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Privacy/International/SOX/
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ALERT

Disagreements Continue Between the SEC and France on Sarbanes-Oxley Whistle Blowing Procedures

As explained in more detail in our Bingham Alert of 12/05, "**Sarbanes-Oxley Act Whistle Blowing Measures Meet Resistance in the EU,"** the Commission nationale de l'informatique et des libertés (the French Data Protection Authority or "*CNIL*") has imposed detailed requirements on employers that are required by the Sarbanes-Oxley Act, Section 301 and Securities and Exchange Commission Rules (collectively "SOX") to implement whistle blowing procedures in France (the "CNIL Guidelines"). The CNIL Guidelines are intended to ensure that whistle blowing schemes are consistent with French data protection laws. In light of numerous questions by many U.S-listed multinationals about the Guidelines, on March 23,2006, *CNIL* issued a list of Frequently Asked Questions ("FAQs") (http://www.cnil.fr/index.php?id=1982 – English version) in an effort to clarify the Guidelines.

CNIL has issued FAQs that provide further guidance, but it remains unclear whether US authorities will accept the French provisions.

According to CNIL, companies providing whistle blowing schemes in France must now register with CNIL, but it is unclear whether companies that do not register will be sanctioned. Apparently, already 80 companies (most of them listed on U.S. exchanges) have registered their whistle blowing schemes with *CNIL*.

It is also unclear whether a company that registers its whistle blowing scheme and thus agrees to follow the Guidelines also can remain compliant with SOX. While the Securities and Exchange Commission ("SEC") has not addressed this issue, based on recent comments by the SEC and CNIL, it appears that the respective agencies disagree on certain aspects of the Guidelines.

Some key areas of disagreement are:

Scope of the Whistle Blowing Scheme: The SEC states that the scheme should allow all employees of a company to raise *any* concern related to accounting or auditing matters. The *CNIL's* position is narrower. It states that the whistle blowing system must be limited to facts relating to serious risks to the company in the fields of accounting, financial audit, bribery or banking. However, other "serious" matters "affecting the vital interests of the company or its employees' physical or mental integrity" may also be reported through the whistle blowing system. Whether a matter is considered "serious" is evaluated on a case by case basis. Reports outside the permitted scope of the whistle blowing system and analyzed as not particularly serious must be rapidly destroyed or archived.

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Confidentiality and Anonymity: This issue continues to be a major point of disagreement between the SEC and the CNIL. The SEC states that it is imperative to have open channels of information to the audit committee which is best facilitated by anonymous reporting. The CNIL and other European supervisory authorities assert that anonymity is not a good solution for the person making the report or the organization and is inconsistent with European culture. While not banning anonymous reports the CNIL urges organizations to promote non-anonymous, confidential reports. It suggests that companies should not advertise the right of a person to remain anonymous. On the other hand, individuals should be assured that his or her report will be handled confidentially. That is, the identity of the informant will not be disclosed to the reported individual or to his managers so as to prevent retaliation.

Data Processing and Retention: The SEC insists the audit committee, wherever it is located, should be able to receive and review all data that is gathered through the hotlines and is entitled to hire an outside adviser to review the data. Although the CNIL has expressed a preference for in-house processing of data it has not forbidden the use of external providers to collect reports and process data. However, external providers must agree by contract to comply with French and European data protection rules and comply with the terms of its client's authorized whistle blowing scheme. External providers may not use the data for any other purpose, must adhere to strict confidentiality principles, and must return or destroy all data at termination of the contract. Agreements providing for the transfer of data to a provider outside the EU must require the protection of the data by use of model contract clauses established by the European Commission.

Companies with business in France must register their whistle blower schemes nor or could face sanctions.

WE HAVE BEEN ADVISED BY THE SEC STAFF THAT IT INTENDS TO CONTINUE TO WORK WITH THE CNIL TO RESOLVE DIFFERENCES AND MAY SEND FURTHER CLARIFICATION OF ITS POSITION TO THE CNIL IN THE NEXT FEW WEEKS. IF YOU ARE INTERESTED IN RECEIVING THE NEW SEC GUIDELINES ONCE THEY ARE ISSUED, PLEASE E-MAIL ANNE LUONG AT ANNE.LUONG@BINGHAM.COM AND REFERENCE "SEC GUIDELINES."

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