

**CEO/CFO CERTIFICATION UPDATE:
SEC PROPOSES PROCEDURES FOR CERTIFICATIONS
UNDER SECTIONS 302 AND 906 OF SARBANES-OXLEY ACT**

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On March 21, 2003, the Securities and Exchange Commission proposed revised rules under the Sarbanes-Oxley Act of 2002 (the "Act") with respect to the officer certifications required under Sections 302 and 906 of the Act.¹ The revised rules would require that certifications pursuant to both sections be included in relevant filings as exhibits. The SEC has proposed the revised rules with the objective of standardizing compliance and thereby making it easier for the SEC and investors to locate and review the certifications.

STATUTORY AND REGULATORY BACKGROUND

As discussed in our prior memoranda regarding the Act², the Act requires two different officer certifications:

- Section 906 of the Act amended the U.S. Criminal Code to require that each periodic report containing financial statements filed by an issuer with the SEC pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, be accompanied by specified certifications by the chief executive officer and chief financial officer of the issuer (the "906 Certifications").
- Section 302 of the Act separately required the SEC to adopt rules requiring that the principal executive officer and principal financial officer of reporting companies provide certifications in each annual or quarterly periodic report filed or submitted under either Section 13(a) or 15(d) of the Exchange Act (the "302 Certifications").

¹ SEC Release Nos. 33-8212, 34-47551 and IC-25967 (March 21, 2003) (the "Release").

² All of our memoranda regarding the Act and other corporate governance and disclosure developments are available upon request or at our website: www.simpsonthacher.com.

In August 2002, the SEC adopted Rules 13a-14 and 15d-14 to comply with Section 302 of the Act. These rules currently require reporting companies to include 302 Certifications by both their principal executive officer and principal financial officer immediately following the signatures at the end of all quarterly and annual periodic reports. Heretofore, the SEC had not prescribed the form of 906 Certifications or the method by which such certifications might accompany relevant filings as required by Section 906 of the Act.

PROPOSED RULES

How to File. The SEC proposes to amend Item 601 of Regulation S-K, which prescribes the exhibits that must accompany filings on the various SEC report forms, to require that the 302 Certifications be included as Exhibit No. 31 in all annual and quarterly reports filed with the SEC and that the 906 Certifications be included as Exhibit No. 32 in all periodic reports containing financial statements filed with the SEC.³ In addition, the SEC has proposed to amend Rules 13a-14 and 15d-14 (which currently mandate the 302 Certifications and set forth the form which the 302 Certifications must take) to also require that 906 Certifications be included in exhibits to all periodic reports containing financial statements.⁴

Text of Certifications. The SEC proposes to delete the form of the 302 Certification from the annual and quarterly periodic report forms and to relocate the certification form to Item 601(b)(31) of Regulation S-K. While proposed Item 601(b)(31) would set forth the exact text of the 302 Certification, the SEC has elected not to mandate precise language for the 906 Certification. Instead, proposed Item 601(b)(32) would simply require certification in the form required under Section 906 of the Act.

Signature. The rules would require that the CEO and CFO sign the certifications themselves. The certifications cannot, for example, be signed by an attorney-in-fact pursuant to a power of attorney.

³ Corresponding form amendments are proposed to Forms 20-F and 40-F for foreign private issuers and Form N-CSR for registered investment companies.

Although the required officer certifications are commonly referred to as “302 Certifications” and “906 Certifications,” the SEC proposes to identify the certifications in Item 601 as, respectively, the “Rule 13a-14(a)/15d-14(a) Certifications” (referencing the SEC rule implementing Section 302 of the Act adopted on August 28, 2002) and the “1350 Certifications” (referencing the applicable section of the U.S. Criminal Code added by Section 906 of the Act).

⁴ The proposed amendments to Rules 13a-14 and 15d-14 would not impose new substantive requirements, but instead would allow the SEC to reject a periodic report as “incomplete” if it did not include a 906 Certification as an exhibit.

906 Certification 'Furnished' and Not 'Filed.' In the Release, the SEC proposes that the 906 Certification attached as an exhibit to an annual or quarterly report be deemed “furnished” and not “filed” (thus not subjecting the 906 Certification to separate liability under Section 18 of the Exchange Act or automatic incorporation by reference under Section 11 of the Securities Act of 1933, as amended).

IMMEDIATE EFFECTS

With respect to 302 Certifications, reporting companies should continue to make their certifications in the form and location currently required by the relevant Exchange Act forms – premature compliance with the proposed changes with respect to 302 Certifications may result in the filing not complying as to form with the current requirements, notwithstanding a company’s good intentions.

