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The Effect of the Sarbanes-Oxley Act of 2002 on Small Business

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Since the collapse of Enron, WorldCom, Global Crossing and other high profile public companies over the past year, the American public has been barraged with news of shady off-balance sheet partnerships, dubious revenue enhancement schemes, document shredding by auditors, decimated 401(k) accounts, wildly excessive compensation and perquisites for CEOs and other officers, and disgraced executives exercising their Fifth Amendment privilege against self-incrimination (often foreshadowing a subsequent report of the same executives appearing in court in handcuffs). Arthur Andersen has been tried and convicted of obstruction of justice for its role in the Enron scandal and is now widely expected to close its doors, having lost its ability to perform audit services. The predictable public outcry has been for honest auditors, diligent boards of directors and audit committees, and swift punishment for greedy executives and their cohorts. The response from President Bush, Congress, the Securities and Exchange Commission and innumerable academic, political and legal commentators was a demand for increased government regulation of publicly held companies and their auditors in order to restore public confidence in the financial statements they produce for public consumption.

This political landscape was the genesis of the Sarbanes-Oxley Act of 2002, a broad auditing, financial disclosure and corporate governance law passed by Congress on July 25, 2002 and signed into law by President Bush on July 30, 2002. Sarbanes-Oxley increases the responsibility and independence of auditors and audit committees, enhances and accelerates the disclosure obligations of public companies and corporate insiders, encourages and, in some cases, mandates “whistleblowing” on corporate wrongdoing, prohibits loans to officers and directors, lengthens the statute of limitations for private securities fraud lawsuits, mandates various SEC rules and studies, including rules on securities analysts’ conflicts of interest, and increases criminal penalties for securities fraud. Meanwhile, even before Sarbanes-Oxley was passed, the SEC had adopted or proposed various new disclosure and auditor oversight rules and the New York Stock Exchange and the Nasdaq Stock Market had proposed enhanced corporate governance rules as part of their listing standards. The SEC has also reportedly launched more than 100 major investigations of the accounting practices of major U.S. corporations, including household names like Xerox and Qwest, and the Justice Department has filed criminal charges against executives from Tyco International, Enron and Adelphia Communications, among others.

There are two different kinds of small businesses which are directly affected by this new wave of government regulation of business—the small public company, usually trading on Nasdaq or the OTC Bulletin Board, and the small, but rapidly growing, private company. The former needs to consider whether the benefits of remaining a publicly held company, including the costs and risks attendant to “going private”, still outweigh the increased burdens, costs and risks of being public. Similarly, the privately held small business seeking capital for growth and liquidity for ownership interests must decide whether an initial public offering remains the “promised land” for entrepreneurs or has been transformed into a dangerous last resort for the capital starved business.

I. SUMMARY OF THE SARBANES-OXLEY ACT OF 2002

What is perhaps most unusual about Sarbanes-Oxley as a securities law is that, in addition to a variety of accelerated and enhanced disclosure requirements, it imposes substantive rules as to the conduct of publicly-held companies, in many cases supplanting rather than supplementing state corporation laws. The result is a daunting set of new rules governing the conduct, as well as the disclosure of that conduct, of public companies, their auditors, officers, directors, attorneys and employees. The following summary does not purport to be comprehensive or to reflect all indirect effects of the new law. But it is a good starting point to understand the breadth and depth of the new law.

A. Personal Loans to Executives Prohibited

No public company may directly or indirectly extend credit to any director or executive officer, other than certain specified margin or other loans made in the ordinary course of business. Sarbanes-Oxley Act, § 402. Extensions of credit “maintained” on July 30, 2002 are grandfathered, but material modifications or renewals of existing loans or credit arrangement are not permitted. Id. This is a clear pre-emption of the traditional “business judgment” rule of state corporation laws.

B. Forfeiture of Compensation Upon Restatement of Financial Results

If a public company restates its financial statements due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement, both the CEO and CFO of the public company must reimburse the issuer for any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period after the initial issuance of the financial statements and any profits from the sales of securities of the issuer during that period. Sarbanes-Oxley Act § 304. This would include performance-driven salary increases, cash or stock bonuses and profits from stock option exercises.

