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Breaking the Bank: Reconsidering *Central Bank of Denver* after Enron and Sarbanes-Oxley

*Celia R. Taylor**

I. INTRODUCTION

In this era of heightened awareness of corporate wrongdoing, the role of "gatekeepers" – those charged with policing and preventing bad behavior – is coming under intense scrutiny. Precisely what role gatekeepers should play, and what liability they should face if they fail to perform their role adequately, is the subject of great debate. Consequently, those actors usually thought of as gatekeepers – auditors, accountants and lawyers, among others – face a confusing array of legal precedents and largely untested legal regimes as they try to conform their conduct to the requirements of the law. The uncertainty they face is harmful for the gatekeepers, for those who attempt to hold them accountable and for the legal system as a whole, as it undermines the fundamental goal of clarity and certainty of law.

This Article addresses one small aspect of gatekeeper liability, arguing that it is time to reinstate aiding and abetting liability for such "secondary actors" in suits brought by private parties under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (the "'34 Act").[1] Although the Securities Exchange Commission (the "SEC") currently has the authority to pursue such claims, the Supreme Court in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* ("*Central Bank*")[2] held that private parties do not. Because aiding and abetting liability is an important weapon in the fight to deter corporate fraud and because the Supreme Court is unlikely to reverse its course on the issue, Congress must act. It could easily do so by adding a provision to the Public Company Accounting and Investor Protection Act of 2002, commonly known as the Sarbanes-Oxley Act ("Sarbanes-Oxley," or "SOX")[3] expressly authorizing a private right of action for aiding and abetting liability under Section 10(b) and Rule 10b-5.

Empowering private parties to pursue aiding and abetting claims will provide a needed avenue of recourse to investors who suffer serious harm

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1. 15 U.S.C. §§ 78a-nn (2000).

2. 511 U.S. 164 (1994), *superseded by statute*, Private Sec. Litig. Reform Act of 1995, Pub. L. No. 104-67, 1995 U.S.C.C.A.N. (109 Stat.) 737 (1995).

3. Pub. L. No. 107-204, 2002 U.S.C.C.A.N. (116 Stat.) 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

when gatekeepers fail to deter fraud. It will enhance the deterrence of improper behavior in the securities industry and will increase investor confidence in the capital markets.

This Article makes the case for reinstating the ability of private parties to bring aiding and abetting liability claims against gatekeepers by demonstrating that judicial and Congressional will supports such an effort. It first defines "gatekeepers" and explains their role in the securities arena. The Article then discusses the decision in *Central Bank* and explains the turmoil that the decision caused for courts seeking to hold gatekeepers liable. It then looks at the decision handed down by the court that considered the liability of various actors for Enron's implosion, and argues that the decision shows strong judicial commitment to expanding gatekeeper liability. Next, the Article examines Sarbanes-Oxley and its impact on gatekeeper liability, arguing that in passing that Act, Congress demonstrated solid commitment to holding secondary actors to account. Finally, it proposes a method of reinstating aiding and abetting liability and weighs the arguments for and against taking such a step, concluding that it would be beneficial to all if aiding and abetting liability is reinstated for private party claims.

II. DEFINING "GATEKEEPER"

A "gatekeeper" is generically defined as a third party, who by virtue of his position has the ability to prevent another person from engaging in illegal or inappropriate behavior. In the corporate context, gatekeepers include participants who facilitate transactions, although they are not the main participants in the transactions themselves. Auditors, accountants, banks and lawyers are corporate gatekeepers.[4] Gatekeepers, also referred to as secondary actors, have the ability to monitor corporate conduct and help prevent fraud by refusing to provide their necessary assistance if they find evidence of wrongdoing by the primary participants in a transaction. For example, an auditor who discovers an anomaly in an issuer's financial statements can refuse to issue a necessary opinion letter. Conversely, gatekeepers may help perpetuate a fraud by allowing a transaction to continue despite evidence of the primary actors' wrongdoing. Consider, for example, a lawyer who during the course of due diligence discovers financial impropriety in an issuers' books, but says nothing and allows public documents containing the misrepresentations to be filed. While the attorney may not have participated directly in working a fraud on investors, she has allowed fraud to occur when it may have been in her power to prevent it, assuming that responsible parties at the

4. For useful descriptions of gatekeepers and their functions see Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Reiner H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986).

issuer would have responded appropriately if she alerted them to the impropriety. Thus, she has failed as a gatekeeper.

It is precisely this kind of gatekeeper failure that continues to generate extensive discussion. Corporate gatekeeper behavior is at the center of the storm over how best to monitor corporate behavior because of the abject failure of such actors in recent years to perform the job expected of them. Despite the presence of gatekeepers at virtually every step of the way, rampant corporate fraud *did* happen at companies such as Enron and WorldCom, to name just a few of the more dramatic examples. Clearly, the parties the securities industry traditionally relied on to help monitor the field proved woefully inadequate for the job. This drastic gatekeeper failure naturally leads to questions about why it occurred, and what might be done to prevent similar failure in the future.[5] While the explanations for gatekeeper failure and suggestions for its reform vary, there is common recognition that gatekeepers are essential to the functioning of U.S. capital markets. Therefore, rather than eliminating their role, most considering the issue advocate enhancing their power and responsibility. The need for enhancing gatekeeper power and accountability comes not only from legal academicians but also from courts and Congress. Decisions such as the one issued by the court that considered the implosion at Enron[6] show judicial concern with the role of gatekeepers and reflect a commitment on the part of courts to hold secondary actors liable for failure to perform their functions adequately. The need for stronger gatekeepers is also on the mind of Congress, as demonstrated with the enactment of Sarbanes-Oxley, which explicitly made gatekeeper functions a primary focus of reform.[7]

As important as recent decisions and SOX are in establishing more clearly defined gatekeeper responsibilities, they do not answer a serious issue that has long plagued the corporate bar. Specifically, they do not clarify the appropriate threshold of liability for gatekeepers who fail to perform their proscribed roles properly. The issue of gatekeeper liability has been controversial since the United States Supreme Court decided *Central Bank of Denver v. First Interstate Bank*[8] in 1994, and in a surprising move, eliminated the ability of private parties to bring aiding and abetting claims under Section 10(b) and Rule 10b-5.[9] As discussed below, *Central Bank* largely insulated

5. *See, e.g.*, John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301 (2004); Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735 (2004).

6. Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & ERISA Litig.), 235 F. Supp. 2d 549 (S.D. Tex. 2002).

7. For discussion of specific provisions of SOX focusing on gatekeeper liability, see *infra* Part IV. *See also* Jill E. Fisch & Caroline M. Gentile, *The Qualified Legal Compliance Committee: Using the Attorney Conduct Rules to Restructure the Board of Directors*, 53 DUKE L.J. 517 (2003).

8. 511 U.S. 164 (1994) *superseded by statute*, Private Sec. Litig. Reform Act of 1995, Pub. L. No. 104-67, 1995 U.S.C.C.A.N. (109 Stat.) 737 (1995).

9. *See id.*

gatekeepers from liability for fraud, but did not protect them entirely. Instead, the decision caused great confusion and uncertainty as to when and how gatekeepers might be held liable when fraud occurred.

