Executive Certification Requirements in the Sarbanes-Oxley Act of 2002: A Case for Criminalizing Executive Recklessness

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I. INTRODUCTION

The collapse of once-great corporations such as Enron and WorldCom drew intense scrutiny to the ivory-tower executives heading those institutions, as well as to the severe economic consequences of fraudulent financial disclosures.1 While the Enron debacle involved the use of off-balance-sheet transactions to shift losses to a complex network of subsidiaries and partnerships, the misstated losses at WorldCom appear to have been simple fraud.2 In August 2002, Michael Kooper, a senior executive in Enron's finance department, pled guilty to charges of money laundering and conspiracy to commit wire fraud.3 While nineteen Enron employees have been indicted by the Federal government, the two top executives,

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2. Id. Off-balance-sheet transactions are those not required to be reported in quarterly or annual financial statements, such as the balance sheet, which lists assets, liabilities, and equity. For Enron, these off-balance-sheet transactions appeared in the form of Special Purpose Entities (SPEs) that were used to disguise liabilities and high-risk ventures. Matthew Goldstein, Raising the Bar on Off-Balance-Sheet Finance, THESTREET.COM (July 4, 2003), at http://www.thestreet.com/markets/matthewgoldstein/10097959.html. For a comprehensive academic account of the Enron situation, see William W. Bratton, Enron and the Dark Side of Shareholder Value, 76 TUL. L. REV. 1275 (2002). For a more detailed account of the WorldCom scandal, see Kurt Eichenwald, 2 Ex-Officials at WorldCom Are Charged in Huge Fraud, N.Y. TIMES, Aug. 2, 2002, at A1.

Jeffery Skilling and Kenneth Lay, have not been tied to the accounting fraud. Scott Sullivan, a former chief financial officer at WorldCom, was indicted along with WorldCom's director of general accounting for securities fraud and for making false filings with the Securities and Exchange Commission ("SEC"). The economics of securities investment leads one to conclude that the negative impact of these corporate failures on investor confidence has disrupted capital markets.

Had institutional investors, individual shareholders, and employees with pensions at stake known the truth about the collapsed companies, billions of dollars worth of time and money would have been allocated to other uses. Both initial investment choices (securities with no history) and the valuation of existing stock prices (securities that have been on the market for some time) should reflect an assessment of the earnings prospects and risks associated with the issuing company and its operations. When investors and analysts believe their financial assessments are misled by questionable or fraudulent financial disclosures, the market fails to correctly allocate resources. The general economic malaise that followed the collapse of Enron, WorldCom, and others lends empirical support to this model.

This loss in investor confidence prompted Congress and President Bush to adopt a spate of new measures designed to address "systemic and structural weaknesses affecting the capital markets." Collectively, this legislation is embodied in the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), which impacts nearly every aspect of the system that brings financial information from a public corporation to existing and potential investors, including the areas of accounting oversight, auditor independence, corporate governance, analyst

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5. Id.
7. See generally supra note 1.
9. See generally id. (the more investors see a corporation's representative data as limited or uncertain, the more they will discount its value for risk).
10. See supra note 1.
conflicts of interests, and fraud. In response to the Enron and WorldCom disasters, Congress stated that the purpose of the Sarbanes-Oxley Act is to protect investors by improving the reliability and accuracy of corporate disclosures made pursuant to securities laws.

This Comment focuses on sections 302 and 906 of the Sarbanes-Oxley Act. Section 302 requires Chief Executive Officers (CEOs) and Chief Financial Officers (CFOs), or their equivalents, to personally certify the accuracy of financial disclosure filings required by the SEC and to vouch for the reliability of the internal corporate controls that produce that information. Section 906 contains an additional certification requirement and provides specific criminal penalties for willful or knowing violations of that requirement. An efficiency-based analysis of these two sections of the Sarbanes-Oxley Act suggests that including a recklessness standard of intent would be more likely to increase the accuracy of the information, reduce the aggregate costs of obtaining the information, and restore much-needed investor confidence. As a result, Congress should amend the Sarbanes-Oxley Act to create a single, coherent certification requirement with criminal penalty provisions that incorporate recklessness as a standard of intent giving rise to criminal culpability.

In order to understand why Congress should amend the Sarbanes-Oxley Act, one must understand how security disclosure laws evolved. This Comment begins by briefly looking at how financial disclosure regulations and criminal sanctions have operated in the years leading up to the Sarbanes-Oxley Act. Relevant portions of the landmark Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, as amended, make up the subject matter of Part II. Part III looks at the specific changes, or lack thereof, that the Sarbanes-Oxley Act has attempted to impose on financial disclosure laws. This Comment gives particular attention to the currently bifurcated and incoherent certification requirements of sections 302 and 906, which are redundant and largely ineffectual. One must understand these sections in order to grasp the failures of

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13. Id. pmbl.
17. Id. §§ 78a–mm (2003).
the prior system and the impact, if any, that the Sarbanes-Oxley Act is likely to have on the regulatory failures that it purports to combat.

Finally, Part IV will show that Congress should amend the certification requirements and the criminal penalties in the Sarbanes-Oxley Act in two important ways. First, Congress should rid the Sarbanes-Oxley Act of the redundant and confusing dual certification requirements in order to reduce compliance costs and dispose of what could be a costly trap for the unwary. Second, the amended version of the Sarbanes-Oxley Act should include a recklessness standard of intent that will encourage executives to ensure that financial information is accurate enough to protect all stakeholders and to restore investor confidence.18

II. FINANCIAL DISCLOSURE LAWS BEFORE THE SARBANES-OXLEY ACT

Financial disclosure requirements are primarily found in two landmark securities laws from the Depression era—the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act").19 The Securities Act requires that companies register all the securities it offers to the general public with the SEC and that it provide a prospectus for prospective investors.20 This Act focuses on the initial investment scenario, where a security or venture has no history upon which investors can rely.21 The Exchange Act requires all companies listing securities on a national exchange to register with the SEC and to file annual and periodic (most often quarterly) financial reports with the SEC.22 In contrast to the Securities Act, the Exchange Act was intended to provide investors with ongoing information useful in deciding whether to purchase existing securities on an open market.23 These two securities laws often required duplicate filings and superfluous paperwork from a common core of information.24

