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## The Impact of the Sarbanes-Oxley Act on Non-Shareholder Constituents: A Silver Lining, But Will it Endure?

THIS ESSAY WAS COMPOSED IN CONNECTION WITH a conference aimed at commemorating the fifth anniversary of the enactment of the Sarbanes-Oxley Act of 2002 (the "Act").<sup>1</sup> The anniversary provides us with an opportunity to reflect on the Act's impact and assess whether predictions about its impact have come to fruition. Five years later, we know that the Act has had a host of both intended and unintended consequences.<sup>2</sup> Moreover, while the Act has impacted shareholders and corporate managers, it also has had an impact on non-shareholder constituents, such as employees, consumers, and the broader community.<sup>3</sup> This Essay will assess whether some early predictions about the Act's impact on such non-shareholder constituents have come true, and comment on whether the impact that the Act has had thus far will withstand the recent economic downturn.

First, this Essay will demonstrate the increase in corporate rhetoric and actions addressing non-shareholders following the passage of the Act, and highlight some corporate scholars<sup>4</sup> original belief that the early surge in such rhetoric and actions would not endure.<sup>5</sup> Second, this Essay briefly will examine some data suggesting that this early belief has not come to fruition.<sup>6</sup> Instead, this Essay will demonstrate that the Act appears to have had a positive impact on non-shareholder constituents,

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\* Professor of Law and Director of the Business Law Program, University of Maryland School of Law. Special thanks to Dean Karen Rothenberg for her support with the Conference, as well as the staff of the *Journal of Business & Technology Law* for their work on this and other Issues throughout the year.

1. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

2. Ella Mae Matsumura & Jae Yong Shin, *Corporate Governance Reform and CEO Compensation: Intended and Unintended Consequences*, 62 J. BUS. ETHICS 101 (2005); Peter J. Wallison, *Blame Sarbanes-Oxley, ON THE ISSUES* (Am. Enter. Inst. for Pub. Pol'y Res.), Sept. 2003, at 1, available at [http://www.aei.org/publications/pubID.19123/pub\\_detail.asp](http://www.aei.org/publications/pubID.19123/pub_detail.asp); James S. Linck, Jeffrey M. Netter, & Tina Yang, *Effects and Unintended Consequences of the Sarbanes-Oxley Act on Corporate Boards* (Aug. 31, 2005) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=902665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902665)).

3. Symposium, *The Criminalization of Corporate Law: The Impact on Shareholders and Other Constituents*, 2 J. BUS. & TECH. L. 91, 91-105 (2007).

4. Admittedly, I was amongst this mistaken group.

5. See *infra* Part I.

6. See *infra* Part II.

and such impact may be viewed as a silver lining to the much maligned legislation.<sup>7</sup> However, this Essay questions whether this rhetoric and behavior will survive the recent economic downturn.<sup>8</sup>

### I. EARLY PREDICTIONS ABOUT THE ACT'S IMPACT ON NON-SHAREHOLDER CONSTITUENTS

A short time after the Act was passed I attended a conference at UCLA where a panel was asked to assess the probable impact of the Act on non-shareholder constituents.<sup>9</sup> This was not just an idle question, but stemmed from what appeared to be a growing trend in the aftermath of the Act.<sup>10</sup> That is, corporations appeared to have enhanced their engagement in other-regarding rhetoric and behavior.<sup>11</sup> Rhetorically, there was an increase in the number of corporations trumpeting their commitment to programs focused on other constituents both on their website and within public documents.<sup>12</sup> Many corporations for the first time began preparing separate citizenship or social responsibility reports documenting their good deeds.<sup>13</sup>

7. See *infra* Part II.

8. See *infra* Part III.

9. Conference Schedule, UCLA-Sloan Research Program on Business Organizations, Conference on the Means and Ends of Corporations (Jan. 28–29, 2005), available at <http://www.law.ucla.edu/docs/sloanconferenceschedule.pdf>.

10. Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, LAW & CONTEMP. PROBS., Autumn 2004, at 109.

11. This may have been a response to the widespread calls for reform following the corporate scandals at the turn of the century. See, e.g., Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2123 (2003) (noting that the corporate misdeeds of high-profile companies gave rise to “widespread” calls for reform of corporations and focused attention on strategies for improving corporate ethics and behavior).

