

## Client Alerts

### Checklist for CEO/CFO Certifications by Large Companies and Sarbanes-Oxley Certifications

August 9, 2002

On July 25 and July 30, 2002, the Staff of the Securities and Exchange Commission issued additional guidance for large public companies that are subject to the SEC's Order that requires CEOs and CFOs to certify the company's public filings. In addition, on July 29, 2002, the Staff issued a statement that the contents of the certification should be handled in the same manner as other **material nonpublic information** (i.e., subject to Regulation FD and other restrictions). Accordingly, the Staff recommends that companies subject to the order:

- disclose the filing of the sworn statements under Item 5 or 9 of Form 8-K and attach the statements as exhibits,
- post the statements on the company's website, and
- take other appropriate steps to ensure broad dissemination of the statements.

#### **In addition, the enactment of the Sarbanes-Oxley Act of 2002 on July 30, 2002**

- creates an independent requirement, effective immediately, for CEOs and CFOs of all public companies to certify all periodic filings that contain financial statements, and
- directs the SEC to adopt rules within 30 days that will require CEOs and CFOs to certify each annual and quarterly filing.

#### **In summary, CEOs and CFOs of public companies are potentially subject to three separate certification requirements:**

- **Before August 14, 2002**, for 947 large public companies, certification that the officers are not aware of any material misstatements and omissions in the company's prior public filings;
- **Effective immediately, unless relief is granted or the final Sarbanes-Oxley Act is modified**, certification (subject to criminal penalties) for **all** public companies that each public filing that contains financial statements complies fully with the reporting requirements of the Securities Exchange Act of 1934 and fairly presents, in all material respects, the company's financial condition and results of operations; and
- **Effective within 30 days** for all public companies, under rules to be adopted by the SEC, expanded certification of each annual or quarterly report, including the officers' conclusions about the effectiveness of the company's internal controls.

**For more information on the topics in this E-Alert, please contact your attorney at Andrews & Kurth L.L.P.**

#### **Certification by CEOs and CFOs of Large Companies**

##### **List of large companies.**

The companies covered are the 947 large public companies covered by the SEC's order posted at <http://www.sec.gov/rules/other/4-460.htm>. In addition, a company not on the list may voluntarily file a certification under Item 5 or Item 9 of Form 8-K.

The list of companies is posted on the SEC's website at <http://www.sec.gov/rules/other/4-460list.htm>. Frequently asked questions are posted at

- <http://www.sec.gov/rules/other/4-460faqs.htm>
- <http://www.sec.gov/rules/other/4-460addlfaqs.htm>
- <http://www.sec.gov/rules/other/4-460addlfaqs2.htm>

The SEC's statement on July 29, 2002 that the contents of the statement should be broadly disseminated is posted at <http://www.sec.gov/rules/extra/staff21a1.htm>. The form of certification is posted on the SEC's website at <http://www.sec.gov/rules/other/4-460a.htm>

## Client Alerts

### **Notarized statement.**

The CEO and CFO are each individually required to sign a Rule 10b-5 certification of the company's public filings. Each officer must file a notarized written statement, under oath, to best of the officer's knowledge, that the officer is not aware of any material misstatements or omissions contained in their company's

- most recent annual report on Form 10-K,
- reports on Forms 10-Q or Form 8-K filed after the most recent Form 10-K and before the certification (other than any Item 9 reports that are "furnished" on Form 8-K but not "filed"), and
- any definitive proxy materials.

### **Information covered.**

The certification applies to all information included in the reports and any amendments, including all financial statements, statistical data, industry information and forward-looking statements. If the certification is filed before the second quarter Form 10-Q due on August 14, 2002, it will not cover the contents of the Form 10-Q. In practice, however, most companies will probably update their public filings by filing the Form 10-Q before making the certification.

### **Form.**

The CEO and CFO must give the certification in the form provided by the SEC, with *no* alterations or modifications. Rather than qualify or modify the form of the certificate, the company may revise or update its disclosure in the Form 10-Q or a Form 8-K to permit the CEO and CFO to make the certification in the required form. Any change in the wording of the certificate (*even an inconsequential change, such as "as defined below"*) creates the obligation to explain relevant facts and circumstances.

### **Posting on SEC website.**

After review by the Staff, the sworn statements will be sorted into two categories – one that follows the exact form without an explanation of "facts and circumstances," and a category of "all others." The two categories of statements are posted on the SEC's website at <http://www.sec.gov/rules/extra/ceocfo.htm>. For statements received on or about August 14, 2002, the SEC expects to complete the categorization process during the week of August 19, 2002.