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18. "Stakeholders" includes investors in public securities, employees, and the general population whose fortune may rise and fall with an economy driven by corporate activity. See BLACK'S LAW DICTIONARY 1412 (7th ed. 1999).
21. Id.
22. Id.
23. Id.
24. See generally 2 HAZEN, supra note 19, at 22–25.
The dual disclosure schemes remained largely separate until 1982, when the SEC adopted a partially integrated disclosure system, known as Regulation S-K, that attempted to combine elements of the Securities Act and the Exchange Act.\(^25\) Regulation S-K requires management to disseminate annual and quarterly reports of audited financial statements; to make disclosures regarding the corporation’s liquidity, capital resources, and results of operations; and to discuss favorable and adverse trends.\(^26\) Regulation S-K places a greater emphasis on periodic disclosures, as established in the Exchange Act, rather than on the initial prospectus reporting of the Securities Act.\(^27\)

Given that both the Exchange Act (through Regulation S-K) and the Sarbanes-Oxley Act (discussed in Part III infra) address the same periodic disclosure requirements, it is important to compare the standards of criminal liability and penalties imposed by these Acts.\(^28\) This comparison should make clear that the Sarbanes-Oxley Act has done little to change the criminalization of inaccurate and fraudulent disclosures post-Enron/WorldCom. The Exchange Act establishes criminal liability for willful violations of all its provisions, and for willfully and knowingly making false or misleading statements in all documents required to be filed under the Exchange Act.\(^29\)

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25. *Id.* at 23 (stating that the move to uniformity covered Forms 10-Q and 10-K, the annual shareholder report under the Exchange Act of 1934, and Forms S-1, S-2, S-3, S-4, S-8, S-11, and formerly S-18 under the Securities Act of 1933).

26. *Id.* at 31. "Liquidity" refers to the amount of time required to convert an asset into cash or pay a liability; "capital" structure is the composition of the invested capital, such as the mix of debt and equity financing. Shannon Pratt, *The Lawyer’s Business Valuation Handbook* 205, 403 (2000); see also 17 C.F.R. § 229.301 (2003) for more detailed requirements; "results of operations" requirements are similarly defined in *id.*

27. See 1 Bloomenthal (2002), *supra* note 20, at 63.

28. Bruce C. Bennett & Graham Robinson, *Executive Certifications*, in 34th Annual Institute on Securities Regulation 552 (PLI Corp. Law & Practice Course Handbook Series No. B0-01GD, 2002). SEC rules promulgated pursuant to the Sarbanes-Oxley Act require certification for Forms 10-K, 10-Q, 10-KSB, 10-QSB, 20-F, 40-F and N-SAR (including any amendment to or transition reports on such forms), but not for Forms 6-K or 8-K. *Id.*


Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78b of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000, or imprisoned not more than 10 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $2,500,000 may be imposed; but no person shall be subject to
Historically, a natural person convicted under section 32(a) of the Exchange Act could be fined up to $1 million, or imprisoned up to ten years, or both.\textsuperscript{30} However, a person could not be criminally liable if he or she could prove lack of knowledge of the rule or regulation that was violated.\textsuperscript{31} The Sarbanes-Oxley Act purported to make meaningful changes to this system of criminal enforcement.\textsuperscript{32}

III. SARBANES-OXLEY ACT FAILED TO MEANINGFULLY IMPACT FINANCIAL DISCLOSURE LAWS

Similar to the Exchange Act, the Sarbanes-Oxley Act addresses periodic reporting standards. It requires that companies file under sections 13(a) or 15(d) of the Exchange Act, which also ensures that financial reports are certified.\textsuperscript{33} Pursuant to section 13(a), every issuer of a security registered on an exchange must file the following information with the SEC: (1) information and documents needed to keep reasonably current the information filed in registering; and (2) annual and quarterly reports as the SEC may prescribe.\textsuperscript{34} Section 15(d) simply covers any supplemental filings of annual or quarterly reports.\textsuperscript{35} Thus, the Sarbanes-Oxley Act does not make substantive changes to the reporting requirements: it seeks to make those reports more reliable by requiring personal certifications from executives. The remainder of this part discusses the Sarbanes-Oxley Act as a mechanism affecting the regime of criminal penalties used to encourage accurate disclosures of section 13(a) and 15(d) material.

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\textsuperscript{30} imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

\textsuperscript{31} Practically speaking, an executive could claim that he or she did not understand that certain "bottom line" figures were the result of improper accounting methods because he or she was not an expert in accounting, or perhaps because the executive simply did not have the time to review the accounting procedures of a multi-billion dollar company— a somewhat successful tactic thus far in the case of Enron. See supra notes 3-4. It seems the burden would be on the Department of Justice and the Securities and Exchange Commission to produce a "smoking gun" document indicating a willful and knowing disregard of disclosure laws.

\textsuperscript{32} This Comment only examines the criminal penalties found in the Exchange Act and the Sarbanes-Oxley Act. Private civil liability, available under SEC Rule 10b-5 and section 18(a) of the Exchange Act, are certainly relevant to the issue of creating incentives for more complete financial disclosures, but are beyond the scope of this Comment.

\textsuperscript{33} Sarbanes-Oxley Act of 2002 § 302(a), 15 U.S.C. § 7241(a) (2003). The U.S.C. cognates to sections 13(a) and 15(d) are 15 U.S.C. § 78m and § 78o(d), respectively.


