NOTE
AUDITING THE AUDITORS: OVERREGULATION UNDER THE SARBANES-OXLEY ACT

I. INTRODUCTION

Dominating the auditing industry, as well as the headlines of business news, the world's largest accounting firms and their governmental counterparts continue to turn heads.[1] Collectively known as the Big Four, Deloitte, Ernst & Young ("EY"), KPMG, and PricewaterhouseCoopers ("PwC")[2] have a special place in the world of commerce.[3] Engaging with a majority of the world's largest corporations, the Big Four prevail in the market of providing financial examinations, otherwise known as auditing services.[4] Since 2002, the Securities and Exchange Commission ("SEC") and the Public Company Accounting Oversight Board ("PCAOB") have taken a particular interest in the regulation of these firms.[5] In June 2022, the SEC issued a record $100 million fine against EY over an internal cheating scandal on the Ethics Portion of the Uniform Certified Public Accountant ("CPA")

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1. *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021); Al Barbarino, *After EY Cheating Scandal, Will the 'Big Four' Finally Get It?*, LAW360 (July 1, 2022), https://plus.lexis.com/api/permalink/54b9adf4-b980-40ee-b582-da437a819f3b/?context=1530671 [https://perma.cc/J5GH-K5RL].

2. *See Big Four Accounting Firms*, CORP. FIN. INST., https://corporatefinanceinstitute com/resources/careers/companies/big-four-accounting-firms-services-overview [https://perma.cc/5HQZ-2JPT] (last visited Dec. 2, 2023) (explaining that the expression, "the Big Four," refers to "the four largest professional service firms in the world that provide audit, transaction advisory, taxation, consulting, risk advisory, and actuarial services.").

3. *See* Andrew Ceresney, Director, U.S. Sec. & Exch. Comm'n Div. Enf't, Keynote Address at American Law Institute Conference on Accountants' Liability 2016: Confronting Enforcement and Litigation Risks (Sept. 22, 2016), https://www.sec.gov/news/speech/ceresney-enforcement-focus-auditors-and-auditing [https://perma.cc/5XBZ-BEXZ] (describing the crucial role auditors play in the financial reporting process "as critical gatekeepers in the area of issuer reporting and disclosure").

4. *See Big Four Accounting Firms*, *supra* note 2 (explaining that the Big Four audit the majority of public and private companies throughout the world).

5. *Cf.* Thomas C. Pearson & Gideon Mark, *Investigations, Inspections, and Audits in the Post-SOX Environment*, 86 NEB. L. REV. 43, 44-46, 69 (2007) (asserting that one of the main goals of the Sarbanes-Oxley Act was to create a tougher enforcement environment for SEC oversight, including enhanced penalties to deter wrongdoing and additional investigatory staff).

Examination, the largest it has ever imposed against an auditing firm.[6] The sweeping and significant charges against EY begs the question: do the PCAOB and SEC even have jurisdiction over this matter?[7]

The SEC is an independent federal agency created pursuant to the Securities Exchange Act of 1934[8] ("Exchange Act") to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.[9] One of the primary modes by which the SEC asserts its regulatory agenda over the Big Four is through its management of the PCAOB.[10] In 2002, President Bush, Congress, and the SEC passed the Sarbanes-Oxley Act ("SOX")[11] to increase investor protection in the wake of Enron's collapse.[12] Enron Corporation, an energy trader and supplier, misled regulators with fraudulent holdings and off-the-books accounting practices,[13] making the company appear more profitable by hiding debt and toxic assets.[14] The company's collapse, widely known as the Enron scandal, had a significant impact on Wall Street,[15] and led to the creation of the PCAOB.[16] The PCAOB is a nonprofit corporation created to oversee the auditing of public companies and protect investors by ensuring accurate audit reports,[17] and it is managed by the SEC through its appointment of board members and approval of standards.[18]

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6. Barbarino, *supra* note 1.

7. *See infra* Part III.

8. Securities Exchange Act of 1934, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78rr).

9. *About the SEC*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/strategic-plan/about [https://perma.cc/4T9N-GV8X] (last visited Dec. 2, 2023).

10. *Cf.* Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks Before the Stanford Law School Federalist Society: Audit Regulators and Cliff Hangers (Feb. 15, 2022), https://www.sec.gov/news/speech/peirce-audit-regulators-cliff-hangars-20220215 [https://perma.cc/82FS-RDCK] (explaining how the SEC often "handles an enforcement action against a PCAOB-registered auditor because the facts are intertwined with a related enforcement action . . . or because the SEC can obtain more meaningful remedies").

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

12. Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA, https://www.investopedia.com/updates/enron-scandal-summary [https://perma.cc/823A-DZNG] (Apr. 5, 2023).

13. *Id.*

14. *Id.*

15. *Id.*

16. Kelsey Elizabeth Stapler, Note, *The Auditor for the Auditors' Auditor: Accounting for the Unitary Executive in* Free Enterprise Fund v. Public Company Accounting Oversight Board, 38 PEPP. L. REV. 709, 712-14 (2011).

17. *Id.*

18. Gideon Mark, *Accounting Fraud: Pleading Scienter of Auditors Under the PSLRA*, 39 CONN. L. REV. 1097, 1110-11 (2007) (analyzing how the five PCAOB board members are appointed by the SEC and subject to its "for cause" removal authority; how "the SEC must approve the PCAOB's annual budget, support fees, rules, and professional standard[;]" and how the SEC is

Attention should be brought to the fact that all of the SEC's investigations, including fact development and compelling witness testimony by subpoena, are conducted privately.[19] Similarly, all PCAOB investigations are to be kept confidential and nonpublic under SOX.[20] Due to the obscurity in both of these entities' procedures and proceedings, one cannot help but wonder what is going on behind closed doors.[21] SOX provides an extensive grant of authority to the PCAOB in terms of its ability to promulgate rules "as may be necessary or appropriate in the public interest or for the protection of investors."[22] It bears noting, however, that nowhere in SOX does it grant the PCAOB or SEC the specific authority to investigate accounting firms' CPA examination-taking practices.[23] There comes a point when a broad grant of authority to an agency crosses the line into a grant of unchecked power due to a lack of political accountability to a governmental branch.[24] Traditionally and increasingly, Congress has delegated significant policymaking authority to independent agencies.[25] Nevertheless, the Supreme Court has held that Congress must provide intelligible principles with its grant of power to guide an agency in its practices or it will be found an impermissible delegation of authority.[26] It

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"a source of appellate review for PCAOB disciplinary actions and disputes related to PCAOB inspection reports about accounting firms.").

19. *How Investigations Work*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/enforce/how-investigations-work.html [https://perma.cc/2X6Y-UFNB] (last visited Dec. 2, 2023) (stating that the SEC Enforcement Division "obtains evidence of possible violations of securities law" and then conducts all investigations privately, even without a formal order of investigation).

20. *Enforcement*, PUB. CO. ACCT. OVERSIGHT BD., https://pcaobus.org/oversight/enforcement [https://perma.cc/T2LC-339X] (last visited Dec. 2, 2023) (explaining that the PCAOB uses "[w]ritten requests and demands for documents and information; [s]worn testimony of individuals and firm representatives; and [p]ublic filings, referrals, and whistleblower tips[,]" all of which are nonpublic).

21. *See infra* Part II.B–D.

22. Michael A. Carvin et al., *Massive, Unchecked Power by Design: The Unconstitutional Exercise of Executive Authority by the Public Company Accounting Oversight Board*, 4 N.Y.U. J.L. & BUS. 199, 205 (2007) (quoting 15 U.S.C. § 7213(a)(1)).

23. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.).

24. *See, e.g.*, Carvin et al., *supra* note 22, at 214-15 (discussing how Congress created the PCAOB with a structure that "violates both the Constitution's separation of powers and the Appointments Clause" due to lack of executive oversight capabilities).

25. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 457-58 (2001) (holding that the congressional grant of authority to the Environmental Protection Agency ("EPA") to set national ambient air quality standards for pollutants every five years was a constitutional grant of authority); West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (discussing "the explosive growth of the administrative state since 1970" and its effects).

26. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (holding that Congress must lay down an intelligible principle to which the body authorized to act is directed to conform to when conferring decision-making authority upon agencies).

can be contended that Congress's lack of foresight and specificity in the legislation of SOX has not only created dissatisfaction for corporate officials, companies, and lawmakers,[27] but may be unconstitutional due to the lack of explanation as to how these agencies should carry out their delegations.[28]

On its face, EY's cheating scandal raises concern,[29] as auditors are supposed to facilitate reliability and integrity in the capital markets.[30] Yet, it is not clear that the PCAOB or SEC has the constitutional authority to be the watchdog over this particular matter.[31] While the Senate Committee on Governmental Affairs has defined the SEC as "the most important watchdog of all,"[32] Congress expansively uses the term to refer to various "attorneys, accountants, stock market analysts, boards of directors, and financial institutions" who owe the public a legal duty to monitor the capital markets.[33] Yet, the regulatory or legal bases for the assertion of a public duty owed by these actors remains unknown and ill-defined.[34]

This Note will proceed in four Parts and investigate the extent to which the SEC and PCAOB have the designated authority to regulate auditors' examination taking.[35] Part II of this Note will examine the history of regulation in the auditing sector with a specific emphasis on

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27. Robert E. Freer Jr. & Raymond W. Burroughs, *Unintended Consequences: Sarbanes-Oxley and Its Progeny*, 7 S.C. J. INT'L L. & BUS. 47, 54 (2010).

28. *See J.W. Hampton, Jr. & Co.*, 276 U.S. at 408-09; *infra* Part III.A–C.

29. *See* Barbarino, *supra* note 1 (analyzing the issue that arises when the professionals responsible for monitoring the cheating of their clients were themselves caught cheating on ethics exams).

30. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges PwC LLP with Violating Auditor Independence Rules and Engaging in Improper Professional Conduct (Sept. 23, 2019) (discussing how the SEC charging PwC with violating auditor independence rules and engaging in improper professional conduct raises concern as "[a]uditors play a fundamental role in protecting the reliability and integrity of financial reporting").

31. *See generally* Scott Mascianica et al., *SEC in Constitutional Danger Zone Following Several Recent Decisions*, HOLLAND & KNIGHT (June 3, 2022), https://www.hklaw.com/en/insights/publications/2022/06/sec-in-constitutional-danger-zone-following-several-recent-decisions [https://perma.cc/MFZ9-NR8N] (analyzing enforcement practices by the SEC that "have come under constitutional scrutiny recently through a series of opinions and filings with high-level courts, including the U.S. Supreme Court").