C. Acceleration of Reporting of Insider Trades

Changes in equity ownership (i.e., stock purchases, sales, option grants and option exercises) by directors, officers, and 10% beneficial owners must be reported by the end of the second business day following the trade. Sarbanes-Oxley Act § 403. Within one year of the Act’s enactment, Form 4 equity ownership reports must be filed electronically and posted on the issuer’s website and on the SEC’s website (EDGAR). Id. Under prior law, an insider had until the tenth day of the month following a transaction -- up to 40 days in some cases -- to report transactions in the public company’s securities.

D. Disclosures of Off-Balance Sheet Transactions and Pro Forma Information

By January 27, 2003, the SEC must adopt rules (a) providing for the disclosure of all material off-balance sheet transactions, arrangements, and obligations, and other relationships that may have a material current or future effect, (b) prohibiting pro forma financial information in any press release or other public disclosure from including any material misstatement or omission, and (c) requiring reconciliation of pro forma information with financial statements prepared in accordance with generally accepted accounting principles. Sarbanes-Oxley Act § 401. This is clearly aimed at the now discredited practice of excluding various types of negative financial data from press releases to create more positive “pro forma” results.

E. Securities Analysts and Research Reports

By July 30, 2003, the SEC must adopt its own rules, or approve self-regulatory organization rules, designed to address securities analysts’ conflicts of interest. Sarbanes-Oxley Act § 501. The SEC had already proposed a new Regulation AC, which would govern research analysts’ research reports and public appearances, and the New York Stock Exchange and Nasdaq had adopted new rules restricting transaction-based compensation of analysts. More recently, the NYSE and Nasdaq proposed further

tightening of their own new rules. Frankly, however, the newly formed joint enforcement and rulemaking task force of the SEC, the New York Stock Exchange, Nasdaq and the New York Attorney General's office is widely expected to do even more than the original SEC proposal or the existing self regulatory organizations' rules.

F. Real Time Issuer Disclosures

The Act authorizes the SEC to require public companies to disclose on a rapid and current basis information concerning changes in the issuer's financial condition or operations. Sarbanes-Oxley Act § 409. In fact, the SEC has already proposed a dramatic expansion of reportable events and acceleration of filing deadlines for Form 8-K reports and has adopted shorter deadlines for Forms 10-K and 10-Q. As a result, "real time" reporting of material events is a new and pressing concern of CEOs, CFOs and securities lawyers for public companies.

G. SEC Rules to Mandate Whistleblowing by Attorneys

Within 180 days after the Act's enactment, the SEC must issue rules of professional responsibility for securities lawyers, including a rule requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty to the issuer's chief legal counsel or chief executive officer. The Act also requires these new rules to provide that, if the counsel or CEO does not appropriately respond to the evidence, the attorney must report the evidence to the audit committee, another committee composed entirely of independent directors, or the board of directors. Sarbanes-Oxley Act § 307. It is likely that the SEC's rules will propose to cover even more than the statutory mandate. In any event, these highly controversial rules could dramatically change the dynamics of the relationship between officers of public companies and legal counsel, not to mention the focus of ethics regulation of securities lawyers.

H. Audit Committees and Independent Boards of Directors

Each public company must have an audit committee which is responsible for the appointment, compensation, and oversight of the work of the auditor (including resolution of disagreements between management and the auditor regarding financial reporting). All companies listed on Nasdaq or a stock exchange (NYSE, Amex, etc.) will be required to have audit committees composed entirely of directors who are not affiliated with the issuer and do not accept any consulting, advisory, or other compensatory fee from it. The audit committee must establish procedures for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters and must have the right to engage independent counsel and other advisers at the issuer's expense. The audit committee must have at least one member who is a financial expert. Sarbanes-Oxley Act §§ 301, 407.

The biggest news with respect to the composition of the board of directors, however, is actually not in the Sarbanes-Oxley Act of 2002; rather, it is the proposals of the NYSE and Nasdaq that a majority of the Board of Directors of all listed companies must be "independent directors" as defined in their rules. This would be required even if the vast majority of the public company's shares are held by insiders. Needless to say, this could have a dramatic effect on an entrepreneur's ability to control the Board of Directors of "his" public company.