\textsuperscript{35} Id. § 15(d), 15 U.S.C. § 78o(d) (2003).
A. Dual Certification Requirements

From a practical standpoint, the Sarbanes-Oxley Act is difficult to understand because of inconsistencies that were most likely caused by the haste with which it was drafted. The certification provisions are exemplary in this regard. Commentators have noted that sections 302 and 906 of the Sarbanes-Oxley Act actually present two distinct certification requirements. While both sections specifically refer to sections 13(a) and 15(d) of the Exchange Act, because section 302 is a securities law, it is subject to rulemaking authority by the SEC. Because the SEC has rulemaking authority, it can specify methods of certification, offer guidance in formal opinions, and promulgate rules regarding enforcement. In contrast to section 302, section 906 is codified under the crimes and criminal procedure section of the United States Code, Title 18, which subjects those provisions to direct enforcement by the Justice Department without SEC input. Section 906 establishes a bifurcated criminal sentencing scheme based on two intent requirements: “willful” and “knowing” violations. Understanding the substance of these two sections of the Sarbanes-Oxley Act, as well as the operational relationship between them, helps make it clear that Congress should amend the statute to adopt recklessness as a standard of criminal intent for certification violations.

1. The Requirements and Implications of Section 302

Section 302 of the Sarbanes-Oxley Act not only requires that the CEO and CFO certify that the company’s section 13(a) and 15(d) financial reports are accurate, but it also requires that the CEO and CFO state that they have designed and reviewed their company’s internal controls to ensure that they receive the necessary material information. Although the “internal controls” language in section

36. Bennett & Robinson, supra note 28, at 542, 545. WorldCom announced its discovery of illegitimate accounting practices requiring a $4 billion restatement of earnings on June 25, 2002. Id. at 542. The Sarbanes-Oxley Act, which is a massive piece of legislation, was passed by Congress and signed into law on July 30, 2002. Id. at 545.

37. Id. at 546; 1 HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK 692–93 (2003) [hereinafter 1 BLOOMENTHAL (2003)].


39. Bennett & Robinson, supra note 28, at 547 (referring to the new SEC rules made pursuant to its § 302 authority).

40. Id. at 551 (noting that the SEC has stated that § 906 is not within its jurisdiction).

41. Id.


(a) Regulations required. The Commission shall, by rule, require, for each company filing periodic reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)), that the principal executive officer or officers
302(4) is relatively straightforward, its consequences are nebulous because section 302 does not include a penalties scheme for misrepresentations or omissions of each required representation. Instead, as an amendment to the Exchange Act, section 302 implicitly relies on the criminal remedies traditionally available under the Exchange Act for enforcement. The ambiguity of section 302 is further exacerbated because it requires reconciliation with the separate, yet similar, requirements of section 906.

and the principal financial officer or officers, or persons performing similar functions, certify in each annual or quarterly report filed or submitted under either such section of the Act that—

(1) the signing officer has reviewed the report;
(2) based on the officer’s knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make statements made, in light of the circumstances under which the statements were made, not misleading;
(3) based on such officer’s knowledge the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the reports;
(4) the signing officers—
   (A) are responsible for establishing and maintaining internal controls;
   (B) have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared;
   (C) have evaluated the effectiveness of the issuer’s internal controls as of a date within 90 days prior to the report; and
   (D) have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date.

43. Id.
Failure of corporate officers to certify financial reports.
(a) Certification of periodic financial reports.—Each periodic report containing financial statements filed by an issuer with the Securities Exchange Commission pursuant to 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall be accompanied by a written statement by the chief executive officer and chief financial officer (or equivalent thereof) of the issuer.
(b) Content.—The statement required under subsection (a) shall certify that the periodic report containing the financial statements of section 13(a) or 15(d) of the Securities Exchange Act [o]f 1934 (15 U.S.C. 78m(a) or 78o(d)) and that the information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.
(c) Criminal penalties.—Whoever—
   (1) certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement
2. The Requirements and Implications of Section 906

Section 906 was included in the Sarbanes-Oxley Act as an afterthought. A separate bill, the proposed White-Collar Crime Penalty Enhancement Act of 2002 ("WCCPEA"), was undergoing the amendment process in the Senate during the summer of 2002.\(^{46}\) Senators Biden and Hatch offered what would become section 906 as an amendment to the proposed WCCPEA that the Senate passed by a unanimous vote of 96–0.\(^{47}\) As the Sarbanes-Oxley Act grew, it began to subsume similar legislation, such as the proposed WCCPEA, which was ultimately modified and added to the Sarbanes-Oxley Act as Title IX: White-Collar Crime Penalty Enhancements.\(^{48}\)

On its face, section 906 appears to be ineffectual by way of redundancy.\(^{49}\) First, section 906 refers to certifications of financial statements under sections 13(a) and 15(d) of the Exchange Act\(^{50}\)—both of which are also required under section 302.\(^{51}\) Second, while section 906 provides amendments to the criminal code by creating harsher maximum penalties,\(^{52}\) section 1106 of the Sarbanes-Oxley Act amends the Exchange Act by increasing the maximum prison time to twenty years and the maximum fine to $5 million, precisely the same penalties adopted in section 906.\(^{53}\) As noted, the criminal sanctions for violating the section 302 requirements exist by implication through those now-identical Exchange Act penalties.\(^{54}\) Thus, to the degree willfulness is the standard of intent used by the Sarbanes-Oxley Act and the Exchange Act, the penalties that follow from section 906 add nothing to a system of corporate criminal laws that gave us Enron and WorldCom.

\(^{46}\) 1 BLOOMENTHAL (2003), supra note 37, at 692.


\(^{49}\) See generally 1 BLOOMENTHAL (2003), supra note 37, at 692–94.


\(^{51}\) Id. § 302(a), 15 U.S.C. § 7241(a) (2003).

\(^{52}\) Id. § 906(c), 18 U.S.C. § 1350(c) (2003). Knowing violators shall be fined not more than $1,000,000 or imprisoned not more than 10 years, or both. Id. Willful violators shall be fined not more than $5,000,000 or imprisoned not more than 20 years, or both. Id.