32. STAFF OF S. COMM. ON GOVERNMENTAL AFFAIRS, 107TH CONG., REP. ON FIN. OVERSIGHT OF ENRON: THE SEC AND PRIVATE-SECTOR WATCHDOG 1-2 (Comm. Print 2002).

33. Miriam M. Weismann, *Corporate Transparency or Congressional Window-Dressing? The Case Against Sarbanes-Oxley as a Means to Avoid Another Corporate Debacle: The Failed Attempt to Revive Meaningful Regulatory Oversight*, 10 STAN. J.L. BUS. & FIN. 98, 102 n.16 (2004) (asserting that the broad characterization of a watchdog under SOX without definition or identification of where the legal duty stems from leaves many questions unanswered).

34. *Id.* at 136 (elaborating that the SOX regulations do not answer the most difficult problems involved in the Enron controversy).

35. *See infra* Part II–IV.

the development of SOX in response to corporate accounting scandals.[36] It will probe into the SEC and PCAOB's missions, organizational structures, and sources of authority.[37] Finally, Part II will discuss current regulatory actions taken by the SEC and PCAOB against the Big Four auditing firms.[38] Part III of this Note will investigate issues that arise when examining whether these entities have the authority, through their statutory framework, to scrutinize the Big Four's employees' CPA examination-taking practices.[39] This line of questioning raises the following matters: (1) Should the accounting profession have a system of self-regulation, or should it be policed by the government?[40] (2) If there is a body that should police matters involving CPA exams, what should it be?[41] (3) Does the party that should be policing the system have the proper authority under the current legal framework?[42] Finally, Part IV of this Note will propose the need for congressional clarification regarding the regulation of auditor testing and present the novel solution that the SEC and PCAOB's authority be restricted due to the diminishing returns of overregulation.[43]

II. EVOLUTION OF THE AUDITOR AND AGENCY RELATIONSHIP

In order to grasp SOX's influence on the U.S. market and auditing profession, it is essential to understand the participants involved under its administration.[44] The current state of corporate governance in the auditing sector conforms with the rise and fall of Enron in 2001.[45] Part II of this Note will begin with an overview of Enron's demise,[46] proceed

36. *See infra* Part II.
37. *See infra* Part II.B–D.
38. *See infra* Part II.E.
39. *See infra* Part III.
40. *See infra* Part III.A.
41. *See infra* Part III.B.
42. *See infra* Part III.C.
43. *See infra* Part IV.
44. *Cf.* Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225, 262 (2005) (contending that "an understanding of the power, authority, and jurisdiction of Congress, the SEC, and the federal courts in the area of corporate governance rulemaking represents an essential first step in the analysis").
45. *See generally* Andriy Blokhin, *The Impact of the Sarbanes-Oxley Act of 2002*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/052815/what-impact-did-sarbanesoxley-act-have-corporate-governance-united-states.asp [https://perma.cc/23FN-F9LZ] (Jan. 17, 2022) (discussing the significant impact of SOX in dissuading fraud in the area of corporate governance through new standards, tougher retribution, and stronger guidelines regarding transparency).
46. *See infra* Part II.A.

into the anatomy of the SEC and PCAOB,[47] then delineate the condition of Big Four regulation following SOX's implementation.[48]

A. The Enron Scandal

The early 2000s was a period of turbulence for the U.S. economy.[49] The Dot-Bomb Recession was on the horizon, following what was the longest economic expansion in history.[50] Coincidingly, Enron's house of cards that was built upon its accumulating mound of debt and toxic assets was beginning to cave in.[51] Formed in 1985, Jeffrey Skilling established Enron Corporation as an energy trader and supplier.[52] Skilling, who began his career in consulting, had Enron's accounting team use a mark-to-market ("MTM") accounting method, as opposed to the traditional historical cost accounting method.[53] In essence, this MTM accounting method allowed Enron to record estimated profits in place of actual profits.[54] While Enron's subsidiaries were losing money, the MTM practice allowed Enron to hide its losses and appear more profitable through the presentation of financial stability.[55] Eventually, investors began to question the company's nontransparent accounting practices, which resulted in Enron's shares dropping eighty-three percent during the year of 2001.[56] With the stark drop on Wall Street, the SEC

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47. *See infra* Part II.B–D.

48. *See infra* Part II.E.

49. *See* POPULATION REF. BUREAU, U.S. ECONOMIC AND SOCIAL TRENDS SINCE 2000 2 (Feb. 2010), https://www.prb.org/wp-content/uploads/2010/02/Population-bulletin-2010-65-1-united-states.pdf [https://perma.cc/8GBW-NGW9] (analyzing the U.S. economic and social trends between 2000 and 2010 stemming from "a major terrorist attack, a housing meltdown, a severe economic recession, and significant downturn in the U.S. stock market").

50. *See* Adam Hayes, *Dotcom Bubble Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/d/dotcom-bubble.asp [https://perma.cc/AU86-BVFM] (June 13, 2023) ("The dotcom bubble was a rapid rise in U.S. technology stock equity valuations fueled by investments in Internet-based companies . . . in the late 1990s."); *A Review of Past Recessions*, INVESTOPEDIA, https://www.investopedia.com/articles/economics/08/past-recessions.asp [https://perma.cc/673M-5QVF] (Sept. 8, 2023) ("The collapse of the dotcom bubble contributed to one of the mildest recissions on record following what was then the longest economic expansion in U.S. history.").

51. Segal, *supra* note 12.

52. *Id.*

53. *See id.* (noting that in 1992, Enron received official SEC approval to use this MTM accounting method).

54. *Id.*

55. *Id.*

56. Alex Berenson, *S.E.C. Opens Investigation into Enron*, N.Y. TIMES (Nov. 1, 2001), https://www.nytimes.com/2001/11/01/business/sec-opens-investigation-into-enron.html [https://perma.cc/8ZL2-55RG] (discussing how Enron's financial issues came to light "in mid-October of 2001, when it disclosed that its shareholders' equity, a measure of the company's value, dropped $1.2 billion in the third quarter" and due to "complex accounting rules, the write-down was not apparent in Enron's quarterly earnings report.").

opened formal investigations into Enron's transactions in November 2001,[57] and by December, the company was forced into Chapter 11 bankruptcy.[58] Arthur Andersen LLP ("Arthur Andersen"), Enron's financial statements auditor, ultimately ceased its auditing practices in August 2002, collapsing alongside the company.[59] Although Arthur Andersen's actual role in the Enron scandal remains in debate,[60] Arthur Andersen was aware that the transactions of Enron's subsidiaries were being manipulated, yet continued to allow the company to mislead its investors.[61] As such, there is a consensus that the firm took many risks in the interest of Enron's earnings that demonstrated a disregard for the ethical considerations of accounting.[62]

Much like the notorious Enron scandal, the WorldCom scandal followed closely behind with similar practices and actors.[63] WorldCom was a telecommunications company that hid its failing profitability by recording expenses as investments, which in turn inflated its net income and cash flow.[64] Arthur Anderson was WorldCom's auditor for its 2001

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57. *Id.*

58. *See Chapter 11 Bankruptcy*, LEGAL INFO. INST. AT CORNELL L. SCH., https://www.law.cornell.edu/wex/chapter_11_bankruptcy [https://perma.cc/H3P9-Y7YE] (last visited Dec. 2, 2023) (explaining that "[C]hapter 11 bankruptcy is the formal process that allows debtors and creditors to resolve the problem of the debtor's financial shortcomings through a reorganization plan . . . . [and] is generally intended to provide business debtors, like corporations and limited liability companies, the opportunity to reorganize their debt"); Scott Cohn, *Twenty Years After Epic Bankruptcy, Enron Leaves a Complex Legacy*, CNBC (Dec. 2, 2021), https://www.cnbc.com/2021/12/02/twenty-years-after-epic-bankruptcy-enron-leaves-a-complex-legacy.html [https://perma.cc/853Y-2QEG] (describing how "Enron's bankruptcy on December 2, 2001, was the largest in U.S. history at the time").

59. *See* Mark Maurer, *Arthur Andersen's Legacy, 20 Years After Its Demise, Is Complicated*, WALL ST. J. (Aug. 31, 2022), https://www.wsj.com/articles/arthur-andersens-legacy-20-years-after-its-demise-is-complicated-11661938200 [https://perma.cc/Y8B9-EMQC] (explaining that the accounting firm formerly known as Arthur Andersen "stopped auditing public companies on August 31, 2002, . . . turn[ing] the Big Five into the Big Four").

60. *See An Examination of Professional Ethics in Retrospect: The Enron/Arthur Andersen Scandal*, ACCOUNTINGEDU.ORG (June 30, 2022), https://www.accountingedu.org/an-examination-of-professional-ethics-in-retrospect-the-enronarthur-anderson-scandal [https://perma.cc/Y262-LRAN] (pointing to the fact that "Arthur Andersen's overall role and responsibility in the Enron scandal is still argued today"); Maurer, *supra* note 59 (describing how "[t]he Supreme Court in 2005 unanimously overturned Arthur Andersen's criminal conviction, concluding the judge's instructions to the jury were flawed").

61. *See* Segal, *supra* note 12.

62. *See An Examination of Professional Ethics in Retrospect: The Enron/Arthur Andersen Scandal*, *supra* note 60 (contending that Arthur Andersen did not maintain the integrity expected from the CPA profession through its failure to maintain objectivity and lack of due care for public interest by providing services for unethical clients).

63. Adam Hayes, *The Rise and Fall of WorldCom: Story of a Scandal*, INVESTOPEDIA, https://www.investopedia.com/terms/w/worldcom.asp [https://perma.cc/4RAQ-YWRQ] (Aug. 29, 2023) (explaining that WorldCom, one of America's leading phone companies, had to file for bankruptcy in July 2002 due to its capitalization of expenses).

64. *Id.*

financial statements and reviewed its 2002 financial books.[65] Parallel to the accusations associated with Enron, Arthur Andersen was accused of failing to uncover the accounting irregularities that led to WorldCom's bankruptcy in 2002, one of largest bankruptcy filings in U.S. history.[66]

B. The Sarbanes-Oxley Act of 2002

While governmental endeavors to regulate the financial markets, and the companies involved in them, have become commonplace, this was not always the case.[67] The reaction of the public to the Enron scandal created an opportunity for the government to implement stricter accounting regulations while giving more latitude to the invasive practices of the SEC.[68] In response to the disintegration of Enron and WorldCom, as well as the overall investor distrust in the financial markets, Congress passed SOX in July 2002.[69] SOX implemented new directives for public companies in terms of auditing standards to deter fraud, increase transparency, and promote accurate financial reporting.[70] Congress granted the SEC a variety of enforcement tools to utilize against companies beyond its control over the PCAOB within SOX.[71] It is important to bear in mind when considering these capabilities that the SEC is a mere agency, not an elected government body representative of the people through election.[72] While the SEC may be deemed noble in its

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65. *Id.*

66. *WorldCom's Bankruptcy Crisis*, CTR. FOR ETHICAL ORGANIZATIONAL CULTURES AT AUBURN UNIV., https://harbert.auburn.edu/binaries/documents/center-for-ethical-organizational-cultures/cases/worldcom.pdf [https://perma.cc/237V-6VFS] (last visited Dec. 2, 2023).

