging partner) against its investment losses in its financial statements. Because payment was with its own stock, however, Enron never actually decreased the economic risk of its investments. Importantly, these types of transactions were conducted with the approval of Arthur Andersen.[181] When the markets declined in 2001, Enron could no longer cover its losses through creative accounting and had to announce in October 2001 a $544 million after-tax charge against earnings and reduce shareholder equity by $1.2 billion.[182]

III. Enron as a Redesigned Corporation

While students of corporate law learn that the board of directors manages the company on the behalf of the shareholders, it is arguable how much "managing" a board actually engages in. It is well accepted at this point that many corporations have a management level that handles the day-to-day running of a corporation and that reports to the board. As much as a board "manages down" and guides the trajectory of a corporation by directing management, however, management equally "manages up" when it provides information that will shape

[176] *Id.* at 12
[177] *Id.*
[178] *Id.*
[179] *Id.* at 14.
[180] *Id.*
[181] *Id.*
[182] *Id.* at 15.

board decisions. Successful governance strategies—and by extension, a board's success at managing a company—therefore depend largely on a board's ability to obtain quality information it needs from management to assess the state of the corporation.

Professor Robert E. Rosen suggests that certain "progressive" corporate organizations—including Enron—which he terms "redesigned corporations," have characteristics that make them more susceptible to governance defects related to the board's information gathering abilities.[183] According to Rosen, in a redesigned corporation, projects are conceived and executed from the bottom-up, and the board monitors the corporation through analyzing risk management reports.[184] As such, a board's success depends on its ability to analyze the reports and probe for further information as necessary.[185] Redesigned corporations also emphasize innovation, taking on high-risk, high reward projects, which require a board to properly mitigate risk.[186] Rosen argues that distinctions between providers, suppliers and competitors are blurred in redesigned corporations.[187] In other words, a redesigned corporation integrates guest workers into its operations, creating a situation where an individual's loyalty to another entity (e.g. the contracting agency) is a conflict of interest while the individual's self-interest and entrepreneurialism within the redesigned corporation is rewarded.[188]

If one thinks about Enron as a redesigned corporation as Rosen suggests, it is possible to see how the company managed to conceal—or, for the board of directors, miss—its problematic accounting practices for so long. Enron was widely seen as one of the most innovative companies of its time—driven, perhaps, by the structure of its departments. Enron's departments had a history of operating so independently from each other that they were referred to as "stand-alone silos"[189] and a tolerance for group-driven projects. For instance, the company apparently invested $15 million (excluding salaries) into the Enron Online project before it occurred to the project's team leader to inform management about the development of the project.[190] Although Kenneth Lay and Jeffrey Skilling, Enron's top

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[183] Robert E. Rosen, *Risk Management and Corporate Governance: The Case of Enron*, 35 CONN. L. REV. 1157, 1158 (2003).
[184] *Id.*
[185] The Powers Report found that the Enron board did not do enough probing, concluding that the board "can and should be faulted for failing to demand more information, and for failing to probe and understand the information that did come to it." Powers Report at 23.
[186] Rosen, *supra* note 183 at 1158.
[187] *Id.*
[188] *Id.*
[189] John Schwartz, *As Enron Purged Its Ranks, Dissent Was Swept Away*, N.Y. TIMES (Feb. 2, 2002), http://nyti.ms/1nIj9ae.
[190] Rosen, *supra* note 183 at 1166.

executives, were both reportedly "surprised" when they learned about Enron Online's development,[191] Enron Online would go on to be lauded as a success, averaging 6,000 transactions worth about $2.5 billion each day two years after it launched.[192] This sort of project development typifies how projects are developed in redesigned corporations and shows that management's ability to direct the corporation relies heavily on receiving accurate, timely information from its project teams. As noted above, projects in a redesigned corporation are developed and presented to management. Management makes its decisions to green or red light projects based on its analysis of the project teams' presentations. In a company with a culture of departments operating autonomously, there is little coordination between the departments. Instead, projects developed by the different departments compete for resources within the corporation by presenting compelling risk management plans to the executives. What executives do not know about, they cannot say no to. Furthermore, by the time management does learn about a project through a presentation or risk management plan, significant resources may have been poured into the project.

Given that a redesigned corporation relies on risk management reports to decide whether to pursue a particular project, the ability to reduce the risk of a project adds to its value. In line with the redesigned corporation model, which proposes that outside consultants and contractors are integrated into the company, Enron engaged professionals or consultants who added value to the company by working to reduce project risks—or perhaps gave the veneer of mitigated risks. Recall, for instance, that Arthur Andersen apparently approved the structure of the SPEs Enron formed with LJM funded with Enron stock.[193] While one function of accountants is to provide third party verification and certification of a company's audit ("gatekeeping"), accountants are also in the business of selling their services. In the 1990s, auditors found themselves operating in a period with low legal risk as auditors, owing to the combination of the Supreme Court's *Lampf, Pleva, Lipkind & Petigrow v. Gilbertson* and *Central Bank of Denver, N.A. v. First Interstate of Denver, N.A.* decisions and the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").[194] Consequently, there might have been greater

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[191] *Id.*

[192] Briony Hale, *Enron's Internet Monster*, BBC NEWS (Nov. 30, 2001), http://news.bbc.co.uk/2/hi/business/1684503.stm.

[193] Powers Report, *supra* note 149 at 14.

[194] John C. Coffee, Jr., *Understanding Enron: It's About the Gatekeepers, Stupid*, 14 (Columbia Law Sch. Ctr. for Law and Econ. Studies, Working Paper No. 207, 2002), *available at* http://ssrn.com/abstract_id=325240. *See also* 501 U.S. 350, 359-61 (1991) (finding that litigation litigated under the Securities Exchange Act of 1934 §10(b) and Rule 10b-5 must be instituted within one year after the discovery of the facts of the securities violation and within three years of said violation); 511 U.S. 164 (1994) (eliminating "aiding and abetting"

willingness on the part of the auditors to acquiesce to management decisions and give the gloss of certification as a hook to selling consulting services.[195] Consulting fees were far more lucrative for auditors and made up the bulk of an auditor's fees.[196] As such, auditors like Arthur Andersen were motivated to "work for the client" in order to retain their consulting engagements.[197] An auditor's interest in remaining a consultant for a company thus turned it into a "yes man" unable to provide a fully independent assessment of the company's project risks and accounting. This is, as Professor John C. Coffee terms it, "gatekeeper failure."[198] Given that a decision in a redesigned corporation can only be as good as the information that was presented to management, inherently faulty information generated by interested parties can only result in inherently faulty decision making.