\(^{54}\) 1 BLOOMENTHAL (2003), supra note 37, at 693.
Although appearing harmless, the language of section 906 could potentially become a subtle trap for unwary executives and their corporate counsel in at least two ways. First, in stating that sections 13(a) and 15(d) reports must "fully comple[y] with the requirements of the Exchange Act," section 906 leaves out the "materiality" qualifier found in section 302.55 Because such complex reports are unlikely to be entirely free of mistakes, even one minor mistake will render a section 906 certification false when the statute is read literally.56 Thus, there is a need for language stating that only "material" misstatements—those that would have some relevance to an investor or regulator—are criminal violations. Second, the Exchange Act penalties found in section 32(a) only apply to willful and knowing violations,57 while section 906 of the Sarbanes-Oxley Act applies to willful or knowing violations.58 Although the Model Penal Code generally does not distinguish between "willful" and "knowing" violations, the Sarbanes-Oxley Act penalizes willful violations more severely than knowing violations.59 The Sarbanes-Oxley Act is even more frustrating because it adds uncertainty by not defining "knowingly" or "willfully." As described in the following section, it is difficult to parse out the distinction between these standards of intent.

B. Applications of the Criminal Intent Standards in the Sarbanes-Oxley Act and Beyond

This section deals with the sometimes subtle and indistinguishable levels of intent used to define the past and present financial disclosure fraud crimes. The standards applicable to the Exchange Act and the Sarbanes-Oxley Act are those known as "willfulness" and "knowingly." What has never been used as a standard of intent in the statutory financial disclosure context is "recklessness," although at least one court appears to have come close

55. Bennett & Robinson, supra note 28, at 566.
56. Id. Until courts hear criminal cases based on violations of section 906, enforcement expectations will be unclear and compliance will be more costly.
59. A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears. MODEL PENAL CODE § 2.02(8) (2003). The Sarbanes-Oxley Act imposes different penalties under the two standards, which clearly indicates Congress' intent to distinguish the two. In this case, "willfully" appears to be synonymous with "purposely" under the Model Penal Code.
to adopting it sua sponte. The following three subsections discuss each standard of intent separately as they might apply to the Sarbanes-Oxley Act.

1. Willful Violations

The least likely, but easiest to identify, event implicating the Sarbanes-Oxley Act would be a willful violation of the certification requirement. An executive implicated under section 906(c)(2) or section 302 (via section 32(a) of the Exchange Act) would either have to order lower level managers to falsify or misrepresent information on financial statements, or do those acts herself (if that is even possible given the vast division of labor in most publicly traded corporations). Then, the executive must personally certify the fraudulent statements with the intent to deceive regulators. The violations at WorldCom may exemplify a willful violation because there is evidence that some former executives were involved in the decision to hide several billion dollars worth of expenses over a number of years.

2. Knowing Violations

In the case of a knowing violation, one or both of the certifying executives must be aware that an employee had intentionally or unintentionally misstated financial information that was bound for the SEC. One might argue that the failure to correct such a misstatement before the certification would only be an omission to act, which could justify the softer penalties found in section 906(c)(1), rather than the harsher violations required under the willfulness standard. However, the certification requirement still demands an affirmative act—the personal oath that the disclosures are materially accurate to the best of the executive’s knowledge. The alternative is for the executive to refuse to certify the disclosures by the periodic deadline, which carries its own costs in terms of enforcement by the SEC, but hardly represents the kind of culpability associated with a

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60. See supra note 29; see also United States v. Gruenberg, 989 F.2d 971 (8th Cir. 1993), cert. denied, 510 U.S. 873 (1993).

61. “Willfulness” has been described as the intentional doing of the wrong acts, but not necessarily with knowledge of the law that is being broken. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (rejecting the “knowledge” and “reckless disregard” standards).


64. Certification of Disclosure in Companies’ Quarterly and Annual Reports, Sarbanes-Oxley Act Release No. 33-8124, 67 Fed. Reg. 57,276, 57,277 (Sept. 9, 2002) (amending the annual and quarterly report forms to include text for the certification of each individual report required under sections 13(a) and 15(d)).
blatant lie. Given that a knowing violation includes an affirmative act of deception, established when the corporate officer certifies a false financial statement, it will be especially difficult to distinguish knowing and willful violations in the practical application of the law. Thus, any meaningful distinction between section 906 and the Exchange Act penalties is very difficult to define.

3. The Recklessness Standard and the Similar Willful Blindness Standard

Under the Model Penal Code’s definition of recklessness, “[a] person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the material element [of an offense] exists or will result from his conduct.” The “disregard” must be a “gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation,” but there is no requirement that the actor be “practically certain” that the conduct will result in a violation of the law. Thus, this standard is a distinct step below “knowingly” in the hierarchy of mens rea. A key factor in the recklessness standard is the existence of an objectively verifiable “substantial and unjustifiable risk.” In the corporate disclosure context, this means that executives of corporations with a recent history of violations likely would operate under the cloud of greater risk. However, each case will require a fact-specific analysis.

There is some support in the case law for the use of a willful blindness standard of intent for violations of section 32(a) of the Exchange Act, which appears to be similar to a recklessness standard. For example, in United States v. Gruenberg, the court held that a willful blindness jury instruction was appropriate where defendants were charged under 15 U.S.C. § 78ff. The defendants, who were the co-founders and officers of a corporation that manufactured

65. In Search of Honesty, ECONOMIST, Aug. 17, 2002, at 49 (noting that the SEC is authorized to impose penalties for the failure to certify by the required deadline).
67. MODEL PENAL CODE § 2.02(2)(c).
68. Id.
69. Id. § 2.02(2)(b)(ii).
70. Id. § 2.02(2)(c).
biochemical culturing devices, fraudulently misstated the corporation's sales figures in order to artificially inflate the price of its stock.\textsuperscript{73} The court found that there was sufficient evidence to support an inference of "deliberate ignorance" when one defendant personally loaned $2.8 million to the other defendant, which was used to pay off accounts receivable owed by the corporation's most important distributor.\textsuperscript{74} This account represented approximately sixty percent of the corporation's total sales in fiscal year 1986.\textsuperscript{75} The court held that the failure to investigate the need to personally finance a customer's debt, which was highly unusual, supported a jury instruction of willful blindness.\textsuperscript{76}

Courts have equated the recklessness standard with deliberate ignorance.\textsuperscript{77} Deliberate ignorance is a step below acting with the specific knowledge that fraud has occurred, and in that sense, it is more akin to acting recklessly. Although \textit{Gruenberg} may seem to indicate a willingness to move towards adopting a recklessness standard, the close corporation setting and blatancy of the fraud in that case are better viewed as a finding that the violations simply could not have been unknown, as the defendant claimed. Thus, courts have not gone so far as to apply a true recklessness standard in the securities fraud context.