67. *See, e.g.*, Michael Schmidt, *Financial Regulators: Who They Are and What They Do*, INVESTOPEDIA, https://www.investopedia.com/articles/economics/09/financial-regulatory-body.asp [https://perma.cc/QK5G-79MH] (Dec. 6, 2021) (elaborating on the multitude of federal and state agencies created as regulatory bodies for the U.S. financial sector, including the Federal Reserve Board, Commodity Futures Trading Commission, and the Financial Industry Regulatory Authority).

68. *See* Freer Jr. & Burroughs, *supra* note 27, at 50 (explaining that "the public attention created by the magnitude of fraud forced" in the new regulatory practices).

69. Blokhin, *supra* note 45.

70. *Id.*

71. *See* Linda Chatman Thomsen & Donna Norman, *Sarbanes-Oxley Turns Six: An Enforcement Perspective*, 3 J. BUS. & TECH. L. 393, 400 (2008) (discussing the SEC's new authority under SOX, including "extraordinary payment freezes, clawbacks of executive compensation in the event of a restatement for 'material noncompliance,' fair funds, executive certifications of financial statements, and enhanced remedies").

72. *See generally* Humphrey's Ex'r v. United States, 295 U.S. 602, 628-30 (1935) (holding that Congress may constitutionally create independent agencies as long as they are quasi-legislative or quasi-judicial, maintaining authority that is not purely executive); Michael A. Sabino, *"Liberty Requires Accountability": The Appointments Clause,* Lucia v. SEC*, and the Next Constitutional Controversy*, 11 WM. & MARY BUS. L. REV. 175, 233 (2019) ("As a nation, we must always be foremost concerned with portentous constitutional matters, such as checking the exercise of government power, especially by unelected office-holders.").

pursuits, SOX's delegation of regulatory capabilities does not ipso facto provide the SEC with the authority to investigate an auditing firm's employees.[73]

With SOX's creation of the PCAOB, the Board was empowered to "establish auditing and ethic standards, conduct inspections and investigations of registered firms, impose sanctions, and set its own budget."[74] Further, it grants the PCAOB authority to change the inspection frequency of an accounting firm's audit engagements, at its discretion, to ensure consistency with the Act, public interest, and the protection of investors.[75] These formal investigations may be conducted for any action which it deems to be a possible violation of SOX, PCAOB rules, federal securities laws, or professional standards.[76] Along with these investigations, the Board may issue sanctions for a firm's failure to supervise employees or other associated persons who violated Board rules, securities law, or professional standards.[77]

The PCAOB was created as a regulatory body to assist in the governance of the accounting profession under the direct oversight and control of the SEC.[78] The SEC has essentially unrestricted power over the PCAOB itself, in addition to the rules and sanctions implemented by it.[79] The SEC can relieve the PCAOB of any responsibility to enforce compliance with the Act or securities laws, appoint and remove Board members, and has complete approval authority over the Board's budget and proposed subpoenas.[80]

C. The SEC

The SEC is an independent regulatory agency whose nature and scope of authority is subject to congressional delegation by statute.[81] As a result of the 1929 stock market crash that led to the Great Depression, the Commission was created under the Exchange Act "to protect investors, maintain fair, orderly, and efficient markets, and facilitate

73. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.).

74. Bennett v. Sprint Nextel Corp., No. 11-9014-MC-W-ODS, 2012 U.S. Dist. LEXIS 145902, at *2-3 (W.D. Mo. Oct. 10, 2012) (citing 15 U.S.C. §§ 7211(c), 7219(c)–(d)).

75. 15 U.S.C. §§ 7214(b)(1), (2); Carvin et al., *supra* note 22, at 206.

76. 15 U.S.C. § 7215(b)(1); Carvin et al., *supra* note 22, at 206.

77. 15 U.S.C. § 7215(c)(6)(A); Carvin et al., *supra* note 22, at 206.

78. Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J.L. & BUS. 485, 486, 490 (2009) (describing how the SEC exercises extensive control over the PCAOB).

79. *Id.* at 491 (explaining that none of the PCAOB's rules or disciplinary sanctions "have any legal effect unless and until the SEC adopts them").

80. *See id.*

81. Heminway, *supra* note 44, at 254-55.

capital formation."[82] The SEC works to protect against fraudulent practices in the securities markets and monitor U.S. corporate takeovers, and it is involved in every major case of financial misconduct.[83] The Commission's principal purpose involves the oversight of organizations and individuals involved in the securities markets, including securities exchanges and investments themselves, as well as brokerage firms, dealers, and investment advisors.[84]

The SEC is led by five commissioners, appointed by the President with the advice and consent of the Senate, that serve five-year terms.[85] No more than three Commissioners may be from the same political party in order to promote non-partisanship.[86] The SEC comprises five divisions that are allowed to bring civil actions in federal courts or in front of their own administrative law judges, as well as issue injunctions and civil money penalties.[87] Conceived and operational under the authority of federal laws, the SEC is accountable to Congress.[88]

The current Supreme Court has begun to raise issue with agency accountability to Congress due to lack of oversight and control,[89] and the SEC is no stranger to its jurisdiction being in question.[90] Financial regulations have greatly expanded the SEC's authority since its creation, so much so that the Commission can now impose penalties against individuals who are not even registered under the SEC in its own

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82. *Doing Business with the Securities and Exchange Commission (SEC)*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/offices/oacq/doing_business_with_the_sec.pdf [https://perma.cc/W67C-8JGU] (last visited Dec. 2, 2023); James Chen, *Securities and Exchange Commission (SEC) Defined, How It Works*, INVESTOPEDIA, https://www.investopedia.com/terms/s/sec.asp [https://perma.cc/NA5X-US8A] (Apr. 27, 2022). *See generally* Securities Exchange Act of 1934, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78rr).

83. *See* Chen, *supra* note 82 (detailing how the SEC "charged 204 entities or individuals and collected nearly [four] billion dollars" in monetary relief as a result of the 2008 recession).

84. *Id.*

85. *Current SEC Commissioners*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioners [https://perma.cc/2HEF-F39V] (last visited Dec. 2, 2023).

86. *Id.*

87. *See* Chen, *supra* note 82 (noting that the five divisions of the SEC include the Division of Corporate Finance, Division of Enforcement, Division of Investment Management, Division of Economic and Risk Analysis, and Division of Trading and Markets).

88. *Id.*

89. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2608-10 (2022).

90. *See, e.g.*, Jay Clayton & Patrick McHenry, *SEC's Climate-Change Overreach*, WALL ST. J. (Mar. 20, 2022), https://www.wsj.com/articles/the-secs-climate-change-overreach-global-warming-risks-lawmakers-invertors-market-data-11647801469 [https://perma.cc/6TTV-VQYK] (contending that the SEC's job "is to facilitate the investment decision-making process" and the legislature's job is to determine climate policies, which should not involve the SEC).

administrative proceedings.[91] Although the SEC has been granted broad authority to mandate disclosures on matters beyond corporate financial performance under the Exchange Act,[92] there comes a point where the SEC's lack of formal authority will render its actions as overreaching.[93] While the SEC may view its discretion to determine what disclosures are appropriate as extremely broad,[94] the Commission holds only those powers granted upon it by Congress.[95]

D. The PCAOB

The PCAOB is a private, nonprofit corporation created by Congress through SOX in response to the Enron and WorldCom scandals.[96] The PCAOB oversees the audits of public companies, brokers, and dealers registered with the SEC to minimize audit risks.[97] To fulfill its mission, the Board ensures that the auditors of companies' financial statements

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91. Eric Bauwens, *The Dodd-Frank Act and Government Overreach: How Expanded SEC Authority Affects the Investing Public and How to Better Regulate the Financial Industry*, 67 SYRACUSE L. REV. 741, 745 (2017); *see* Julia Kagan, *Registration: Definition, Steps, SEC Rules*, INVESTOPEDIA, https://www.investopedia.com/terms/r/registration.asp [https://perma.cc/6B9S-W9Z2] (Apr. 26, 2022) (elaborating that before a company can offer and sell securities, it must register with the SEC by filing documents which disclose financials and other information about the business).

92. Faith Stevelman Kahn, *Legislatures, Courts and the SEC: Reflections on Silence and Power in Corporate and Securities Law*, 41 N.Y. L. SCH. L. REV. 1107, 1133-34 (1997).

93. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 315 (2014). The Supreme Court states that under the *Chevron* test there is a presumption that an ambiguous prescription under a congressional statute authorizes agencies to resolve any ambiguities. *Id.* (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). The question for a reviewing court then becomes "whether in doing so the agency has acted reasonably and thus 'stayed within the bounds of its statutory authority.'" *Id.* (quoting City of Arlington v. FCC, 569 U.S. 290, 297 (2013)); *accord Chevron*, 467 U.S. at 842-45 (establishing that an agency's interpretation of an ambiguous statute must be reasonable in order for it to be afforded judicial deference).

94. *See* Kahn, *supra* note 92, at 1134.

95. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

96. 15 U.S.C. § 7211(a); *see* Carvin et al., *supra* note 22, at 202-03 (explaining that the hasty implementation of SOX was the result of a series of accounting scandals which brought about congressional efforts to regulate the profession).