III. THE *CENTRAL BANK* DECISION

From the time Section 10(b) and Rule 10b-5 came into being in the 1930s until the mid-1990s, federal courts uniformly recognized a private cause of action for aiding and abetting under Section 10(b), the general anti-fraud provision of the Securities Exchange Act of 1934.[10] Although the statute itself does not explicitly mention aiding and abetting liability, courts quickly adopted the position that to further the '34 Act's basic philosophy of seeking to create and maintain a securities market free from fraud, private parties, as well as governmental entities could impose liability under Section 10(b) on those who do no more than aid and abet violations of that section.[11]

Decided in 1994, *Central Bank* changed the playing field dramatically and marked the end of straight-forward aiding and abetting liability under section 10(b) and Rule 10b-5. *Central Bank* involved claims arising out of bond offerings Colorado Springs-Stetson Hill Public Building Authority ("Authority") made in 1986 and 1988 for which Central Bank of Denver served as the indenture trustee.[12] The bond covenants required that the bonds

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10. Section 10(b) states that

> [i]t shall be unlawful for any person, directly or indirectly, by the use any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j (2000).

Under Section 10(b), Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2005).

11. *See, e.g*, Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 680 (N.D. Ind. 1966) (discussing the expansion of Section 10(b) standing)

12. *Cent. Bank*, 511 U.S. at 167.

be secured by real estate having an appraised value of at least 160% of the outstanding principal and interest.[13] The first offering was made without incident.[14] However, although the real estate market in Colorado was suffering a serious decline at the time of the offerings, the appraisal of the collateral for the second offering did not reflect any change, but indicated that the value had remained essentially the same.[15] When the lead underwriter questioned the accuracy of the appraisal, Central Bank decided that an independent appraisal was necessary, but delayed that action until after the completion of the second bond offering in 1988.[16] Thereafter, and before any independent review was done, the Authority defaulted on its bonds.[17] First Interstate, who had purchased over $2 million of bonds as part of the second issue, sued.[18] As part of its claim, First Interstate alleged that Central Bank of Denver had aided and abetted Authority's fraudulent scheme by failing to obtain an accurate appraisal of the collateral.[19]

In the initial phases of the proceedings, and in keeping with the then prevailing understanding of liability under Section 10(b), the parties and the court accepted that aiding and abetting liability existed under Section 10(b), but differed over Central Bank's culpability.[20] Of its own initiative, the Supreme Court raised the question of whether aiding and abetting liability was appropriate at all under that section.[21] In a 5-4 majority opinion that surprised most commentators,[22] the Court strictly interpreted the text of the '34 Act and held that no private right of action for aiding and abetting existed under the section in question.[23] The Court noted that the words "aid" and "abet" do not appear in the statute, and rejected the SEC's argument that the phrase "directly or indirectly" in Section 10(b) shows Congressional intent to reach aiding and abetting.[24] The Court reasoned that permitting aiding and abetting

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13. *Id.*
14. *See generally id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *See id.*
20. *Id.* at 186-88.
21. *See id.* at 182-84, 191. The Court had expressly declined to address this issue many years earlier in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.7 (1976).
22. *See, e.g*, David J. Baum, *The Aftermath of Central Bank of Denver: Private Aiding and Abetting Liability Under Section 10(b) and Rule 10b-5*, 44 AM. U. L. REV. 1817 (1995); Sean G. Blackmun, Note, *An Analysis of Aider and Abettor Liability Under Section 10(b) of the Securities Exchange Act of 1934: Central Bank of Denver v. First Interstate Bank of Denver*, 27 CONN. L. REV. 1323 (1995); James D. Redwood, *Toward a More Enlightened Securities Jurisprudence in the Supreme Court? Don't Bank on it Anytime Soon*, 32 HOUS. L. REV. 3 (1995).
23. *Cent. Bank*, 511 U.S. at 191.
24. *Id.* at 176-77.

liability to reach secondary actors on the theory that such actors are indirectly engaging in the fraud of the primary actors would reach "persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do."[25] For the Court, such an extension of liability was not statutorily justified. Reasoning that "Congress knew how to impose aiding and abetting liability when it chose to do so," the Court concluded that "the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation."[26]

While this holding clearly shut down the right of an individual to pursue a gatekeeper on an aiding and abetting claim under Section 10(b) and Rule 10b-5,[27] the Court did not protect corporate gatekeepers from *all* liability. Instead, in a statement that would lead to great interpretive confusion, the Court found that

> [t]he absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.[28]

Essentially then, after *Central Bank*, corporate gatekeepers cannot be found liable for aiding and abetting, but can be found liable if their conduct is sufficiently pro-active that they can be characterized as a primary violator. With respect to private party actions, this remains the state of the law today.[29] If a plaintiff can establish the necessary elements of a 10b-5 claim, which include proof that a defendant: (1) made a misstatement or omission;[30] (2) of a material fact;[31] (3) with scienter;[32] (4) on which the plaintiff relied;[33] (5) in

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25. *Id.* at 179.

26. *Id.* at 176-77.

27. Originally, all parties were barred by *Central Bank* from pursing aiding and abetting claims. However, as part of the Private Securities Litigation Reform Act of 1995, the SEC was given the power to do so through an amendment to the Securities Exchange Act of 1934. *See* Sec. Exchange Act of 1934 § 20(e), 15 U.S.C. § 78e (2000).

28. *Cent. Bank*, 511 U.S. at 191.

29. The SEC was granted authority to pursue aiding and abetting claims under § 10(b) and Rule 10(b)5 by the Public Securities Litigation Reform Act. 15 U.S.C. § 78e.

30. *See* Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

31. *See id.*

32. To establish the requisite scienter, the plaintiff must plead with particularity that the defendant acted with the "intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 & n.12 (1976).

33. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).

connection with the purchase or sale of a security;[34] and (6) the plaintiff's reliance caused her injury,[35] her claim may go forward.

IV. THE AFTERMATH OF *CENTRAL BANK*

The decision in *Central Bank* forced lower courts to confront the sticky issue of who would be considered a primary violator, and therefore potentially liable under Section 10(b), and who would be merely a secondary actor not subject to liability, although involved in the fraud to some degree. In other words, courts have had to determine at what point a gatekeeper, through her conduct, has crossed the line from merely serving in an advisory capacity to serving as a primary actor in the transaction. Over time, two tests have developed to answer this question, each leading to very different results.

A. The Bright Line Test

Used by a majority of jurisdictions, the bright line test is the more restrictive of the tests imposing liability on gatekeepers. The test requires that to be considered a primary violator, and therefore subject to potential liability, an actor must "make" a false or misleading statement, and that the misstatement must be attributed to the gatekeeper at the time it is disseminated to the public.[36] For jurisdictions adopting the bright line test, strict adherence to these requirements is essential to comply with *Central Bank*. Requiring that the defendant "make" the statement addresses the concern voiced in *Central Bank* that a liable party actually "engage" in proscribed conduct. As the Second Circuit made clear in one of the early cases confronting the issue after *Central Bank*:

> [I]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).[37]

Under the bright line test, the need to link the misstatement directly to the gatekeeper is necessary to satisfy *Central Bank's* demand that *all* elements of primary liability be satisfied before a gatekeeper can be found liable. Public attribution enables a plaintiff to claim reliance on the particular mis-

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34. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

35. *See* Bastian v. Petren Res. Corp., 892 F.2d 680 (7th Cir. 1990).

