A GOOD ACT TO FOLLOW

THE SARBANES-OXLEY ACT WAS PASSED LAST YEAR IN THE US IN RESPONSE TO CORPORATE SCANDALS SUCH AS ENRON AND WORLDCOM. BUT AS **MARK WILSON** OF BANK OF NEW YORK FINDS, OUT THERE ARE IMPLICATIONS FOR SEC-LISTED UK FIRMS TOO.

The Sarbanes-Oxley Act (SOx) legislation passed by the US Congress in July 2002 represents one of the most significant and wide ranging pieces of American securities legislation since the Glass-Steagall Act of the 1930s, which required the separation of investment and commercial banking activities by US banks.

The Act was passed largely as a response to the Enron, WorldCom and similar corporate scandals in the US. However, the scope of the legislation is such that it has implications for any non-American company that reports to the US SEC under the Securities Exchange Act of 1934 (for example, Form 20-F). In the UK, about 100 companies are affected by the Act, the great majority of these being listed on one of the US exchanges. It is the SEC reporting status resulting from registration of equity or debt, rather than the actual US listing, that triggers the SOx provisions, and for this reason companies with unlisted or privately placed debt or equity securities in the US, typically reliant on an SEC 12g3-2(b) exemption, are not generally caught in the SOx net. Currently, 80-plus UK companies maintain the exemption through their Level One American Depository Receipt (ADR) facility or 144A private placement.

A combination of SOx and the state of the equity markets (on both sides of the Atlantic) has led to a total absence of UK companies filing new US registration statements during the second half of 2002 and the immediate outlook for the first quarter of 2003 is much the same. Those companies working on a US registration statement, perhaps in contemplation of a US listing, have not unreasonably decided to wait to see how those with an existing 20-F have faired, and also to see some of the fine print as the US SEC introduces the rules necessary to implement the provisions of the Act. Your lawyers should be advising you almost weekly of these rules (see also *The Treasurer*, September and December 2002).

Although those companies with a June or September financial year end will have already been through the process, for those with a 31 December financial year end, the first annual filing with the SEC under the new Act will be in the first or second quarter of 2003. With no urgent reason to seek a US listing in the current market environment, watching and waiting has been the sensible option for potential new registrants. Have any companies decided not to register in the US because of SOx? It is difficult to judge because, with one or two exceptions, it is not the sort of information companies would normally make public. However, it is apparent that those companies planning to register in the US have well thought out reasons for doing so. These may relate to the long-term commercial and financing activities of the company, or the need to provide additional compensation alternatives for US employees; these potential benefits remain valid, despite SOx. The barrier to entering the US capital markets may have been raised by the rule changes, but the logic for the SEC registration remains unaltered.

As for the SEC, its recent and imminent publication of a number of proposed rules to implement the provisions of SOx provide the opportunity for it to modify some of the more controversial clauses of the Act. A good example of its willingness to try and accommodate issues raised by non-US registrants are the recently announced concessions relating to the independence of audit committees. Some provisions of the Act will require a recalibration of internal policies and procedures, notably the requirement for chief executives and chief financial officers to attest to the accuracy of their company's accounts. Over the years, however, the SEC has encouraged non-US companies to enter the US financial markets and in the past has, where possible, tried to accommodate UK and other foreign registrants. The most notable example of this being the exemption from the requirement applicable to US firms for the filing of quarterly financial statements. Despite SOx, this policy has not changed.

Many of the changes necessary to internal policies and procedures may be seen as transitional because, once incorporated, they will become part of normal corporate routine. In many respects, the impact of the legislation is likely to be greatest on the companies' professional advisers such as accountants and lawyers.

SOx may well have made those companies contemplating a US registration pause, but in this highly competitive environment can a company with sound business and financial reasons afford not to access the US capital markets when conditions allow?

Mark Wilson is Head of ADRs, UK & Ireland at The Bank of New York.
mwilson@bankofny.com
www.adrbny.com