97. Will Kenton, *Public Company Accounting Oversight Board (PCAOB)*, INVESTOPEDIA, https://www.investopedia.com/terms/p/pcaob.asp [https://perma.cc/58K9-3VAK] (Apr. 19, 2022); Caroline Banton, *Publicly Traded Company: Definition, How It Works, and Examples*, INVESTOPEDIA, https://www.investopedia.com/terms/p/publiccompany.asp [https://perma.cc/5949-2G63] (Sept. 26, 2023) (defining public company as "a corporation whose shareholders have a claim to part of the company's assets and profits"); Adam Hayes, *What Is a Broker-Dealer (B-D), and How Does It Work?*, INVESTOPEDIA, https://www.investopedia.com/terms/b/broker-dealer.asp [https://perma.cc/6NPH-VPY2] (May 29, 2021) (characterizing a broker-dealer as "a person or firm in the business of buying and selling securities for its own account or on behalf of its customers . . . . act[ing] as a broker (or agent) when it executes orders on behalf of its client . . . [and] as a dealer, or principal when it trades for its own account").

have followed a set of strict guidelines.[98] The PCAOB requires accounting firms to follow specific procedures and comply with standards when auditing, which are enforced through inspections, investigations, and sanctions.[99] From its point of inception under the Act, it was clear that the PCAOB would hold extensive power over decisions of the entire accounting industry.[100] For example, in its distribution of authority under SOX, Congress only goes so far in its instruction to the Board, directing it to develop fair procedures for its investigatory and disciplinary functions.[101]

The Board is led by five members—the majority of which cannot be CPAs—who serve a five-year term with a two-term limit.[102] Originally under SOX, Board members could only be removed by the SEC for "good cause," including willful violations of SOX, abuse of authority, or failing to enforce compliance with the Act.[103] However, SEC Commissioners can only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."[104] In the 2010 case *Free Enterprise Fund v. PCAOB*, the Supreme Court determined that the SEC and SOX's removal process for PCAOB Board members was unconstitutional, as the structure rendered the Board free from presidential oversight and control due to insulation by the SEC.[105] *Free Enterprise Fund* sheds light on the persistent issue of SEC and PCAOB overreach under SOX,[106] despite the Court failing to find the Act as a whole unconstitutional.[107] As a result, PCAOB Board members are now removable by the SEC at will, rather than only for good cause,[108] while

98. *See* Kenton, *supra* note 97.

99. Carvin et al., *supra* note 22, at 205-06.

100. *Id.* at 203-04 (discussing how the PCAOB's independence was intended to preclude it from political pressure).

101. 15 U.S.C. § 7215(a); Donna M. Nagy, *The SEC at 70: Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1014 (2005).

102. Stapler, *supra* note 16, at 731.

103. 15 U.S.C. § 7217(d)(3); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 503 (2010).

104. *Free Enter. Fund*, 561 U.S. at 486-87.

105. *Id.* at 496, 498 (holding that the two-tiered "for cause" removal structure violated the separation of powers by impermissibly undermining executive authority).

106. *See id.* at 508 (elaborating that the petitioner's complaint posed the argument "that the Board's 'freedom from Presidential oversight and control' rendered it, 'and all the power and authority exercised by it' in violation of the Constitution") (internal citations omitted).

107. *See id.* at 509 (holding that the Sarbanes-Oxley Act remains "fully operative as a law") (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)).

108. Press Release, Pub. Co. Acct. Oversight Bd., Decision in Free Enterprise Fund v. PCAOB (June 28, 2010), https://pcaobus.org/news-events/news-releases/news-release-detail/decision-in-free-enterprise-fund-v-pcaob_292 [https://perma.cc/4YJM-FFJW].

all other aspects of the PCAOB structure, its programs, and SEC oversight remain in place.[109]

It has been contended that, in its creation of the PCAOB, Congress essentially granted the Board unchecked power to ensure that its full autonomy would be without industry or constituent pressures.[110] Notwithstanding its commendable goals,[111] critics of SOX question the ability of the government to replace an industry's self-regulation and challenge the PCAOB as testing the outer limits of the government's separation of powers.[112] The private structure of the PCAOB allows it to work with significantly less transparency than other federal agencies.[113] Further, the Board is less accountable to the public, as compared to traditional independent regulatory agencies, due to the fact that the President does not appoint nor remove its Board members.[114] Notably, in *Free Enterprise Fund* the Court did not address these issues, as it failed to establish a bright-line test for the constitutional role of presidential control over independent agencies.[115] In contrast, the current Court demonstrates a willingness to realign separation of powers in a manner that restricts the administrative state.[116] As such, it is perceivable that the sitting Supreme Court may be open to addressing these further questions regarding the construction of the PCAOB.[117]

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109. *See id.*

110. *See* Carvin et al., *supra* note 22, at 203-04 (contending that "[a]s one of the Act's supporters made clear, the PCAOB's 'massive power' to 'make decisions that affect all accountants and everybody they work for' . . . would be 'unchecked power, *by design*'") (quoting 148 CONG. REC. S6334 (statement of Sen. Gramm)) (emphasis added).

111. 15 U.S.C. § 7211(a); Stapler, *supra* note 16, at 712-13 (discussing Congress's decision to instill the PCAOB with auditing oversight "to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports").

112. Stapler, *supra* note 16, at 739.

113. Donna M. Nagy, *Is the PCAOB a "Heavily Controlled Component" of the SEC? An Essential Question in the Constitutional Controversy*, 71 U. PITT. L. REV. 361, 362-63 (2010).

114. *Id.*

115. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 536 (2010) (Breyer, J., dissenting) (arguing that the majority failed to define when the duties of an employee in the Executive Branch render him an inferior officer); Stapler, *supra* note 16, at 715.

116. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2621-24 (2022) (Gorsuch, J., concurring); Shay Dvoretzky et al., West Virginia v. EPA*: Implications for Climate Change and Beyond*, SKADDEN (Sept. 21, 2022), https://www.skadden.com/insights/publications/2022/09/quarterly-insights/west-virginia-v-epa [https://perma.cc/9FPA-Z87G] (elaborating that in *West Virginia v. EPA*, the Court approved of the "major questions" doctrine argument, which holds "that an administrative agency has no power to make decisions on such 'major questions' unless Congress 'clearly' gave it such authority").

117. *See infra* Part III.

E. Regulation of the Big Four Post-SOX

Significant costs and benefits have come out of the enactment of SOX for the Big Four.[118] Its implementation has not only heightened the audit requirements for public companies, but also brought private and nonprofit entities into the auditing realm.[119] As the demand for auditors has increased, so have associated audit fees.[120] The total cost of legal-related audit practice expenses for the Big Four was found to have risen from 7.7% of its revenue in 1999 to 14.2% in 2004, post-SOX implementation.[121]

In 2020, the PCAOB's 219 audit inspections resulted in sanctions against thirteen firms and eighteen individuals.[122] In 2021, the PCAOB's 191 audit inspections resulted in sanctions against fourteen firms and fifteen individuals.[123] Further, it appears that the Board is approaching a record-setting year for civil monetary penalties, as it had issued up to $1.36 million into July 2022 alone.[124] As all formal investigations proceedings of the PCAOB and SEC are non-public,[125] statistics issued by these entities do not state the specific firms or individuals involved in these enforcement actions.[126] Documents, testimony, and other information prepared by the PCAOB and SEC are confidential and do not become public unless and until the entities deem it to be in the public's interest.[127]

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118. *See* Freer Jr. & Burroughs, *supra* note 27, at 66 (discussing how "the United States market is attractive for growth, [but] the costs and burdens of SOX compliance outweigh the potential long-term benefit[s]").

119. *See MIT Sloan Study Shows Negative Effects of Sarbanes Oxley on Nonpublic Entities*, MIT SLOAN SCH. MGMT. (Nov. 16, 2017), https://mitsloan.mit.edu/press/mit-sloan-study-shows-negative-effects-sarbanes-oxley-nonpublic-entities [https://perma.cc/M2SC-7T6D] (analyzing the increase in auditor demand by public companies which has diminished private companies and nonprofits' access to auditors since SOX's passage).

120. *See id.* (finding that "audit fees for nonpublic entities increased significantly and private companies applying for bank financing decreased their use of independent auditors").

121. David Reilly, *Booming Audit Firms Seek Shield From Suits*, WALL. ST. J. (Nov. 1, 2006), https://www.wsj.com/articles/SB116235111161209823 [https://perma.cc/29MJ-CVQ8].

122. Kenton, *supra* note 97.

123. *Id.*

124. Elle Graper, *PCAOB on Pace for Record Year of Financial Penalties*, ACCT. TODAY (Aug. 19, 2022), https://www.accountingtoday.com/opinion/pcaob-on-pace-for-record-year-of-financial-penalties [https://perma.cc/58YP-AMLK].

125. 17 C.F.R. § 202.5; PUB. CO. ACCT. OVERSIGHT BD., BYLAWS AND RULES OF THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, R. 5108, 82-84 (2004) [hereinafter PCAOB BYLAWS].

126. *See, e.g.*, Elaine M. Harwood et al., *Accounting and Auditing Enforcement Activity—2021 Review and Analysis*, CORNERSTONE RSCH., https://www.cornerstone.com/insights/reports/accounting-and-auditing-enforcement-activity2021-review-and-analysis [https://perma.cc/B6YH-2DY5] (last visited Dec. 2, 2023) (analyzing statistics issued by the SEC and PCAOB regarding the percentages of individuals and firms involved in accounting and auditing actions).

127. PCAOB BYLAWS, *supra* note 125, at 82-84.

In terms of the recent inspections of the Big Four's examination taking, the SEC and PCAOB have been obscure in regard to where their authority to initiate these investigations derives from.[128] The SEC order regarding EY's recent CPA examination cheating states that the firm violated PCAOB Quality Control Standards, as well as the Code of Professional Conduct of the American Institute of Certified Public Accountants ("AICPA").[129] It is worth noting that the facts issued by the Commission demonstrate a focus on the SEC's discontent that EY notified the PCAOB, as opposed to the SEC, of examination cheating by employees it discovered during an internal investigation.[130] Moreover, EY is not the only Big Four auditor that the PCAOB and SEC have decided to implement these invasive inspection and investigation practices against.[131] In 2019, the SEC issued an order against KPMG in connection with its employees' cheating on their continuing professional education ("CPE") auditing courses.[132] The SEC held that KPMG willfully violated PCAOB and AICPA Rules due to its audit professionals passing answers to training exams onto their colleagues.[133]

In both orders against the auditing firms, the SEC found the firms' conduct to be in violation of PCAOB Rule 3500T within the meaning of Section 4C(a)(2–3) of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[134] PCAOB Rule 3500T merely requires that a registered public accounting firm and its associated persons shall comply with ethics standards of the AICPA's Code of Professional Conduct when preparing audit reports.[135] Section 4C(a)(2–3) of the Exchange Act and 102(e)(1)(iii) of the Commission's Rules of Practice simply vest the SEC with authority to censure any person of the privilege of appearing or practicing before the Commission due to a willful violation of securities laws or its rules and regulations.[136] The

128. *See generally* United States v. Ernst & Young LLP, SEC Admin. Proceeding No. 3-20911 (June 28, 2022) [hereinafter EY Order 2022] (issuing order instituting public administrative and cease-and-desist proceedings and failing to state the specific authority with which the PCAOB derived its authority to investigate the examination practices of KPMG's employees).

129. *Id.* at 8-9.

130. *See id.* at 6-7 (stating that EY did not amend its answer regarding "tips it had received involving exam-related misconduct" and asserting that the SEC did not know of the issue until nearly nine months after the PCAOB was notified).

