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BOCA RATON / FT. LAUDERDALE / MIAMI / ORLANDO / TALLAHASSEE / TAMPA / WEST PALM BEACH

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What is the Sarbanes-Oxley Act?

On July 30, 2002, President Bush signed the Sarbanes-Oxley Act of 2002 (the "Act") into law after both Houses of Congress passed the Act by overwhelming margins. 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 a lot of issues and areas of uncertainty which may take years to resolve.

*For more information, contact Broad and Cassel's Corporate and Securities Practice Group, or our White Collar Criminal and Civil Defense Practice Group. **BC***

Sarbanes-Oxley Act of 2002

KEY PROVISIONS OF THE ACT

CORPORATE GOVERNANCE REQUIREMENTS

Certification of Periodic Reports by CEOs and CFOs

The Act has two separate sections requiring certifications for CEOs and CFOs: Section 906 (the "Section 906 Certification"), and Section 302 (the "Section 302 Certification.")

Section 906 Certification

Provides for a statement that any periodic report containing financial statements fully complies with Section 13(a) or 15(d) of the Exchange Act and that the information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the public company. It also provides for criminal penalties for a willful and knowing violation. Companies should promptly begin the internal process to support the Section 906 Certification.

Section 302 Certification

Instructs the SEC to require that each Form 10-K and Form 10-Q report filed with the SEC include a written certification by a company's principal executive officer and principal financial officer that:

- The signing officer has reviewed the report;
- Based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;
- Based on the officer's knowledge, the financial statements and other financial

information included in the report, fairly present in all material respects the financial condition and results of operations of the company as of, and for, the periods presented in the report;

- The officers are responsible for establishing and maintaining internal controls, have designed such internal controls to ensure that material information relating to the company and its subsidiaries is made known to such officers, have evaluated the effectiveness of the company's internal controls as of a date within 90 days prior to the report, and have presented in the report their conclusions as to the effectiveness of the internal controls based on that evaluation;
- The officers have disclosed to the company's auditors and the audit committee all significant deficiencies in internal controls and any fraud, whether or not material, involving management or employees who have a significant role in internal controls; and
- The signing officers have indicated in the report whether or not there were significant changes in internal controls subsequent to the date of their evaluation.

All companies should promptly begin to evaluate their company's internal controls in order to be able to support the Section 302 Certification.

Audit Committee Responsibilities

— Audit Committees must:

- Be responsible for the appointment, compensation and oversight of auditors and the auditors must report directly to the audit committee and not management;

- Consist of independent members of the board of directors;
- Establish procedures to treat complaints received by the company regarding accounting or auditing matters and confidential, anonymous submission of complaints by employees; and
- Have the authority and the funding to engage independent counsel and other advisers to carry out its duties.

Public companies which do not have audit committees complying with the foregoing will be prohibited from being listed on national securities exchanges and NASDAQ.

Prohibitions on Personal Loans to Executives

— Prohibits companies 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. This 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.

Forfeiture of Bonuses and Profits

— Requires CEOs and CFOs to forfeit to the company any bonuses, or other incentive-based or equity-based compensation, and any profits from the sale of securities of the company, received by the CEO or CFO 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 public company as a result of "misconduct" with any financial reporting requirement under

the securities laws.

Bars on Officers and Directors —

Expands the SEC's authority to prohibit any person, conditionally or permanently, who has violated certain anti-fraud provisions of the federal securities laws from serving as an officer or director of any issuer that has a class of securities registered pursuant to Section 12, or which is required to file reports pursuant to Section 15(d), of the Exchange Act if the person "demonstrates unfitness" to serve as an officer or director of such issuer.

Insider Trades During Pension

Plan Blackouts — The Act prohibits any executive officer or director of a company directly or indirectly, to trade or transfer any equity security of such company during any pension plan blackout period if the officer or director acquires the security in connection with his or her service as an officer or director. This Section will go into effect January 26, 2003.

Code of Ethics — The Act requires the SEC to promulgate rules that require companies to disclose in its periodic reports whether it has adopted a code of ethics for senior financial officers by January 2003. The SEC has adopted rules implementing this provision.