I. CEO/CFO Certifications

Chief executive officers and chief financial officers of public companies are now required to certify that, among other things, the financial information in each annual and quarterly report fairly presents in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report (as well as several representations concerning the issuer's internal controls). Sarbanes-Oxley Act § 302(a). In addition, the Act imposes criminal penalties on CEOs and CFOs whose periodic report certifications do not comport with Section 906 of the Act, which differs from the SEC rule required to be promulgated by Section 302. The result is that two separate CEO/CFO certifications are now being filed with each Form 10-K or Form 10-Q.

J. Pension Fund Blackout Periods

Directors and executive officers may not purchase or sell any equity securities of the public company during any pension fund blackout period with respect to such equity security, if the director or officer acquired the equity security in connection with service or employment as a director or executive officer. Sarbanes-Oxley Act, § 306.

K. Auditor Independence

A public company may not obtain specified non-audit services from its auditor under any circumstances. Sarbanes-Oxley Act § 201(a). A public company may obtain other non-audit services from its auditor only with the pre-approval of the audit committee and disclosure in its SEC reports. Sarbanes-Oxley Act § 202. Auditors must rotate the lead audit partner and the remaining partner every five years. Sarbanes-Oxley Act § 203. A public accounting firm may not audit an issuer if the CEO, CFO, controller, chief accounting officer, or equivalent person was employed by the public accounting firm and participated in the audit of the issuer during the one-year period preceding the date of the initiation of the audit. Sarbanes-Oxley Act § 206. The most noticeable result to small public companies is likely to be dramatically higher audit fees as audit firms seek to comply with the new rigorous mandates of Sarbanes-Oxley even while losing the highly profitable consulting business which, many claim, operated to subsidize the audit business.

L. Improper Influence of Conduct of Audit

The SEC now has authority to bring a civil proceeding against any officer or director of a public company, or any person acting at the direction of an officer or director, who fraudulently influences, coerces, manipulates, or misleads any auditor in the performance of an audit for the purpose of rendering such financial statements materially misleading, in contravention of SEC rules which must be proposed by October 28, 2000. Sarbanes-Oxley Act § 303(a).

M. FAIR Funds for Investors

Civil penalties for securities law violations may now be added to the disgorgement fund for the benefit of the victims of the violation instead of going to the U.S. Treasury. The SEC is also charged with developing methods to improve collection rates and provide more restitution to injured investors. Sarbanes-Oxley Act § 308. The intent seems clear -- get more money from securities law violators and get more of what you recover into the hands of injured investors.

N. Longer Statute of Limitations for Private Civil Actions

The Act extends the limitations period for private securities fraud claims to the earlier of two years after the discovery of the facts constituting the violation or five years after the violation. This new limitations period is applicable to all proceedings commenced on or after the date of enactment, irrespective of when the allegedly violative conduct occurred. Sarbanes-Oxley Act § 804.

O. Criminal Penalties

A number of criminal penalties have been added or increased, including a new crime of securities fraud with a maximum penalty of 25 years. See, e.g., Sarbanes-Oxley Act §§ 802 and 807.

P. No Discharge in Bankruptcy

The Act provides that debts incurred on account of violations of securities fraud laws are nondischargeable in bankruptcy. Sarbanes-Oxley Act § 803.

Q. SEC Power to Bar Officers and Directors

The Act gives the SEC authority to permanently bar persons from serving as a director or officer of a public company in an administrative proceeding before the SEC. Sarbanes-Oxley Act § 305. This power was previously only entrusted to a federal district court as potential relief in a civil injunctive action brought by the SEC.

R. Corporate Codes of Ethics

Public companies will be encouraged by new SEC rules required by Sarbanes-Oxley Act §406 to adopt corporate codes of ethics for senior officers. A proposed rule of the New York Stock Exchange would require the adoption of corporate governance guidelines and a code of business conduct and ethics for all listed companies.

S. Public Company Accounting Oversight Board

A five-member Public Company Accounting Oversight Board has been created to oversee audits of public companies. The Board will have five members, two of whom must be certified public accountants. Accounting firms that audit public companies must register with the Board. The Board will establish and enforce auditing, quality control, and independence standards, subject to SEC oversight. The Board will be funded by fees assessed on public companies based on their equity market capitalizations, and the Board will also use these fees to fund the Financial Accounting Standards Board, which will continue to establish generally accepted accounting principles. The SEC must appoint the members of the Board, after consultation with the Chairman of the Federal Reserve Board and the Secretary of the Treasury, by October 28, 2002.