In the case of 906 Certifications, we recommend that reporting companies consider complying with the new requirements as soon as possible. In the Release, the SEC encourages companies, until the adoption of final rules, to file 906 Certifications as “Additional Exhibits” under Item 99 of Item 601(b) of Regulation S-K.⁵

For electronic filings, the SEC advises companies to insert the following legend after the text of each 906 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.

For paper filings, companies should file signed originals and conformed copies of each 906 Certification in accordance with the requirements of the relevant report form.

In the Release, the SEC indicates that a 906 Certification made pursuant to the proposed rules will be deemed as “accompanying” the periodic report to which it relates rather than “filed” as part of the report (thus not subjecting the 906 Certification to separate liability under Section 18 of the Exchange Act or automatic incorporation by reference under Section 11 of the Securities Act).

⁵ Foreign private issuers are encouraged to file the 906 Certifications under the exhibit requirements applicable to Forms 20-F and 40-F.

IMPACT ON VOLUNTARY FILERS

We believe that the proposed rule and form changes will not effect the certification obligations of principal executive officers and principal financial officers of so-called “voluntary filers.” Voluntary filers are companies that file periodic reports with the SEC solely to comply with covenants under debt instruments, to facilitate sales of securities under Rule 144 or for other corporate purposes rather than pursuant to statutory or regulatory requirements to make such filings.

As discussed in a prior memorandum,⁶ we have concluded that the 906 Certification requirements are not applicable to voluntary filers, principally on the basis of a Frequently Asked Questions (the “FAQ”) posted by the SEC on its website in November 2002.⁷ This FAQ makes clear that voluntary filers are not “issuers” for the purposes of the Act. Because the 906 Certification requirements apply by their terms only to “issuers,” one can conclude that the 906 Certification requirements do not apply to voluntary filers, in contrast to the 302 Certification requirements which apply to all reporting companies.

Notwithstanding the proposed requirement that companies include 906 Certifications as exhibits to their filings, Rules 13a-14 and 15d-14 as proposed would preserve the distinction between companies obligated to include 302 Certifications and 906 Certifications and voluntary filers obligated to include only 302 Certifications. Rules 13a-14(b) and 15d-14(b) as proposed would require the furnishing of 906 Certifications with “each periodic report containing financial statements filed by an *issuer*” [emphasis added], and accordingly, voluntary filers should not be subject to an obligation to include 906 Certifications in their filings, even though the exhibit table in Item 601 might otherwise suggest that 906 Certifications must be included with all annual reports and all quarterly reports.

IMPACT ON REGISTERED INVESTMENT COMPANIES

The proposed rules discussed above would generally apply to registered investment companies, subject to certain modifications.

The SEC recently adopted Form N-CSR for registered investment companies to use for filing certified shareholder reports with the SEC. As adopted, Item 10(b) of Form N-CSR

⁶ See “*Application of the Sarbanes-Oxley Act to Voluntary Filers of Periodic Reports with the SEC*” dated January 10, 2003.

⁷ *Question 1*, SEC’s Division of Corporation Finance: Sarbanes-Oxley Act of 2002 – Frequently Asked Questions, posted November 8, 2002 (revised November 14, 2002) at www.sec.gov/divisions/corpfin/faqs/soxact2002.htm.

requires 302 Certifications to be filed as an exhibit. The SEC's proposed rules would continue to require that 302 Certifications be filed as an exhibit to Form N-CSR, but would re-designate current Item 10(b) as Item 10(a)(2). In addition, the SEC has proposed to amend Investment Company Act Rule 30a-2 to require that 906 Certifications be provided with reports on Form N-CSR that contain financial statements and that are filed pursuant to Section 13(a) or 15(d) of the Exchange Act. New Item 10(b) of Form N-CSR would add the 906 Certifications as a required exhibit. The proposed rules do not affect small business investment companies or unit investment trusts because they are not required to file Form N-CSR and are not required to provide a 302 Certification with their Form N-SAR.

For annual or semi-annual periods ending on or before March 31, 2003, registered investment companies may choose to file the 302 Certifications with either Form N-CSR or Form N-SAR. For annual or semi-annual periods ending on or after April 1, 2003, registered investment companies will no longer have the option of including their 302 Certifications with Form N-SAR filings: for annual or semi-annual periods ending on or after April 1, 2003, registered investment companies must file on Form N-CSR and include the 302 Certifications with such filings. The SEC encourages registered investment companies currently filing on Form N-CSR to include the 906 Certifications as an exhibit and those using this option should use Exhibit 99.906CERT in their EDGAR filings. Registered investment companies choosing to file on Form N-SAR for annual or semi-annual periods ending on or before March 31, 2003, should continue to include a 302 Certification but those reports do not require a 906 Certification because they do not contain financial statements.

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This memorandum is for general informational purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate governance developments, can be obtained from our website, *www.simpsonthacher.com*.

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