



## U.S. Securities and Exchange Commission

### UNITED STATES OF AMERICA Before The SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934  
Release No. 43761 / December 21, 2000

Accounting and Auditing Enforcement  
Release No. 1355 / December 21, 2000

Administrative Proceeding  
File No. 3-10397

In the Matter of  INTERNATIONAL BUSINESS MACHINES CORPORATION,  Respondent.	ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 21C THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER
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I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against International Business Machines Corporation ("IBM").

II.

In anticipation of the institution of these proceedings, IBM has submitted an Offer of Settlement ("Offer") that the Commission has determined to accept. As set forth in the Offer, IBM admits the jurisdiction of the Commission over it and over the subject matter of this proceeding. Solely for the purpose of this proceeding and any other proceeding brought by or on behalf of the Commission, or to which the Commission is a party, and prior to a hearing and without admitting or denying the findings contained herein, IBM consents to the entry of this Order Instituting Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"). The Commission has determined that it is appropriate to accept the Offer from IBM, and accordingly is issuing this Order.

III.

#### FINDINGS

Based on the foregoing, the Commission finds that:

#### A. Respondent

International Business Machines Corporation is a New York corporation with its

headquarters in Armonk, New York. The common stock of IBM is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange.

#### B. Other Relevant Entities and Persons

IBM-Argentina, S.A. ("IBM-Argentina") is an indirectly wholly-owned subsidiary of IBM with its headquarters in Buenos Aires, Argentina. IBM-Argentina reports to IBM through the Latin America division of IBM-World Trade Corporation, which division is now headquartered in Miami, Florida.

Banco de la Nacion Argentina ("BNA") is a government-owned commercial bank in Argentina. BNA entered into a \$250 million systems integration contract with IBM-Argentina in 1994 (the "Contract").

Capacitacion Y Computacion Rural, S.A. ("CCR") is an Argentine corporation that was a subcontractor to IBM-Argentina on the BNA Contract.

Gustavo Soriani ("Soriani") was IBM-Argentina's Vice President of Operations until his termination in September 1995. He resides in Argentina and is a citizen of that country.

Ricardo Martorana ("Martorana") was IBM-Argentina's General Manager until his resignation in September 1995. He resides in Argentina and is a citizen of that country.

Javier Orcoyen ("Orcoyen") was IBM-Argentina's Vice President of Finance until his resignation in September 1995. He resides in Argentina and is a citizen of that country.

Soriani, Martorana and Orcoyen were, at the time of their departure, the three highest ranking officials at IBM-Argentina and are referred to herein collectively as "IBM-Argentina's Former Senior Management."

#### C. Facts

This matter involves violations of the books and records provisions of the Exchange Act, arising out of presumed illicit payments to foreign officials during 1994. As described below, in connection with the Contract, IBM-Argentina's Former Senior Management caused IBM-Argentina to enter into a subcontract with CCR (the "Subcontract"), and money paid to CCR by IBM-Argentina in connection with the Subcontract was apparently subsequently paid by CCR to certain BNA officials.

In January 1994, IBM-Argentina submitted a proposal to BNA for a system to modernize and fully integrate the computers in its main and branch offices. In February 1994, BNA awarded the Contract to IBM-Argentina. The Contract was one of IBM-Argentina's largest contracts. Without the knowledge or approval of any IBM employee in the United States, IBM-Argentina's Former Senior Management caused IBM-Argentina to enter into the Subcontract with CCR.<sup>1</sup> During 1994 and 1995, IBM-Argentina paid CCR approximately \$22 million under the Subcontract, of which at least \$4.5 million was transferred to several BNA directors by CCR.

In connection with the Subcontract, IBM-Argentina's Former Senior Management overrode IBM procurement and contracting procedures, and hid the details of the Subcontract from the technical and financial review personnel assigned to the Contract. Although IBM's procurement procedures specified that a Procurement department employee should have performed and documented certain reviews in connection with the Subcontract,<sup>2</sup> those procedures were overridden by IBM-

Argentina's Former Senior Management by providing the Procurement department with fabricated documentation, including a backdated authorization letter and a document that stated incomplete and inaccurate reasons for hiring CCR. IBM-Argentina's Former Senior Management were able to bypass IBM-Argentina's established procurement review procedures and caused the issuance of a purchase order for CCR's services. Based on these documents, IBM-Argentina paid CCR approximately \$22 million.

IBM-Argentina recorded the payments to CCR in its books and records as third-party subcontractor expenses. While IBM did not falsify or destroy any records, in consolidating its subsidiaries' financial results, and without the knowledge or approval of any employee in the United States, this information was incorporated into IBM's 1994 Form 10-K, which was filed with the Commission on March 23, 1995.

After IBM officials learned that its policies and procedures had been circumvented by IBM-Argentina's Former Senior Management, the company took immediate corrective action. Among other things, Soriani was terminated from his position at IBM-Argentina, Martorana and Orcoyen were asked to, and did, resign from their positions at IBM-Argentina, and all future payments to CCR under the Subcontract were stopped. IBM also enhanced its internal controls with respect to Foreign Corrupt Practices Act ("FCPA") compliance issues. This Order and the complaint filed contemporaneously herewith relate to events that occurred in 1994 and 1995, and not the current practices of IBM.

IV.

#### LEGAL DISCUSSION

Section 13(b)(2)(A) of the Exchange Act, the "books and records" provisions of the FCPA, requires reporting companies to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect their transactions and disposition of assets. Such companies are also responsible for ensuring that their wholly-owned foreign subsidiaries comply with Section 13(b)(2)(A).

Based upon the foregoing, the Commission concludes that IBM violated Section 13(b)(2)(A) by failing to ensure that IBM-Argentina maintained books and records which accurately reflected IBM-Argentina's transactions and dispositions of assets with respect to the Subcontract. The presumably illicit payments to the foreign officials were not disclosed in IBM-Argentina's books and records. Instead, IBM-Argentina's books and records include incomplete and inaccurate descriptions of CCR's services, and a backdated authorization document.

V.

In determining to accept IBM's Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded to the Commission staff.

VI.

Based upon the foregoing, the Commission deems it appropriate to accept the Offer submitted by IBM.

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 21C of the Exchange Act, that IBM cease and desist from committing any violation of Section 13(b)(2)(A) of the Exchange Act by inaccurately recording payments made to CCR pursuant to the Subcontract and from committing or causing any future violation of Section 13(b)(2)(A) of the Exchange Act.

By the Commission.

Jonathan G. Katz  
Secretary

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## Footnotes

<sup>1</sup> Under the Subcontract, CCR purportedly agreed to provide certain services to IBM-Argentina, including an alternative banking software system for BNA. The total amount of the Subcontract was \$37 million.

<sup>2</sup> The procurement review process included formal evaluations of both the technical and cost feasibility of all major subcontracts.

*<http://www.sec.gov/litigation/admin/34-43761.htm>*

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