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LEGAL ALERT

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SECURITIES LAW ALERT

APPLICABILITY OF THE SARBANES-OXLEY ACT OF 2002 TO FOREIGN ISSUERS

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On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002 ("Act"). The Act, which applies to any issuer, including any foreign issuer, that has securities registered, or that is required to file reports, under the Securities Exchange Act of 1934 ("Exchange Act"), provides significant revisions to the U.S. securities laws and establishes a new regulatory requirement for accounting firms that audit public companies.[1]

Certain provisions of the Act became effective immediately upon signature or within a specified period after enactment. Other provisions require the Securities and Exchange Commission (the "SEC") to adopt specific regulations within a certain period of time. The purpose of this memorandum is to provide a brief synopsis of the key provisions of the Act for foreign issuers, to highlight matters that require immediate attention and those that will require further consideration once the SEC proposes and then promulgates rules.

CEO and CFO Certification

The Act contains two provisions requiring certifications by the chief executive officer and chief financial officer (or equivalent) of issuer disclosures: one under Section 906, and the other under Section 302.

Section 906

Under Section 906, chief executive officers and chief financial officers are required to provide a certification to accompany any periodic report containing financial statements filed under Section 13(a) or 15(d) of the Exchange Act. The officers must certify that:

- the periodic report fully complies with the requirements of Section 13(a) or 15(d) of the Exchange Act; and
- the information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

This means that any Form 20-F or Form 40-F filed with the SEC must be accompanied by a Section 906 certification. It is currently unclear how the CEO/CFO certification will apply to foreign issuers submitting quarterly or semi-annual financial statements to the SEC under a Form 6-K and we suggest that you consult with us before making any financial statement filings on this form.

Whoever certifies any statement "knowing" that (a) the periodic report accompanying the certification does not fully comply with Section 13(a) or 15(d) of the Exchange Act or (b) the information contained in the periodic report does not fairly present, in all material respects, the financial condition and results of the issuer, is subject to criminal penalties under the Act which may be increased if the violation is "willful".

Section 302

Section 302(a) of the Act and Exchange Act Rules 13a-14 and 15d-14 promulgated thereunder require an issuer's principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, each to certify in each quarterly and annual report, including transition reports, filed or submitted by the issuer under Section 13(a) or 15(d) of the Exchange Act that:

- he or she has reviewed the report;
- based on his or her 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 with respect to the period covered by the report;
- based on his or her knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of, and for, the periods presented in the report;
- he or she and the other certifying officers:

    - are responsible for establishing and maintaining "disclosure controls and procedures" (a newly-defined term) for the issuer;
    - have designed such disclosure controls and procedures to ensure that material information is made known to them, particularly during the period in which the periodic report is being prepared;
    - have evaluated the effectiveness of the issuer's disclosure controls and procedures as of a date within 90 days prior to the filing date of the report; and
    - have presented in the report their conclusions about the effectiveness of the disclosure controls and procedures based on the required evaluation as of that date;

- he or she and the other certifying officers have disclosed to the issuer's auditors and to the audit committee of the board of directors (or persons fulfilling the equivalent function):

    - all significant deficiencies in the design or operation of internal controls of which he or she is aware (a pre-existing term relating to internal controls regarding financial reporting as required pursuant to Section 13(b) of the Exchange Act) which could adversely affect the issuer's ability to record, process, summarize and report financial data and have identified for the issuer's auditors any known material weaknesses in internal controls; and
    - any fraud, whether or not material, of which he or she is aware that involves management or other employees who have a significant role in the issuer's internal controls; and

- he or she and the other certifying officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

The Section 302(a) certification is to be included in each annual or quarterly report filed or submitted under either Section 13(a) or 15(d) of the Exchange Act. In the case of foreign issuers, the certification requirement applies to annual reports on Forms 20-F and 40-F. Finally, the certification requirement applies to amendments to, and transition reports on, any of the foregoing reports. Reports that are current reports, such as reports on Forms 6-K and 8-K, rather than periodic (quarterly and annual) reports are not covered by the certification requirement.

New Exchange Act Rules 13a-15 and 15d-15 require an issuer to maintain adequate disclosure controls and procedures, so that its principal executive and financial officers can supervise and review these periodic evaluations and report the results to security holders through the issuer's Exchange Act reports.