### **Cover letter.**

An officer may include a cover letter with the sworn statement. However,

- if the cover letter attempts to qualify or otherwise affect the form of the statement, or
- if the company makes a filing that modifies, qualifies or otherwise explains the sworn statement,

the officer would be required to explain the relevant facts and circumstances and the statement would be identified on the SEC's website as an "all other" (nonconforming) statement.

## **TIMING OF CERTIFICATION**

### **Calendar year companies.**

For companies whose fiscal year ends on December 31, the statements must be filed with the SEC no later than August 14, 2002.

### **Non-calendar year companies.**

For companies whose fiscal year does not end on December 31, the statements must be filed by the date on which the first Form 10-K or 10-Q is due on or after August 14, 2002.

### **Early filing.**

## Client Alerts

The SEC could issue additional guidance before August 14, and companies may prefer to defer an early filing until it is clear that no further guidance or relief is forthcoming. However, the merits of early filing include:

- Investors may favor securities of companies that have already certified their public filings (especially if the company is in a troubled industry);
- Early filing of the required certification permits concurrent early filing of the Form 10-Q, if the company's general practice is to make early Exchange Act filings; and
- The SEC website will promptly post and reflect the filing date of an early certification, whereas a delay in posting is expected for certifications filed on or about August 14.

### **Concurrent filing of report and certification.**

If a company files its Form 10-Q or other filing early, we recommend filing the certification concurrently with the early Form 10-Q filing. Otherwise, if material disclosures arise between the filing of the Form 10-Q and the filing of the certification, a company may need to file a Form 8-K to make additional disclosures or updates so that the CEO and CFO can make the certifications without qualification. However, concurrent filing of the report and statements is not required, and the CEO and CFO need not file their statements at the same time.

### **Extension of due date.**

If a company files a Form 12b-25 to extend the due date of the first Form 10-K or Form 10-Q due on or after August 14, 2002, the same extension would apply to the certification deadline. Companies who file a Form 12b-25 for the Form 10-Q due August 14, 2002 should be prepared for possible adverse market reaction.

### **No electronic filing.**

The statements may not be filed by EDGAR and must be physically delivered in written form on paper to:

Johnathan G. Katz,  
Secretary Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-0609

The sworn statements may be sent to the SEC by fax through August 14 if followed by an original. The fax numbers are 202.942.9651 (before August 13) and 202.824.5090/5091 (August 13 and 14). The Staff will not accept a certification by e-mail.

### **Standard of review.**

The CEO and CFO are insiders who are held to a higher standard than the "due diligence" standard applicable to underwriters. The objective of the internal review is to uncover and correct any material misstatements and omissions in the public filings. Apart from assisting in the review and update of the company's public filings, back-up certificates and inquiries may not provide much protection to the CEO and CFO if material deficiencies are later found in the Exchange Act reports. A company should not adopt back-up procedures so extensive that it cannot reasonably comply with its own guidelines.

### **Materiality.**

In determining whether information is material, the certifying officers should consider the SEC's interpretation released in August 1999 that a quantitatively small financial item may be considered material under certain circumstances. For example, information may be material if the item concerns a segment or business that has been identified as qualitatively significant to the company's operations or profitability. See <http://www.sec.gov/interps/account/sab99.htm>

### **Internal back-up procedures.**

Most companies are making internal inquiries or obtaining back-up certifications from

## Client Alerts

- accounting staff with knowledge of critical accounting policies, estimates and judgments, and
- subordinate officers and managers with oversight of the company's financial results or results of important segments or divisions.

Company websites (or hyperlinks in an e-mail) can be used to identify the filings to be certified and make them conveniently available to employees for back-up review and update. If the CEO and CFO obtain written back-up for the certificate, the company may either use the SEC's form or should use another form suitable for the files (and for discovery in possible future shareholder litigation). The company should not use a back-up certificate so detailed that it raises more questions than it answers.

### **Other internal review.**

In preparation for filing the certification, the company should

- review recent letters from the auditors to management and address any open issues, and
- confirm that the certifications are not excluded under the company's director and officer insurance policy and that coverage is appropriate.

Note that future rules to be adopted by the SEC under the Sarbanes-Oxley Act will require an internal control report in each annual report on Form 10-K, including an assessment by management, attested by the auditors, of the company's internal controls. Accordingly, public companies should increase their focus on internal controls and letters to management from the auditors in preparation for all public filings.

### **Meetings with CEO or CFO.**

Key financial and accounting personnel and subordinate officers should have the opportunity to request a confidential one-on-one meeting with the CEO or the CFO, in order to identify any concerns that could otherwise be made public by a whistle blower at the company. Note that future rules to be adopted by the SEC under the Sarbanes-Oxley Act will require the Audit Committee to establish procedures for the confidential, anonymous submission of employee concerns regarding questionable accounting or auditing matters.