\textit{Gruenberg} notwithstanding, recklessness is absent from the Exchange Act.\textsuperscript{78} While Congress decided not to use that standard of intent in crafting the Sarbanes-Oxley Act, it is important to recognize that it did come under consideration.\textsuperscript{79} During the Senate debate over the legislation that ultimately became section 906, Senator Biden initially used the language "recklessly" in place of "knowing," stating that this proposed law was designed to set "a high standard."\textsuperscript{80} Without explanation, the Senator subsequently asked and received unanimous consent to change the language from "recklessly" to "recklessly and knowingly," effectively raising the standard to one of

\begin{itemize}
  \item \textsuperscript{73} \textit{Gruenberg}, 989 F.2d at 973.
  \item \textsuperscript{74} \textit{Id.} at 974–75.
  \item \textsuperscript{75} \textit{Id.}
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{See} United States v. Long, 977 F.2d 1264, 1271 (8th Cir. 1992).
  \item \textsuperscript{78} \textit{Cf.} United States v. Hanlon, 548 F.2d 1096, 1100–02 (2d Cir. 1977) (upholding an instruction that the element of knowledge of a given fact may be satisfied by proof that a defendant acted with reckless disregard of what the truth was in bank and wire fraud case, but cautioning that the use of the term "reckless" should be avoided because it could mislead the jury about the proper standard).
  \item \textsuperscript{79} 148 CONG. REC. S6546 (2002).
  \item \textsuperscript{80} \textit{Id.}; 1 BLOOMENTHAL (2003), supra note 37, at 694.
\end{itemize}
"knowingly" with the use of the conjunctive "and." Finally, in Conference Committee, the language was changed again into its final form, using only the term "knowingly," making it even more apparent that recklessness would have no part in the new legislation. The following part explains how this calculated decision to disregard the recklessness standard dampened the potential effectiveness of the Sarbanes-Oxley Act with regard to its stated intent: "address[ing] systemic and structural weaknesses affecting the capital markets." Moreover, the early inclusion of a recklessness standard in the securities fraud context makes the important point that such a standard should be given serious consideration by lawmakers.

IV. CONGRESS SHOULD ACT TO STREAMLINE SARBANES-OXLEY ACT AND ADOPT A RECKLESSNESS STANDARD OF INTENT

The Sarbanes-Oxley Act's certification requirements failed to meaningfully alter existing criminal penalties for materially inaccurate financial disclosures. Thus, in choosing to do little more than increase the maximum criminal penalties for violations of laws in existence long before Enron and WorldCom, lawmakers seem not to have taken seriously both the need for accurate financial disclosures and the ability of corporate executives to control the processes that generates this information. Moreover, section 906 is redundant, yet just ambiguous enough to be a costly danger to unwary executives and their corporate counsel. An efficiency-based analysis suggests that Congress should amend section 906 to abolish the dual certification requirements, and tie it to section 302 through a recklessness standard of intent. This amendment would be more likely to increase the accuracy of financial statements and to reduce the aggregate costs of obtaining the information, while also restoring much-needed investor confidence.

81. 148 CONG. REC. S6546 (2002); 1 BLOOMENTHAL (2003), supra note 37, at 694. The "recklessly" language is meaningless when used in conjunction with "knowingly."
82. 148 CONG. REC. S6546 (2002); 1 BLOOMENTHAL (2003), supra note 37, at 694.
83. HAMILTON & TRAUTMANN, supra note 11. As noted, this was a primary purpose of the legislation as a whole, and the certification requirements in particular.
84. Although the record is devoid of reasons for using "knowledge" rather than "recklessness," it might be the result of haste, lobbying efforts, or a genuine belief that a lower standard would be ineffective or unfair.
A. Congress Should Abolish the Dual Certifications by Amending Section 906

As discussed in Part III.A.2, section 906 is largely redundant, yet potentially costly because of its lack of a materiality qualifier and the difficulty of parsing out the difference between willful and knowing violations. These inconsistencies add to the cost of compliance, which is a barrier to achieving the most efficient regulatory process for directing highly accurate information to the marketplace.\(^85\) To date, every corporation implicated by the Sarbanes-Oxley Act has had to incur significant legal costs to determine the requirements of the dual certifications.\(^86\) Thus, the first step in making the certification requirements in the Sarbanes-Oxley Act more efficient is to amend the statute with an eye toward creating a single certification requirement with clearly delineated consequences.

Congress should begin by abolishing the second certification requirement in section 906 through the elimination of subsections (a) and (b).\(^87\) Instead, section 906 should state that it exists solely as a criminal penalty provision with respect to violations of section 302, while section 302 should be amended to cross-reference section 906 as a penalty provision for violations of the section 302 certification requirements. These changes would eliminate the Sarbanes-Oxley Act's uncertainty as to the possibility of executives facing criminal liability for meaningless deviations in highly technical disclosure forms by remedying the lack of a materiality qualifier in the certification requirement.

Dealing with the inconsistencies in the Sarbanes-Oxley Act's certifications is, however, merely a threshold measure. An effort to streamline the compliance process will certainly reduce costs, but the goal should be greater. Congress should look not just to the process, but also to the substance. That is to say, if the post-Enron/WorldCom objective is to bring trustworthy information into the market as efficiently as possible, Congress should place the burden of producing that information squarely on those corporate officers best able to establish reliable internal controls.

\(^{85}\) Jeffrey L. Harrison, Law and Economics in a Nutshell 62 (1995). This is a problem of transaction costs, which are not the costs of producing the information, but rather are the costs of trying to understand what section 906 certification requires.

\(^{86}\) See generally Bennett & Robinson, supra note 28.

B. An Efficiency-Based Analysis Demands the Adoption of a Recklessness Standard of Intent

This section begins with a brief look at the economic theory behind financial disclosure laws. What follows are some examples of the corporate reaction to the Sarbanes-Oxley Act's certification requirements. Finally, we will see how the Sarbanes-Oxley Act would increase the accuracy of financial disclosures while creating a net reduction in the economic costs associated with a corporate collapse, if it included a recklessness standard of intent.