II. SARBANES-OXLEY ACT §101-109 THE GOING PUBLIC, OR STAYING PUBLIC, DECISION

A. The Benefits and Burdens of Being Public Generally

Entrepreneurs have long been counseled that there are advantages and disadvantages to being a public company. During the Internet boom, however, the public appetite for new public offerings so significantly increased the amount of capital available – and a business owner's chances of benefiting from that capital – that IPOs simply were too tempting for existing owners of businesses to pass up, irrespective of any warnings of potential disadvantages.

B. The Benefits of Being a Public Company

1. Proceeds of IPO and Access to Additional Capital. Many entrepreneurs believe that a public company more easily can conduct future public offerings to raise capital in addition to the funds raised in the IPO itself. Short-form Securities Act registration on SEC Forms and S-2 and S-3 – which enable companies to move quickly to sell securities in the public markets – may be available to public companies for future offerings. But these more facile procedures are no guarantee that investor funds will be more readily available.

2. Company Stock as Currency for Acquisitions. The business that wants to grow through acquisitions can use newly issues shares of its own publicly traded stock instead of cash or debt to make acquisitions. Subject to the prevailing market price of the public company's stock, the issuance of publicly traded stock can facilitate a business' rapid expansion without having to spend cash or "incur" debt to finance it.

3. Owner Liquidity. Public offerings allow entrepreneurs to raise the capital critical to their company's growth and thereafter reward the top executives responsible for the company's success by increasing the value of their stock and making it, subject to various legal and contractual restrictions, salable in the marketplace. Moreover, when the entrepreneur has accumulated substantial value in the

nonpublic enterprise, his or her estate's ability to sell readily a portion of the deceased entrepreneur's equity holdings in the stock market can help to pay estate taxes and permit the smooth transition of management. Liquidity of the deceased entrepreneur's shareholdings to pay estate taxes can preserve long-term enterprise value, as successor management then can be chosen on merit rather than on their ability to provide cash to the estate.

4. Public Awareness of Business. Companies that sell to consumers, and even those that simply deal with other businesses, often find that being publicly held creates a positive perception among these potential customers and business associates that improves their business. Much of this allure may have been lost, however, by the recent infamy of criminal acts by CEOs, CFOs and even General Counsels of public companies.

5. Potential for Further Market Appreciation of Business Valuation. Most IPOs are fueled by dreams of growth and expansion beyond the premium inherent in the IPO price. In fact, underwriters may decide to take a company public because they expect it to appreciate in the future, often because the company is part of what they perceive to be a "hot industry." Correspondingly, savvy entrepreneurs select underwriters based on the underwriters' track record of postoffering trading prices. Needless to say, in today's depressed stock market, few companies are enjoying the fruits of market appreciation and some solidly profitable companies are complaining of undervaluation of their securities by the stock market.

6. Equity Compensation for Employees. It generally is believed that giving employees an equity stake in the enterprise improves their morale and their performance. Employees of privately held companies can receive equity interests in their companies in the form of restricted grants, stock options, phantom stock and outright stock ownership, but the only real source of funds to buy that equity back is the company itself or its principals. The burden of funding such equity ownership plans can be considerable, even with average employee turnover. After a public offering, even broad-based equity incentive plans can be funded through sales of employee stock to the stock market. A depressed stock market can result in "underwater" options, however, eliminating value as an incentive.

C. Pre-Existing Disadvantages of Going Public and Being Publicly Held

1. Lack of Confidentiality. The entrepreneur who wants to keep secrets about the business from customers, competitors or suppliers should pause before grabbing the IPO brass ring; being publicly held sometimes is referred to as undressing in public. If information is "material" to an investor or shareholder, it will have to be disclosed to the world. Generally speaking, "material" means important to a reasonable person trying to decide whether to purchase or sell the company's stock (or, in some cases, trying to decide how to vote shares at a shareholder meeting). Unfortunately, the line between "confidential business secrets" and "information material to an investor" is not always clear.

2. Transactional and Ongoing Costs. Going public is neither cheap nor risk free. Proposed public offerings to fail and can leave a company with hundreds of thousands of dollars in accounting fees, legal fees, printing costs, transfer agent fees, SEC and state filing fees, "road show" expenses, due diligence costs, underwriters' expenses and other costs. Moreover, even a successful IPO cannot be described as inexpensive capital since its total fees and expenses, including underwriting fees, likely will range from just less than 10 percent of the gross proceeds (for larger offerings), to as much as 20 percent (for smaller offerings). And, much to the entrepreneur's chagrin, many of these costs, such as increased legal and accounting fees, Nasdaq or stock exchange listing fees and investor relations expenses, particularly printing and mailing costs, continue long after the proceeds of the IPO have been spent.