For additional information concerning the officer certification requirements, we suggest that you review our separate September 2002 Securities Law Alert on this topic.

Prohibition on Personal Loans to Officers and Directors

The Act prohibits U.S. and foreign issuers from, directly or indirectly, including through any subsidiary, extending or maintaining credit, arranging for the extension of credit, or renewing an extension of credit, in the form of a personal loan to or for any director or executive officer. Among the types of arrangements that may be prohibited in addition to conventional loan transactions are loans pursuant to split-dollar life insurance policies and certain cashless exercises of options.

The Act does not define the terms "director" or "executive officer" but specifically provides that persons in equivalent positions are covered by the prohibition. Under Section 3(a)(7) of the Exchange Act, a "director" includes any director of a corporation or any person "performing similar functions with respect to any organization, whether incorporated or unincorporated."

Exchange Act Rule 3b-7 defines an "executive officer" as the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions. Executive officers of subsidiaries may be deemed to be executive officers of the parent company if they perform policy-making functions at the parent company level.

Loans in existence as of July 30, 2002, the date of enactment of the Act, would not be prohibited, provided that on or after that date there is no material modification of any term and such loan is not extended or renewed.

The Act excepts specified ordinary course home improvement loans, consumer credit, or margin loans by SEC-registered broker-dealers to their own employees. The excepted loans must be available to the public and made on market terms.

Forfeiture of Certain of Bonuses and Profits in the Event of a Restatement

If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirements, effective immediately, the Act requires the chief executive officer and chief financial officer to reimburse to the issuer for:

- any bonus or other equity or incentive-based compensation paid by the issuer to the chief executive officer or chief financial officer during the 12-month period following the first public issuance or filing of the noncomplying financial document; and
- any profits realized from the sale of the issuer's securities by the chief executive officer or chief financial officer during the same 12-month period.

The SEC is authorized to exempt any person from this provision as it deems necessary and appropriate.

Disclosure of Auditor Adjustments

The Act requires disclosure in periodic reports of all material correcting adjustments identified by the issuer's independent auditor in accordance with generally accepted accounting principles and SEC rules.

Establishment of Public Company Accounting Oversight Board

The Act establishes an independent, nongovernmental accounting oversight board (the "Board") to oversee the audit of public companies that are subject to the federal securities laws. The Board is required to be fully organized by April 26, 2003. Within 180 days after commencement of operations, public accounting firms will be required to register with the Board in order to perform audit functions for any public company.

The Board is responsible for overseeing the auditing of public companies and establishing auditing, quality control, ethics, independence and other standards relating to the preparation of audit reports. Foreign public

accounting firms are specifically made subject to the requirements of the Act to the same extent as U.S. public accounting firms.

In addition, the Board is authorized to make a foreign public accounting firm subject to the Act even though it does not issue an audit opinion to an issuer subject to the Act, provided the Board determines such a firm plays a "substantial role" in the preparation and furnishing of such audit opinions.

The SEC and the Board have been given authority to exempt any foreign public accounting firm from the provisions of the Act and the rules of the SEC and the Board. It is not known at this time whether either of these bodies will use its exemptive authority to address the potential difficulties faced by foreign public accounting firms.

Services Outside the Scope of Practice of Auditors

Beginning 180 days after commencement of operations of the Board, the Act prohibits any registered public accounting firm from providing non-audit services contemporaneously with audit services. Non-audit services include:

- Bookkeeping or other services related to the accounting records or financial statements of the audit client.
- Financial information system design and implementation.
- Appraisal or valuation services, fairness opinions, or contribution-in-kind reports.
- Actuarial services.
- Internal audit outsourcing services.
- Management functions or human resources.
- Broker or dealer, investment advisor, or investment banking services.
- Legal services and expert services unrelated to the audit.
- Any other service that the Board determines, by regulation, is impermissible

Pre-approval Requirements

Following the establishment of the Board, the issuer's audit committee[2] must approve all auditing and non-auditing services provided to an issuer, including the issuance of comfort letters in connection with securities underwritings, subject to certain *de minimis* exceptions. In addition, the Act requires that any non-auditing services approved by the audit committee be disclosed to investors in the issuer's periodic reports.

Audit Partner Rotation

The Act prohibits a registered public accounting firm from providing audit services to an issuer if the lead audit partner, or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the five previous fiscal years of that issuer.

