



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:

Section 302 Certification Overview

CEO and CFO to make specific certifications as of the end of each **quarterly** and **annual** reporting period, including:

- Report contains no untrue statements
- Report is fairly presented in all material respects
- Responsibility for design and maintenance of disclosure controls and procedures as well as internal controls over financial reporting
- Not based on a specific criteria (approach based on risk)

Section 404 Certification Overview

CEO and CFO to certify as of the end of every **annual** reporting period:

- Their responsibility for establishing and maintaining effective internal controls over financial reporting (ICFR)
- Their assessment of internal controls, accompanied by the independent auditors' attestation report
- Based on a specific criteria (i.e. COSO)

Section 906 Certification Overview related to 302 and 404 Certifications

- CEOs and CFOs to make certifications that all financial reports—including **annual** and **periodic** 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.
- It also provides for significant criminal penalties for non-compliance. (see previous slide)

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

Statue 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:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally. . . ; or

(ii) 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

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

References and Resources

Sarbanes Oxley Statute

<http://www.gpo.gov/fdsys/pkg/BILLS-107hr3763enr/pdf/BILLS-107hr3763enr.pdf>

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/>



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