The Center for American and International Law

Southwestern Institute for International and Comparative Law

Multi-National Counsel Boot Camp: Practical Solutions for International Lawyers

A Never Ending Saga - Sarbanes Oxley and Doing Business Abroad

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SOX Overview

The Sarbanes-Oxley Act of 2002 ("SOX") is a United States federal law enacted on July 30, 2002, which mandated a number of reforms to enhance corporate responsibility, enhance financial disclosures and combat corporate and accounting fraud. Among other things, SOX:

- Established the Public Company Accounting Oversight Board ("PCAOB")

- Strengthened penalties for corporate fraud

- Sets requirements for management to annually state responsibility for establishing and maintaining an adequate internal control structure and procedures for financial reporting (Section 404a)

- Sets requirements for the independent auditor to opine on the effectiveness of the Company’s Internal Control over Financial Reporting as of the reporting date (Section 404b)

- Establishes standards of professional conduct for attorneys practicing before the US SEC (Section 307)
Applicability to non-US Companies

SOX applies to all public companies in the U.S. and international companies that have registered equity or debt securities with the Securities and Exchange Commission and the accounting firms that provide auditing services to them.
Key Components of SOX

Certification
• CEOs and CFO must certify periodic SEC reports (both the 10Q and 10K)

Corporate governance
• Independent Audit Committee directly responsible for appointment, pre-approval, compensation, and oversight of the public accounting firm, including the resolution of disagreements between management and the auditor regarding financial reporting

Potential Criminal Penalties
• Each periodic report containing financial statements filed with the SEC shall be accompanied by a written certification by the CEO and CFO:
  – Information must present fairly, in all material respects, the financial condition and results of operations of the issue
• Certifying statements that do not comply with the requirements may result in up to 10 years in prison and/or up to $5 million fine

Complaints and Anonymous Tips
• The Audit Committee must have procedures for the receipt of complaints regarding questionable accounting, auditing or internal control
• Complaints must be anonymous and confidential
**Overview of Internal Control Certification Requirements**

**SOX** imposes significant responsibilities upon executives:

<table>
<thead>
<tr>
<th>Section 302 Certification Overview</th>
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<tr>
<td>CEO and CFO to make specific certifications as of the end of each <strong>quarterly</strong> and <strong>annual</strong> reporting period, including:</td>
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<td>• Report contains no untrue statements</td>
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<td>• Report is fairly presented in all material respects</td>
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<td>• Responsibility for design and maintenance of disclosure controls and procedures as well as internal controls over financial reporting</td>
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<td>• Not based on a specific criteria (approach based on risk)</td>
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<tr>
<th>Section 404 Certification Overview</th>
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<td>CEO and CFO to certify as of the end of every <strong>annual</strong> reporting period:</td>
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<td>• Their responsibility for establishing and maintaining effective internal controls over financial reporting (ICFR)</td>
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<td>• Their assessment of internal controls, accompanied by the independent auditors’ attestation report</td>
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<td>• Based on a specific criteria (i.e. COSO)</td>
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<th>Section 906 Certification Overview related to 302 and 404 Certifications</th>
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<tr>
<td>• CEOs and CFOs to make certifications that all financial reports—including <strong>annual</strong> and <strong>periodic</strong> reports—fairly presents, in all material respects, the financial condition and results of operations of the issuer and that they conform and comply with the Act.</td>
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<td>• It also provides for significant criminal penalties for non-compliance. (see previous slide)</td>
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## Overview of Rules of professional responsibility for attorneys

### Section 307 Overview

An attorney appearing before the SEC must:
- Report material violations of securities law or fiduciary responsibilities
- Detailed procedures for reporting

Some potential conflicts with state bar rules of professional responsibility

Statute states that it takes precedence over state bar

Does not apply to “Non-appearing foreign attorneys”

### Non-appearing Foreign Attorney

(j) Non-appearing foreign attorney means an attorney:
1. Who is admitted to practice law in a jurisdiction outside the United States;
2. Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other...; and
3. Who:
   - Conducts activities that would constitute appearing and practicing before the Commission only incidentally...; or
   - Is appearing and practicing before the Commission only in consultation with counsel, ..., admitted or licensed to practice in a state or other United States jurisdiction.
Potential SOX Implementation Challenges

1. Understanding the risk to the Company should material weaknesses be identified.
2. Cost of compliance
3. Understanding the impact of internal control compliance to the business
4. Implementing with speed and efficiency
5. Integrating SOX efforts with other work streams
6. Determining when to outsource areas of internal controls
7. Determining global leadership structure to support SOX compliance and understanding global challenges
8. Training Company on internal controls and SOX requirements
9. Selecting and implementing supporting compliance technology
10. Managing global expectations about the complexity of an initial SOX 404 implementation
References and Resources

Sarbanes Oxley Statute

US Securities and Exchange Commission, Spotlight on Sarbanes-Oxley Rulemaking and Reports
http://www.sec.gov/spotlight/sarbanes-oxley.htm

17 CFR 205 Standards of Professional Conduct For Attorneys Appearing and Practicing Before the Commission In The Representation Of An Issuer
http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=bf16e79517599f11c896dc9655e2d4e5&mc=true&n=pt17.3.205&r=PART&ty=HTML

Public Company Accounting Oversight Board (PCAOB)
http://pcaobus.org/Pages/default.aspx

Committee of Sponsoring Organizations of the Treadway Commission (COSO)
http://www.coso.org

Control Objectives for Information and Related Technologies (COBIT)
https://cobitonline.isaca.org/