36. *See, e.g.*, Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1205 (11th Cir. 2001); Shapiro v. Cantor, 123 F.3d 717, 720-21 (2d Cir. 1997).

37. *Shapiro*, 123 F.3d at 720 (alteration in original) (quoting *In re* MTC Elec. Techs S'holders Litig., 898 F. Supp. 974, 987 (E.D.N.Y. 1995)).

statement at issue – and of course, reliance is an element of a Section 10(b) claim. Therefore, under the bright line test it is not enough that a misstatement is made. Instead, the false or misleading statement "'must be attributed to that specific actor at the time of public dissemination, that is, in advance of the investment decision.'"[38]

The significance of the bright line test is its limiting effect on potential gatekeeper liability. Under the test, primary actor status and its associated liability does not extend to participants in a securities transaction who do not sign documents, release materials under their own name or in some other way affirmatively announce their involvement with the transaction.[39] As long as actors remain behind the scenes, they cannot be characterized as primary actors and will not incur liability.

B. The Substantial Participation Test

The substantial participation test defines more gatekeeper behavior as that of a primary violator than the bright line test. Developed in large part by the Ninth Circuit, the test reads *Central Bank* more expansively and characterizes an actor as a primary violator if that actor participates in the fraud in a "significant" manner.[40] The critical difference between the substantial participation test and the bright line test is that under the substantial participation test there is neither a requirement that the gatekeeper be named, nor that any false statement be attributed to her directly.[41] Thus, the substantial participation test allows primary liability to attach to secondary actors who participate in the drafting of documents containing false or misleading statements, even if those actors do not affirmatively make a statement in the documents, and even when there is no misstatement publically attributed to them. Under the substantial participation test, liability as a primary violator for such gatekeepers is appropriate because they are "intricately involved" in the fraud,[42] and therefore can be considered to have personally engaged in proscribed behavior.

For many years, the substantial participation test found little favor outside of the Ninth Circuit. Recently, however, it gained prominence in a deci-

38. Winkler v. Wigley, No 00-7624, 2000 U.S. App. LEXIS 31332, at *8 (2d Cir. Dec. 6, 2000) (quoting Wright v. Ernst & Young, LLP, 152 F.3d 169, 175 (2d Cir. 1998)).

39. *See, e.g.*, *Ziemba*, 256 F.3d 1194 (law firm involved in transaction could not be held liable absent public statement); *Wright*, 152 F.3d 169 (outside auditor who was never identified in press release at issue could not be held liable).

40. *See, e.g.*, Dannenberg v. PaineWebber Inc. (*In re* Software Toolworks Inc.), 50 F.3d 615, 628 n.3 (9th Cir. 1994); *In re* ZZZZ Best Sec. Litig., 864 F. Supp. 960, 971 (C.D. Cal. 1994).

41. *See* Howald v. Everex Sys., Inc., 228 F.3d 1057, 1061 n.5 (9th Cir. 2000).

42. *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. at 970.

sion involving Enron issued by Judge Melinda Harmon.[43] That decision not only approved, but arguably extended the reach of the substantial participation test, leading one commentator to note that "[u]nder the Enron ruling, most who could formerly be reached under 'aiding and abetting' liability now seemingly can be reached as a 'maker' or 'creator' of a public statement."[44]

V. ENRON AND "SUBSTANTIAL PARTICIPATION"

The implosion of Enron, which caused billions of dollars of shareholder equity to vanish into thin air, not surprisingly led to multiple public and private lawsuits.[45] Several of the private actions were consolidated into one major class action, filed in the United States District Court for the Southern District of Texas. Defendants in the class action included many secondary actors – banks, accountants and lawyers to name a few. The Enron case thus called the issue of primary liability for secondary actors squarely into question.

In her opinion, Judge Harmon, after an exhaustive review of *Central Bank* and its progeny, adopted an expansive version of the substantial participation test, finding that "'when a person, acting alone or with others, creates a misrepresentation [on which the investor-plaintiffs relied], the person can be liable as a primary violator . . . if . . . he acts with the requisite scienter.'"[46] The court adopted this test for primary liability directly from an amicus brief submitted by the SEC, concluding that the approach and rationale of the SEC with regard to primary liability under Section 10(b) was "well reasoned and reasonable, balanced in its concern for protection for victimized investors as well as for meritlessly harassed defendants . . . in addition to the policies underlying the statutory private right of action for defrauded investors and . . . consistent with the language of § 10b(b), Rule 10b-5, and *Central Bank*."[47]

Careful examination of the position of the SEC on secondary actor liability provides helpful insight because of its wholesale adoption in the *Enron* decision. In its brief (which was initially prepared in connection with a different case[48]), the SEC strongly criticized the bright line test for gatekeeper liability.[49] For the SEC, the relevant issue is whether

43. Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & ERISA Litig.), 235 F. Supp. 2d 549 (S.D. Tex. 2002).

44. Coffee, *supra* note 5, at 338.

45. *See* Joseph Weber et al., *Arthur Anderson: How Bad Will It Get?*, BUS. WK., Dec. 24, 2001, at 30 (Enron investors lost nearly $80 billion).

46. *Enron*, 235 F. Supp. 2d at 588 (citation omitted).

47. *Id.* at 590.

48. *Id.* at 585-86. ("The majority of [the SEC's] pleading is a submission filed . . . in a case that was pending in the Third Circuit, but which was settled before that appellate court could review the issue *en banc*.").

49. *Id.*

> a person who makes a material misrepresentation, while acting with the requisite scienter, but who does not himself disseminate the misrepresentation to investors, and whose name is not made known to them, is only an aider and abettor of the fraud, or is that person a primary violator subject to liability [under § 10(b)]?[50]

A critical component of the SEC argument was equating the word "make" as used in Rule 10b-5 with the word "creates."[51] After equating "makes" with "creates" the SEC argued that anyone involved in the "creation" of a misstatement could be found liable for making that misstatement.[52] Accepting the terms as synonymous justified extending primary violator liability to violators who were involved with a fraud, but who neither made an affirmative misstatement of their own, nor had any misstatement publicly attributed to them. As the argument goes, such actors "create" the misstatement through their participation in the preparation of the documents. If done with scienter, that creation is the equivalent of a positive assertion, and primary violator liability may attach.

The SEC justified its position by noting that the Supreme Court in *Central Bank* did not set forth a bright line test for liability and that extending liability to one who "creates" the misrepresentation supports the overall statutory language of Section 10(b).[53] Specifically, the SEC pointed to the language of the section prohibiting an actor from indirectly using or employing a deceptive device or contrivance.[54] In other words, for the SEC, and therefore for the *Enron* court, any actor who participates in the creation of a misleading document is doing precisely what the statute forbids and therefore can be held liable as a primary violator. Under this approach, the creation of the misstatement is enough. No attribution of the misstatement to the gatekeeper is or should be required because requiring attribution "would have the unfortunate and unwarranted consequence of providing a safe harbor from liability for everyone except those identified with the misrepresentations by name."[55]

Further, under the SEC position as adopted by *Enron*, not only is attribution of the misstatement to the gatekeeper not required, but the gatekeeper need not be the originator of the misstatement. Indeed,

> it would not be necessary for a person to be the initiator of a misrepresentation in order to be a primary violator. Provided that a plaintiff can plead and prove scienter, a person can be a primary

50. *Id.* at 586.