Viewed through the lens of the redesigned corporation model, Enron's meltdown exposes at least several key corporate governance issues: the importance of (1) the board's oversight power; (2) the board's ability to obtain quality information about the risks of the company's operations; and (3) the potential conflicts of interest arising from working too closely with auditors.

IV. The U.S. Regulatory Response: Sarbanes-Oxley

In response to Enron and several other major accounting scandals in the 1990s and early 2000s, Congress passed and President George W. Bush signed into law the Sarbanes-Oxley Act ("Sarbanes-Oxley" or "SOX" or the "Act") in 2002.[199] Aimed at restoring investor confidence in the United States capital markets, the Act introduced a number of regulatory reforms in accounting and in required corporate reporting that directly responded to some of the governance issues that plagued Enron.[200] For instance, as a redesigned corporation, Enron

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liability in private securities fraud cases); Pub. L. 104-67, 109 Stat. 737 (codified in sections of 15 U.S.C.) (raising the pleading standards for securities class actions and introduced a safe harbor for forward looking statements);

[195] Coffee, *supra* note 194 at 14.

[196] *Id.* Although the fallout of Enron and implosion of Arthur Andersen resulted in a restriction on the types of consulting services auditors could offer to clients, consulting work continues to bring in big fees for auditors. For instance, HSBC Holdings PLC apparently paid KPMG LLP $208 million for consulting fees, which was over five times as much for consulting fees than it did auditing fees, between 2010 and 2012. Consulting revenue across the Big Four accouting firms also apparently grew 33% between 2009 and 2014, while audit revenue grew only 6%. Emily Chasan, *Auditors Draw Somes Clients Closer*, WALL ST. J. (Mar. 4, 2014), http://blogs.wsj.com/cfo/2014/03/04/auditors-draw-some-clients-closer/.

[197] *See* Coffee, *supra* note 194 at 15-16 (arguing that a company could effectively threaten its auditor by decreasing the auditor's consulting services with the firm in retaliation for the auditor's refusal to endorse its aggressive accounting practices without the public visibility of actually firing the auditor).

[198] *Id.* at 5.

[199] William H. Donaldson, Chairman, U.S. Sec. and Exch. Comm'n, Testimony Concerning Implementation of the Sarbanes-Oxley Act of 2002, Address Before the Senate Committee on Banking, Housing and Urban Affairs (Sep. 9, 2003), https://www.sec.gov/news/testimony/090903tswhd.htm.

[200] *Id.*

engaged in activities including creative accounting facilitated in partnership with its auditors, inaccurate disclosure of its financial picture that resulted in restatements that dramatically decreased shareholder equity,

Sarbanes-Oxley introduced regulatory reform in the accounting profession, imposed additional disclosure and financial reporting responsibilities for corporations, created individual liability for top executives and gave stronger enforcement power to the SEC.[201] Incorporating lessons from Enron's revealed corporate governance defects, Sarbanes-Oxley imposed regulations that could be thought of as "good practices" aimed at preventing governance problems.

1. Public Company Accounting Oversight Board and Auditor Independence and Accountability

One of Enron's most striking governance defects was its gatekeeper failure. Enron's auditor, Arthur Andersen, not only failed to catch the creative accounting that led to Enron's collapse but also at times explicitly approved the company's bookkeeping practices. As a response to preventing future gatekeeper failures, Sarbanes-Oxley created the Public Company Accounting Oversight Board (PCAOB).[202] The PCAOB, which is under SEC oversight,[203] is a nonprofit corporation that regulates public accounting firms providing audit services. Under Sarbanes-Oxley, public accounting firms that prepare audits reports for securities issuers must register with PCAOB.[204] The PCAOB promulgates auditing standards and has the power to investigate and discipline its members.[205]

Sarbanes-Oxley also took aim at auditor independence and accountability. Under SOX, auditors are now prohibited from providing non-audit (consulting) services contemporaneously to its audit client.[206] Engagements with auditors for both auditing and consulting work must be pre-approved by a company's audit committee, and approval of non-audit consulting services must be disclosed to the company's investors in periodic reports.[207]

[201] *Id.*
[202] *Id.*
[203] The SEC's oversight authority includes the approval of the PCAOB's rules, standards and budgets. The SEC also appellate authority over PCAOB disciplinary actions and disputes PCAOB inspection reports. *Id.*
[204] *Id.*
[205] *Id.*
[206] These services include: (1) bookkeeping or other services related to the accounting records or financial statements of the audit client; (2) financial information systems design and implementation; (3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports; (4) actuarial services; (5) internal audit outsourcing services; (6) management functions or human resources; (7) broker or dealer, investment adviser, or banking services; (8) legal services and expert services unrelated to the audit; and (9) any other service that the [PCAOB] determines, by regulation, is impermissible. Pub.L. 107-204, 116 Stat. 771-72.
[207] Pub.L. 107-204, 116 Stat. 773.

SOX mandates that a securities issuer must rotate lead auditing firms every five fiscal years.[208] SOX also requires auditors to present to the audit committee periodic reports on:

> "(1) All critical accounting policies and practices to be used;
>
> (2) All alternative treatments of financial information within generally accepted accounting principles that have been discussed with management officials of the issuer, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm; and
>
> (3) Other material written communications between the registered public accounting firm and the management of the issuer, such as any management letter or schedule of unadjusted differences."[209]

This provision particularly responded to remedying the criticism leveled against the Enron Board for failure to probe into the company's risky accounting practices.[210] While an audit committee still has the duty to sufficiently investigate the state of the company's accounting practices, SOX added a layer of accountability that makes it more likely than not that the committee receives such information. Taken together, these provisions within SOX were meant to facilitate the role of auditors as independent gatekeepers able to provide certification to parties like investors of the veracity of a company's claimed finances.