12. *Profit and the Public Good*, ECONOMIST, Jan. 22, 2005, at 15; *The Ethics of Business*, ECONOMIST, Jan. 22, 2005, at 210; *The Good Company*, ECONOMIST, Jan. 22, 2005, at 3; *The Good Company: Capitalism and Ethics*, ECONOMIST, Jan. 22, 2005, at 11; *The World According to CSR*, ECONOMIST, Jan. 22, 2005, at 10. Whatever the rhetoric may be, it is not clear whether corporations’ rhetoric mirrors their actions. One need only to look at the situation at British Petroleum (BP) for evidence of this point. BP adopted an aggressive marketing strategy seeking to define itself as socially and environmentally responsible. See British Petroleum p.l.c., About BP, How We Run the Business, <http://www.bp.com/subsection.do?categoryId=7&contentId=2006634> (last visited on July 22, 2007) (containing numerous links to content containing extensive rhetoric on responsibility). In fact, not just its commercials, but also the company’s website, annual report, and sustainability report are saturated with rhetoric about its responsibility and the importance of translating its values into action. Yet BP has been accused of ignoring significant safety problems that caused a tragic accident in Texas. JAMES A. BAKER III, ET AL., THE REPORT OF THE BP US REFINERIES INDEPENDENT SAFETY REVIEW PANEL 66–67 (2007), available at [http://www.bp.com/liveassets/bp\\_internet/globalbp/STAGING/global\\_assets/downloads/Baker\\_panel\\_report.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/Baker_panel_report.pdf). This instance discredits any notion that BP felt any behavioral allegiance to its rhetoric. Although, one could argue that it was not BP, but certain officers at BP that were out of step with the rhetoric. See *id.* at 27, 36–41, 60 (pinpointing the many people responsible for safety process issues). Nevertheless, those allegations seem to confirm the common intuition that corporate rhetoric of responsibility is just a marketing ploy with no impact on behavior.

13. See CHEVRON CORP., 2004 CORPORATE RESPONSIBILITY REPORT (2004), available at [http://www.chevron.com/cr\\_report/2004/documents/cr\\_report\\_2004\\_complete.pdf](http://www.chevron.com/cr_report/2004/documents/cr_report_2004_complete.pdf); EXXON MOBIL CORP., 2004 CORPORATE CITIZENSHIP REPORT (2004), available at [http://exxonmobil.com/corporate/files/corporate/ccr04\\_fullreport.pdf](http://exxonmobil.com/corporate/files/corporate/ccr04_fullreport.pdf); FORD MOTOR CO., 2003/04 CORPORATE CITIZENSHIP REPORT (2004), available at <http://>

In fact, one study reveals that close to 90% of these kinds of reports were created post Sarbanes-Oxley.<sup>14</sup> In addition to the rhetoric, at least on the heels of the corporate governance scandals, the empirical evidence suggests that corporations were in fact engaging in more other-regarding practices. For example, 2003 and 2004 saw all-time highs in corporate charitable giving,<sup>15</sup> while proxy data and other studies documented an increase in corporate support of labor and other policies favoring other constituents.<sup>16</sup> This was not an across the board increase, but there were some companies at least increasing their efforts in these areas. Of course, some theorized that the surge in rhetoric and behavior reflected a desire to present an image of good citizenship to counter that generated by the negative publicity of Enron and other corporations engaged in misconduct.<sup>17</sup> In other words, to some extent people blamed the tunnel-vision focus on profit and wealth maximization for the corporate scandals, and saw a corporate focus on other constituents as a welcome counter to that vision, and hence an indication that corporations would not engage in corporate malfeasance.<sup>18</sup> As one person noted, other-regarding acts may have reflected a “gussied-up bid for good favor” among the public.<sup>19</sup>

So the question was posed: to what extent can we expect this rhetoric and its corresponding behavior to continue after the passage of the Act, and after the public concern about corporate misconduct dissipates? Interestingly, at the conference, all of the panelists (myself included) believed that the Act would not facilitate a focus on other constituents, and hence the other-regarding behavior, if not the rhetoric, would subside over time.<sup>20</sup>

We predicted that this would happen for three reasons. First, the Act itself seemed to focus on financial matters such as the creation of the Public Company

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[www.ford.com/en/company/about/corporateCitizenship/report/default.html](http://www.ford.com/en/company/about/corporateCitizenship/report/default.html); GEN. ELEC. CO., OUR ACTIONS: GE 2005 CITIZENSHIP REPORT (2005), available at <http://www.ge.com/files/usa/en/citizenship/pdfs/citizrep2005.pdf>; GEN. MOTORS CORP., 2004 CORPORATE RESPONSIBILITY REPORT (2004), available at [http://www.gm.com/company/gmability/sustainability/reports/04/000\\_tools/fullreport.pdf](http://www.gm.com/company/gmability/sustainability/reports/04/000_tools/fullreport.pdf).

