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# Financial Week

## Amicus Curious: How Quickly They Forget

What happens to commerce when one's word can no longer be counted on

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President Bush and Treasury Secretary Paulson seem to have short memories when it comes to Enron and the banks that participated in that financial drama. Enron? What's Enron?

True, the president and his secretary gave a logical enough reason last week for quashing a friend-of-the-court brief that the Securities and Exchange Commission wanted to file in a Supreme Court case that could determine whether Barclays, Credit Suisse and Merrill Lynch are held liable for helping Ken Lay, Jeff Skilling and Andy Fastow (remember them?) commit financial fraud, as plaintiffs represented by the securities mega-lawyer William Lerach charge. Their stated reason was that furthering the cause of aggrieved Enron investors through such an action would hurt the competitiveness of U.S. business. Logical? Well, yes, in so far as litigation can beget more litigation, which anti-regulatory types ranging from the Mr. Paulson-blessed Committee on Capital Markets Reform to the American Enterprise Institute ceaselessly contend is a huge problem for U.S. competitiveness.

But let's briefly review what happened at Enron and what that actually meant for the capital markets. It was a complex disaster for everyone in the markets, not just Enron investors. The company's stunning collapse after its fraud was revealed led to a severe loss of confidence in U.S. markets that ultimately cost trillions in equity value, and that in turn led to the near-universally criticized Sarbanes-Oxley Act (with the support of the Bush administration). Given all that, what could possibly be more harmful to U.S. companies in need of capital than another fraud on the scale of Enron?

Now we're supposed to forget all that. Come to closure. Stop the hand-wringing, because that was then and this is now. Really? This type of thinking is worse than shortsighted, if only because, to crib from George Santayana, historic events shoved down the memory hole tend to get repeated ad nauseam. And Enron was nothing if not historic (not to say nauseating).

To help jog foggy memories, the column at left contains excerpts from a legal filing against the three aforementioned banks that describes what plaintiffs say they did to help land Messrs. Skilling and Fastow in prison (Mr. Lay died while awaiting sentencing). Banks and others not found to be "primary actors" in financial fraud have long enjoyed legal protection in the U.S. Yet that protection isn't as airtight as it once was. While the Supreme Court ruled in 1994 that those who merely aid and abet financial fraud are not subject to legal action, Congress changed the law the following year to allow the SEC (though not investors) to pursue secondary actors. So why is a friendly brief from the SEC on behalf of investors who want to test the 1995 law uncalled for when only a few years later Enron paid investment banks generous fees for projects that ultimately helped management pull off one of the biggest scams ever? It's not as if the banks had no idea what the fees were for, as Mr. Fastow himself once bragged that they approached him at one point with marketing pitches for the same types of phony partnerships he'd already put in place. And while Citigroup, J.P. Morgan Chase and Canadian Imperial Bank of Commerce reached expensive settlements for their parts in the debacle, they may regret doing so in light of the Bush administration's current stance.

Even the Italian government, which isn't exactly known for the probity of its financial regulation, is pursuing

banks implicated in fraudulent deals more aggressively. Last week, prosecutors in Milan filed criminal charges against Citi, Deutsche Bank, Morgan Stanley and UBS for underwriting what they call fraudulent bonds issued by now-defunct Parmalat. This suggests Messrs. Bush and Paulson think U.S. capital markets will benefit from being more lenient than Italy's toward bad behavior by investment banks. Not exactly a ringing recommendation for the quality of U.S. capital markets. Instead, it is an argument to the effect that the more poorly companies and their advisers treat investors, the easier it will be for those companies to raise capital. That is simply not the basis of a sound financial system. FW

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