2. Corporate Responsibilities and Executive Liability

While a board of directors has a fiduciary duty to provide oversight to a company's activities,[211] boards necessarily relies on management to handle the day-to-day running of a corporation and to accurately report back to the board. The Sarbanes-Oxley Act targets management's reporting of accurate information by raising the stakes for executives of publicly traded companies. Under SOX, CEOs and CFOs must personally certify both financial and non-financial information filed with the SEC or risk criminal charges.[212] By

[208] *Id.*
[209] *Id.*
[210] *See* S. REP. NO. 107-70, at 17 (2002) ("Andersen informed the Audit Committee members that Enron was engaged in accounting practices that 'push limits' or were 'at the edge' of acceptable practice. In the discussion that followed, Andersen did not advocate any change in company practice, and no Board member objected to Enron's actions, requested a second opinion of Enron's accounting practices, or demanded a more prudent approach.").
[211] *See In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) (establishing that the board has a basic duty to monitor corporate acts).
[212] 15 U.S.C. § 7241; 18 U.S.C. § 1350; Donaldson *supra* note 53.

imposing personal liability on the certifying corporate officer, SOX aligned the officer's interest in self-preservation with the SEC's public policy goals of protecting investors and maintaining efficient markets.[213] This had the added benefit of recentralizing power to the board of directors—a defect that Enron, as a redesigned corporation, suffered from. The Act also required that companies maintain disclosure controls and procedures to ensure that information that needs to be disclosed and reported will be properly made public.[214] According to the SEC, the combination of certification requirements and disclosure controls refocused executive attention on company disclosure responsibilities and the quality of the reporting.[215]

3. Enhanced Corporate Disclosures

While securities issuers prior to Sarbanes-Oxley were required to report material information to the SEC in periodic disclosures,[216] the Act instituted additional reporting requirements for these companies. One of the issues uncovered in Enron was that, while the interested transactions between Fastow's LJM partnerships and Enron had in fact been included in SEC filings, the company had only obliquely included this information in the footnotes of its reports.[217] For instance, in disclosing the LJM transactions in the company's 10-Q in the second quarter of 1999, Enron apparently noted that, "[a] senior officer of Enron is managing member of LJM's general partner," but failed to identify Fastow or detail how LJM or Fastow would be compensated.[218] The Senate Report on Enron, echoing the Powers Report, found these indirect disclosures wholly inadequate.[219] Sarbanes-Oxley thus imposed enhanced reporting responsibilities on securities issuers. For instance, off-balance sheet transactions, arrangements and obligations, and any other relationships that a company might have with unconsolidated entities or persons that may have a "material current or future effect on financial condition, changes in financial condition, results in operations, liquidity, capital

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[213] *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. AND EXCH. COMM'N (June 10, 2013), https://www.sec.gov/about/whatwedo.shtml.
[214] Donaldson, *supra* note 199.
[215] *Id.*
[216] According to the Senate's investigation report on Enron, Norman P. Blake, a former director at Enron, apparently claimed that transferring assets of a company's books (as in the LJM transactions) "[was] not immoral as long as disclosed." S. REP. NO. 107-70, *supra* note 210 at 47.
[217] *See* Powers Report, *supra* note 149 at 192-203.
[218] *Id.* at 193.
[219] S. REP. NO. 107-70, *supra* note 210 at 47.

expenditures, capital resources or significant components of revenues or expenses" must now be clearly disclosed in a separately captioned subsection in the Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") section of a company's disclosure documents.[220] The Act also imposed the disclosure of transactions involving management and principal stockholders.[221] Additionally, the Act required that public companies disclose "on a rapid and current basis such additional information concerning material changes in financial condition or operations of the issuer" through Form 8-K.[222] Managers must also maintain and annually report "adequate control structure and procedures for financial reporting," with the attestation of an auditor.[223]

In addition to obligating corporations with increased financial reporting, Sarbanes-Oxley also required that corporations disclose information about corporate codes of ethics and audit committee financial experts.[224] The SEC adopted "adopt or explain" policies in implementing these sections of the statute. A corporation must disclose whether it (1) has an audit committee; (2) if the audit committee has an "audit committee financial expert"; (3) the name of the expert; and (4) whether the expert is independent of management.[225] If the corporation that does not have an expert, it must explain why. Similarly, a corporation must disclose whether it has adopted a code of ethics that applies to the company's executives.[226] The company must explain why if it has not adopted a code, whether any amendments have been made to its code, or if any of its officers has waived out of the code.[227]

V. Effects of Sarbanes-Oxley

In the wake of Sarbanes-Oxley's passage, the Act was criticized across corporate America because of its high cost of implementation and compliance and questionable benefit toward enhancing the U.S. markets.[228] Even ten years after its enactment, the argument over the cost-benefit the Act had yet to subside.[229] Empirical studies on the economic cost of

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220 Press Release, U.S. Sec. and Exch. Comm'n, SEC Proposes Rule to Implement Sarbanes-Oxley Act Reforms (Oct. 30, 2002), *available at* https://www.sec.gov/news/press/2002-155.htm.
221 Pub.L. 107-204, 116 Stat. 788.
222 Press Release, U.S. Sec. and Exchn. Comm'n, SEC Adopts Rules on Provisions of Sarbanes-Oxley Act (Jan. 15, 2003), *available at* https://www.sec.gov/news/press/2003-6.htm.
223 U.S. SEC. AND EXCH. COMM'N, MANAGEMENT'S REPORT ON INTERNAL CONTROL OVER FINANCIAL REPORTING AND CERTIFICATION OF DISCLOSURE IN EXCHANGE ACT PERIODIC REPORTS, RELEASE NOS. 33-8238 (Aug. 28, 2008), https://www.sec.gov/rules/final/33-8238.htm.
224 15 U.S.C. §§ 7264, 7265.
225 U.S. SEC. AND EXCH. COMM'N, DISCLOSURE REQUIRED BY SECTIONS 406 AND 407 OF THE SARBANES OXLEY ACT OF 2002, RELEASE NOS. 33-8177 (MAR. 27, 2003), https://www.sec.gov/rules/final/33-8177.htm.
226 *Id.*
227 *Id.*
228 *A Price Worth Paying?,* THE ECONOMIST (May 19, 2005), http://www.economist.com/node/3984019.
229 For instance, Steven Barth, a partner at Foley & Lardner, called it an "abject failure. If the goal and object of Sarbanes-Oxley was to create more confidence in our capital markets, let's face it: it can't prevent fraud and

implementing Sarbanes-Oxley have found that the Act's reporting and compliance requirements caused significant cash flow declines at the firm level, some of which can be traced to managerial diversion.[230] Yet those requirements have also become, to an accepted cost to doing business with some positive effects. For instance, voluntary disclosure of certain information by corporations increased after the passage of SOX.[231] Elements of the legislation have become accepted as "good practice" even outside public companies, particularly with regard to independence and the restructuring of financial committees.[232] And, in 2009, Audit Analytics published a study that found a 46% higher rate of financial restatements for companies that did not comply with SOX's internal control provisions.[233] While it can be argued that Sarbanes-Oxley treated only the symptoms that led to the Enron collapse, if one believes that efficient markets requires certain types of information about corporations, Sarbanes-Oxley refocused corporate attention to making those types of disclosure, and in that sense, can be seen as successful.