51. *Id.* at 586-87. The SEC argued that the interpretation of "make" must be consistent with the "directly or indirectly" language in the Rule and that therefore equating "makes" with "creates" is more appropriate than equating it with "signs." *Id.*

52. *Id.* at 587.

53. *Id.* at 586.

54. *Id.* at 587.

55. *Id.*

violator if he or she writes misrepresentations for inclusion in a document to be given to investors, even if the idea for those misrepresentations came from someone else.[56]

The key to the SEC argument is premising liability on the creation of the misrepresentation. Rather than testing the level of participation in the overall fraud, this test simply looks at whether the gatekeeper was responsible for the generation of a specific falsehood. Without a hand in the creation, no liability would extend. The SEC was careful to point out that

> a person who prepares a truthful and complete portion of a document would not be liable as a primary violator for misrepresentations in other portions of the document. Even assuming such a person knew of misrepresentations elsewhere in the document and thus had the requisite scienter, he or she would not have created those misrepresentations.[57]

The SEC argued that extending liability to those gatekeepers who "create" a misrepresentation better suits the statutory objectives of Section 10(b) and does not penalizing innocent parties.[58] The requirement that the pleading party prove scienter and reliance substantially minimizes the chances of frivolous claims being brought.[59]

In accepting the SEC position in its entirety, the *Enron* court clearly rejected the bright line test for gatekeeper liability.[60] It suggested that it also rejected the "substantial participation" test, calling it "too expansive."[61] For the court, its opinion fit squarely within the dictates of *Central Bank* because the test it adopts premises liability on the creation of a misstatement.[62] This direct involvement in the fraud is more than simple "participation." It requires affirmative acts that cause the misstatement to come into being. For the *Enron* court "[t]he requirement that the secondary party, itself, allegedly make a misleading or false representation (or omission) or commit a deceptive act that violates § 10(b) brings the party within the primary liability definition of the statue and avoids aiding and abetting pitfalls."[63]

Many have criticized the *Enron* decision, arguing that it takes "a detour around *Central Bank.*"[64] The main objection raised by critics is that the test

56. *Id.* at 693.
57. *Id.* at 588.
58. *Id.* at 586-87.
59. *Id.* at 587.
60. *Id.* at 586, 591.
61. *Id.* at 588 n.26.
62. *See id.* at 591.
63. *Id.*
64. Gary J. Aguirre, *The Enron Decision: Closing the Fraud-Free Zone on Errant Gatekeepers?*, 28 DEL. J. CORP. LAW 447, 447 (2003).

the *Enron* court adopted covertly reinstates aiding and abetting liability by equating "create" with "make."[65] The commentators assert that because *Central Bank* explicitly extended liability only to those who "make" a misstatement and because Section 10(b) covers only those who "use" or "employ" a manipulative device or contrivance, "make" must mean more than create. They argue that it must include some affirmative action on the part of the secondary actor to transmit the misstatement to the public.[66] Premising liability on the mere "creation" of a misstatement penalizes those who do no more than participate in the creation of a fraud, and contradicts *Central Bank*'s prohibition of imposing liability on "persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do."[67]

Further, critics of the test adopted in *Enron* argue that it subverts the reliance element of a Section 10(b) claim.[68] They reason that premising liability on the mere creation of a misstatement, without attribution of it to an identified secondary actor, means that a plaintiff cannot claim to have relied on any particular statement.[69] In response, supporters of the *Enron* test note that theories such as fraud-on-the-market do not require individual allegations of reliance, but allow plaintiffs to rely on the overall "integrity" of market prices.[70]

The "correctness" of the *Enron* decision, while interesting and important, is not the focus of this Article. It is evident from the careful linguistic gymnastics of Judge Harmon's opinion that great effort went into finding an avenue to hold secondary actors liable despite the strict limitations on such liability after *Central Bank*. At the end of the day, the test adopted in *Enron* lends weight to the movement of enhanced gatekeeper liability through its clear rejection of the bright line test. Evidence of the growing desire to enhance gatekeeper accountability also can be seen in legislative action, as is clearly demonstrated in Sarbanes-Oxley.

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65. *See, e.g.*, Andrew S. Gold, *Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Fraud and Secondary Actors*, 53 CATH. U. L. REV. 667, 669-70 (2004); Cecil C. Kuhne, III, *Expanding the Scope of Securities Fraud?: The Shifting Sands of Central Bank*, 52 DRAKE L. REV. 25, 42 (2003).

66. *See* Gold, *supra* note 65.

67. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 176 (1994), *superseded by statute*, Private Sec. Litig. Reform Act of 1995, Pub. L. No. 104-67, 1995 U.S.C.C.A.N. (109 Stat.) 737 (1995).

68. *See* Gold, *supra* note 65, at 677-78; 686-88; *see also Enron*, 235 F. Supp. 2d at 592. Despite the commentator's complaints, the opinion insists that plaintiffs will have to show all elements to prevail.

69. *See generally* Mary M. Wynne, Comment, *Primary Liability Amongst Secondary Actors: Why the Second Circuit's "Bright Line" Standard Should Prevail*, 44 ST. LOUIS U. L.J. 1607 (2000).

70. *See* Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

VI. THE SARBANES-OXLEY ACT

There is no doubt that one of the purposes of SOX is to enhance gatekeeper liability. Senator Sarbanes, a lead sponsor of the Act, stressed that "We have to make sure the gatekeepers are doing their job."[71] Many sections of SOX evidence Congressional intent to statutorily expand the obligations of gatekeepers, primarily by attempting to establish a proscriptive regulatory regime which mandates specific procedures to be followed. To get a sense of this regime, a general understanding of the structure of the Act is necessary. The following section briefly sets forth some of the more important provisions of SOX. This overview is by no means intended as a comprehensive review of the Act. After this short overview, those sections of SOX that address gatekeeper obligations are discussed in greater detail.

A. Overview of Sarbanes-Oxley

Intended to contain "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt,"[72] the "Public Company Accounting Reform and Investor Protection Act of 2002," sailed through Congress and was signed into law by President Bush on July 30, 2002.[73] While commentators may disagree about the suitability of the changes envisioned by SOX and debate its likely effectiveness on fraud prevention, most concur that it fundamentally changes the structure of corporate governance, giving the federal government a much greater role in what was traditionally viewed as the provenance of the states, and agree that this change in structure was intended to strengthen federal oversight over gatekeepers.[74]

The heart of SOX is the creation of a new self-regulatory entity, the "Public Company Accounting Oversight Board" ("PCAOB").[75] With the accounting scandals of WorldCom and Enron foremost in their minds, Congress established the PCAOB to help prevent a recurrence of those events.[76]

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71. Pamela Barnett, *Sarbanes Says Punishing 'Bad Actors' Not Enough*, NAT'L J. CONGRESSDAILY, July 8, 2002, *available at* http://nationaljournal.com/cgi-bin/ifetch4?ENG+%20CONGRESS+7-.