Rules of Professional

Responsibility for Lawyers — The Act requires the SEC to promulgate rules by January 26, 2003, which set forth the minimum standards of professional conduct for attorneys appearing and practicing before the SEC. The SEC rules must require attorneys to report evidence of a material violation of the securities laws or a breach of fiduciary duty or similar violation by the company or any company agent to either the Chief Legal Officer or CEO. If appropriate action is not taken, the

attorney must report the evidence to the audit committee, another committee made up of only independent directors, or to the board of directors.

NEW DISCLOSURE REQUIREMENTS

The Act requires companies to comply with new disclosure requirements. The new requirements include:

Financial Statements Must

Reflect All Material Correcting

Adjustments — Every financial report filed with the SEC, which contains financial statements, is required to reflect all "material correcting adjustments" identified by a registered public accounting firm. The Act, however, does not define the term "adjustment."

Real-Time Disclosure —

Companies will now be required to disclose to the public on a "rapid and current basis" and in plain English, any information concerning material changes in its financial condition or operations as the SEC determines is necessary or useful. The SEC is required to adopt rules to implement this provision.

Disclosures in Periodic Reports —

The SEC is required to issue rules by January 26, 2003, providing for disclosures in Form 10-Ks and Form 10-Qs of "all material off-balance sheet transactions, arrangements and obligations and other relationships of the issuer with unconsolidated entities or other persons."

Section 16 Insider Trading

Disclosure — Effective August 29, 2002, the Act amends Section 16(a) of the Exchange Act to require Section 16 (a company's directors, officers and 10 percent beneficial owners) filers to disclose changes in ownership of securities prior to the end of the second business day after the transaction is executed.

Previously, the disclosure was required prior to the 10th day of the calendar month following the transaction. The SEC has adopted rules implementing this provision.

Management Assessment of

Internal Controls —

The Act requires the SEC to adopt rules requiring that Form 10-Ks contain an "internal control report." The SEC is required to adopt rules to implement this provision.

Disclosure of Audit Committee

Financial Expert —

The SEC is required to adopt rules that require a company to disclose whether its audit committee has at least one member who is a "financial expert," and if not, the reason why not by January 2003.

ACCOUNTING REFORM PROVISIONS

Accounting Oversight Board —

The Act creates a Public Company Accounting Oversight Board.

Auditor Independence —

The Act prohibits registered accounting firms from providing any non-audit services to a company "contemporaneously with an audit."

Registered public accounting firms will now be required to rotate their lead audit partner or the coordinating audit partner responsible for reviewing the audit every five years.

The Act prohibits any company officer or director or person acting under an officer's or director's direction from fraudulently influencing, coercing, manipulating or misleading any independent public accountant that is engaged in the performance of an audit of the company's financial statements for the purpose of rendering the statements materially misleading.

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INCREASED CRIMINAL PENALTIES AND NEW FELONIES

Criminal Provisions — The Act strengthens existing criminal penalties and creates new criminal prohibitions:

- ◆ Destruction of Documents
- ◆ Destruction of Audit Records
- ◆ Securities Fraud
- ◆ Criminal Conspiracy to Commit an Offense Against or to Defraud the U.S.
- ◆ Mail and Wire Fraud
- ◆ Retaliation Against Informants
- ◆ Violations of ERISA

- ◆ Violations of the Exchange Act
- ◆ Violations of Certification Requirement

Statute of Limitation for Securities

Fraud — The Act extends the statute of limitations for investors to file a private action for securities fraud to two years after discovery of the facts and five years after the occurrence of the alleged violation (compared with the current 1- and 3-year limitations, respectively). This provision applies to all actions filed after July 30, 2002.

Protection for Whistleblowers — The Act protects employees of public companies against retaliatory discharge or other adverse employment action for providing information or otherwise assisting in investigation by governmental agencies,

the members of Congress or a supervisory authority over the employee involving alleged violations of the securities laws, SEC regulations or securities fraud. A prevailing employee shall be entitled to relief including reinstatement, back pay with interest, and compensation for any special damages. Claims must be brought within 90 days of the date of the violation. This provision became effective immediately upon enactment of the Act.

Temporary Freeze Authority — The Act authorizes the SEC to petition the court for a temporary order requiring a public company to escrow for 45 days any extraordinary payments to any officer, director, partner, controlling person, agent or employee during an investigation of possible securities law violations. **BC**