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abuse from occurring. Has the stock market become more trustworthy over the past 10 years?" Melissa Maleske, *Eight Ways SOX Changed Corporate Governance*, INSIDE COUNSEL (Jan. 1, 2012), http://www.insidecounsel.com/2012/01/01/8-ways-sox-changed-corporate-governance.

[230] *See e.g.* Anwer S. Ahmed, Mary Lea McAnally, Stephanie Rasmussen, Connie D. Weaver, *How costly is the Sarbanes Oxley Act? Evidence on the effects of the Act on corporate profitability*, 16 J. CORP. FIN. 503 (2010) (finding that average cash flows delcine by 1.3% of total assets after SOX came into effect).

[231] Lawrence A. Gordon, Martin P. Loeb, William Lucyshyn, Tashfeen Sohail, *The impact of the Sarbanes-Oxley Act on the corporate disclosures of information security activities*, 25 J. ACCT. PUB. POL'Y 503 (2006).

[232] Rick Cohen, *Sarbanes-Oxley: Ten Years Later*, NONPROFIT Q. (Dec. 30, 2012), https://nonprofitquarterly.org/2012/12/30/sarbanes-oxley-ten-years-later/.

[233] Ernst & Young, *The Sarbanes-Oxley Act at 10* (2012).

D. Comparing Enron and Siemens

I. Corporate Misconduct: Divergent Outcomes

The Enron and Siemens scandals have been widely cited as examples of egregious corporate misconduct in the last 20 years. While the misconduct at Enron and Siemens may not be directly comparable (accounting irregularities and bribery, respectively), both companies had engaged in activities that were arguably characteristic of peer companies in their respective countries and markets and had corporate cultures that acknowledged yet subverted internal controls.[234] Yet the regulatory and economic resolutions of the companies' respective misconduct were dramatically different: Enron ceased to exist while Siemens continues to be a major international corporation.[235] These differences in outcome may be attributable to the varying corporate traditions and regulatory structures. Furthermore, while Enron's value was tied to its reputation as being on the cutting edge of energy and energy

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[234] *See* Clinton Free, Norman Macintosh & Mitchell Stein, *Management Controls: The Organizational Fraud Triangle of Leadership, Culture and Control in Enron*, IVEY BUSINESS J. (Jul. 2007), http://iveybusinessjournal.com/publication/management-controls-the-organizational-fraud-triangle-of-leadership-culture-and-control-in-enron/ (arguing that Enron CEO Jeff Skilling introduced a corporate culture that resulted in the disregard of internal controls); and Samuel Rubenfeld, *Siemens CFO: Our Internal Control System Works Like a Charm*, WALL ST. J. (Jan. 15, 2013), http://on.wsj.com/X1zilc (noting cultural changes made to Siemens' corporate compliance culture following the company's FCPA fine).

[235] The individual penalties imposed on key figures within their respective corporations also differed. Enron CEO Jeffrey Skilling was sentenced to over two decades in prison in the U.S., while Siemens CEO Heinrich von Pierer was fined 5 million euros.

markets, Siemens value was associated with tangible products and engineering, which may have contributed to the difference in outcomes.

The 2001 collapse of the Texas-based energy company Enron resulted in the remarkably expedient passage of the Sarbanes-Oxley Act of 2002 because accounting scandals of its ilk threatened investor trust in the capital markets.[236] Enron had issued financial restatements related to Enron's off-the-book transactions with SPEs that dramatically reduced shareholder equity and ultimately resulted in the company's bankruptcy and collapse. Although off-balance-sheet transactions with SPEs were not per se illegal,[237] the company engaged in questionable accounting with regard to consolidating these transactions into its financial statements, which resulted in overstating the company's value. When the company was forced to issue restatements of its financial reports, it projected instability and unreliability to investors. For a company whose lifeblood depended on being at the cutting edge, instability apart from the inherent risks of technological innovation could be—and was—fatal. As such, Enron's demise can be linked to shaken investor trust in the company. SOX, which directly addressed many of the practices that led to Enron's downfall and introduced regulation into the accounting industry, was clearly a reactionary piece of legislation aimed at preventing this type of instability in the future. The political climate at the time of its passage was ripe for such a piece of legislation, given the number of other accounting scandals that had come to light in the late 1990s and early 2000s.[238] Furthermore, the legislation was rationally consistent with the SEC's policy of protecting investors and maintaining efficient markets through information disclosure.[239]

SOX's swift enactment in the United States as a response to the accounting and governance practices that led to Enron's downfall stands in contrast to Germany's regulatory response to the discovery of Siemens' bribery scandal. Regulators discovered Siemens' bribery practices in 2003, and it did not become public until 2006 when German police raided

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[236] The bill that led to Sarbanes-Oxley was introduced into the House of Representatives on February 14, 2002. It passed both the House and the Senate by July 15, 2002 and was signed into law by President George W. Bush on July 30, 2002. Bill Summary & Status http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03763:@@@S.

[237] Off-balance-sheet transactions are frequently—and legitimately—used by companies to manage risk or take advantage of tax minimization opportunities. For instance, a corporation might structure a lease as an "operating" lease, which allows for a company to pay for the use of an asset over a period of time, exclude the asset and related obligations from its balance sheet and show lease payments on its income statement as a rent expense. *See e.g. Transferring Risks Off of the Balance Sheet and the Income Statement*, CENTER FOR FINANCIAL RESEARCH AND ANALYSIS, INC. (Feb. 19, 2002), *available at* http://faculty.babson.edu/halsey/acc7500/Off%20balance-sheet%20financing%20-%20transferring%20risk.pdf.