14. See Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory For Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 780, 821–23 (2007).

15. Brian Grow, *The Debate Over Doing Good*, BUSINESSWEEK, Aug. 15, 2005, at 76.

16. See John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 3–4, 6 (2005); Fairfax, *supra* note 14, at 785–86; CHRIS KELLY ET. AL., THE ASPEN INST. & BOOZ ALLEN HAMILTON INC., DERIVING VALUE FROM CORPORATE VALUES 2, 3–5 (2005), available at <http://extfile.bah.com/livelihood/livelihood/145534/?func=dOc.fetch&nodeid=145534> (revealing that almost 90% of international corporations have adopted mission or value statements).

17. Lisa M. Fairfax, *The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 677 (2006).

18. *Id.* at 678.

19. Grow, *supra* note 15.

20. See, e.g., Margaret Blair, *Reforming Corporate Governance: What History Can Teach Us*, 1 BERKELEY BUS. L.J. 1, 40 (2004) (a panelist from the UCLA conference, noting that the Act’s reforms “are intended to improve the quality and reliability of information that shareholders have about the corporations in which they are investing. . . . But better information does not affect the degree of control that corporate directors have over corporate decisions or allocation of corporate assets.”).

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Accounting Oversight Board,<sup>21</sup> the new requirements related to independent audit committees,<sup>22</sup> executive certification of financial reports,<sup>23</sup> and of course Section 404 dealing with internal controls to ensure adequate oversight of financial information. The prediction was that such a focus not only would prompt corporations to focus their attention on financial affairs, but also would discourage corporations from focusing on non-financial matters.<sup>24</sup> Second, in the aftermath of the Act there was a renewed effort to empower shareholders, which many predicted would undermine the corporations' ability to focus on non-shareholders.<sup>25</sup> The effort to empower shareholders was led by scholars such as Lucian Bebchuk, who has been a leading voice in support of granting shareholders access to the corporate proxy statement and securing other measures that would increase shareholder power.<sup>26</sup> Yet, Bebchuk points out that some people object to increased shareholder power because of the possibility that it will undermine the corporation's ability to focus on non-shareholders.<sup>27</sup>

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21. Sarbanes-Oxley Act §101(a), 15 U.S.C. § 7211(a) (Supp. V 2006).

22. See 15 U.S.C.A. § 78j-1(m)(2), (3)(B)(i)-(ii) (West Supp. 2007); Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. 2638, 2640 (proposed Jan. 17, 2003) (to be codified at 17 C.F.R. pts. 228, 229, 240, 249 and 274) (describing the purpose for the change in audit committee conduct as an attempt to "enhance audit committee independence").

23. Sarbanes-Oxley Act § 404(b), 15 U.S.C. § 7262(b); see also C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 KAN. L. REV. 77, 77 n.1 (2002) (published almost immediately after the passage of SOX and stating that SOX focused on protecting financial concerns, and not social concerns).

24. See generally Thuy Vo, *Lifting the Curse of the SOX Through Employee Assessments of the Internal Control Environment*, 56 KAN. L. REV. 1, 12 (2007) ("Among the costs of SOX 404 compliance have been the loss of senior management's time and strategic decision-making to maximize shareholder value . . .").

25. Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 878 (2005); Margaret M. Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 304-05 (1999).

26. *Bebchuk v. CA, Inc.*, 902 A.2d 737 (Del. Ch. 2006); *Hearing on Empowering Shareholders on Executive Compensation Before the H. Comm. on Fin. Servcs.*, 110th Cong. (2007) (testimony of Lucian A. Bebchuk, William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance and Director of the Corporate Governance Program, Harvard Law School); Letter from Lucian Arye Bebchuk, William J. Friedman and Alicia Townsend Professor of Law, Economics, and Finance, Harvard Law School, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission 1, 3-5 (June 13, 2003) (reviewing proxy-solicitation rules), available at <http://www.sec.gov/rules/other/s71003/labebechuk061303.htm>; Lucian A. Bebchuk, *Reply: Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784 (2006); Lucian Arye Bebchuk, *Streamlining Access to the Corporate Ballot*, 12 CORP. GOVERNANCE ADVISOR 28 (2004); Bebchuk, *supra* note 25; Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43 (2003); Lucian A. Bebchuk, *The Myth of Shareholder Franchise*, 93 VA. L. REV. 675 (2007). But see Stephen Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1746 (2005) (arguing against increased shareholder power); Stephen Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 624 (2006) (same).