1. The Economics of Financial Disclosure Laws

The economics of information and investment would have us expect that there is little need for regulatory disclosure rules and penalties regarding misrepresentation and non-disclosure because firms vying for scarce investor dollars have an incentive to produce a good deal of highly accurate information. Over time, firms signaling their ability to disseminate such information would fare better than those without that reputation in the form of a lower cost of capital. Commentators call this the self-interest model of financial disclosure.

There are, however, limitations to the self-interest model. First, the information may be valuable not only to potential investors, but also to third-party firms. This "free-rider" problem often causes under production or intentional hiding of information to protect a competitive advantage. Second, low-quality firms could mimic the disclosure of high-quality firms by manipulating their business models and making false statements. This problem is exacerbated by the "cozy relationships... [accounting] firms have with corporate clients," which helps allow the inaccurate reporting.

88. See generally Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 280 (1991); Ribstein, supra note 6 at 47-61 (arguing that the market should be able to produce an adequate disclosure system now that fraud cases such as Enron and WorldCom have revealed that the demand for such a system exists).
89. Id. at 53-55. Cost of capital is based on risk, a "price," if you will, that a business pays for investment dollars.
90. Easterbrook & Fischel, supra note 88, at 290.
91. Id.
92. Id.; Posner & Scott, supra note 8, at 325.
93. Harrison, supra note 85, at 46. Free riding takes place when individuals are able to take advantage of the benefits of activities of others without paying for those benefits.
94. Easterbrook & Fischel, supra note 88, at 290.
95. Id. at 280-81.
Third, the emphasis on short-term gains over long-term value in highly liquid securities markets creates an incentive to use accounting processes that produce overly optimistic information. These market failures result in what we might call the sub-optimal information model because, left to its own devices, the market does not provide the quantity and quality of information investors would prefer.

The sub-optimal information model is further aggravated by the agency problem that exists between the interests of management and shareholders. Top-level executives now required to file certificates under the Sarbanes-Oxley Act are often compensated through options and bonuses based on short-term gains in stock price. In contrast, many shareholders, especially individuals, hold stocks in the hope of long-term appreciation. This creates the kind of conflict that might lead executives to hide losses in off-balance-sheet transactions or list expenses as capital investments.

In response to the market failures of the financial information distribution, the government has long imposed disclosure requirements on those firms selling securities to the public. These regulatory disclosure requirements and the penalties imposed for violating the requirements serve to offset the incentives not to disclose information at the quantity and quality that we would see if the problems associated with the sub-optimal information model did not exist. The periodic financial statement certification requirement in the Sarbanes-Oxley Act is also an attempt to impose checks on the agency


98. But see EASTERBROOK & FISCHEL, supra note 88, at 280–83 (arguing that the market will still operate efficiently even without anti-fraud regulations due to accounting oversight, vetting by investment bankers, and stock option incentives for management). It should be evident at this point that even with all of the safeguards in place that Easterbrook and Fischel were convinced (in 1991) would prevent market failures, the need for corrective regulation is in reality an absolute necessity.

99. This classic conflict of interest problem might be dealt with by the threat of a fiduciary duty claim under agency law, though that threat has clearly been an insufficient deterrent thus far. For possible explanations as to why management insiders choose to engage in fraud, see Ribstein, supra note 6, at 20–22, discussing managerial overconfidence, investor’s demand for a high level of performance, and the incentive to cover up past frauds with even greater ongoing fraud.

100. Osterland, supra note 97; see also Eric Wahlgren, Spreading the Yankee Way of Pay, BUSINESS WEEK ONLINE (Apr. 18, 2001), at http://www.businessweek.com/careers/content/apr2001/ca20010419_812.htm. According to Business Week, CEO’s at the 365 largest publicly traded U.S. companies earned an average of $13.1 million in 2000. Id.

101. See Eichenwald, supra note 2.

problem that seems to have caused the sort of deception and outright fraud seen at Enron and WorldCom.103

2. The Sarbanes-Oxley Act Merely Shifts Responsibility down the Corporate Ladder

Before addressing the reasons that a recklessness standard would promote the goals of the Sarbanes-Oxley Act, it is important to examine how the Sarbanes-Oxley Act has changed the behavior of executives during its short existence. On August 14, 2002, the first meaningful deadline of the Sarbanes-Oxley Act, the two top executives at 695 listed companies with annual revenues over $1.2 billion were required to certify their financial statements or admit problems.104 In the weeks leading up to that deadline, some executives forced their own middle managers to sign documents stating that the information they had provided to the higher-ups was accurate.105 These back-up certifications have continued to find use, though their legal effect is unclear.106

Certifications appear designed to create a paper trail that would defeat the “knowingly” standard of culpability.107 Certainly, these measures do have positive aspects, such as giving middle managers a reason to resist internal or external pressure to be creative with their numbers,108 and in turn giving CEOs and CFOs protection against some violations that might be impossible for them to prevent. However, these certifications also represent a practical failure of the “willful” or “knowingly” standard because they undermine the stated goals of the Sarbanes-Oxley Act. Passing the responsibility of accurate reporting to subordinates represents the bare minimum an executive can do to minimize his “knowledge” about disclosure inaccuracies and to avoid the risk of personal liability. Given the ineffectiveness of certifications in addressing the underlying problem, this secondary certification scheme almost certainly would not have prevented the Enron/WorldCom collapses that prompted such swift passage of the Sarbanes-Oxley Act in the first place.109

103. See discussion supra note 99.
104. In Search of Honesty, supra note 65. Senior executives of all 14,000 firms listed in the United States, including those based overseas, were required to certify by August 29, 2002.
105. Id.
107. Id.
109. Enron CEO Ken Lay has claimed continuously, and with apparent success thus far (i.e., no indictments), that he had no knowledge of the off-balance-sheet expenses scheme that
3. A Recklessness Standard Would Increase Accuracy and Reduce the Aggregate Costs in Shifting the Burden to Those Best Able to Create Reliable Systems of Internal Control

The Sarbanes-Oxley Act may encourage executives to ignore what is going on beneath them or to cease communicating openly with middle management and auditors in an attempt to avoid liability. As noted in the preceding section, some executives have attempted to limit their potential criminal liability by having middle managers sign truthfulness declarations. Under the current standard, it is conceivable, and even probable, that executives will seek to limit communication with those employees as much as possible. There is, however, a solution. Using a standard of criminal intent lower than knowledge, such as recklessness, would restore the incentive to both communicate with middle management and establish an efficient structure for producing accurate information.