[238] These include Waste Management (1998), Enron (2001), Tyco International (2002), Adelphia (2002), Peregrine Systems (2002) and WorldCom (2002).

[239] *See supra* note 213.

the company's offices.[240] Yet it was not until November 2015 that Germany enacted new laws directed against corruption despite attempts in 2006 to pass similar legislation.[241] Although bribery had technically been illegal in Germany for several years,[242] the country had formerly had a tradition of tolerating corporate bribery. For instance, up until 1999, bribes of foreign officials—or as Siemens referred to them, *nützliche Aufwendungen* or "useful money"—were considered tax-deductible business expenses under the German tax code.[243] In 2006, Daimler AG was discovered to have bribed officials in countries including Russia, China and Turkistan.[244] Even Deutsche Bahn AG, a private railway corporation owned by the German government, has engaged in bribery, reportedly bribing Greek officials to win a railway contract for the 2004 Olympic Games in Athens.[245] It is possible that this former tradition of paying "useful money" contributed to Germany's slow embrace of additional anti-corruption enforcement and sanctions post-Siemens. Although the Siemens scandal was discovered several years after Germany outlawed corporate bribery, one could surmise that social attitudes toward bribery were in a state of flux, and that, given the relative newness of the 1999 legislation at that time, German regulators adopted a wait and see approach to evaluating the effects of those regulatory changes.

Given the German regulatory landscape, the Siemens scandal certainly would not have progressed to the degree it did but for the fact that Siemens had been listed on the NYSE[246] and therefore subject to SEC reporting requirements and the United States' Foreign Corrupt Practices Act (FCPA).[247] Key to Siemens' cooperation in investigating the extent of its

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[240] David Crawford and Mike Esterl, *Inside Bribery Probe of Siemens*, WALL ST. J. (Dec. 28, 2007), http://www.wsj.com/articles/SB119879170772353601.
[241] *See* Joachim Kaetzler and Hannes Ronken, *The New German Anticorruption Law*, LEXOLOGY (Dec. 3, 2015), http://www.lexology.com/library/detail.aspx?g=8df6e411-77b5-4a6e-842a-ced0db740a9e (describing the changes to anti-corruption law in Germany introduced by the enactment of *Gesetz zur Bekämpfung der Korruption* in 2015).
[242] *See supra* Section B.III.2.
[243] Siri Schubert and T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES (Dec. 20, 2008), http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html.
[244] Dietmar Hawranek, *Useful Payments: US Investigators Crack Down on Daimler's Culture of Corruption*, SPIEGEL (Mar. 30, 2010), http://www.spiegel.de/international/business/useful-payments-us-investigators-crack-down-on-daimler-s-culture-of-corruption-a-686238.html.
[245] Jörg Schmitt, *Complicit in Corruption: How German Companies Bribed Their Way to Greek Deals*, SPIEGEL (May 11, 2010), http://www.spiegel.de/international/europe/complicit-in-corruption-how-german-companies-bribed-their-way-to-greek-deals-a-693973.html.
[246] Siemens delisted from the NYSE in May 2014. *NYSE Delisting FAQs*, SIEMENS AG (May 2014), *available at* http://www.siemens.com/investor/pool/en/investor_relations/delisting_faq_en.pdf.
[247] One can muse about whether "corporate governance" can be characterized as a set of norms and best practices for corporations, and a company's "best" set of practices depends on its particular jurisdiction and the regulatory framework within which it operates. Given German tolerance for useful money, application of the FCPA, which is based on the U.S.'s policy toward bribery, arguably put Siemens in the middle of a clash of cultures.

bribery practices was that it risked exclusion from public procurement contracts.[248] In 2004, the European Union (EU) issued Directive 2004/18/EC (the "Directive"), which set out, among other requirements, rules for participating in EU public procurement processes for contracts over a certain value and requirements.[249] The Directive included a particularly significant provision for Siemens as it faced charges under the FCPA: Article 45. Under Article 45, contractors who have been *convicted* of (1) participating in a criminal organization, (2) corruption, (3) fraud, or (4) money laundering are mandatorily excluded from participating in a public contract.[250] While Siemens, as a corporation, did not risk conviction in Germany,[251] it risked a conviction under the FCPA as a result of its listing on the NYSE, which could have resulted in mandatory debarment from public contracts in the EU under Article 45.[252]

The threat of debarment stemming from an FCPA conviction faced by Siemens may very well have been the company's saving grace. As a major international public contractor, Siemens' value as a company could be tied to the value of the various contracts it had procured. Additionally, it had a number of other assets with inherent physical or hard value. [253] Siemens is also a conglomerate, with subsidiaries throughout the world. In charging Siemens with violations of the FCPA, the SEC and the DOJ in fact charged Siemens AG (the parent company) with violating the internal controls and books and records provisions of the FCPA and Siemens Venezuela and Siemens Bangladesh (subsidiaries) under the anti-bribery provisions of the FCPA.[254] This allowed Siemens to isolate liability and avoid Siemens AG's mandatory debarment under the Directive.[255]

Taken together, it may be that Siemens' survival as a company could be predicated on several key factors: (1) the company had diversified assets that could be tied to hard value; (2) the GCC could not hold corporate entities criminally guilty; and (3) the statutory frameworks

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[248] Eric Lichtblau and Carter Dougherty, *Siemens to Pay $1.34 Billion in Fines*, N.Y. TIMES (Dec. 15, 2008), http://nyti.ms/1JnHnzG.

[249] Peter B. Clark & Jennifer A. Suprenant, *Siemens—Potential Interplay of FCPA Charges and Mandatory Debarment Under the Public Procurement Directive of the European Union*, 2009 ABA NAT'L INST. ON WHITE COLLAR CRIME (San Francisco, Mar. 5-6, 2009), *available at* http://www.cadwalader.com/uploads/books/91c1ede0d0f75f091cd9852e4e36e20e.pdf.

[250] *Id.*

[251] *See supra* Section III.3.a.aa.

[252] The United States has a similar suspension provision to EU Directive 2004/18/EC Article 45 in the Federal Acquisition Regulation (48 C.F.R.) that gives government agencies discretionary authority to debar contractors that have been convicted of or found civilly liable for any integrity offenses, including bribery.