72. *See* Signing Statement of George W. Bush, July 30, 2002, http://www.whitehouse.gov/news/releases/2002/07/print/20020730.html.

73. *See id.*

74. *See* Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625 (2004); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 57-59 (2002).

75. Sarbanes-Oxley Act § 101, 15 U.S.C. § 7211(a) (2000 & Supp. 2002).

76. Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 672-74 (2002).

The PCAOB is charged with regulating the accounting industry, establishing auditing standards and imposing discipline on members of the auditing profession.[77] The jurisdiction of the PCAOB over accounting firms is ensured by Section 102 of SOX, which makes it unlawful for any person who is not registered with the Board "to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[78] In essence, the PCAOB is intended to fill the role for the accounting industry that the National Association of Securities Dealers (the "NASD") fills for the brokerage industry.

In addition to creating a new regulatory agency to ride herd on the accounting industry, SOX imposes several substantive requirements on public corporations directly affecting governance issues. These include, among others, the requirements that public company audit committees be made up entirely of independent directors,[79] that the chief executive and chief financial officers of all public companies certify on an on-going basis the accuracy of their company's financial statements,[80] and that corporations change their periodic reporting to make more current and complete disclosure about their financial conditions.[81] Each of these provisions shows Congressional determination to have federal regulation play a more prominent role in corporate governance.

Other provisions of SOX do not impact corporate governance as directly, but aim to increase the deterrent effect of SOX and other securities laws. Examples of this type of provision include sections enhancing criminal penalties for violations of the securities laws,[82] extending protection to whistleblowers,[83] and extending the statute of limitations for securities fraud actions.[84]

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77. Sarbanes-Oxley Act § 103-105, 15 U.S.C. §§ 7213-7215.

78. *Id.* § 102, 15 U.S.C. § 7212(a).

79. *Id.* § 301, 15 U.S.C. § 78j-1(m)(3)(B)(ii). The Act defines "independent" as requiring that an audit committee member may not be an "affiliated person" of the corporation or any subsidiary and may receive no more than a director's fee for services. *Id.*

80. *Id.* § 302, 15 U.S.C. § 7241(a). In addition to certifying the accuracy of the reports the chief executive and chief financial officer must also certify as to the effectiveness (or lack thereof) of internal controls they agree to establish and maintain. *Id.*

81. *Id.* § 409, 15 U.S.C. § 78m(*l*). Under this section, corporations must disclose material changes in a "rapid and current basis." *Id.* Further, Section 401 requires companies to disclose "all material off-balance sheet transactions" that might have a "material current or future effect" on the financial health of the company. *Id.* § 401(a), 15 U.S.C. § 78m(j).

82. *See id.* § 802, 18 U.S.C. § 1520(b).

83. *Id.* § 806, 18 U.S.C. § 1514A(a). This section creates a new criminal statute – 18 U.S.C. § 1514A – that protects whistleblowers from discharge, demotion and other penalizing actions. *Id.*

84. *Id.* § 804, 28 U.S.C. §§ 1658(a), (b). This section changes the current statute of limitations from one year after discovery of the facts constituting the violation or three years after such violation occurred rule to a two year/five year rule. *Id.*

The sections of SOX described so far effect significant changes to the structure of corporate governance and take meaningful steps to increase the likelihood that the requirements of the securities laws will be complied with. Another category of provisions of particular relevance for this Article are provisions that alter affirmatively the responsibilities placed on gatekeepers. Specifically, SOX addresses directly the responsibilities of public accounting firms and persons associated with them,[85] and of attorneys who appear before the SEC "in any way in the representation of issuers,"[86] among others.[87] In each case, SOX attempts to define more clearly the role that each gatekeeper is expected to play, and provides for recourse against those who fail to perform their functions as mandated.

B. Public Accounting Firms and Associated Persons

As mentioned above, one of the key provisions of SOX is the creation of the PCAOB, a regulatory body with extensive authority over public accounting firms. Section 103 of the Act speaks directly to the power of the Board, calling for it to establish standards for auditing and attestation, including quality control and ethics, to be used by all registered public accounting firms, which effectively means any accounting firm working in the securities industry.[88] The Act specifically requires the PCAOB to establish rules addressing certain procedural details of how accounting firms must conduct their auditing work.[89] The Act clearly intended these rules to increase the obligations placed on gatekeepers as they perform their traditional functions, and are intended to raise the level of diligence required of such actors. The rules specify requirements regarding records retention,[90] independent verification of auditing work,[91] and description and evaluation of the effectiveness of issuers' internal control structure and procedures.[92]

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85. *Id.* § 105, 15 U.S.C. § 7215(a).

86. *Id.* § 307, 15 U.S.C. § 7245. Under this section, the SEC is to institute rules requiring attorneys who represent pubic companies to report the described violations first to the company's chief legal counsel or CEO. *Id.* § 307(1), 15 U.S.C. § 7245(1). If that individual fails to take "appropriate action" the attorney must report the violation to the company's audit committee, to its independent directors or its entire board of directors. *Id.* § 307(2), 15 U.S.C. § 7245(2).

87. *Id.* § 501, 15 U.S.C. § 78o-6(a). This section sets forth specific requirements for rules intended to "improve the objectivity of research and provide investors with more useful and reliable information." *Id.*

88. *Id.* § 103, 15 U.S.C. § 7213(a)(1).

89. *Id.*

90. *Id.* § 103(a)(2)(A)(i), 15 U.S.C. § 7213(a)(2)(A)(i) (firms must prepare and maintain records for no less than seven years). This rule is a direct reaction to the problems caused by Arthur Anderson's shredding of documents.

91. *Id.* § 103(a)(2)(A)(ii), 15 U.S.C. § 7213(a)(2)(A)(ii).

92. *Id.* § 103(a)(2)(A)(iii), 15 U.S.C. § 7213(a)(2)(A)(iii).

Another set of provisions addresses the internal governance of accounting firms rather than the methods by which they must conduct their external audit functions. Rules addressing internal governance matters require, among other things, that firms monitor professional ethics;[93] have specific methods for the supervision, hiring, professional development and advancement of personnel;[94] and control the acceptance and continuation of engagements.[95] These rules, like those governing the method of conducting audits, increase the regulation of accounting entities and help to ensure that these gatekeepers are held responsible.

In addition to these specific rules governing external and internal procedures to be used by all registered public accounting firms, the Act charges the PCAOB with establishing general standards to be used by such firms in the preparation and issuance of audit reports as required by SOX or "as may be necessary or appropriate in the public interest or for the protection of investors."[96] The Board is granted the power to police firms for compliance with these rules and standards, to take disciplinary actions authorized by SOX and to report any violations it discovers to the SEC or appropriate state regulatory authorities.[97] This broad grant of authority assures that the PCAOB has the ability to respond to any situations that may arise that were not addressed adequately by the specific rules contained in SOX. It provides the flexibility necessary to ensure that the newly created regulatory agency can provide effective monitoring functions in the future.