27. Bebchuk, *supra* note 25, at 908 (citing Blair & Stout, *supra* note 25, at 253, 304-05; John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 23-24 (1986); John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435, 446-47; Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 115-16 (1979); Martin Lipton & Steven A. Rosenblum, *Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come*, 59 BUS. LAW. 67, 72-73 (2003); Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in *CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES* 33, 37-41 (Alan J. Auerbach ed., 1988)).

Finally, many presumed that corporations' increased rhetoric on addressing the concerns non-shareholder constituents would subside over time because the increased prosecution of white collar criminals along with the increase in civil prosecutions would serve to focus attention on shareholders and share value.<sup>28</sup> In other words, the very real possibility that executives and officers would face lawsuits and severe criminal or civil liability for their failure to remain focused on financial affairs also would serve to make directors leery of focusing their attention elsewhere.<sup>29</sup>

Hence, the idea was that the Act and the surrounding regulatory environment would discourage corporate actors from using their discretion to engage in acts beneficial to non-shareholders. To some extent, this may have been the point of the Act—to direct corporate attention towards shareholders and increasing firm value, without any attention to other issues.

## II. THE SILVER LINING OF SARBANES-OXLEY: TRENDS SUGGESTING A POSITIVE IMPACT ON NON-SHAREHOLDER CONSTITUENTS

The predicted lack of attention on other constituents has not come to pass. Instead, since the Act went into effect, evidence reveals three trends that may constitute a silver lining for non-shareholder constituents.

First, since the Act's passage, there has been an increase in efforts to focus corporations' attention on issues that impact other constituents.<sup>30</sup> Thus, proxy data reveals that since 2002, there have been a record number of shareholder proposals regarding issues important to other constituents. Such proposals range from those relating to the environment to those associated with labor and employment matters.<sup>31</sup>

Second, corporations have responded to these efforts, and thus not only have corporations engaged in more dialogue about these issues, but also there has been an increase in the number of measures adopted aimed at enhancing other constituents.<sup>32</sup> Thus, in the past five years, proxy data reveals an increase in the number of corporations responding favorably to proposals concerning other-constituents.<sup>33</sup> Indeed, proxy data from the Institute for Shareholder Services shows that, com-

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28. Cf. Christopher A. Wray, Ass. Att. Gen., Crim. Div., Dep't of Justice, Remarks at the ABA White Collar Crime Luncheon 2 (Feb. 25, 2005) (discussing the increased civil and criminal prosecutions of white collar crime).

29. Benjamin P. Falit, *Curbing Industry Sponsors' Incentive to Design Post-Approval Trials that are Suboptimal for Informing Prescribers But More Likely than Optimal Designs to Yield Favorable Results*, 37 SETON HALL L. REV. 969, 975 (2007) (theorizing that a manager who focuses on non-shareholders could be subject to criminal prosecution).

30. Fairfax, *supra* note 14, at 774.

31. *Id.* at 774, 780, app. A.

32. *Id.* at 786 (noting an increase in the percentage of companies adopting stakeholder ideals in their mission statements and corporate codes over the last five years).

33. Anne Moore Odell, *Shareholders Push Social and Environmental Issues to the Forefront*, SUSTAINABILITY INV. NEWS, June 13, 2007, <http://www.socialfunds.com/news/article.cgi/article2310.html> (last visited Feb. 25,

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pared to prior years, the number of proposals implemented by corporations involving other constituents has more than doubled and in some cases tripled. Also, many proposals have been withdrawn because corporations have demonstrated an increased willingness to speak with advocacy groups about how to best respond to issues concerning various non-shareholder constituents.<sup>34</sup> In fact, as of the beginning of July 2007, nearly 25% of shareholder proposals related to other constituents were withdrawn during the 2007 proxy season.<sup>35</sup> Proxy analysts believe that withdrawn proposals suggest greater communication between shareholders and managers.<sup>36</sup> Then too, shareholders and corporations have been forming a variety of different working groups to discuss key governance issues.<sup>37</sup> Some of those issues focus on other constituents. Hence, the data reveals that corporations have increased dialogue about issues impacting shareholders and non-shareholders alike. Moreover, the data reveals that this dialogue sometimes translates into measures that have a positive impact on non-shareholder constituents and their concerns.