3. Increased Management Responsibilities and Costs. Being public requires a company to file an alphabet soup of SEC forms continuously: quarterly reports to the SEC on form 10-Q; annual reports on Form 10-K; proxy statements on Schedule 14A; important event reports on Form 8-K; insiders' stock holdings, sales plans and sales reports on Schedules 13D and 13G, Form 144, and Forms 4 and 5, respectively. These filings often require corresponding communications with the investment community

or with the company's shareholders. Besides imposing the burden and expense of preparing all these filings and making sure that their contents are fully and faithfully disclosed to the world, going public exposes a company to liability for material omissions in any of its SEC filings or other public pronouncements. There has always been a risk that those liabilities would be greater than the amount raised in the public offering but few entrepreneurs have been deterred thereby.

4. *Personal Liability for Securities Violations.* Because state and federal securities laws create liabilities that can penetrate the "corporate veil," securities class actions and SEC enforcement actions not only threaten the company but also are potential sources of personal liability for the company's executive officers, directors and controlling shareholders. The company can lose much or all of what it gained from the public offering, and if the company (or its insurance carrier) cannot satisfy its investors' claims, its executives can find themselves financially ruined by their personal liability.

5. *Possible Loss of Management Control.* Entrepreneurs seldom maintain 51 percent of the voting power of a company's shares after going public. Although the CEO nevertheless might be able to maintain a grip on the corporate reins thanks to the control of a hand-picked board of directors and a diffuse group of shareholders, even "friendly" boards can rebel and the shareholder mix can change quickly.

6. *Pressure for Short-Term Profits.* Once publicly held, many companies find themselves pressured by stockholders, investment bankers, analysts and employees to take all steps that might increase the trading price of the company's stock. Entrepreneurs who view long-term success as more important than short-term profits may find these new pressures repugnant. Worse yet, they may succumb, thereby sacrificing the company's long-term stock prospects for a short-term stock price increase. Similarly, because a transaction which is structured to positively affect reported earnings under Generally Accepted Accounting Principles (GAAP) may not receive favorable tax treatment, officers of public companies may find themselves choosing between badly needed cash from tax savings and reporting higher earnings to Wall Street.

7. *Pressure for Dividends or Sale.* Even if they balance short-term and long-term considerations fairly, however, entrepreneurs may be frustrated by the price of success. A successful company often will be subject to a real risk of takeover, friendly or otherwise. Thus the entrepreneur is faced with options like emptying the corporate coffers by paying dividends, consummating marginal acquisitions, selling "crown jewel" assets or erecting legal defenses like "poison pills" to keep control of the company. These tactics can be the basis for a shareholder lawsuit claiming breach of fiduciary duty for not pursuing a sale to the highest bidder. And even if the entrepreneur acquiesces to a sale and accepts the customary consulting agreement and severance package, unless it is an all-cash deal, he or she later may be accused of being liable for an unprofitable result for the other shareholders.

D. *Effect of Sarbanes-Oxley on the Decision to Go Public, or Stay Public*

In some ways the entrepreneur's decision whether to go public nowadays is an academic one. With the stock market's downturn has come a significant decrease in the likelihood of securing an underwritten initial public offering – historically the "exit strategy" of choice for entrepreneurs in search of a financial reward for their hard work. Even if the market rebounds, however, the new regulatory burdens imposed by the Sarbanes-Oxley Act and the related SEC, NYSE and Nasdaq rules and proposals have transformed IPOs into a much less attractive choice.

Moreover, investment bankers nowadays will consider conducting IPOs for fewer businesses, and the valuations they assign to those IPOs are much less generous than they were just a few years ago. Historically popular formulae based on earnings and revenues have been dusted off, and "New Economy" theories of value based on projected web site hits per month have been discarded. The possibility of a further or continued downturn in the economy and the stock markets no longer is discounted as ignorant heresy.

