

## Client Alerts

### Update: Certification with Criminal Penalties for All Public Companies

August 9, 2002 **Immediate effectiveness.**

As most public companies are aware, CEOs and CFOs of all public companies are currently required to make the certifications required under the criminal provisions of Section 906 of the Sarbanes-Oxley Act of 2002, which was signed into law on July 30, 2002. On August 2, 2002, the SEC indicated that it believes Section 906 imposes independent and self-operative certification requirements. See Footnote 11 in the [SEC release](#).

#### **Certification.**

Section 906 requires CEOs and CFOs of **all public companies, effective immediately, subject to criminal penalties**, to certify each periodic report filed with the SEC that contains financial statements. The CEO and CFO must certify that

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

#### **Violation of Securities Exchange Act.**

Under the general enforcement provisions of the Sarbanes-Oxley Act, failing to file a report with the required certification would, in our view, violate the Securities Exchange Act of 1934, as amended. Section 906 amends the federal criminal code and became effective on July 30, 2002, leaving no time for guidance or rule-making. The SEC does not have interpretive authority to grant relief from these provisions or to provide guidance regarding the form of the certification.

#### **Recommendations.**

In the absence of rules directly on point, we make the following comments and recommendations based on Section 906 and recent interpretations by the SEC Staff on other required certifications:

- **Conservative approach.** We believe that the safest course is to recite the certification language exactly as set forth in Section 906, without modification or qualification. Filings made immediately after the effective date of the Sarbanes-Oxley Act suggest that most issuers have taken this course.
- **Required form of certification.** In our recommendations, we draw on the SEC Staff's interpretations of its June 27 Order, which required CEOs and CFOs of 947 large public companies to file sworn statements attesting to the accuracy of their companies' public filings since their most recent Form 10-K. The SEC Staff has taken a hard line about the form of sworn statements filed pursuant to the June 27 Order, cautioning that officers should refrain from making any changes to the prescribed form of sworn statement.
- **Modification to form of certification.** Many officers have expressed concern about certifying, without any knowledge or materiality qualification, that the filed report complies with the periodic reporting requirements under the Exchange Act. Officers may take some comfort in the fact that the rules and regulations under the Exchange Act do contain some materiality qualifiers and exceptions. The absence of a knowledge qualifier remains a concern to officers and securities counsel alike. However, the Sarbanes-Oxley Act does not contain any language that appears to permit a CEO or CFO to qualify the certification to the officer's knowledge.\*
- **SEC guidance to large companies.** Frequently asked questions answered by the SEC Staff in connection with the June 27 Order applicable to large companies are posted at:
  - <http://www.sec.gov/rules/other/4-460faqs.htm>,
  - <http://www.sec.gov/rules/other/4-460addlfaqs.htm>, and
  - <http://www.sec.gov/rules/other/4-460addlfaqs2.htm>.

*Although the SEC Staff interpretations applicable to large companies do not apply to Section 906, the courts may look to these Staff interpretations for guidance.*

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- **Alternative approaches.** Two practices appear to be developing for filing the CEO and CFO certifications required by Section 906 of Sarbanes-Oxley (this is the certification required for all Form 10-Q filings now being made and for future periodic reports that contain financial statements).
  - The first practice, used in most Form 10-Qs filed to date, is to include the certifications as exhibits to the Form 10-Q.
  - The second approach (recommended by some groups within the securities bar) is a two-step process:
    - File the certifications by EDGAR as a nonpublic correspondence filing to "accompany" the Form 10-Q filing, as required by Section 906.
    - Promptly after the Form 10-Q filing, file a Form 8-K, using Item 9 (Regulation FD Disclosure) to disclose that the certifications have been made.

Under this two-step approach, the certifications are not deemed to be "filed" with the SEC for purposes of any liability under the Securities Exchange Act of 1934 and Securities Act of 1933, but still "accompany" the filing as required by Section 906 and are publicly disclosed as required by Regulation FD. Example of Item 9 disclosure on Form 8-K: Item 9. Regulation FD Disclosure

On August , 2002, [Company Name] submitted to the Securities and Exchange Commission the certification by its chief executive officer and chief financial officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, of the Company's report on Form 10-Q for the quarter ended June 30, 2002.