The Model Penal Code's definition of recklessness would extend the potential liability of corporate executives by making them liable for inaction when past or present circumstances signal that the internal accounting process is failing. By adopting this standard, the CEO and CFO of an offending corporation would face criminal liability not only for taking affirmative acts that result in the filing of inaccurate information, but also for consciously disregarding an unjustifiable risk that the corporation's internal processes are producing periodic financial reports that are materially inaccurate. This standard would apply, for instance, when circumstances indicate that the corporation has had similar reporting failures in the past. While there would be initial uncertainty as to how pervasive past failures must have been to trigger a charge based on the recklessness standard, that difficulty could be mitigated by formal SEC opinions and the development of case law. Furthermore, because it appears to be a

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led to his company's collapse. At WorldCom, there is evidence that executives who would have been implicated by the Sarbanes-Oxley Act are subject to criminal liability under the willful and knowingly standard of the Securities Exchange Act §32(a), as well as securities fraud provisions.

10. See supra text accompanying notes 104–05; Bennett & Robinson, supra note 28, at 557–58 (noting that "many executives have asked for back-up certifications from employees who participate in preparing the reports . . . because they have been advised that they are legally beneficial or because they believe that they are helpful in structuring their disclosure process").

11. Recall that not "knowing" precludes liability, and section 906 does not provide penalties for the "internal controls" requirement in section 302.

12. See MODEL PENAL CODE § 2.02(2)(c) (definition of recklessness).

13. Id.

14. For example, if post-bankruptcy Enron or WorldCom failed to change their accounting and financial disclosure processes, resulting in more restatements, it would be difficult to argue that executives in those companies were not reckless.
requirement of section 302, we must assume that the executives implicated in the Sarbanes-Oxley Act have the ability to refine the internal controls of their companies' processes for producing the Exchange Act reports.\textsuperscript{115} Therefore, in amending section 906, the criminal provisions should include a third set of penalties based on a recklessness standard of intent. This standard should also be tied directly to the requirement that the CEO/CFO review and approve the internal processes for producing the information.\textsuperscript{116}

As compared to the SEC, independent investment firms, individual shareholders, and corporate executives are in the best position to ensure accurate financial information enters the marketplace at the lowest cost.\textsuperscript{117} Executives have ready access to internal data and the singular power, required under section 302, to create or alter the internal process the corporation uses to prepare the disclosures.\textsuperscript{118} However, at present, these executives only face criminal culpability under section 32(a) of the Exchange Act for willful and knowing violations of section 302.\textsuperscript{119} As a practical matter, it would be nearly impossible to "willfully" create an internal process that results in fraudulent representations of material information without otherwise becoming culpable for fraudulent representations under the traditional Exchange Act intent standard.\textsuperscript{120} Although the penalties under the current system are a substantial deterrent, there are no criminal consequences for even the sloppiest management of financial disclosures, as long as the financial disclosures are not made with the intent to deceive.\textsuperscript{121}

The economics of disclosure laws also suggest that even a strict rule against fraud and misrepresentation (e.g., a recklessness standard) will impose few additional costs on firms already dedicated to producing accurate information.\textsuperscript{122} Firms that have previously misled investors (either intentionally or because of lax internal controls) will bear the majority of compliance costs, thus rewarding firms that have


\textsuperscript{116} Id.

\textsuperscript{117} See EASTERBROOK & FISCHEL, supra note 88, at 279–81; HARRISON, supra note 85, at 28. This issue involves productive efficiency, which deals with whether a particular output is being produced at the lowest possible cost.


\textsuperscript{120} Id.

\textsuperscript{121} Id.

\textsuperscript{122} See generally EASTERBROOK & FISCHEL, supra note 88, at 283. An anti-fraud rule imposes low or no costs on the honest, high-quality firms.
been, and continue to be, honest and well managed.\(^1\) Again, because these firms, and more specifically their top tier of management, are best able to control their own behavior, it is most efficient to place the burden on them, rather than on the SEC or shareholders.

Opponents of the recklessness standard likely would criticize this solution because of the increased costs associated with enforcing a criminal statute with a lower standard of intent.\(^2\) Admittedly, the recklessness standard would impose some additional costs on regulators and law enforcement because honest as well as dishonest firms will have to be investigated over time.\(^3\) For example, proving recklessness as an element of intent will require much more than the simple discovery of a memorandum indicating a fraudulent purpose or the knowledge of deceit.\(^4\) Using recklessness as the standard might, for instance, require detailed regulatory minimums of corporate internal accounting and finance practice.\(^5\) Because each industry, or even each firm, will have its own specialized practices and business models, generic regulation might be ineffective.\(^6\) In contrast, the more specific the regulation, the more costly it will be to administer and to comply with.\(^7\)

However, the increased costs of a recklessness standard are not prohibitive and are justified by the benefits of the recklessness standard. First, the current scheme already requires substantial investigative costs to distinguish between honest and dishonest firms. Adding a recklessness standard will only result in a marginal cost increase. Second, while the costs of enforcement and compliance

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123. *Id.* at 283–85.

124. The SEC has estimated the increased time requirement for compliance with sections 302 and 906 at two burden hours per issuer in connection with preparing each quarterly report on Forms 10-Q or 10-QSB and annual report on Forms 10-K, 10-KSB, 20-F or 40-F (for eight burden hours total per year). With approximately 13,200 public companies implicated, respondents will incur approximately 105,384 burden hours in the aggregate. The changes are expected to raise the total burden hours for preparing those reports to 20,644,439, an increase of 0.53%. Certification of Disclosure in Certain Exchange Act Reports, Sarbanes-Oxley Act Release Nos. 33-8212, 34-47551, 68 Fed. Reg. 15,600, 15,603–04 (Mar. 31, 2003). Presumably, adopting a recklessness standard would increase the burden on public companies more substantially.