[253] Amongst other things. Siemens, in addition to producing trains and turbines, also produces medical devices and light bulbs.

[254] Peter B. Clark & Jennifer A. Suprenant, *supra* note 249.

[255] Siemens Venezuela and Siemens Bangladesh, as distinct legal entities, could plead separately to the charges. Since they presumably did no business in the EU, they would be relatively unaffected by the Directive's debarment. The United States extracted its pound of flesh, and Siemens AG could go about its business.

of the FCPA and the Directive allowed the company to isolate liability. This is in contrast to Enron, whose assets were tied to soft value—trading on commodities, derivatives and investor confidence—and the structure of the Securities Exchange Act of 1934, which imposes liability on a single public issuer.

II. Comparative Regulatory Responses

In the following the law and the reaction shall be compared.

1. The U.S. Regulatory Response vs. the German "Response"

Although the managerial conduct in Enron and Siemens may not directly comparable, this section will attempt to compare the relevant regulatory responses in the United States and Germany. Enron was one of several accounting scandals that occurred within a very short period of time in the U.S. Viewed as one of a series of like scandals, including Waste Management and WorldCom, the Enron case can be seen as the straw that broke the camel's back and prompted the passage of Sarbanes-Oxley. The Siemens scandal, however, did not prompt any quick legislative changes, even though there were similar corruption scandals around the same time, including *MAN, Daimler, Telekom or Volkswagen*. In particular, bribery revelations at Volkswagen tainted the image of Germany's corporate institutions in 2005. Volkswagen managers had used company funds to buy the support of labor representatives with sex parties, holidays with prostitutes and cash bonuses.[256] This scandal was likely more embarrassing than the comparatively demure Siemens affair and struck the heart of German integrity. To understand why Germany did not respond immediately to the Siemens scandal with any quick legislative changes, while the United States immediately passed Sarbanes-Oxley, this section will compare the landscapes of both legal regimes prior to and post scandals.

Prior to the Siemens scandal, German regulators had made some legislative changes toward quashing corruption.[257] As mentioned above[258], the current German policy regarding bribery is the result of a gradual process. The decisive change happened in 1998 when the bribery of foreign officials became a crime in Germany. Prior to this change, only the bribery of Germany's own national officials was usually punished. The bribery of foreign officials was common practice and used as legitimate means to acquire public orders abroad. After the

[256] Sexbelege und Lügengeschichten.
[257] Siemens-Korruptionsaffäre brodelt weiter.
[258] See "Legal situation in Germany", 12-15.

scandal, the German legislators tried to continue to improve the regulations, but not directly in answer to the corruption scandal. It took a while to reach the current legal situation to better combating corruption in Germany. In contrast, the United States passed the Foreign Corrupt Practices Act in 1977.

America on the other hand did not have a sufficient legal and regulatory structure relating to accounting rules. The former laws and SEC regulations allowed firms, for instance, to provide consulting services to a company and then turn around and provide the audited report concerning the financial results of these consulting activities. This resulted in a conflict of interest that was built into the American legal structure.[259] Sarbanes-Oxley placed restrictions on some of these activities. SOX also increased corporate compliance costs for companies listed in the United States relative to costs for companies registered only on foreign exchanges. The Sarbanes-Oxley Act moved the American system of corporations, which had been more based on self-regulation, toward increasing governmental regulation.[260]

Another reason why Germany may not have immediately passed laws targeting corruption could be that the Siemens scandal was resolved in a relatively timely manner (2006-2008). Siemens cooperated with both German and American authorities. Siemens also agreed to establish a compliance system under the supervision of an independent compliance monitor who would make regular reports to the DOJ. As such, unlike in Enron, there was no real necessity for the immediate regulatory intervention by the native legislators. In other words, Germany had a workable corporate code that addressed bribery—Siemens merely had a corporate culture of ignoring said code.[261]

Concluding, it can be noted that the reactions to the scandals were different in terms of their rapidity and outcome. Perhaps, also, the German disposition of skepticism towards knee-jerk legislative changes contributed to the reluctance around political reform. Germans are rather afraid of quick legislative changes and prefer gradual reforms.

2. Sarbanes-Oxley Act, Foreign Corrupt Practices Act and the consequences for German Corporations

Since the 16th of May 2014,[262] Siemens is no longer listed on the American Stock exchange, and as such, the Sarbanes-Oxley Act no longer applies. To understand this

[259] What Really Went Wrong with Enron? A Culture of Evil?
[260] Wymeersch, in: Hommelhoff/Hopt/v. Werder, Handbuch Corporate Governance, 156.
[261] The American student in this team will wonder why, if the GCGC was so "workable," did no one think to revise it if there was rampant bribery?
[262] Delisting New York Stock Exchange, 1.

decision, it is important to examine the impact of the Sarbanes-Oxley Act as well as the Foreign Corrupt Practices Act on German firms, and to compare the Sarbanes-Oxley Act with German regulations such as AktG to see whether the requirements of the respective regulations are congruent or not.

In general, the implementation of the Sarbanes-Oxley Act meant that the corporations that are issuers in the United States were faced with new requirements in the area of Corporate Governance. Of particular importance are sections 302 and 404 of the Sarbanes-Oxley Act. They address the internal control system of a company and prescribe which changes have to be considered. If the regulations of the Sarbanes-Oxley Act are to be compared with the Germany's regulation, it can be concluded that they go well beyond the German applicable legal provisions. It punishes infringements that under German law would be considered unpunished erroneous entries ("Fehlbuchung or Führen falscher Bücher").[263] Further, according to §§ 242 until 245 i.c.w. § 264 of the commercial code (Handelsgesetzbuch; abbr.: HGB[264]), the German executive board is obliged to set up and sign the annual financial statement. This shall be used to determine whether the financial data in the annual financial statement is correct and complete. Almost the same can be said for section 302 of the Sarbanes-Oxley Act, which regulates the establishment of disclosure controls and procedures. Both, CEO and CFO, have the duty to confirm in writing the disclosure controls and procedures. In cases of any infringement of these rules however, the penalties differ. The penalties in America can reach, for example, an imprisonment of 20 years,[265] whereas an imprisonment of up to 5 years "only" is possible according to § 332 HGB in Germany. Section 404 of the Sarbanes-Oxley Act, which requires the firms to establish an intensive internal control system and external assessment, also adds to the costs of compliance in the United States.[266]