Our view continues to be that most companies will prefer to file the certifications as exhibits, in part to reassure investors that the Section 906 certifications have been made in the required form. We do not believe that filing the certifications as a nonpublic correspondence filing offers protection from a violation of Section 906, which is a criminal statute, or from disclosure violations under the Exchange Act or the Securities Act, and could appear evasive in the event of any later investigation or securities proceeding. However, some officers may prefer to file the certifications as a nonpublic correspondence filing, and this practice could become more prevalent as the filing deadline approaches and therefore could become more acceptable to investors. We believe that both practices satisfy the requirements of Section 906.

- **Public disclosure.** The SEC Staff has stated that other certifications are "almost certainly" material nonpublic information. We believe that certifications under Section 906 of the Sarbanes-Oxley Act would be viewed as similarly material. Regulation FD therefore argues in favor of public disclosure and other public dissemination of the Section 906 certifications, such as posting to the company's website. The SEC Staff's statement to large companies issued on July 29, 2002 in favor of public filing is posted at <http://www.sec.gov/rules/extra/staff21a1.htm>.
- **Signatures.** The certifications may be filed as an exhibit to the Form 10-Q and attached as Exhibit 99. Alternatively, the certifications may be included in a correspondence filing with the Form 10-Q. The signed certifications should be checked before the EDGAR filing is submitted to ensure that the certifications include a conformed signature "/s/ Name of Officer".
- **Exhibit filings.** Each officer should sign separately below the required statement. The certifications may be set forth in separate exhibits (Exhibits 99.1 and 99.2) or in a single exhibit (Exhibit 99.1) in which the language is repeated for the CEO and CFO, with each officer signing immediately below the statement. Alternatively, if the certifications are filed in a correspondence filing, the certifications would be filed together under a &lt;CORRESP&gt; EDGAR tag.
- **Statement in report.** We suggest that the main part of the Form 10-Q or Item 9 filing on Form 8-K include a statement that the officers have made the certifications. The statement should not attempt to modify, qualify or otherwise explain the certification. The purpose of making this disclosure in the report is to comply with Regulation FD and ensure that the filing of the certifications is clearly disclosed to the public.
- **Posting to website.** After the certifications are filed (but not before), we recommend that the certifications be posted on the company's website to increase public dissemination. This recommendation is based on the July 29 statement by the SEC Staff applicable to certification by large public companies.
- **Form 8-K.** It is not entirely clear whether a current report on Form 8-K that includes financial statements, such as financial statements of an acquired business, is a "periodic report" that requires Section 906 certification.

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- **NYSE companies.** Under new rules to be proposed for New York Stock Exchange companies, officer certifications must be disclosed in the company's annual report. When final rules are adopted, these required disclosures could be extended to all public companies.
- **SEC guidance.** We do not expect relief or guidance from the SEC because the Sarbanes-Oxley Act has become law, the SEC has no authority to interpret it, and the Department of Justice is unlikely to interpret a criminal statute recently enacted by Congress and signed by the President. **Certification Pursuant to**

**18 U.S.C. Section 1350,**

**As Adopted Pursuant to**

**Section 906 of the Sarbanes-Oxley Act of 2002**

In connection with the Quarterly Report of [ ] (the "Company") on Form 10-Q for the period ended June 30, 2002, as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, [ ], [CEO/CFO] of the Company, certify, pursuant to 18 U.S.C. §1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that:

- (1) The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
- (2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

/s/

Name:

Title:

Date: August [ ], 2002

**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. \* Congress may have intended Section 906 of the Sarbanes-Oxley Act to permit the officers to certify the periodic reports to the officer's "knowledge." Arguments also could be made that such a qualification would be consistent with the meaning of "certification." However, the consequences of modifying the certification are uncertain, both for the company and the individual officers. If an unqualified certification is, in fact, required by the Sarbanes-Oxley Act, a qualified certification would result in a periodic filing that fails to conform to the Exchange Act. Any modification or qualification should be undertaken only after careful analysis and consideration. In short, the risk of making an unqualified certification should be weighed against the risk that a qualified certification could later be found to have violated the Exchange Act.**

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