131. *See, e.g.*, United States v. KPMG LLP, SEC Admin. Proceeding No. 3-19203, at 1 (June 17, 2019) [hereinafter KPMG Order 2019] (issuing order instituting public administrative and cease-and-desist proceedings).

132. *Id.* at 12.

133. *Id.*

134. *See* KPMG Order 2019, *supra* note 131, at 1-2; EY Order 2022, *supra* note 128, at 1-2; 15 U.S.C. § 78d-3; 17 C.F.R. § 201.102(e)(1)(iii); PCAOB BYLAWS, *supra* note 125, at 53.

135. *See* PCAOB BYLAWS, *supra* note 125, at 123.

136. *See* 15 U.S.C. § 78d-3; 17 C.F.R. § 201.102(e)(1)(iii).

SEC issued a $100 million fine against EY and a $50 million fine against KPMG as a result of these findings.[137] What was not addressed in these findings, however, is the enabling legislation by Congress which grants the PCAOB and SEC the authority to infringe upon these entities' zone of privacy.[138] The failure to point to a clear congressional authorization to regulate in this manner leaves the PCAOB and SEC open to the possibility of litigation, bringing them into the sphere of the Supreme Court, which is looking to minimize the administrative state.[139]

III. CURRENT STATE OF THE LAW GOVERNING CPA EXAMINATIONS

While the accounting profession historically maintained a system of self-regulation, heightened government intervention seemed necessary to Congress in light of the Enron and WorldCom scandals.[140] However, Congress simply identifying issues arising under prior auditing practices and implementing broad regulations over auditing firms does not ensure that the issues will be resolved in the most effective manner.[141] In order for SOX to result in effective corporate governance, governmental actors must ensure that auditors are provided enough latitude to foster corporate profitability and competition.[142] Part III of this Note will assess the capabilities of SOX's governmental actors and determine whether Congress enacted SOX with the appropriate legislation at the forefront with the correct vehicles holding regulatory jurisdiction.[143]

137. Jason Bramwell, *EY Nailed with Record $100 Million Fine from the SEC for Ethics Exam Cheating*, CPA PRAC. ADVISOR (June 28, 2022), https://www.cpapracticeadvisor.com/2022/06/28/ey-nailed-with-record-100-million-fine-from-the-sec-for-ethics-exam-cheating/47956 [https://perma.cc/U6YM-MZBW].

138. *See* KPMG Order 2019, *supra* note 131; EY Order 2022, *supra* note 128. *See generally* Sarah Pruitt, *How the 14th Amendment Made Corporations Into 'People,'* HISTORY (June 15, 2018), https://www.history.com/news/14th-amendment-corporate-personhood-made-corporations-into-people [https://perma.cc/SVU3-9ZQ9] (discussing how the Fourteenth Amendment's Due Process Clause protects individuals and corporations from infringement by state and federal governments).

139. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2621-24 (2022) (Gorsuch, J., concurring); Dvoretzky et al., *supra* note 116 (contending that the "newly sanctioned major questions doctrine" addressed in *West Virginia v. EPA* "reflects a Supreme Court that is eager to realign separation of powers" and curtail the current administrative state of government regulation).

140. Nagy, *supra* note 101, at 977, 983-84.

141. *See infra* Part IV.

142. *See* Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 79 (2005) (discussing the possibility that SOX may result in adverse consequences as its provisions "are proscriptive in an area where flexibility has long been valued" and due to its basis in "an adversarial model of corporate governance in contrast to a consensus model" which has generally prevailed).

143. *See infra* Part III.C.

A. Self-Regulation or Government Police Power?

The United States Constitution vests the government with broad authority to enact laws that coerce its citizenry for the public good.[144] Congress may choose to utilize this police power by delegating, through specific directives to agencies, some or most of its regulatory authority in a particular substantive area.[145] Yet, this gives rise to concerns that such delegations may be unconstitutional.[146] The reason for the United States' recognition as a vast regulatory nation is due to Congress's delegation of authority to agencies and the Supreme Court's rubber-stamping of that delegation.[147] However, the powers that are not delegated to the federal government by the Constitution are reserved to the states.[148] Once the Supreme Court decides it will no longer universally approve such federal delegations by making the requirements stricter on Congress, the vast regulatory abilities of these agencies may begin to diminish.[149]

In the 1930s, Congress and the SEC resolved that the accounting profession would hold a system of self-regulation.[150] The standard-setting of accounting principles was eventually granted to the AICPA, a national professional organization that was the industry's principal trade association.[151] Subsequently, the SEC let the responsibility of establishing national auditing standards fall to the AICPA as well.[152] Eventually, the AICPA designated the Financial

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144. *See, e.g.*, *Police Powers*, LEGAL INFO. INST. AT CORNELL L. SCH., https://www.law.cornell.edu/wex/police_powers [https://perma.cc/PSE4-EE7E] (last visited Dec. 2, 2023).

145. *See* Hannah J. Wiseman, *Delegation and Dysfunction*, 35 YALE J. ON REG. 233, 242-43 (2018) (elaborating on the broad concept of delegation and the various forms of delegation amongst government branches).

146. *See, e.g.*, J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 392, 408-09 (1928) (contending that it is not the judiciary's position to decide whether it is wise for the legislature to vest a commission with complete authority to determine rates of duty, but it is the Supreme Court's position to decide whether "they have transcended their constitutional authority" in doing so).

147. *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381-82 (2017) (explaining that the New Deal era constituted a "reevaluation of established constitutional doctrine" due to the "scope of federal regulatory power" over "social and economic development" expanding alongside the Court's alteration of nondelegation with its "new approach to the delegation of legislative power underscor[ing] its reassessment of the judicial role within the constitutional system").

148. U.S. CONST. amend. X.

149. *See* Whittington & Iuliano, *supra* note 147, at 404 (asserting that Supreme Court decisions which involve challenges to impermissible statutory delegation "do[] not provide much basis for thinking that there was ever a seriously confining nondelegation doctrine as part of the effective constitutional order").

150. Nagy, *supra* note 101, at 983-84.

151. *Id.* at 984-86.

152. *Id.* at 989-90.

Accounting Standards Board ("FASB") to establish accounting principles governing the profession.[153] With the passage of SOX, Congress strengthened the FASB's authority by continuing to allow it to establish the generally accepted accounting principles, so long as it remained dissociated from the accounting profession.[154] Furthermore, in the sector of auditing, Congress and the SEC placed significant authority in the adoption of rules and regulations with the PCAOB.[155] This chain of transfers in authority is a prime example of Congress's delegation through its legislative power from Congress to the SEC and so on.[156]

Is this extensive line of authority necessary to ensure investor protection?[157] Following the SEC's significant penalty against EY, it is imperative to determine whether this is an area of corporate practice that should even be policed.[158] For years, Congress favored self-regulation in this sector, but ultimately deemed that the SEC's reliance on the private accounting profession alone was insufficient.[159] The Enron and WorldCom scandals provided Congress with an opportune moment to address the growing number of accounting and corporate governance scandals that it had difficulty remedying before.[160] Investors lost approximately $67 billion in the collapse of Enron and $161 billion in the collapse of WorldCom due to fraudulent earnings, undisclosed related party transactions, and inflated revenues.[161] In remedying this situation, Congress focused on the main issues of inadequate oversight of accounts, lack of auditor independence, weak corporate governance procedures, stock analysts' conflicts of interest, and deficient disclosure provisions that led to these market failures.[162] As the accounting sector is vital to the integrity of the capital markets and the infrastructure of the

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153. *Id.* at 986.

154. *Id.* at 988-89.

155. *Id.* at 991-92.

156. *See* Heminway, *supra* note 44, at 249-50 (explaining that "Congress has delegated significant authority under federal securities law to the SEC, and that delegation continues to be evident in Sarbanes-Oxley's corporate governance provisions").

157. *See* discussion *infra* Part IV.A–B.

158. *See* discussion *infra* Part IV.A–B.

159. Nagy, *supra* note 101, at 993; STAFF OF S. COMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., REP. ON FED. REGUL. AND REGUL. REFORM 38 (S. Comm. Print 1976).

160. *See* Nagy, *supra* note 101, at 994-96 (discussing how "the Big Five accounting firms and other major campaign contributors were staunchly opposed to increased government regulation").

161. Steven B. Harris, Bd. Member, Pub. Co. Acct. Oversight Bd., Speech at the American University Kogod School of Business: The Importance of Auditing and Audit Regulation to the Capital Markets (Mar. 20, 2014), https://pcaobus.org/news-events/speeches/speech-detail/the-importance-of-auditing-and-audit-regulation-to-the-capital-markets_518 [https://perma.cc/PT6V-S2CM]).

162. *Id.*

entire financial system, the termination of the auditing profession's self-regulation framework seemed essential.[163] Thus, with the creation of the PCAOB under SOX to oversee the profession, self-regulation in the industry came to an end.[164]

In *Free Enterprise Fund*, the Supreme Court assessed the PCAOB and SEC's oversight of the accounting industry in terms of self-regulation versus governmental police power.[165] Free Enterprise Fund contended that the structure of the PCAOB violated separation of powers by infringing upon the authority of the executive branch, and thus, SOX in its entirety should be deemed unconstitutional.[166] The Council of Institutional Investors contended, for the respondent PCAOB, that the PCAOB is not unconstitutional and must maintain its independence from the accounting industry, as the recent accounting scandals demonstrated a need for government enforcement as opposed to self-regulation.[167] The Court held in a five-to-four decision that the PCAOB itself was constitutional, but the appointment and removal of the Board members was not.[168] By deeming that the unconstitutional provision of the Act did not necessarily defeat the validity of the remaining provisions, the Court invoked its power of severability and invalidated only the unconstitutional provision.[169]

In his opinion, Chief Justice Roberts declined the opportunity to analyze the constitutionality of the PCAOB and its capabilities.[170] While the Court stated that "[t]he failures of accounting regulation may be a 'pressing national problem,' but 'a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse[,]'"[171] it kept SOX fully operative as law without an analysis of the PCAOB's authority.[172] Asserting that the only issue in this case was whether Congress could deprive the President of adequate control over the Board,[173] the ruling ultimately deemed the remainder of SOX constitutional.[174] However, the matter in question in

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163. *Id.*
164. *Id.*
165. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484-85 (2010).
166. Stapler, *supra* note 16, at 714-15.
167. *Id.* at 743-44.
168. *Free Enter. Fund*, 561 U.S. at 508.
169. *See id.* at 509.
170. *See id.* at 508 (asserting that "[t]he only issue in this case is whether Congress may deprive the President of adequate control over the Board").
171. *Id.* at 501 (citing New York v. United States, 505 U.S. 144, 187-88 (1992)).
172. *Id.* at 509-10 (holding that the remaining portions of SOX are to remain, while abstaining from analysis of the PCAOB's regulatory capabilities).
173. *Id.* at 508.
174. *Id.* at 509.