Like the Sarbanes-Oxley Act, the Foreign Corrupt Practices Act (FCPA) also imposed compliance requirements on corporations. It is a law designed to fight against corruption, and is enforced by the SEC and the Department of Justice. It is applicable to all corporations that are listed on the American stock exchange (even foreign ones such as Siemens) and to legal or natural persons that have any contact with America.[267] As such, it is far broader than the Sarbanes-Oxley Act. The FCPA is divided into two parts, anti-corruption regulations and

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[263] Schürrle, in: Weidenfeld, Nützliche Aufwendungen, 120.
[264] Handelsgesetzbuch, as of December 22, 2015, BGBl. III 1897, 4100-1.
[265] Deutsche sind verärgert über Sarbanes-Oxley-Act.
[266] Justenhoven/Krawietz, BFuP 2006, 63 (75).
[267] Partsch, The Foreign Corrupt Practices Act der USA, 1.

books and records. The law forbids, among other acts, acts of bribery of foreign officials. Unlike §§ 331 ff. StGB, the FCPA is punishing only the donor's side (Bestechung) and not the recipient's side (Bestechlichkeit).[268] Non-observance of the FCPA can lead to serious economic and criminal consequences for the enterprises.[269] Unlike Germany, which does not have the concept of corporate crime, corporations can be held criminally liable in America. Corporations can receive a fine of up to 2 million USD for each relevant violation of the bribe regulation. Natural persons are threatened with a penalty up to $100,000 USD per violation and imprisonment for 5 years, 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff(c). Even more drastic are the fines which are possible according to 15 U.S.C. § ff(a) if the legal obligation to keep records is intentionally infringed. Corporations can be fined up to $24 million USD per infringing act, and natural person can be called to account for up to $5 million USD and imprisonment for 20 years. In Germany, according to § 283b StGB, the fine is much less: 2 years of imprisonment or a fine. The range of sentences shows what a "powerful weapon" the FCPA in the hands of the U.S. authorities can be.

Taken together, the enforcement of the FCPA and Sarbanes-Oxley Act show a fundamental difference between United States and German law. The United States has adopted a relatively aggressive scheme of enforcement that holds both corporate entities and individuals liable for misconduct. In contrast, German law does not have the concept of corporate crime and focuses on the criminality of the individual and imposes relatively less onerous sanctions on infringers.

III. The Effect of Enron and Siemens on Subsequent Corporate Practices

Enron and Siemens have each influenced how corporations manage their internal processes and interact with regulatory systems. Enron exposed how even the best of monitoring systems may fail, whether through the self-interested actions of managers, corporate culture or over-reliance on gatekeepers. Although Enron and Siemens involved different problems—accounting and bribery, respectively—the net effect of each has been a refocusing of managerial and regulatory attentions on monitoring and preventing those substantive issues. For instance, SOX introduced mandatory accounting controls, and the years since the Act's passage have not yet yielded any accounting scandals comparable to the scale of Enron or WorldCom. Enron, interestingly, may have had an effect on FCPA prosecution, which Siemens benefited from. Siemens, meanwhile, sparked renewed

[268] Partsch, The Foreign Corrupt Practices Act der USA, 5.
[269] Partsch, The Foreign Corrupt Practices Act der USA, 22-24.

international interest in preventing corporate bribery and set the standard for future internal investigations and deferred prosecution agreements.

1. Enron's Effect on Monitoring and the FCPA

Given that SOX's passage preceded the discovery of Siemens' U.S. prosecution, one might surmise that its emphasis on the presence of internal controls may have also had an effect on FCPA prosecution. The FCPA, which was passed in 1977 and has accounting control requirements like SOX, had been relatively unenforced until after the passage of SOX.[270] Beginning in 2002, there has been an upward trend in FCPA actions brought by the DOJ and SEC alike.[271] This increase in enforcement has coincided with an increase in self-reporting by companies of potential FCPA violations.[272] Trends have indicated that companies that self-report potential violations and cooperate with the SEC and DOJ may be able to resolve FCPA charges with more favorable outcomes like a deferred prosecution agreement (DPA).[273] The prospect of a less onerous sanction in the event of a charge underscores SOX's emphasis on internal controls and incentivizes companies to focus more resources to its compliance programs.

Enron may have also contributed to the increased use of DPAs and other alternative non-prosecution agreements as a means to resolving corporate criminal charges. Enron's auditor Arthur Andersen had been one of accounting's Big Five.[274] In the aftermath of Enron, Andersen was convicted of a felony count of obstructing an official government proceeding, which barred the firm from auditing financial statements for issuers.[275] For an auditing firm, this arguably was like an execution sentence. While the conviction was later vacated by the Supreme Court,[276] Andersen's business cratered (the "Andersen Effect"),[277] turning the Big Five into the Big Four. Some have argued that Andersen's destruction shows how the

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[270] *See* David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 Cornell Int'l L.J. 307, 307-08 (2008) (commenting "[a]lthough [the FCPA's] first twenty-five years were relatively quiet, the same cannot be said for its last five years.").
[271] *Recent Trends and Patterns in FCPA Enforcement*, SHEARMAN & STERLING LLP (Oct. 10, 2007), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2007/10/Recent-Trends-and-Patterns-in-FCPA-Enforcement/Files/FCPA-Trends/FileAttachment/FCPA_Trends_100507.pdf.
[272] *Id.*
[273] *Id.*
[274] The Big Five also included PriceWaterhouseCoopers, Deloitte, Ernst & Young, and KPMG.
[275] Jonathan Weil & Alexei Barrionuevo, *Arthur Andersen Is Convicted on Obstruction-of-Justice Count*, WALL ST. J. (Jun. 16, 2002), http://on.wsj.com/1XACiH6.
[276] *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
[277] Andersen has, however, been resurrected to some degree. Several former Andersen partners bought the rights to the name and currently offer tax—but not auditing—services under the Andersen name. Robert Schmidt, *Arthur Andersen Name Returns Decade After Firm's Collapse*, BLOOMBERG BUSINESS (Sept. 1, 2014), http://bloom.bg/1R6iMhW.

conviction of a major corporation can have huge collateral consequences and that the rise of DPAs and other non-prosecution agreements is correlated to preventing a repeat of the Andersen Effect.[278] The structure of the Siemens conviction is consistent with this policy of preventing collateral damage. Siemens cooperated with authorities, launching a massive internal investigation[279]—a move that has since become de rigueur for companies under investigation.[280] Ultimately, Siemens AG pleaded guilty to accounting charges, while two of its subsidiaries in non-European countries pleaded guilty to bribery charges.[281] This partitioning of culpability allowed Siemens to maintain its public contracts in Europe. It is entirely imaginable that the existence of Siemens would have been majorly threatened if the parent company were barred from public contracts. Thus, Siemens arguably benefited from one of the effects that Enron had on corporate investigations.