Finally, there has been increased collaboration between traditional shareholders and shareholders interested in supporting non-shareholder concerns. This increased collaboration has resulted in a steady increase in the level of support for issues impacting non-constituents from more traditional shareholders like mutual funds and other institutional investors.<sup>38</sup> Support from more traditional shareholders has a significant impact on corporate managers. Indeed, to the extent managers must act in the best interests of the shareholders, managers must consider issues that receive broad shareholder support, even if those issues reach beyond strict profit.<sup>39</sup> In recognition of this collaboration and the greater support non-shareholder issues have received from more traditional shareholders, corporations increasingly have endorsed the proposition that focusing on both shareholders and non-shareholders alike is important to the health of the corporate enterprise.<sup>40</sup> This point should not be overstated because there are certainly many companies that are not engaging in other-regarding behavior.<sup>41</sup> Moreover, even before the Act, companies expressed the sentiment that focusing on other constituents was important to

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2008); Press Release, Social Investment Forum, Shareholder Resolutions to Tie 2004 Proxy Season Record (Apr. 7, 2005), available at <http://www.socialinvest.org/news/releases/pressrelease.cfm?id=87>.

34. Erin White, *Firms, Investors Trying More Talk, Less Acrimony*, WALL ST. J., July 16, 2007, at B4.

35. *Id.*

36. *Id.*

37. *Id.*

38. See, e.g., George Djurasovic, *The Regulation of Socially Responsible Mutual Funds*, 22 J. CORP. L. 257, 260–62 (1997); Michael S. Knoll, *Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment*, 57 BUS. LAW. 681, 681–89 (2002); Michael E. Murphy, *Pension Plans and the Prospects of Corporate Self-Regulation*, 5 DEPAUL BUS. & COM. L.J. 503, 561–63, 573–74 (2007).

39. Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1442 (2006) (“[M]anagers who are accountable to shareholders have significant incentives to maximize social wealth rather than just accounting profits.”).

40. Grow, *supra* note 15.

41. See Fairfax, *supra* note 14, at 789–90 (stating that 62% of *Fortune* 100 companies are not included in the Domini 400 Social Index, and 61% of the *Fortune* 100 corporations do not appear in Calvert’s index).

firm value.<sup>42</sup> Yet the proxy data suggests that after the Act's passage there has been greater across the board collaboration that appears to have encouraged corporations to focus attention on non-shareholder constituents.<sup>43</sup> In that regard, the Act appears to have prompted a positive the trend in this area.

Therefore, an examination of recent proxy data suggests that the Act has positively impacted non-shareholder constituents—encouraging proposals that focus on issues important to non-shareholder constituents, increasing dialogue about the concerns of non-shareholder constituents, and inspiring collaboration between shareholders and non-shareholders on common issues.

### III. WILL THE RECENT ECONOMIC DOWNTURN CAUSE THE SILVER LINING TO FADE?

To be sure, it is not clear whether the current focus on non-shareholder constituents will endure in light of the recent economic downturn. First, it is not clear that any form of corporate activism, whether by shareholders or non-shareholder groups, can survive the economic dip spawned by the credit crisis.<sup>44</sup> Certainly, in the past few years we have seen a rise in activism among shareholders and their advocates.<sup>45</sup> However, the credit crisis may cause such activism to end. This is because many activist shareholders, particularly private equity funds, relied heavily on cheap capital to finance and employ their strategies.<sup>46</sup> Without that capital, such shareholders' activism may wane.<sup>47</sup>

Then too, even if shareholders can remain active with regard to core governance issues, it may be that activism that focuses on other-regarding behavior represents a "bourgeois luxury" that we cannot afford during times of economic turmoil or shake-ups in the capital markets.<sup>48</sup> In other words, only corporations in strong financial health can afford to engage in other-regarding or socially responsible behavior.<sup>49</sup> This notion may be troubling to advocates of non-shareholders—after all, employees and other stakeholders certainly experience hardships during economic

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42. See, e.g., All About Box Tops, Box Tops Education, <http://www.boxtops4education.com/AboutBoxTops/> (last visited Feb. 25, 2008) (claiming that General Mills' "Box Tops for Education" program has helped America's schools since 1996).