Auditor Reports to Audit Committees

The Act requires accounting firms to report to the audit committee of the issuer the methods, practices and policies behind the audit work.

Conflicts of Interest

The Act prohibits an accounting firm from providing audit services for an issuer if the chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in the equivalent capacity for the issuer was employed in the audit practice of the accounting firm during the one year period prior to the audit.

Public Company Audit Committees

The Act directs the SEC to promulgate rules by April 26, 2003, which will prohibit the listing by national securities exchanges and Nasdaq of any security of an issuer that does not have an audit committee of its board of directors which is:

- Composed entirely of independent directors. In order to be considered to be independent, the member of the audit committee may not, other than in his or her capacity as a member of the board of directors, accept any consulting, advisory or other compensatory fee from the issuer or be an affiliated person of the issuer or any subsidiary. The Act gives the SEC authority to exempt particular relationships with respect to audit committee membership.
- Directly responsible for the appointment, compensation and oversight of the issuer's auditors (including the resolution of disagreements between management and the auditor regarding financial reporting).
- Equipped with procedures for receiving accounting complaints and concerns with respect to the issuer, including confidential submissions by employees.
- Authorized to engage the issuer's auditors and to retain independent counsel or other advisers as it deems necessary.

Disclosure of Audit Committee Financial Expert

The Act directs the SEC to issue rules by April 26, 2003 to require each issuer to disclose whether or not, and if not, the reasons therefore, its audit committee includes at least one "financial expert" (to be defined by the SEC) to serve on its audit committee.

Insider Trades During Pension Fund Blackout Periods

The Act prohibits directors and executive officers of an issuer from purchasing, selling or transferring (other than an exempted security) any equity security of that issuer during any pension fund blackout period under a company's 401(k) plan, pension plan, or other profit sharing plan or retirement plan if such director or officer acquires such equity security in connection with his or her service or employment as a director or executive officer and provides for disgorgement of any profits received from such transfers during blackout periods. Exceptions to this rule are made for merger and acquisition activity. The Act requires employers to give employees 30-day advance written electronic notice of any pension fund blackout period.

Rules of Professional Responsibility for Attorneys

The Act requires the SEC to issue rules by April 26, 2003 that will require attorneys that appear or practice before the SEC to report violations of securities laws to the CEO or chief legal counsel of the issuer and, if no action is taken, to the audit committee.

Disclosures in Periodic Reports

The Act requires by the SEC to issue final rules by April 26, 2003 to require that all annual and quarterly financial reports filed with the SEC to fully disclose off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons that may have a material current or future effect on the financial condition of the issuer.

The Act requires the SEC to issue final rules by April 26, 2003 to require that pro forma financial information included in any periodic or other report filed with the SEC pursuant to securities laws or included in a press release or other public disclosure, does not contain an untrue statement of a material fact.

Management Assessment of Internal Controls

The Act directs the SEC to issue rules (without a deadline for such issuance) requiring that annual reports filed with the SEC shall state the responsibility of management for establishing and maintaining adequate internal control structure and procedures for financial reporting; and contain an assessment, of the effectiveness of such internal controls.

The Act requires that accounting firms also report on internal controls of the client.

Code of Ethics for Senior Financial Officers

The Act directs the SEC to issue rules by April 26, 2003 that require issuers to publicly disclose whether or not, and, if not, the reason therefor, the issuer requires senior financial officers to sign a code of ethics.

About Our Securities Law Practice Group

Our broad ranging securities law practice includes representation of both domestic and foreign issuers in public and private securities offerings (including ADR offerings), preparation of SEC periodic reporting documents, advice with respect to compliance with SEC regulations, mergers and acquisitions, state securities work, and preparation of general corporate and financing documents.

[1] The Act also applies to issuers that have filed a registration statement under the Securities Act of 1933, as amended, that has not yet become effective and that has not been withdrawn. However, the Act does not apply to foreign issuers furnishing information to the SEC pursuant to the exemption set forth in Rule 12g3-2(b).

[2] The Act does not require that a public company have an audit committee, although the stock exchanges and Nasdaq Stock Market require the establishment of an audit committee as a condition to listing. If a company does not have an audit committee, it appears that the entire board of directors will be considered the audit committee and will have to meet the Act's criteria.