Free Enterprise Fund does not resolve the current predicament the Big Four are facing in regard to the invasive investigative practices of the PCAOB.[175] As the only issue analyzed in *Free Enterprise Fund* was the constitutionality of control of the Board's members,[176] a challenge concerning the PCAOB and SEC's overreach through their investigative practices into the examination taking of the Big Four's employees without formal authority could result in curtailment.[177]

Nonetheless, proceeding under the current state of the law post-*Free Enterprise Fund*, SOX, along with its grants of authority to the PCAOB and SEC, presents a constitutional assertion of police power over the auditing industry.[178] Past market catastrophes demonstrate that governmental oversight produces preferable outcomes as compared to industry self-regulation.[179] Congress and the SEC's history of deferring to self-regulation has resulted in failures, such as the Wall Street Crash of 1929 and losses of the New York Stock Exchange ("NYSE") in the 1960s.[180] As with the Enron scandal, previous calamities establish that industry self-governance is not effective for the accounting industry.[181] The transition from auditing and accounting self-regulation to governmental police power proves necessary to maintain public financial order.[182] Yet, going so far as to allow an agency to analyze the examination taking of a company's employees may be the line at which the judiciary halts the licensing of extraconstitutional governmental authority warned of by Chief Justice Roberts in *Free Enterprise Fund*.[183]

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175. *See id.* at 508-10; *supra* Part II.C–E (elaborating that the SEC's authority may not extend to the point of discretion to determine appropriate disclosures surrounding a company's employees).

176. *Free Enter. Fund*, 561 U.S. at 508.

177. *See id.* at 508-10; *supra* Part II.C–E.

178. *See supra* Part II.C–E.

179. Weismann, *supra* note 33, at 115-16.

180. *Id.* at 114-19 (pointing to the failure of nearly 160 NYSE member firms within two years of the NYSE acting as principal self-regulator, under the authorization of the SEC); Will Kenton, *Stock Market Crash of 1929: Definition, Causes, Effects*, INVESTOPEDIA, https://www.investopedia.com/terms/s/stock-market-crash-1929.asp [https://perma.cc/7VDD-E2MC] (Mar. 16, 2023) (explaining that the absence of governmental oversight over the stock market was one of the major causes of the Wall Street crash in 1929).

181. *See supra* Part II.A.

182. *See supra* Part II.

183. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 501 (2010); *see, e.g.*, Carvin et al., *supra* note 22, at 214-15 (asserting that "the PCAOB's policies are undeniably controversial and have serious and wide-ranging consequences for the economy and American businesses").

B. Who Should This Police Power Be Given To?

Upon determining that positive regulation of the auditing process and its actors may be necessary under these circumstances,[184] there must be an analysis of the institutions best suited for the task.[185] Assertions that Congress moved too quickly in implementing SOX, as well as points of contention as to the true effectiveness of the Act, have become commonplace.[186] However, the institutions at the basis of all these discussions and the grants of power provided to them have been generally overlooked.[187] Identification and examination of the various administrative agencies whom Congress may place this authority with, and the extent of the authority given, can be determinative of the effectiveness of the regulatory outcomes.[188]

Article 1, Section 8, Clause 3 of the U.S. Constitution, otherwise known as the Commerce Clause, provides Congress with the power to regulate commerce among the states and with foreign nations.[189] During Franklin Delano Roosevelt's presidency, an expansive interpretation was given to the Commerce Clause as grounds for legislation regarding commerce and economic and social conditions.[190] This shift began the Supreme Court's deferential approach to legislation passed under the Commerce Clause, as seen specifically by the New Deal.[191] President Roosevelt signed the Securities Act of 1933 into law as part of his New Deal.[192]

184. *See* Weismann, *supra* note 33, at 115-16.

185. *See* Heminway, *supra* note 44, at 383 (comparing federal institutional choices tailored to corporate governance reform and contending that proponents for change "should not suggest changes in legal rules without also suggesting the vehicle for the suggested reforms").

186. *Id.* at 229-30.

187. *See id.* at 231-32.

188. *See id.* at 383-84 (suggesting that an analysis of institutions available to implement legal change is a "means of improving their ability to engage in jurisprudential decisionmaking and disclosure in connection with federal corporate governance reform").

189. U.S. CONST. art. 1, § 8, cl. 3; *Commerce Clause*, LEGAL INFO. INST. AT CORNELL L. SCH., https://www.law.cornell.edu/wex/commerce_clause [https://perma.cc/SZV7-CSAJ] (last visited Dec. 2, 2023).

190. *How Has the Supreme Court Interpreted the Commerce Clause*?, BILL OF RTS. INST., https://billofrightsinstitute.org/activities/handout-h-how-has-the-supreme-court-interpreted-the-commerce-clause [https://perma.cc/S6D2-LE47] (last visited Dec. 2, 2023).

191. *Id.* (explaining that the New Deal was a series of programs proposed by President Roosevelt and passed by Congress pertaining to novel laws which would regulate economic conditions, such as the stock market and social conditions, such as Social Security).

192. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa); Will Kenton, *Securities Act of 1933*, INVESTOPEDIA, https://www.investopedia.com/terms/s/securitiesact1933.asp [https://perma.cc/Y32U-DJTK] (Oct. 20, 2020).

While the SEC was established to facilitate improved disclosure of companies' financials for potential investors,[193] the SEC is not the only agency involved in the field of economic regulation.[194] The invasive investigation practices utilized against the Big Four provide ample opportunity for the Supreme Court to render SOX's delegation unconstitutional, as well as the practices of the SEC through its control of the PCAOB as overreach.[195] In order to remedy the shortcomings of SOX, Congress could provide clarification on its grants of authority under the Act, or transfer authority of the PCAOB to another federal agency.[196]

The Consumer Financial Protection Bureau ("CFPB") and the Securities Investor Protection Corporation ("SIPC") may serve as viable alternative agencies for the monitoring of the Big Four's auditing due to their corporate governance backgrounds.[197] However, when examining the functions that these agencies were implemented to serve, it is unlikely they would provide improvement in the areas of governance associated with SOX.[198] The CFPB was created in 2010 to "oversee[] financial products and services offered to consumers."[199] While its goals include the prevention of financial harm to consumers, similar to that of SOX,[200] its efforts have a primary focus on the financing of higher education, retirement, or homeownership.[201] Additionally, the SIPC "is a nonprofit corporation created . . . to protect the clients of brokerage firms facing bankruptcy."[202] The intent behind creating the SIPC, to return customers' securities and funds quickly upon bankruptcy,[203]

193. Kenton, *supra* note 192.

194. *See, e.g.*, Jim Probasco, *Consumer Financial Protection Bureau (CFPB)*, INVESTOPEDIA, https://www.investopedia.com/terms/c/consumer-financial-protection-bureau-cfpb.asp [https://perma.cc/8ZS9-A3HU] (Sept. 27, 2023) (analyzing the creation, purpose, and function of the Consumer Financial Protection Bureau); Will Kenton, *Securities Investor Protection Corporation (SIPC)*, INVESTOPEDIA, https://www.investopedia.com/terms/s/sipc.asp [https://perma.cc/77J8-GYM6] (Apr. 29, 2022) (analyzing the creation, purpose, and function of the Securities Investor Protection Corporation).

195. *Cf.* West Virginia v. EPA, 142 S. Ct. 2587, 2622-24 (2022) (Gorsuch, J., concurring) (elaborating that Congress had not given the EPA clear authority to institute certain carbon emission caps nor do the ancillary and gap-filler provisions of the EPA's congressional grant of authority allow it to do so).

196. *See infra* Part IV.

197. *See* Probasco, *supra* note 194; Kenton, *supra* note 194.

198. *See* Probasco, *supra* note 194 (discussing the CFPB's role in regulation); Kenton, *supra* note 194 (discussing the SIPC's role in regulation).

199. Probasco, *supra* note 194.

200. Segal, *supra* note 12.

201. Probasco, *supra* note 194.

202. Kenton, *supra* note 194.

203. *Id.*

resembles the concerns arising out of the Enron scandal.[204] However, the SIPC focuses on the liquidation of the brokerage firms that go bankrupt, not the firms that audit them,[205] in order to prevent bankruptcy.[206] As such, the SEC's primary function of overseeing organizations and individuals involved in the securities market appears better suited to facilitate the disclosure goals desired under SOX.[207] While the SEC appears to be the most suitable institutional vehicle to pursue SOX's objectives, and thus rightfully holds the police power to monitor the Big Four, this does not ipso facto establish that the SEC has the authority required to justify its current regulatory practices.[208]

C. Is There a Proper Grant of Authority to Warrant These Investigations?

The Supreme Court maintains that "it is a fundamental cannon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[209] Applying this principle to the SEC and PCAOB's inspections of the Big Four's employees and their examinations, an argument that these investigations are warranted under SOX is tenuous at best.[210] General policing of a system by an administrative agency does not mean that the agency always maintains the proper authority for its actions under current legislative framework.[211] While the PCAOB and SEC may have broad authority under SOX to regulate accounting firms and their auditing practices,[212] a sound point of contention arises as to the extent of that authority.[213]

SOX authorizes the PCAOB to establish auditing and ethical standards.[214] The appointment of its Board members by the SEC, and the

204. *See* Stapler, *supra* note 16, at 712.

205. Ceresney, *supra* note 3.

206. Kenton, *supra* note 194.

207. Chen, *supra* note 82; Blokhin, *supra* note 45.

208. *See infra* Part III.C.

209. West Virginia v. EPA, 142 S. Ct. 2587, 2607-08 (2022) (citing Davis v. Mich. Dep't of the Treasury, 489 U.S. 803, 809 (1989)).

210. *Cf. id.* at 2609 (asserting that the Court is reluctant to read a delegation into statutory text which is not actually there unless an agency can point to a "clear congressional authorization" for its assertion of power).

211. *See id.* at 2609 (contending that "[e]xtraordinary grants of regulatory authority are rarely accomplished through" subtle terms).

212. *See supra* Part II.

213. *Cf. West Virginia*, 142 S. Ct. at 2609 (stating that oblique language will not establish a clear statement of congressional intent and addressing reliance on broad expressions).

