

**FOREIGN PAYMENTS LEAD TO DOMESTIC INVESTIGATION AND FINE**

A top manufacturer of airport bomb detection equipment, InVision, recently ran afoul of the Foreign Corrupt Practices Act (FCPA), resulting in its payment of a total of \$1.9 million in fines. However, it was able to avoid federal prosecution and further SEC civil action.

The FCPA, adopted in 1977, requires companies to keep accurate books and records, requires SEC-registered companies to maintain responsible internal accounting control systems, and prohibits bribery of foreign officials by U.S. corporations. A company can be liable under the FCPA even when it simply fails to follow up on the possibility of improper use of its funds. Penalties for violations of the FCPA include corporate fines of \$2 million—\$25 million and individual liability of five years imprisonment and a \$250,000 fine.

Here, one of InVision’s distributors working in China allegedly sought and received an additional payment from

the company as compensation for delays in shipping the detection equipment to a government-owned airport in China.

However, at the time of payment, the SEC claimed that InVision’s managers were aware that the distributor had expressed an interest in using the funds to instead provide foreign travel and other benefits to the airport officials. The SEC cited similar instances of possible improper use of InVision funds in connection with



**InVision creates bomb-detection equipment for airport usage**

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sales in Thailand and the Philippines.

In settling with the U.S. Justice Department and the SEC, InVision did not admit or deny liability. Its \$1.1 million fine to the SEC included disgorgement of its profits made on the transactions at issue, plus interest.

**Adopting an effective FCPA compliance program can (i) help a company detect and avoid violations, (ii) serve as a positive factor to be considered by the U.S. Justice Department in deciding whether to prosecute a violation, and (iii) reduce the potential punishment under U.S. sentencing guidelines if a violation is found.▣**

**JUDGE ISSUES FINAL DECISION IN SOX WHISTLEBLOWER CASE**

On February 15, 2005, a U.S. Department of Labor administrative law judge issued a supplemental recommended decision that reinstated a whistleblower and awarded damages, fees and costs, all pursuant to the Sarbanes-Oxley Act of 2002 (the "Act"). Our February 11, 2004 issue of Corporate Notes reported the judge's initial recommended decision.

**“ONE THING ABOUT SARBANES-OXLEY: FOR EVEN A LITTLE GUY LIKE ME IN A COMPANY THAT IS WAY BELOW THE RADAR SCREEN, IT STILL APPLIES.”**  
- DAVID WELCH, PLAINTIFF

In the case, a whistleblower, the Chief Financial Officer of Cardinal Bankshares Corporation, was terminated after raising accounting concerns with management and the SEC. In the initial recommended decision, the judge held that the CFO was terminated in violation of the whistleblower provisions of the Act.

In addition to awarding back pay, special damages (including expert witness fees, travel expenses, and job search expenses), and attorney's fees totaling \$170,000, the judge rejected the company's argument that the CFO's reinstatement was inappropriate. Among other things,

the judge found that:

- Shareholder support of the termination is not relevant to the right to reinstatement;
- Despite hostility between the parties, reinstatement, while difficult, is an appropriate remedy; and
- Displacement of the current CFO is not sufficient to prevent reinstatement.

**Public companies should monitor compliance with their whistleblower policies to avoid substantial penalties and business disruption.▣**

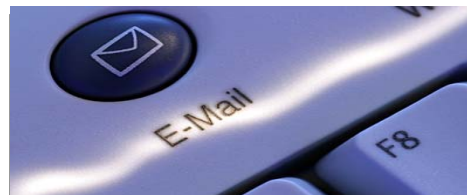
## COMPANY FACES LARGE FINES FOR FAILING TO RETAIN E-MAILS

One of the largest investment banking firms in the country was recently fined a total of \$2.1 million by the SEC, NYSE, and NASD for its failure to retain e-mail in connection with an investigation of research analyst conflicts of interest that covered 1999 through 2002. According to the SEC, the firm "lacked adequate systems or

procedures for the preservation of electronic mail communications."

The company agreed to pay \$700,000 to each of the regulatory agencies for violating record-keeping requirements by failing to preserve its business-related e-mail for the required three year period. Also, the company did not make the last two years' of e-mails readily accessible for review, as required by regulations. According to the SEC, backup tapes could not be found in storage facilities, were damaged or contained errors, or were never made.

This regulatory action comes on the heels of recent sanctions imposed in other cases at the trial level. In one instance, a different investment company was sanctioned by a trial judge because its retention system allowed the loss or destruction of



e-mails relevant to an ongoing lawsuit in which the investment company was a defendant.

This latest action highlights the increasing emphasis being placed even at the regulatory level on retaining electronic communications and having them readily available for investigation.

**Companies should evaluate their electronic document retention policies to ensure that they comply with applicable regulations. ■**

**"[THE FIRM'S] REPRESENTATION THAT ITS E-MAIL RETENTION PRODUCTION WAS COMPLETE, WITHOUT DISCLOSING THAT IT HAD FAILED TO RETAIN, LOCATE, AND RESTORE ALL E-MAIL RESPONSIVE TO OUR INVESTIGATION, IS SIMPLY UNACCEPTABLE."**

-SUSAN MERRILL, CHIEF OF ENFORCEMENT AT THE NYSE REGULATION UNIT

## DISSOLUTION OF DEADLOCKED LLC ALLOWED

In a case of first impression, the Delaware Court of Chancery recently ruled that a deadlocked limited liability company (LLC) may be judicially dissolved where two 50% members cannot continue to function in accordance with their limited liability company agreement (LLC Agreement).

In the case, two 50% members of an LLC owned the property upon which a restaurant, owned by one member and managed by the other member, was located. Both 50% members personally guaranteed the mortgage loan on the property.

Under the exit mechanism set forth

in the LLC Agreement, one member could voluntarily leave, but, according to the Court, it would not be without a penalty. The member leaving the LLC would not be relieved of an



obligation to personally guarantee the mortgage loan, and therefore, the exit mechanism provided an inadequate remedy. The Court held that it was not practicable for the LLC to operate under the LLC Agreement and the LLC should be dissolved.

**Members of LLCs should carefully consider whether exit mechanisms in LLC Agreements provide fair exit alternatives in order to reduce the likelihood that the LLC is judicially dissolved. ■**

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