SEC Proposes Amendments to CEO and CFO Certifications Under Sarbanes-Oxley

The SEC recently proposed amendments that would require companies to provide the officer certifications under Sections 302 and 906 of the Sarbanes-Oxley Act of 2002 as exhibits to periodic reports. Importantly, the SEC also indicated that Section 906 certifications should be provided as exhibits to periodic reports pending the adoption of final rules.

**Purpose of Proposed Rules and Deadline for Comments**

The SEC proposed the amendments to allow investors, SEC staff, and the Department of Justice to monitor compliance with the certification requirements more easily and efficiently. The SEC requests comments on the proposed rules on or before May 5, 2003.

**Section 302 Certifications**

Section 302 of the Sarbanes-Oxley Act requires the principal executive and financial officers of public companies to certify, with respect to each quarterly and annual report, that:

- to the officer's knowledge the report is not misleading;
- to the officer's knowledge the financial statements and other financial information included in the report fairly present in all material respects the financial condition and results of operations of the company as of, and for, the periods presented in the report; and
- the officer is responsible for, and has performed, specific tasks with respect to the company's internal controls and disclosure controls and procedures.

Currently, these Section 302 certifications must appear immediately after the signature blocks at the end of the relevant reports, i.e., reports on Forms 10-Q, 10-QSB, 10-K, 10-KSB, 20-F and 40-F.

The proposed amendment would require companies to file the Section 302 certifications as exhibits to such periodic reports. The proposed amendment would add the Section 302 certifications as new Item 31 of the exhibits required under Item 601 of Regulations S-B and S-K.

The proposed amendment would not change the Section 302 certification requirements in any other way. The SEC would continue to treat the Section 302 certifications as “filed” under SEC rules, and the certifications would continue to carry potential liability under Section 18 of the Securities Exchange Act of 1934 (Exchange Act).

**Section 906 Certifications**

Section 906 requires periodic reports that contain financial statements to “be accompanied by” written certifications by the issuer's CEO and CFO. Section 906 certifications must state that:

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

To date, the SEC had required only that the Section 906 certifications “accompany” the periodic reports to which they related. The proposed amendments would require issuers to “furnish” Section 906 certifications as exhibits to periodic reports containing financial statements. Specifically, the amendment would:

- amend Exchange Act Rules 13a-14 and 15d-14 and Investment Company Act Rule 30a-2 to require the Section 906 certifications to be provided with the reports to which they relate; and
- amend Item 601 of Regulations S-B and S-K to add the Section 906 certifications as new Item 32 of the list of required exhibits.

Because the SEC would consider the exhibits “furnished” and not “filed,” the Section 906 certifications would not carry Section 18 liability under the Exchange Act and would not be automatically incorporated by reference into other filings by a company.
Practical Tip: Interim Guidance

Until the SEC adopts final rules, it encourages issuers to submit Section 906 certifications as exhibits to the periodic reports to which they relate. As a result, issuers should:

- designate the Section 906 certifications as an "Additional Exhibit" under Item 99 of Item 601(b) of Regulation S-B or S-K;
- and
- if an EDGAR filer:
  - retain the manual signature page for each certification; and
  - insert the following legend after the text of each certification: "A signed original of this written statement required by Section 906 has been provided to [name of issuer] and will be retained by [name of issuer] and furnished to the Securities and Exchange Commission or its staff upon request."

Text of the Proposed Amendments

This Update is intended only as a summary of the SEC's proposed amendments. You can find the full text of the proposed amendments at [http://www.sec.gov/rules/proposed/33-8212.htm](http://www.sec.gov/rules/proposed/33-8212.htm). You can find discussion of other recent laws and regulations of interest on our website.

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