214. 15 U.S.C. §§ 7211(c), 7219(c)–(d); Bennett v. Sprint Nextel Corp., No. 11-9014-MC-W-ODS, 2012 U.S. Dist. LEXIS 145902, at *2-3 (W.D. Mo. Oct. 10, 2012).

requirement that the SEC approve all of its standards, renders the PCAOB utterly under the power of the SEC.[215] The PCAOB and SEC have exercised their authority by setting guidelines, performing inspections, carrying out investigations, and issuing penalties in pursuit of maintaining the capital markets in the wake of the Enron scandal.[216] However, the SEC's recent imposition of unprecedentedly large penalties against auditing firms for the mere malfeasance of their employees on matters unrelated to these firms' clients or capital markets,[217] should call into question the sphere of its authority.[218]

Even with a broader conception of the SEC and PCAOB's authority under SOX,[219] the investigations of and penalties against the Big Four due to their employees' examination practices would not fall within the powers granted to the SEC and PCAOB.[220] When looking to the purpose of SOX's implementation,[221] the PCAOB and SEC's regulatory roles with respect to ensuring integrity in the market is divergent from the role the SEC is taking in issuing penalties against the Big Four for the immoral practices of their employees when taking tests.[222] The SEC has been granted various enforcement mechanisms to utilize against companies to ensure compliance with regulatory disclosures.[223] Not included in these provisions, however, is the specific authority to invoke such invasive inspections and significant penalization practices.[224]

215. *See* Mark, *supra* note 18, at 1110-11; Pildes, *supra* note 78, at 490.

216. Segal, *supra* note 12.

217. *See supra* Part II.E.

218. *See West Virginia*, 142 S. Ct. at 2607-08 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)) (asserting that the "economic and political significance" of an agency's actions may "provide a 'reason to hesitate before concluding that Congress' meant to confer such authority" to the agency).

219. *See* Stapler, *supra* note 16, at 729.

220. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.); *West Virginia*, 142 S. Ct. at 2610, 2612-13 (arguing that use of an ancillary provision with vague language as empowerment for a new regulatory paradigm demonstrates a shift in governance not adopted by congressional legislation).

221. *See generally* Harris, *supra* note 161 (elaborating on Congress's focus in remedying the Enron scandal by establishing oversight for the auditing of public companies).

222. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 749 (granting authority to the SEC and PCAOB over auditing and accounting regulation); Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 30 (stating that auditors are an essential part in ensuring financial reporting dependability and trustworthiness); Carvin et al., *supra* note 22, at 214-15 (detailing the congressional grant of authority to the PCAOB and SEC regarding the implementation of rules necessary for public interest and investor protection).

223. *See, e.g.*, 15 U.S.C. § 78u(d)(3) (granting the SEC authority to bring an action for civil penalties and disgorgement); *supra* Part II.

224. *See West Virginia*, 142 S. Ct. at 2614 (holding that the EPA regulation was an overreach of its designated authority as "[s]uch a vague statutory grant is not close to the sort of clear authorization required" under Supreme Court precedent). *See generally* Sarbanes-Oxley Act of

Absent a clear statement of delegation from Congress,[225] the ancillary provisions of SOX that grant the SEC and PCAOB with broad discretion over accounting practices and auditing firms cannot be read to provide such an extensive breadth of regulatory authority over a private economic sector.[226]

A reasonable argument could be made that issuing such immense fines against the Big Four ensures integrity in their employees' examination taking, and thus compels these firms and their employees to act with integrity when auditing clients.[227] However, similar arguments have been made by other administrative agencies attempting to overreach and have failed.[228] The Supreme Court struck down an FDA attempt to regulate tobacco products by contending the power fell under its authority to regulate drugs and devices in *FDA v. Brown & Williamson Tobacco Corp*.[229] Reiterated in *West Virginia v. EPA*, the Court held that "'Congress could not have intended to delegate' such a sweeping and consequential authority 'in so cryptic a fashion.'"[230] As precedent demonstrates, the SEC and PCAOB's attempt to construe the meaning of auditing practices to include the employment functions of a private company and its employees should fail.[231]

As recently as 2022,[232] the Supreme Court upheld the notion that when Congress confers decision-making authority to an agency, it must provide an intelligible principle by legislative enactment, to which the

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2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.) (granting authority to the SEC and PCAOB over auditing and accounting regulation).

225. *See West Virginia*, 142 S. Ct. at 2609 (requiring that an agency "point to clear congressional authorization for the power it claims" when alleging that Congress gave it the authority to implement major policy decisions).

226. *See generally* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.) (granting authority to the SEC and PCAOB over auditing and accounting regulation); *West Virginia*, 142 S. Ct. at 2610, 2616 (holding that a gap-filler provision does not provide the EPA with authority to implement a regulation that would "substantially restructure the American energy market[,]" a decision that would have economic and political significance).

227. *See* Bramwell, *supra* note 137 (referencing statements made by the director of the SEC's Enforcement Division that the SEC's action against EY should serve as a warning for auditors against integrity deficiencies); Pearson & Mark, *supra* note 5, at 44-48 (contending that "to create a tougher enforcement environment . . . [e]nhanced penalties were needed to deter wrong-doing").

228. *See West Virginia*, 142 S. Ct. at 2608 (referencing the Court's prior rejections of agency arguments that their authority extended beyond their statutory authority to such an extent that it could implement regulations of social and political significance).

229. 529 U.S. 120, 126-27 (2000).

230. *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 160).

231. *See id.*

232. *See id.* at 2616 (affirming the intelligible principle standard as applicable to agency delegation).

authorized agency must conform.[233] Enabling legislation passed by Congress is "generally not an 'open book to which the agency [may] add pages and change the plot line.'"[234] Under these principles, SOX's current legislation does not provide the SEC or PCAOB with a proper grant of authority to warrant such invasive inspections and significant charges.[235]

IV. CONGRESSIONAL REFORM IS NEEDED TO PROTECT AUDITORS AND INVESTORS

The preceding Part of this Note demonstrates the doctrinal issues that have arisen due to Congress's broad and ill-defined delegation of power to the PCAOB and SEC under SOX.[236] As a result, these entities have the ability to overreach in their regulatory authority of the auditing sector.[237] While Congress may confer decision-making authority upon these entities, SOX lacks the intelligible principles that would authorize these entities to issue such sweeping penalties for economic regulations unrelated to SOX's intended purpose.[238] In order to ensure that accountants and auditing firms remain compliant with the essential mission of SOX, congressional clarification that defines the PCAOB and SEC's authority is needed.[239]

A. Diminishing Returns Due to Overregulation

A great deal of actors in the corporate world, ranging from publicly registered not-for-profit organizations to the Big Four, have felt the harmful effects of SOX's ill-defined yet boundless regulations.[240] The

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233. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (holding that the Supreme Court has "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute").

234. *West Virginia*, 142 S. Ct. at 2609 (quoting Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)).

235. *See generally* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.) (granting authority to the SEC and PCAOB over auditing and accounting regulation).

236. *See supra* Part III.

237. *West Virginia*, 142 S. Ct. at 2609 ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'") (quoting Gellhorn & Verkuil, *supra* note 234). It is "presume[d] that Congress intended to make major policy decisions itself, not leave those decisions to agencies." *Id.*

238. *See, e.g.*, *Whitman*, 531 U.S. at 472, 475.

239. *See infra* Part IV.

240. *See* Peter J. Wallison, *Blame Sarbanes-Oxley*, WALL ST. J. (Sept. 3, 2003), https://www.wsj.com/articles/SB10625561837518100 [https://perma.cc/L9AB-5D8H]; Weismann, *supra* note 33, at 102 n.16.

significant energy required by both employers and employees in complying with the continuing list of requirements by the SEC and PCAOB under SOX takes both time and resources away from businesses' actual operation.[241] While authoritarian regulatory governance may seem desirable after the demises of Enron and WorldCom,[242] reining in these entities' authority may foster the best results by allowing businesses to optimally function without excessive and unnecessary oversight.[243]

As established above, self-regulation of the accounting and auditing industry does not appear to be the best solution in promoting efficient and reliable capital markets.[244] Yet, the increase in responsibility of companies' directors, along with the increasing authority of the SEC, appears to have hindered companies' revitalization of the economy through investment into the stock market.[245] SOX reduced the power of corporate management, while increasing the authority of independent directors.[246] Independent directors have less at stake in a business and, therefore, take less risk to increase company profits as they have little incentive to do so.[247]

While refined regulations are important to promote societal goals, complying with these regulations does increase the cost of doing business.[248] For example, the magnitude and breadth of financial rules and regulations within the past ten years has resulted in the financial sector devoting sixty-two percent more of its resources to compliance.[249] As "the goal of economic analysis is to estimate benefits and costs based on the preferences of actors affected by the regulatory actions[,]" meaningful regulatory reform is necessary for economic growth.[250] The verification of companies' financial reports, quality control tests, and mandatory reporting exemplify the pros associated with SOX's regulations for consumers.[251] The all-inclusive reporting rules, no matter

241. *See* Wallison, *supra* note 240.

242. *See* Freer Jr. & Burroughs, *supra* note 27, at 57-58.

243. *See infra* Part IV.A–B.

244. *See supra* Part III.

245. *See* Wallison, *supra* note 240.

246. *See id.*

247. *Id.*

248. COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 77 (2019), https://www.govinfo.gov/content/pkg/ERP-2019/pdf/ERP-2019-chapter2.pdf [https://perma.cc/2TF3-3G37].

249. Tim Hitchcock, *Doing More with Less: Compliance Under Pressure in 2022 & 2023*, THOMSON REUTERS (Oct. 5, 2022), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/compliance-under-pressure [https://perma.cc/PXK4-NV6E].

250. COUNCIL OF ECON. ADVISERS, *supra* note 248, at 80.

251. *The Pros and Cons of the Sarbanes-Oxley Act*, SOXLAW, https://www.soxlaw.com/the-pros-and-cons-of-the-sarbanes-oxley-act [https://perma.cc/9ZFJ-EHSU] (last visited Dec. 2, 2023).

the size of the company or its resources available, and the increased auditing fees due to more accountability exemplify the cons associated with SOX's regulations for consumers.[252] SOX's ethical mission and benefits are evident;[253] however, the costs of its regulations prove significant as well.[254]

In light of the general cost-benefit analysis associated with SOX governance,[255] modest deregulation of the accounting and auditing industry may prove beneficial to overall compliance.[256] The SEC's exceedingly large fine of $100 million against EY, and the dubious investigations that led to it, demonstrate a prime example of an area that should be deregulated if a court were to hold that the SEC even had the authority in the first place.[257] The PCAOB and SEC's tunnel vision toward severe regulatory action can bring about more harm than good, as it is not evident that actual analysis was put toward the necessity of these charges in pursuit of SOX's goals.[258]

Executives have grown justifiably frustrated due to the large and increasing costs of compliance without evidence it is rendering any actual benefits.[259] However, they continue to invest in these costly practices out of fear of exposure of their organizations to greater liability, not because they believe it is actually beneficial.[260] As such, it remains a discernible, yet widely ignored fact that too much regulation at all levels of government can prove particularly harmful.[261]

B. Congressional Clarification

It remains unclear where the PCAOB derived its authority to investigate EY's employees' CPA examination-taking practices.[262] Furthermore, the SEC has failed to establish from what grant of

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252. *Id.*

253. *See* Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 30; *The Pros and Cons of the Sarbanes-Oxley Act*, *supra* note 251.

