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THINKING ABOUT TAKING YOUR COMPANY PUBLIC?

With the signing the Sarbanes-Oxley Act of 2002 (the "Act") the corporate landscape of America was forever changed. The Act is the most sweeping legislation affecting corporate governance, disclosure requirements and accounting and auditing since the establishment of the securities laws in the 1930s. The implications for public companies, their directors, officers and stockholders, and the legal and accounting professions are extremely significant. The Act is the President's and Congress' response to a series of corporate and accounting scandals involving large public companies, such as Enron, WorldCom, and Global Crossing, which have led to a loss of confidence by the investing public.

The purpose of the Act is to restore the confidence of the investing public in the markets by adding new disclosure requirements, revising the current governance standards, creating an auditor oversight board, increasing criminal penalties for securities laws violations and creating new crimes relating to fraud. The Act, however, has created many issues and areas of uncertainty, which may take years to resolve.

The following points highlight what business owners and corporations should expect under the new Act.

Auditor Independence and Oversight

- ◆ The role of the Audit Committee takes on even more importance as the Committee becomes responsible for the appointment, compensation, and oversight of auditors, who must report directly to the Audit Committee, not management. The Committee must have the authority and the funding to retain independent counsel and other advisors.
- ◆ Members of the Audit Committee must be independent Directors and cannot accept any consulting, advisory, or other compensatory fees from the company other than a director's fee. Committee members may not be an "affiliated person" of the company, however, the SEC may provide exemptions.

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- ◆ The Chairman of the Audit Committee must be a "financial expert", which is defined as someone who has gained certain financial experience as a public accountant or auditor, or as a principal financial officer, controller, or principal accounting officer of a public company. The Chairman is directly responsible for oversight of outside auditors to the Audit Committee.
- ◆ The Audit Committee must pre-approve all audits and permitted non-audit services and is responsible for resolving disagreements between management and auditors. The Committee also requires regular reports from auditors.
- ◆ The Audit Committee must establish procedures for processing complaints received by the company regarding accounting or auditing matters and confidential, anonymous submission of complaints by employees.
- ◆ The Committee will meet separately each quarter with management, internal auditors, and independent auditors and will discuss annual and quarterly financials with management and auditors. Additionally, the Committee will discuss with management risk assessment, risk management policies, and earnings releases and earnings guidance to be provided to analysts and ratings agencies.

Code of Ethics for Senior Officers

- ◆ Companies are required to adopt and disclose a code of business conduct and ethics for directors, officers, and employees, and promptly disclose any waivers of the code for directors and executive officers. The code of ethics must cover, among other things, conflicts of interest, disclosure policies, and compliance with governmental requirements.

Accountability, Liability, and Enforcement

- ◆ New rules require that the CEO and the CFO certify each annual or quarterly report filed with the SEC. The information in the

report must fairly present, in all respects, the financial condition and operating results of the company. Criminal liability attaches to those who certify any statement knowing that the report does not comport with all the relevant requirements. Sanctions include fines up to \$5 million and imprisonment up to 20 years.

- ◆ CEOs and CFOs are required to forfeit any bonuses or other incentive-based or equity-based compensation and any profits from the sale of securities of the company they might receive during the 12-month period following the issuance or filing of a financial report for which the company was required to prepare an accounting restatement due to material noncompliance of the company as a result of "misconduct" with any financial reporting requirement under the securities laws.
- ◆ Companies are prohibited from making any new extensions of credit, renewing existing credit, or materially modifying existing credit in the form of a personal loan to or for any director or executive officer. Prohibition includes items such as allowing cashless or "same-day" exercises of stock options and charging personal expenses to corporate credit cards, even if they are promptly repaid to the company. The purchase or sale of stock by officers and directors and other insiders during pension fund blackout periods also is prohibited.

The attorneys in Broad and Cassel's White Collar Criminal and Civil Fraud Defense Practice Group have a sophisticated understanding of how government investigators work at every level as well as our clients' operations and workforce. Broad and Cassel's attorneys believe in litigation prevention and have experience in the informal resolution of investigations, without formal criminal or civil fraud enforcement action. We also have unsurpassed experience in dealing with fraud matters in its many forms (criminal, civil and administrative) and with all its collateral consequences, such as Federal and state sanctions and disciplinary matters and government debarment and exclusions and contractual relationships. Broad and Cassel's attorneys also offer clients the tools they need to proactively avoid criminal and civil exposure and protect their businesses, property, and liberty. For more information, visit our website at www.broadandcassel.com.