Although the focus of SOX is the creation of the PCAOB and its mandate to regulate public accounting firms, Congress took steps in SOX to enhance auditor independence without using the auspices of the PCAOB. Through amendments to the Securities Exchange Act of 1934, the law now requires greater auditor/issuer independence by prohibiting public accounting firms from engaging in certain specified "prohibited activities."[98] After SOX, it is unlawful for any public accounting firm performing audit functions for a company to simultaneously engage in specified non-audit services.[99] Additionally, no firm may provide audit services to an issuer for more than five consecutive years.[100] The Act further insures auditor/company independence by prohibiting any firm from providing audit services to a company if an insider in the capacity of CEO, CFO, or an "equivalent position" of that company was employed by the auditing firm and participated "in any capacity" in

93. *Id.* § 103(a)(2)(B)(i), 15 U.S.C. § 7213(a)(2)(B)(i).
94. *Id.* §§ 103(a)(2)(B)(iii)-(iv), 15 U.S.C. §§ 7213(a)(2)(B)(iii)-(iv).
95. *Id.* § 103(a)(2)(B)(v), 15 U.S.C. § 7213(a)(2)(B)(v).
96. *Id.* § 103(a)(1), 15 U.S.C. § 7213(a)(1).
97. *Id.* §§ 104(c)(2), (3), 15 U.S.C. §§ 7214(c)(2), (3).
98. *Id.* § 201(a), 15 U.S.C. § 78j-1(g).
99. *Id.* Prohibited non-audit services include, among others, booking, financial information systems design, appraisal or valuation, fairness opinions and actuarial services. *Id.*
100. *Id.* § 203, 15 U.S.C. § 78j-1(j).

auditing the issuer during the one year period preceding the date of the audit.[101] These provisions have sparked plenty of controversy,[102] but illustrate the Congressional intent to use SOX to strengthen the role that accounting firms play as gatekeepers. By insisting on independence between auditors and issuers, Congress tried to increase the likelihood that auditors would be able to perform their gatekeeper function, free from some of the pressures – real or perceived – that prevented them from doing so in the cases of Enron, WorldCom and others.[103]

C. Attorneys

In addition to placing significant obligations and responsibilities on public accounting firms and associated person, Sarbanes-Oxley speaks directly to the responsibilities attorneys have as gatekeepers. Section 307 of the Act calls for the SEC to establish rules "setting forth minimum standards of professional conduct for attorneys appearing . . . before the Commission."[104] In essence, the rules mandated by SOX require attorneys to "report up" material violations of securities laws or breaches of fiduciary duty. "Reporting up" means that any attorney, who discovers evidence of any such violation, must first report the finding to the chief legal counsel or chief executive of the company in question and, if such individual "does not appropriately respond" to such violation, must report the evidence to the company's audit committee or another wholly independent committee, or to the board of directors as a whole.[105]

The blunt statements made by two of the principal drafters of Section 307, while SOX was under consideration, clearly illustrate the rationale for the "reporting up requirement.". Referring to the rash of corporate scandals,

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101. *Id.* § 206, 15 U.S.C. § 78j-1(*l*).

102. *See, e.g.*, Matthew J. Barrett, *In the Wake of Corporate Reform: One Year in the Life of Sarbanes-Oxley –"Tax Services" As a Trojan Horse in the Auditor Independence Provisions of Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 463; Mark J. Loewenstein, *The Quiet Transformation of Corporate Law*, 57 SMU L. REV. 353 (2004).

103. The pressure to perform less then assiduous audits stemmed in the past from the conflicts of interest rampant in the auditing community at the time the Enron scandal developed. For example, Arthur Anderson, Enron's auditor, never raised any red flags about Enron's convoluted bookkeeping. As pointed out by the editorial board of BusinessWeek, that fact is not surprising, as Arthur Anderson "made more money selling consulting services to Enron last year than it did auditing the company. Criticizing Enron's books might have jeopardized consulting work." *Enron: Let Us Count The Culprits*, BUS. WK., Dec. 17, 2001, at 154; *see also* John C. Coffee, Jr., *Understanding Enron: "It's About The Gatekeepers, Stupid"*, 57 BUS. LAW. 1403 (2002) (explaining how "auditing function was essentially a loss leader by which more lucrative services could be marketed").

104. Sarbanes-Oxley Act § 307, 15 U.S.C. § 7245.

105. *Id.*

Senator Michael Enzi (R-Wyo.) remarked: "[O]ne of the thoughts that occurred to me was that probably in almost every transaction there was a lawyer who drew up the documents involved in that procedure."[106] In a similar vein, Senator Jon Corzine (D-N.J.), the former chief executive of Goldman Sachs, noted:

> In fact, in our corporate world today – and I can verify this by my own experiences – executives and accountants work day to day with lawyers. They give them advice on almost each and every transaction. That means when executives and accountants have been engaged in wrongdoing, there have been some other folks at the scene of the crime – and generally they are lawyers.[107]

By requiring attorneys to report up, Congress sought to heighten the gatekeeper function lawyers play. Recognizing that lawyers are intimately involved in virtually all corporate transactions, the new provision demands that they act more effectively as monitors. As with almost all of the provisions of SOX, the reporting up requirement generated significant controversy when it was proposed.[108] Similarly, as with almost all of the provisions of SOX, the reporting up requirement evidences clear Congressional intent to enhance gatekeeper obligation.

VII. A SIMPLE PROPOSAL TO FURTHER ENHANCE GATEKEEPER OBLIGATION

There is strong evidence that legislators and courts want to enhance the role that gatekeepers play in maintaining the integrity of the U.S. capital markets. *Enron* and other cases, together with the enactment of SOX, show broad agreement that all market participants must be held accountable for their fraudulent conduct. Proscribing behaviors through legislation and enforcing

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106. 148 CONG. REC. S6524, S6554 (daily ed. July 10, 2002) (statement of Sen. Enzi).

107. *Id.* at S6556 (statement of Sen. Corzine).

108. *See, e.g.*, Susan Saab Fortney, *National Symposium on the Role of a Corporate Lawyer: Chicken Little Lives: The Anticipated and Actual Effect of Sarbanes-Oxley on Corporate Lawyers' Conduct*, 33 CAP. U. L. REV. 61, 68 (2004); Susan P. Koniak, *Symposium: Regulating the Lawyer: Past Efforts and Future Possibilities: When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1269-71 (2003); Darlene M. Robertson & Anthony A. Tortora, *Reporting Requirements for Lawyers Under Sarbanes-Oxley: Has Congress Really Changed Anything?*, 16 GEO. J. LEGAL ETHICS 785 (2003); Panel Discussion, *The Evolving Legal and Ethical Role of the Corporate Attorney After the Sarbanes-Oxley Act of 2002: Panel 2: The Evolution of Corporate Governance*, 52 AM. U. L. REV. 613, 615 (2002). Commentators raised concerns that the section imposes vague obligations and abort attorney/client confidentiality.

standards under existing legal precedent can help encourage appropriate gatekeeper behavior; however, by themselves they are insufficient to prevent further corporate fraud. Laws and precedent intended to deter bad actions were plentiful at the time that Enron and WorldCom imploded and while SOX strengthens the regulatory regime governing gatekeepers, it does not do enough.