43. See Calvert Group, Ltd., Calvert Social Index, [http://www.calvert.com/sri\\_calvert\\_index.html?format=&letter=All](http://www.calvert.com/sri_calvert_index.html?format=&letter=All) (last visited July 22, 2007) (finding that 39% of Fortune 100 companies are included in Calvert's index of funds, which evaluates mutual funds for their social responsibility); Domini Social Investments LLC, Domini Social Equity Fund Overview, <http://www.domini.com/domini-funds/index.htm> (last visited July 22, 2007) (finding that 38% of Fortune 100 companies are included in the Domini Social Index, which evaluates investment funds with regard to their social responsibility).

44. Andrew Ross Sorkin, *Will the Credit Crisis End the Activists' Run?*, N.Y. TIMES, Aug. 26, 2007, § 3, at 7.

45. *Id.*

46. *Id.*

47. *Id.*

48. John Arthurs, *There Are Clear Arguments for a Clear Conscience*, FIN. TIMES, July 28, 2007, at 16.

49. See *id.* However, there is a school of thought suggesting that companies unable to engage in socially responsible behavior should at least abstain from socially irresponsible behavior. *Id.*



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downturns.<sup>50</sup> Nevertheless, evidence suggests that this notion has some validity. For example, studies suggest that the more resources a corporation has, the more likely it is to engage in “socially responsible” behavior.<sup>51</sup> By comparison, corporations with less resources are less inclined to engage in other regarding behavior. This observation may be self-evident, but it also underscores the notion that difficult economic times may decrease the extent of corporate other-regarding behavior.

Then too, even rhetoric regarding other regarding behavior may be a luxury during times of financial instability. Thus, studies reveal that corporations with many resources are more likely to engage in rhetoric suggesting a commitment to other regarding or socially responsible behavior, even if a corporation does not actually engage in such behavior.<sup>52</sup> In fact, a survey of Fortune 1000 companies reveals that virtually all the companies at the top of the list engage in other regarding rhetoric. Such uniformity in rhetoric from extremely profitable corporations suggests that those corporations feel some pressure to project an image of other regarding or socially responsible behavior, even when there is no corresponding desire to engage in such practices.<sup>53</sup> However, corporations at the bottom of the Fortune 1000 list are much less inclined to engage in such rhetoric.<sup>54</sup> This suggests that, unlike their counterparts at the top of the list, such corporations do not feel as much public or social pressure to project an image of social responsibility or other regarding behavior. Even for corporations at the top of the list, any such rhetoric decreases significantly whenever such corporations experience economic instability.<sup>55</sup> This data indicates that even the rhetoric of other regarding behavior is a luxury that corporations can ill-afford during times of financial instability.

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In the end, at least currently it appears that the Act has not served to undermine corporations’ willingness to pay heed to other constituents.<sup>56</sup> So perhaps there is a silver lining to some of the more distressing features of the reform. However, the

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50. Kimberly D. Krawiec, *Accounting for Greed: Unraveling the Rogue Trader Mystery*, 79 OR. L. REV. 301, 336 (2000) (“[N]on-management employees may suffer from large trading losses or firm bankruptcy. Similarly, shareholders, creditors, suppliers or customers can all suffer from a firm’s economic downturn.” (citations omitted)).

51. Joshua D. Margolis & Hillary Anger Elfenbein, *Do Well by Doing Good? Don’t Count on It*, HARV. BUS. REV., Jan. 2008, at 19 (suggesting that “a history of strong financial performance may simply give a company the wherewithal to contribute to society”).

52. See generally Fairfax, *supra* note 17, at 698 (discussing the evidence both for and against the proposition that rhetoric influences corporate behavior).

53. Fairfax, *supra* note 14, at 780–81.

54. Fortune 500, CNNMoney.com, [http://money.cnn.com/magazines/fortune/fortune500/2007/full\\_list/](http://money.cnn.com/magazines/fortune/fortune500/2007/full_list/) (last visited Feb. 25, 2008) (listing America’s largest 1000 corporations).

55. However, the good will that many corporations built up during the good economic times seems to pay off during economic downturns, as the companies with a reputation for social responsibility have done better than companies without. Marguerite Rigoglioso, *In Bad Times, It Pays to Be Good: A Reputation for CSR May Shield Companies From the Public’s Ire*, STAN. SOC. INNOVATION REV., Summer 2005, at 14.

56. See *supra* Part II.

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question remains as to whether that silver lining will wear off during the current economic downturn.<sup>57</sup>

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57. See *supra* Part III.