Existing public companies may also conclude that being public in the current regulatory environment is not worth the price. Unfortunately, however, many of these companies may find that, in the current business environment, the private capital needed to fund a buyout of public shareholders in a “going private” transaction is unavailable. Furthermore, unless there is a meaningful economic benefit beyond reduced legal, accounting and administrative costs, few public companies are likely to assume the risk of going private. In fact, the securities law class actions, shareholder derivative actions and dissenters’ rights lawsuits which so often follow going private transactions may be even more likely today in light of depressed share prices.

1. Loss of Control of Financial Results. Sarbanes-Oxley and other recent reforms have dramatically increased the independence and the power of audit committees. As a result, management of public companies almost certainly have lost control of the audit of their companies’ financial statements. While some entrepreneurs may find the prospect of less control over accounting and financial reporting matters disconcerting, it is unlikely to affect the honest businessman’s decision whether to go public or to stay public.

2. Loss of Control of Board of Directors. Requiring the board of directors to have a majority of outside directors, as the NYSE and Nasdaq have proposed, could dramatically undermine the entrepreneur’s control over a newly public company. And while most public companies already utilize compensation committees to determine executive compensation, new mandates from the SEC, NYSE or Nasdaq regarding such committees’ independence and powers, including shareholder approval, appear likely in the wake of Sarbanes-Oxley.

3. Increased Personal Risk. Executives of publicly held companies have always faced personal financial liability if SEC filings they approved and signed later prove to be materially inaccurate. But the stakes have certainly been raised. New criminal sanctions, two separate certification requirements by CEOs and CFOs, a longer statute of limitations for private civil actions, and the denial of discharge in bankruptcy for securities fraud judgments are not likely to make anyone more comfortable with the idea of being an officer, or even a director, of a public company. And giving the SEC the right to bar individuals permanently from serving as officers or directors of any public company on its own accord is likely to increase the risk and frequency of such stigmatic sanctions.

4. Reduced Financial Rewards. The new requirement that executives return bonus and equity compensation if earnings are restated, without regard to whether the particular executive is at fault, certainly changes the risk-reward ratio for highly paid, talented officers of public companies. The inability of public company executives to borrow money from a public company is unlikely to deter a public offering, or spur a going private decision, but the prohibition of material modifications or reversals of existing loans for companies that do not have large loans in place could be decisive in some cases. And the prospect of more independent and less generous compensation committees may also be a real concern.

4. Management, Whistleblowers and Control. Sarbanes-Oxley’s encouragement of corporate whistleblowers and its mandate that corporate lawyers report defalcating employees and officers to their supervisors is, frankly speaking, frightening to many corporate attorneys and executives. The result may be a new reluctance of corporate executives to confide in corporate counsel. Similarly, empowering audit committees to hire their own attorneys, accountants and experts raises concerns about whether public companies inevitably will suffer from internal strife, as internal watchdogs, legally sanctioned and practically immune from removal, generate a counterproductive atmosphere of suspicion and dissent throughout public companies.

5. Faster and Better Disclosure. The enhanced “real time” disclosures of stock sales by insiders and self-dealing transactions with insiders are unlikely to affect an entrepreneur’s decision whether to go public or to stay public. Similarly, the shortened time periods for filing more comprehensive, lucid, special event, quarterly and annual reports probably will not be considered material. Frankly, most executives of newly public companies and existing public companies will always

consider their disclosure obligations to be unduly onerous and burdensome irrespective of any changes made by Sarbanes-Oxley.

In sum, an initial public offering is now a far more daunting proposition for entrepreneurs. The Sarbanes-Oxley Act of 2002 has increased the risks of personal and company liability and the burden of mandatory disclosure obligations, and has diminished the amount of control retained by entrepreneurs. While it may be debatable as a legal matter whether the increased civil and criminal penalties have significantly changed the basis upon which a criminal prosecution or civil action may be based, it is certain that the political atmosphere today makes criminal prosecutions, SEC enforcement actions and private securities class actions for alleged securities fraud more likely than ever before. Coupled with the longer statutes of limitations for private civil actions and the increased risk of whistleblowing, meritless or otherwise, many entrepreneurs may conclude that selling out by a merger or an asset sale is a more prudent exit strategy than entering the minefield of liabilities which are now part of going public or staying public. On the other hand, when the next market boom hits, we may see another mad frenzy to grab IPO riches notwithstanding these new and increased liabilities, regulations and risks.

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