What SOX fails to do, and what needs to be done to support the goal of meaningful fraud deterrence, is to explicitly reinstate aiding and abetting liability in private actions. This simple act would strengthen current efforts to hold gatekeepers to high standards of conduct and responsibility and would empower private parties to help monitor and police the capital markets. Allowing private parties to pursue aiding and abetting claims against gatekeepers would decrease the burden on the SEC and other regulatory agencies at a time when their resources are already stretched thin.[109] Finally, a clear articulation of aiding and abetting liability would help clarify the law regarding gatekeeper liability by removing the need for courts to argue over whether the bright line or substantial participation for secondary actor liability should apply.

Several methods could be used to reinstate aiding and abetting liability. First, the Supreme Court could expressly overrule *Central Bank*. This would send a clear message, but the Court is unlikely to take such action, despite the disagreement in the circuits, as evidenced by the lack of uniformity on what the appropriate standard should be to find an actor liable as a primary violator. As an alternative to Supreme Court action, lower courts could resolve the current disagreement about secondary actor liability by uniformly rejecting the bright line test and adopting an expansive interpretation of the substantial participation or creation test, as illustrated by the *Enron* Court. This would achieve a comparable result, and would result in holding more gatekeepers accountable; however, in light of the strong position of some of the circuits, this also seems unlikely.

Furthermore, even if the lower courts proved willing to hold gatekeepers liable under Section 10(b) and Rule 10b-5 by characterizing them as primary violators, doing so does nothing to further the goals of clarity and transparency in the law. As *Enron* shows, it is possible to tweak the language of *Cen-*

109. The fact that the SEC has limited resources is commonly acknowledged. *See, e.g.*, Major Human Capital Challenges at SEC and Key Trade Agencies: Hearing Before the S. Subcomm. on Oversight of Gov't Mgmt., Restructuring and the Dist. of Columbia, Comm. on Governmental Affairs, 107th Cong. 5-6 (2002) (statement of Richard J. Hillman, Director of Financial Markets and Community Investments, and Loren Yager, Director of International Affairs and Trade ("[L]imited resources have forced SEC to be selective in its enforcement activities")); Shaun Mulreed, Comment, *Private Securities Litigation Reform Failure: How Scienter Has Prevented the Private Securities Litigation Reform Act of 1995 From Achieving its Goals*, 42 SAN DIEGO L. REV. 779, 782 (2005) ("Due to limited resources, the SEC is unable to investigate and ultimately prosecute every possible case of fraud.").

tral Bank in such a way as to impose primary actor liability on gatekeepers, but doing so involves linguistic gymnastics, which add little useful guidance to others. Language matters; if the end goal is the re-establishment of aiding and abetting liability, it would be better to do so explicitly, rather than through convoluted interpretation and application of current law.

Rather than leaving it to courts to "legislate from the bench," Congress should expressly re-establish aiding and abetting liability through the addition of a provision to SOX. The language of such a provision is already available – it could simply be taken directly from Section 104 of the Private Securities Litigation Reform Act of 1995.[110] That provision authorizes the SEC to pursue injunctive actions for aiding and abetting violations of certain securities laws, and expressly governs the "liability of controlling persons *and persons who aid and abet violations*."[111] Section 104 provides in relevant part:

> *(f) Prosecution of Persons Who Aid and Abet Violations.*-- For purposes of any action brought by the Commission under paragraph (1) or (3) of section [78u(d) of this title], *any person that knowingly provides substantial assistance to another person in violation of a provision of this [chapter], or of any rule or regulation issued under this [chapter]*, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.[112]

This language is virtually identical to that frequently used by lower federal courts in articulating the elements of aiding and abetting under Section 10(b) before *Central Bank* eliminated private causes of action for aiding and abetting.[113] The elements of Section 104 clearly mirror the elements courts traditionally used to define aiding and abetting under Section 10(b). Because the language is the same as used by courts prior to *Central Bank*, ample precedent exists that has already established standards of liability; thus there will be no need to start from scratch.

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110. Private Sec. Litig. Reform Act of 1995, Pub. L. No. 104-67, 1995 U.S.C.C.A.N. (109 Stat.) 737 (1995).

111. *Id.* § 104, 109 Stat. at 757 (emphasis added).

112. *Id.* (emphasis added).

113. *See, e.g.*, Levine v. Diamantnuset, Inc., 950 F.2d 1478, 1483 (1990) ("To state a claim of aiding and abetting securities fraud, one must plead (1) the existence of an independent primary wrong, (2) actual knowledge or reckless disregard by the alleged aider and abetter of the wrong and of his or her role in furthering it, and (3) substantial assistance in the wrong."); Abell v. Potomoc Ins. Co., 858 F.2d 1104, 1126 (5th Cir. 1988) ("(1) There must have been a securities violation by the primary party; (2) the aider and abetter must have had a 'general awareness' of its role in a Rule 10b-5 violation; and (3) the aider and abetter must have knowingly rendered 'substantial assistance' in the rule 10b-5 violation.").

VIII. IS RE-INSTATING AIDING AND ABETTING LIABILITY WORTHWHILE?

It is, of course, impossible to know with certainty whether reinstating aiding and abetting liability would make a significant contribution to deterring fraud in the capital markets. Increasing the risk of liability for fraud should have a deterrent effect on those gatekeepers whose behavior is targeted by regulation. One of the premises of the judicial system is that the threat of sanctions increases deterrence. Is aiding and abetting a sufficiently serious problem such that Congress should act to revitalize it? Again, it is impossible to know for sure, but on this point, some hard data is available. In SOX, Congress directed the SEC to conduct a study and submit a report (the "Section 703 Report"[114]) examining the behavior of "securities professionals."[115] The Section 703 Report detailed violations of the federal securities laws and classified offenders as either primary violators, aiders and abettors or both.[116] The Report covers the years from 1998-2001.[117] During that time, the SEC found that 1,299 securities professionals had committed primary violations of the securities laws, while only 13 were found solely to have aiding and abetted such violations.[118] An additional 284 were found to be both primary violators and aiders and abettors.[119]

Because the vast majority of claims brought by the SEC were against primary violators, these numbers may seem to suggest that aiding and abetting violations are not a significant problem and that Congress need not act to reinstate liability for such violations,. However, in light of certain facts, this perception should change. First, the focus of the SEC during the time of reporting was on securities professionals who were the primary actors in the challenged transaction, and as such, were naturally held liable as principal violators. Data from the Section 703 Report shows that of the 1,735 total vio-

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114. Report of the Securities and Exchange Commission: Section 703 of the Sarbanes-Oxley Act of 2002, Study and Report on Violations by Securities Professionals, http://www.sec.gov/news/studies/sox703report.pdf, at 1 [hereinafter *SEC Report*].

115. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 703, 2002 U.S.C.C.A.N. (116 Stat.) 745, 798-99 (2002). "[S]ecurities professionals" is defined as "public accountants, public accounting firms, investment bankers, investment advisers, brokers, dealers, attorneys, and other securities professionals practicing before the Commission." *Id.* "[O]ther securities professionals" is defined to include "individuals associated with an investment adviser or investment company; transfer agents; stock promoters; and chief or principal financial officers of public companies." *See SEC Report*, supra note 114, at 2.

116. *See SEC Report, supra* note 114, at 1. The SEC was able to collect data on aiding and abetting because it retains the ability to bring such claims. *Central Bank* bars only private actions, not agency-instituted ones.

117. *See id.* at 1.

118. *Id.* at 5.

119. *Id.*

lations reported,[120] 796 were committed by individuals associated with broker/dealers[121] and 239 were committed by a broker/dealer firm.[122] When looking at violations committed by entities or individuals considered as secondary actors, the numbers drop precipitously – accounting firms had only 13 findings of violations, while attorneys had 49.[123] These numbers may suggest that secondary actors commit fewer violations and are therefore not worth pursuing. But that argument has several flaws. First, all of those involved with fraud should be held accountable. These numbers tell us very little about the number of violations actually committed by secondary actors. The focus of the SEC investigations was on primary actors because that is where SOX demanded the agency place its attention.[124] There is no way to determine what incidence of aiding and abetting liability would have been uncovered had that activity been more rigorously pursued.

In truth, knowing the precise number of gatekeepers who engage in aiding and abetting, while interesting, is not that important. If reinstating the ability of private parties to bring actions deters just one such actor, reinstatement is worth it. It would perhaps give some sense of purpose and security to the millions of defrauded investors who lost their life savings in the financial meltdown of the late 1990's and early 2000's, or to others who may find themselves in similar situations. Our capital markets depend on investors having faith in the integrity of those involved. Empowering investors to help rid the markets of bad actors would help them regain the trust necessary to maintain a financially viable market.

In addition to giving a sense of empowerment to investors, reinstating a private right of action for aiding and abetting under Section 10(b) and Rule 10b-5 would allow investors to act as additional monitors over gatekeeper behavior. The resources of the SEC are finite – the agency simply cannot do it alone. In fact, some argue that recent trends at the SEC suggest that its policing function is likely to diminish in the future.[125] Whether or not such predictions turn out to be true, it can only benefit both the agency and the markets to have an additional body of monitors.

Those who oppose reinstituting the ability of private parties to bring aiding and abetting claims make several arguments against doing so. First, some argue that further regulation is not necessary because the frauds that corpora-

120. *Id.* App. A, at 6.

121. *Id.* App. A, at 3.

122. *Id.* App. A, at 2.

123. *Id.* App. A, at 1-2.

124. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 703, 2002 U.S.C.C.A.N. (116 Stat.) 745, 798-99 (2002).

125. *See, e.g*, Robert Kuttner, *Californian Chris Cox, the President's Choice to Reverse the Reforms at the SEC, could be Bush's Singly Most Destructive Regulatory Appointee*, THE AM. PROSPECT, Aug. 2005, at 13 (reporting concerns that the newly appointed Chairman may decrease regulatory focus); *With Ease, 3 Nominees Win Seats on S.E.C.*, N.Y. TIMES, July 30, 2005, at C2 (same).

tions such as Enron and WorldCom committed were the result of "a classic bubble that overtook the equity markets in the late 1990s and produced a market euphoria in which gatekeepers became temporarily irrelevant."[126] For "bubble" advocates, which includes Alan Greenspan[127], no action is necessary to prevent gatekeeper bad behavior. Instead, automatic market correction will occur as the "bubble" bursts and gatekeepers regain their sense and their power. Faced with increasingly skeptical investors, issuers will no longer be able to dictate the rules of the game, and gatekeepers will resume their traditional functions.

This somewhat utopian position is hard to support. First, to accept it, one must accept that the financial catastrophes of recent years were caused by an irrational bubble in the markets and not by systemic failure. Further, to accept the bubble position, one must also accept that gatekeepers and issuers will not repeat their bad behavior in a "non-bubble" market. That belief seems idealistic at best. As powerfully pointed out by Marlene O'Conner, the power of "groupthink" is strong.[128] The incentives to commit fraud are especially strong in the corporate arena where there are vast sums of money at stake. It would be naive at best to suppose that those incentives will vanish. Human ingenuity is boundless – the particular types of fraud witnessed in the last round of scandal may be over, but there are certainly other forms waiting to be devised. It is simply unrealistic to presume that fraudulent behavior will vanish.

It could also be argued that reinstating aiding and abetting liability would increase costs to issuers as gatekeepers increase their fees to offset potential risk. While this is a plausible argument, it is simply not convincing. Under the current regime, gatekeepers face uncertainty as to their potential liability. That uncertainty must be compensated for, meaning that gatekeepers already build that cost into their fees. Thus, it is unlikely that removing uncertainty by establishing more clearly-defined legal standards would increase costs.

Another argument raised against reinstating aiding and abetting liability is that doing so will flood the courts with securities fraud claims. On one level, this assertion can be quickly discounted by a blanket refusal to yield to any such "slippery slope" position. Additionally, this argument is countered by the fact that all aiding and abetting claims would have to meet the heavy

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126. Coffee, *supra* note 103, at 1412.

127. *See generally* Chairman Alan Greenspan, Corporate Governance, Remarks at the Stern School of Business, New York University, Mar. 26, 2002, http://www.federalreserve.gov/boarddocs/speeches/2002/200203262/default.htm.

128. *See* Marleen O'Connor, *The Enron Board, The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003). "Groupthink" refers to the phenomenon where the cohesive nature of a group causes its members to strive for unanimity and overrides their motivation to realistically appraise alternative courses of actions. *Id.* at 1238.

burdens set before them by the PSLRA[129] and other securities laws. Thus, aiding and abetting claims will have to satisfy all of the elements of Section 10(b) and Rule 10b-5 and will have to be pled with specificity, among other requirements. The likelihood that such claims would overwhelm the courts is minimal.

IX. CONCLUSION

Despite the controversy over what exactly "caused" the most recent corporate scandals, there is widespread agreement that gatekeepers – those actors best positioned to help prevent fraud – failed miserably. Court decisions and legislation forthcoming after the meltdown at Enron, WorldCom and others demonstrate judicial and Congressional will to take strong action to prevent future recurrence of these tragedies. While admirable, these "fixes" do not go far enough. Allowing gatekeepers to avoid liability by remaining behind the scenes, actively participating in transactions that reek of deception diminishes our markets. Greed and deception will not disappear on their own. The human capacity to create new and ingenious schemes and devices to defraud is boundless. It is time to recognize the significant role gatekeepers can and should play in deterring bad action and to hold them responsible when they fail to do so.

It is time to break the *Bank*, to recognize explicitly what Congress and the courts have done implicitly. Reinstating aiding and abetting liability will strengthen our securities regulation regime at a time when such a result is clearly the will of all involved.

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129. For discussions of these burdens see, for example, Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239 (2003); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988-89 n.7 (2003); Joel Seligman, *Rethinking Private Securities Litigation*, 73 U. CIN. L. REV. 95 (2004).