

Form 11-K: Section 906 Certification Requirement

Fast approaching is the Form 11-K deadline for calendar year employee benefit plans required to file that form. Virtually all plans required to file Form 11-K are covered by ERISA, and for these plans the filing is due 180 days after the end of the fiscal year.

Because a Form 11-K is a “periodic report containing financial statements,” questions have arisen whether it must be accompanied by the certification required under Section 906 of the Sarbanes-Oxley Act.¹ Last month, Senator Biden included in the *Congressional Record* a *post hoc* legislative history stating that the certification was intended to pick up Form 11-K. Although we doubt that at the time of enactment Congress was thinking about Forms 11-K, we recommend, absent contrary guidance from the Department of Justice or the SEC, that the certifications should accompany the report.

The certification must be signed by the chief executive officer and the chief financial officer (or equivalent thereof) of the issuer. The issuer for these forms is the plan itself, interests in which constitute separate securities. It may be -- and indeed is likely -- that the CEO and CFO of the public company sponsor of the plan do not serve in those roles, or in equivalent roles, for the plan. Companies should engage in a functional analysis to determine who serves as the “equivalent” of the CEO and CFO of the Plan. The search should begin by identifying the plan administrator, which may be the company itself, an administrative function within the company (*e.g.*, the human resources department) or a committee. The individual chairing or heading up this administrative function would be an appropriate candidate for plan “CEO”; likewise, the individual principally responsible for preparing the plan’s financial statements would be an appropriate candidate for plan “CFO”. It is possible that one person will serve in both capacities for the plan.

Another complication is that the language of the certification does not neatly fit the plan financial statements. The officers must certify that the information “presents fairly, in all material respects, the financial condition and results of operations” Plan financial statements do not present results of operations in the usual sense. Under the circumstances, we believe it would be appropriate to revise the certification to delete the reference to results of operations. Section 906, unlike the Section 302 certifications codified in an SEC rule, does not specify a form of certification and we believe that this change is reasonable.

What diligence should the signers undertake prior to certification? The CEO and CFO (or the equivalent) should have a discussion with a knowledgeable person, probably a lawyer, about the requirements of the form and should have a meeting with the preparers of the financial statements and the firm that audited them to satisfy themselves that they “fairly present.”

¹ The SEC has expressly exempted Form 11-K from the Section 302 certification requirement.

Finally, the certifications should be furnished in the same way that the issuer furnishes the Section 906 certifications for its periodic reports. This week the SEC adopted final rules establishing the procedure of including these certifications as exhibits to the applicable report.

We remain hopeful that either the DOJ or the SEC will issue something that will obviate the need to go through these steps. Until then, though, we believe that it would be prudent to include the certification with the Form 11-K.

Contact Information

If you have any questions or would like to learn more about the new regulations or interim guidance, please contact the lawyer who normally represents you.