125. *Id.*

126. Investigations would likely be lengthy and complex, requiring more resources.

127. The Generally Accepted Accounting Principles (GAAP) provide a good starting point.

128. Requiring the same internal accounting and reporting structure for a multinational commercial airline company, a national insurance company, and a small software manufacturer would be inappropriate. Each will have different resources, organizations of management, and sources of potential conflicts of interest.

129. *See supra* note 85 for the definition of transaction costs.
would rise under a recklessness standard,\textsuperscript{130} that increase is wholly justified when we consider the benefits that would flow from such a change. As explained above, the recklessness standard should have an effect on corporate behavior by leading to financial disclosures that are more accurate, with fewer instances of fraud. Providing accurate financial disclosures, in turn, should go far in restoring investor confidence, which is the stated purpose of the Sarbanes-Oxley Act.\textsuperscript{131} Accurate financial disclosures will allow investors to allocate their capital to its highest and best use, as they will be able to distinguish between high and low quality firms. Fewer cases of fraud will also provide positive externalities outside of the firm-investor relationship.\textsuperscript{132} Fewer employees will lose their jobs because companies like Enron, WorldCom, and Arthur Anderson will not be forced into bankruptcy, retirement accounts and pension funds will become more reliable, and the general growth of the economy should accelerate or at least cease being harmed.\textsuperscript{133}

Opponents of the recklessness standard might also argue that a recklessness standard would create a level of uncertainty, particularly at the outset, that would deter high quality candidates from seeking those positions that are implicated by the rule. By its very nature, using recklessness as a standard of intent requires executives to take into account all the circumstances surrounding a disclosure that is filed with false or misleading information.\textsuperscript{134} Thus, how could an executive ever know whether he or she has done enough to avoid criminal culpability?

Although the recklessness standard creates some uncertainty regarding liability, there are still strong incentives for prospective executives to take and keep the executive positions implicated by the Sarbanes-Oxley Act.\textsuperscript{135} Just as the maximum penalties in the Sarbanes-Oxley Act decrease from “willful” to “knowing” violations, it is logical that they will decrease further under a recklessness standard.

\textsuperscript{130} See discussion supra note 124. The SEC has recognized that even under the newly created standards of the Sarbanes-Oxley Act, financial issuers will face additional costs. Thus, it is fairly clear that using a lower standard of intent would also increase costs.

\textsuperscript{131} Sarbanes-Oxley Act of 2002 pmbl.

\textsuperscript{132} HARRISON, supra note 85, at 45. Positive externalities occur when the activities of an individual or firm result in benefits, the value of which the producer is unable to internalize.

\textsuperscript{133} See supra note 1 (noting the detrimental impact that corporate collapses have on the economy).

\textsuperscript{134} MODEL PENAL CODE § 2.02(2)(c) (definition of recklessness).

\textsuperscript{135} Supra note 100. Executives get paid handsomely, they have prestigious jobs, and the thousands of companies that have been able to comply with the disclosure requirements illustrates that it is not overly difficult to present accurate information.
Moreover, as with any penalty scheme, first violations would be dealt with much more leniently than repeat violations, and it would not take long for executives and their corporate counsel to understand which actions, or omissions, would result in charges and convictions.

Congress could also deal with the uncertainty problem by amending section 906 to fall under the Exchange Act, rather than the criminal code. This would relegate the penalties and compliance provisions to the SEC’s regulatory authority, rather than leave it to the discretion of the Department of Justice under Title 18 of the United States Code. As an administrative body with rulemaking authority, the SEC could promulgate detailed examples of the minimum requirements for avoiding a recklessness charge and operate as an approval board for corporate executives with specific questions. Moreover, as with any new criminal law, a body of case law would develop to establish the activities that will result in charges and convictions for reckless behavior under the Sarbanes-Oxley Act. Therefore, while there will undoubtedly be some degree of uncertainty, that uncertainty can be mitigated by giving greater authority to the SEC and will eventually be clarified by well-developed case law.

V. CONCLUSION

The federal government has mandatory financial disclosures for publicly traded securities since passage of the Securities Act of 1933 and the Securities Exchange Act of 1934. While that legislation has evolved to meet the needs of the public and the investment community, it was not enough to prevent the disastrous falls of Enron, WorldCom, and an unknown number of other companies. In attempting to save the proverbial day, Congress chose to limit criminal culpability to willful and knowing violations of section 302 (via the Exchange Act), and willful or knowing violations of the more limited certification requirement in section 906. Although the increased penalty maximums under both sections may satisfy the immediate concerns of a wary public, the Sarbanes-Oxley Act does not go far enough in allowing authorities to prosecute executives for actions and

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137. See generally U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2003) ("points" are added for varying types of past criminal offenses).
139. See generally Bennett & Robinson, supra note 28, at 551–52.
140. Id.
omissions that can so thoroughly devastate investors, employees, and the economy as a whole.

The policy implications behind disclosure laws have always included a balance between establishing requirements that provide a sufficient amount of financial information such that investors can allocate their resources efficiently, while imposing that requirement in the least costly and intrusive manner. Because the Sarbanes-Oxley Act fails on both sides of the scale by failing to add any new deterrents against inaccurate disclosures and by imposing expensive dual certification requirements, Congress and President Bush should immediately act to amend the statutes in question. First, lawmakers must rectify the dual certification requirement in section 906. As it stands, section 906 is redundant, yet also ambiguous enough to impose unwarranted costs on corporations and regulators. Second, criminal culpability should be extended to cover executive recklessness that results in violations of the section 302(a)(4) internal controls requirement. Enforcement should be placed in the hands of the SEC—an agency with the expertise to provide executives with a greater degree of certainty as to what type of conduct will not be tolerated. The likely effect of these amendments would be to (1) increase the accuracy of obtaining the information, (2) create a net reduction in economic costs that result from corporate collapses, and (3) restore much-needed investor confidence.