### **Consultation with Audit Committee.**

The certification must state whether or not the CEO and CFO reviewed its contents with the Audit Committee. In effect, unless the officer is prepared to certify to the contrary, both the CEO and the CFO must *personally* review the statement with the Audit Committee. Companies should consider providing copies to the audit committee of documents to be certified by the CEO and CFO.

### **Disclosure review.**

Counsel and auditors should review the periodic reports to confirm that

- all required financial and other disclosures are included (and responsive to the legal and accounting requirements of the form and the financial statements),
- appropriate and conservative standards of materiality are used in determining whether disclosures are required,
- forward-looking information is clearly stated as forward-looking (expected, estimated or believed) and has been updated if appropriate,
- applicable risk factors and cautionary language have been updated and cover each forward-looking statement,
- sensitive disclosures such as related party transactions and off balance sheet financing, as well as other disclosures, are described in plain English, and
- MD&A disclosures conform in substance with the SEC's January 2002 statement posted at <http://www.sec.gov/rules/other/33-8056.htm>

## Client Alerts

### Disclosure revisions.

If the company decides to make additional or revised disclosure, or applies a more conservative standard of materiality, revised or updated information may be included in the Form 10-Q due on August 14, 2002. If new disclosure is added that affects a prior time period, the SEC could take the position that the prior period should be restated.

### Special cases.

Additional guidance released by the Staff on July 25, 2002 provides that:

- All CEOs and CFOs must provide the sworn statement based on the officer's knowledge, even if the officer has been recently appointed;
- Certifications filed by the CEO and CFO at different times may cover different reports if one certification is filed before and the other certification is filed after the required Form 10-Q or Form 10-K; and
- An officer located in a foreign country should have the statement notarized by a notary or another official serving in the same capacity.

**SEC hotline.** The SEC has provided a hotline at 202.942.2808 to answer questions about the certifications.

### SARBANES-OXLEY ACT OF 2002

**Certifications under the Act with criminal penalties.** In addition to the one-time certification on behalf of large public companies due on or before August 14, 2002, the Sarbanes-Oxley Act (in Section 906) creates an independent requirement for the CEO and CFO of all public companies to certify each periodic report filed with the SEC that contains financial statements, **effective immediately**. The CEO and CFO must certify, subject to criminal penalties, that the periodic report

- "fully complies" with the SEC's periodic reporting rules, and
- "fairly presents, in all material respects, the financial condition and results of operations of the issuer."

It is not entirely clear whether a current report on Form 8-K that includes financial statements of an acquired business is a "periodic report" that requires this form of certification. In addition, the wording of the Act leaves open the possibility that Congress did not intend to require immediate certification (with criminal penalties) before the SEC adopts new rules. However, because the bill has been signed by the President, public companies should prepare to include the certification in each filing that includes financial statements, effective immediately.

- **Companies may prefer to delay filing the Form 10-Q in case further relief or guidance is forthcoming.**

### Expanded certifications before August 30, 2002.

The Sarbanes-Oxley Act directs the SEC to adopt rules before August 30, 2002 that will require the CEO and CFO of all public companies to certify all annual and quarterly reports. The Act (Section 302) requires CEOs and CFOs to certify in each annual or quarterly report that

- the officer has reviewed the report,
- to the officer's knowledge, the report does not contain any material misstatements or omissions,
- to the officer's knowledge, the financial statements and other financial information fairly present, in all material respects, the financial condition and results of operations of the company,
- the officer has evaluated the company's internal controls and has included in the report the officer's conclusions about the effectiveness of the controls,
- the officer has disclosed to the auditors and audit committee any deficiencies or fraud involving the internal controls, and
- the officer has included in the report any significant changes and corrective actions affecting the company's internal controls.

### Other Certifications

## Client Alerts

### **New York Stock Exchange.**

The NYSE has issued governance recommendations that would, if adopted, require certification by the CEO to the NYSE each year

- that the CEO is not aware of any violation by the company of the NYSE listing standards related to corporate governance (which include, among other standards, independence requirements relating to the members of the Board of Directors and the Audit Committee).

After enactment of the Sarbanes-Oxley Act, the NYSE recommendations were revised so that no certification to the NYSE will be required regarding the accuracy of information provided to investors.

**This E-Alert is intended to be only a general discussion and summary of the matters discussed, based on laws and regulations and practices currently in effect. For more information on the topics in this E-Alert, please contact your attorney at Andrews Kurth LLP.**