2. Siemens' Effect on Anti-Bribery Regulation

In the years since Siemens, there has been an increased international focus on corporate bribery at an international level. For instance, the United Kingdom introduced changes to its bribery laws with the enactment of the Bribery Act in 2010.[282] Even China announced an anti-corruption campaign[283]—and actually brought charges against GlaxoSmithKline for bribing non-government officials.[284] Efforts in Europe, particularly by the Organisation for Economic Co-operation and Development (OECD), to establish anti-bribery regulations have also increased. For instance, the OECD recommended against the bribery of foreign officials in 2009.[285] This would seem to indicate that in the last two

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[278] Joseph A. Grundfest, *Over Before It Started*, N.Y. TIMES (Jun. 14, 2005), http://nyti.ms/1L9mbxp ("Andersen's demise did serve as a stern reminder to corporate America that prosecutors can bring down or cripple many of America's leading corporations simply by indicting them on sufficiently serious charges.").

[279] Press Release, Debevoise & Plimpton LLP, Debevoise Conducted Siemens Internal Investigation, (Dec. 15, 2008), http://www.debevoise.com/insights/news/2008/12/debevoise-conducted-siemens-internal-investigation.

[280] Peter J. Henning, *The Mounting Costs of Internal Investigations*, N.Y. TIMES (Mar. 5, 2012), http://nyti.ms/19zrJiQ.

[281] Siemens was also required, like many other corporations that enter into DPAs with the DOJ, to retain an independent compliance monitor who would oversee and implement a compliance program within the company and make regular reports to the DOJ. Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fees (Dec. 15, 2008), http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

[282] Bill Jamieson & Lee Howes, *UK Bribery Act of 2010: Facts and Emplications for Businesses* (Feb. 6, 2012), http://www.mondaq.com/x/162966/White+Collar+Crime+Fraud/UK+Bribery+Act+2010+Facts+and+Implications+for+Businesses.

[283] Shai Oster, *President Xi's Anti-Corruption Campaign Biggest Since Mao*, BLOOMBERG BUSINESS (Mar. 4, 2014), http://bloom.bg/1L9TwqG.

[284] Hester Plumridge & Laurie Burkitt, *GlaxoSmithKline Found Guilty of Bribery in China*, WALL ST. J. (Sept. 19, 2014), http://on.wsj.com/1OiHLLz.

[285] Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

decades, there has been a change in global societal attitudes toward the appropriateness of corporate bribery.

Germany also recently introduced changes in its Corporate Governance Code targeting bribery. The Code was subject to major amendments in 2007 as the international developments raised corporate governance questions concerning the management board.[286] Also in the following years the Code has continuously been modified. But since the Code does not really provide Anti-Bribery Regulations, the Siemens case seems not to have affected the Corporate Governance Code. Especially the non-binding nature of the Code is being seen skeptical. As illustrated above[287] criminal regulations undertook some changes but not directly as a result of the Siemens scandal. Last year though, on the 26th of November 2015[288], the law on combating corruption came into force and substantially changed the corruption criminal law.[289] In particular the new amendment in § 299 StGB states that not only the unfair preference in competition (unlautere Bevorzugung im Wettbewerb) is punishable, but also the simple infringement towards the principal (Geschäfstherr). Therefore, the scope of commercial bribery in German Criminal law has been expanded.[290] It probably cannot be seen as a direct result of the Siemens scandal, but nevertheless a step in the right direction has been made. It can be criticized though that the Corporate Governance system and the anticorruption efforts in German companies in general tend to take a reactive approach.

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[286] Meder, ZIP 2007, 1538 (1542-1543).
[287] See “Legal situation in Germany”, 12-15.
[288] Gesetz zur Bekämpfung der Korruption, as of November 20, 2015, BGBl. I 2015, 2025.
[289] Dann, NJW 2016, 203 (203).
[290] Germany expands commercial bribery.

E. Conclusion

"Corporations are not individuals, and they cannot simply choose to obey the law."[291] Rather, it is the responsibility of the people who make up the organization to implement internal checks and processes that can maintain investor trust and are consistent with applicable governmental regulations. Our review of Enron and Siemens shows that in both cases, there was a common pattern of underlying behavior: a company chasing strategic opportunities, facing competition and under financial pressure may engage in questionable behavior that at the *ex ante* stage seemed reasonable. What started as a "one-shot deal" to meet short-term financial expectations or performance metrics may escalate to what is, in the *ex post*, fraudulent activity. Furthermore, this behavior may escape the attention of auditors, well-intentioned boards of directors and careful stakeholders until it is too late.

[291] Conway, 68 Southern California law review (1995), 621.

What is striking is the variety of corporate governance approaches to addressing the various iterations of problematic corporate behavior driven by this underlying theme. Corporate governance failures can be costly and take years to resolve. But what constitutes "good" corporate governance seems to be an ever-evolving concept inspired by *ex post* analyses of corporate meltdowns. For instance, the Enron accounting scandal revealed the potential pitfalls of a redesigned corporation aggressively chasing new opportunities and profits. *Ex post* analysis has emphasized the importance of management attention on internal risk management and the potential liabilities of overly relying on gatekeepers whose interests may not be necessarily aligned with those of the corporation. The Siemens bribery scandal, meanwhile, showed how a German corporation, operating in the tradition of German corporate governance, became subject to foreign expectations of proper corporate practice and accordingly adopted new "best practices." Taken together, it seems essential for corporations to invest proactively in implementing organizational systems that support and encourage conduct that is consistent with and balances (1) the company's norms and cultural values that guide the managers' behaviors and decision making on a daily basis; and (2) the company's obligations to domestic and foreign jurisdictions.