254. *The Pros and Cons of the Sarbanes-Oxley Act*, *supra* note 251.

255. *See, e.g.*, *id.* (elaborating that the control mechanisms implemented by SOX were welcomed but "may prove difficult for some businesses when complying with these requirements").

256. *See* COUNCIL OF ECON. ADVISERS, *supra* note 248, at 79; *supra* Part III.C.

257. *See supra* Part III.

258. *See* COUNCIL OF ECON. ADVISERS, *supra* note 248, at 80; *see also* Pearson & Mark, *supra* note 5, at 44-46 (explaining the goals of SOX); *supra* Part III.C.

259. Hui Chen & Eugene Soltes, *Why Compliance Programs Fail – and How to Fix Them*, HARV. BUS. REV. (Mar.-Apr. 2018), https://hbr.org/2018/03/why-compliance-programs-fail [https://perma.cc/PTZ9-FDMS].

260. *Id.*

261. *See* Adam A. Millsap, *How Too Much Regulation Hurts America's Poor*, FORBES (July 23, 2019), https://www.forbes.com/sites/adammillsap/2019/07/23/how-too-much-regulation-hurts-americas-poor/?sh=2a05d72e271f [https://perma.cc/936G-64MW].

262. *See supra* Part III.C.

authority it could issue such a significant penalty.[263] This occurrence is an attestation to the notion that the precision and detail with which legislation is implemented tends to directly impact the quality and results of regulation.[264] As the clarity and comprehensiveness of a rule is demonstrated through the level of care and expertise exercised by the responsible rulemaking body,[265] the haste with which Congress and the SEC implemented SOX due to media and consumer pressure speaks volumes.[266] Accordingly, congressional reform of SOX is required to restrain these entities' overreach and prevent diminishing returns of its regulations.[267]

"When Congress is not clear, courts often invite, and are glad to receive, legislative correction . . . When Congress has been Delphic or dense, or simply imprecise, legislative clarification can ward off further confusion."[268] The SEC's seemingly endless reforms to disclosure requirements have been met with political and business pressure for the agency to loosen current SOX requirements for internal controls and withdraw from further regulation.[269] Moreover, leaders in the corporate governance field have found that the appropriate course of federal regulatory response is often unclear.[270] These experts have argued for "humble regulation" in light of SOX, condemning congressional intervention in business law and advocating for measures which curb excessive regulatory legislation.[271] It follows that congressional clarification of SOX, which reins in the regulatory capabilities of the PCAOB and SEC, could prove beneficial to the fulfillment of SOX's mission to protect the interests of investors.[272]

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263. *See id.*

264. *See* Heminway, *supra* note 44, at 339-41 (contending that "the more ambiguous and incomplete the rule is, the greater the cost in the form of a loss of accumulated experience").

265. *Id.*

266. *See* Freer Jr. & Burroughs, *supra* note 27, at 52-53.

267. *See supra* Part IV.A.

268. Ruth Bader Ginsburg, *Communication and Commenting on the Court's Work*, 83 GEO. L. J. 2119, 2125 (1995).

269. Faith Stevelman, *Corporate Governance Five Years After Sarbanes-Oxley: Is There Real Change?*, 52 N.Y. L. SCH. L. REV. 475, 485-86 (2008).

270. *See* Stephen M. Bainbridge, *Sarbanes-Oxley § 404 at Twenty*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Sept. 22, 2022), https://corpgov.law.harvard.edu/2022/09/22/sarbanes-oxley-%C2%A7-404-at-twenty [https://perma.cc/AGH7-ZBAL] (detailing the conclusions drawn by Larry Ribstein, a securities law scholar, from his case study that tracked the effects of SOX in response to capital market crises).

271. *See id.*

272. *See* Stevelman, *supra* note 269, at 492-93 (asserting that SOX's broad mandate of SEC action and the complexity of its regulations equate to "their merits and shortcomings . . . not being readily apparent on their face"). *See generally* 15 U.S.C. § 7211(a) ("There is established the Public Company Accounting Oversight Board, . . . in order to protect the interest of investors and further the public interest in the preparation of informative, accurate, and independent audit reports.").

The current ambiguity that arises from Congress's broad mandate under SOX for SEC and PCAOB action not only makes analysis of the entities' effectiveness difficult,[273] but has allowed them to regulate in sectors beyond their authorized reach.[274] If auditors prove to be doing a better job than before the Enron scandal,[275] why jeopardize this improvement by excessively penalizing them for matters unrelated to SOX?[276] As external auditors play a key role in ensuring companies comply with applicable rules and regulations,[277] making enemies out of them does not contribute to the pursuit of SOX's goals.[278]

We must bear in mind that agencies may only exercise discretion in the spaces created by statutory silence or ambiguity.[279] As such, it is time for Congress to modify the broad and undefined discretion it has instilled with the SEC and PCAOB under SOX.[280] By establishing actual intelligible principles for these entities to follow,[281] invasive investigation practices and excessive fines will likely decline, and compliance will likely increase in light of the current diminishing returns due to overregulation.[282] It is evident that the SEC's current practices of ordering arbitrary and excessive fines for issues not addressed by SOX is simply an attempt to assert powers that, as a mere agency, it does not possess.[283] Reducing its jurisdiction through reformation of its provisional grants of power under SOX will not only prevent this tyrannical practice;[284] its effects would hopefully trickle down to the PCAOB, which it effectively controls.[285] Therefore, congressional

273. *See* Stevelman, *supra* note 269, at 492-93.

274. *See supra* Part III.C.

275. David Reilly, *With New, United Voice, Auditors Stand Ground on How to Treat Crunch*, WALL ST. J. (Oct. 17, 2007), https://www.wsj.com/articles/SB119257816857761266 [https://perma.cc/36LD-KYBJ] (pointing to statements by Lynn Turner, former chief accountant of the SEC, regarding the decrease in large-scale accounting frauds reported since SOX).

276. *See supra* Part III.C, IV.A.

277. *See* Ceresney, *supra* note 3.

278. *See* Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 30; Barbarino, *supra* note 1; *The Pros and Cons of the Sarbanes-Oxley Act*, *supra* note 251.

279. Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 326 (2014).

280. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.); *supra* Part III.

281. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); *supra* Part III.

282. *See* COUNCIL OF ECON. ADVISERS, *supra* note 248, at 79-80; *supra* Part III.C.

283. *See* Carvin et al., *supra* note 22, at 214-15; *supra* Part III.C.

284. *See generally* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.) (granting authority to the SEC and PCAOB over auditing and accounting regulation); Freer Jr. & Burroughs, *supra* note 27, at 72-74 (contending that reform of SOX's Section 404 is needed as regulations "that restrict the freedom of the US markets should be reformed to promote the best business practices free from unnecessary limitations").

285. *See supra* Part II.

revision which clarifies and curtails the SEC and PCAOB's regulatory capabilities can ensure the burdens of SOX do not outweigh its potential benefits.[286] In light of SOX's effectiveness in preventing larger corporate accounting frauds,[287] restraint of the SEC and PCAOB through legislative correction is necessary for the Act to continue to produce more good than harm.[288]

V. CONCLUSION

While SOX has promoted diligence, honesty, and transparency in the U.S. financial market, it has not come without cost.[289] The sweeping and transformative changes in corporate law that were instituted as part of SOX modified the prior balance that existed in the auditing industry between governance and regulation.[290] As noted by the Supreme Court, the PCAOB is unique in the expansive power it has been granted to govern the entire accounting industry.[291] As such, when the PCAOB and SEC use this expansive power to regulate in areas not delegated by the intelligible principles established by Congress, it becomes unconstitutional.[292] The SEC and PCAOB's interpretation that the Big Four's private employment practices and employees' examination taking falls within their delegated bounds does not merit deference when it is inconsistent with the statutory scheme of SOX as a whole.[293] History demonstrates that the transition from self-regulation of the accounting and auditing industry to governance under federal police power proves necessary to maintain public financial order.[294] Yet, the broad grant of authority under SOX does not establish that the PCAOB and SEC have the authority required to justify their current regulatory practices.[295]

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286. *See* Dvoretzky et al., *supra* note 116 (maintaining that the current Supreme Court is wishing to address separation of powers and curtail the current administrative state of government regulation); Freer Jr. & Burroughs, *supra* note 27, at 73 (arguing that while no law is perfect, SOX's burdens have proven to outweigh its benefits).

287. Stevelman, *supra* note 269, at 481.

288. *See* Ginsburg, *supra* note 268, at 2115; *supra* Part IV.A.

289. Freer Jr. & Burroughs, *supra* note 27, at 57-58.

290. Stevelman, *supra* note 269, at 481.

291. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484-85 (2010).

292. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (asserting that the Supreme Court has narrowly constructed near unconstitutional delegations of power in an effort to enforce the nondelegation doctrine through statutory interpretation); *supra* Part III.

293. *Cf.* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321 (2014) (holding that deference to an agency's interpretation is not warranted when, on balance, it is incompatible with the statute's composition).

294. *See supra* Part III.A.

295. *See supra* Part III.B–C.

In order for regulatory reform to be meaningful, the costs that it imposes on the affected actors in the industry cannot outweigh the benefits.[296] While refined regulations are important to promote societal goals, complying with these regulations cannot increase the cost of doing business to the extent that it no longer makes sense to compete.[297] Fear of liability for noncompliance, as opposed to incentive from actual results, appears to be the reason for compliance with the SEC and PCAOB's endless requirements.[298] As such, it is time for Congress to establish limited intelligible principles which restrict these entities' reach.[299] Congressional reform of SOX is needed to ensure that bureaucratic regulations do not place such a burden on the U.S. market, and its actors, as to disadvantage businesses and stunt economic growth.[300]

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296. COUNCIL OF ECON. ADVISERS, *supra* note 248, at 79-80.

297. *See id.*; *supra* Part IV.A.

298. *See supra* Part IV.

299. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022); *supra* Part IV.

300. Freer Jr. & Burroughs, *supra* note 27, at 57-58.

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