

SEC Proposes to Change the Location of Certifications Required by Sarbanes-Oxley

March 21, 2003, the SEC proposed that issuers provide the certifications required by Sections 302 and 906 of the Sarbanes-Oxley Act of 2002 (the “Act”) as exhibits to the periodic reports to which they relate. We have previously sent you an SEC Alert dated September 5, 2002, that contains a review of the certification requirements adopted by the SEC under Section 302 of the Act. That SEC Alert and others are available on our website at www.ropesgray.com under “News & Events”.

Section 302 Certification

Under current SEC rules, each periodic report filed under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the “Exchange Act”) must include a certification by the company’s CEO and CFO as to the matters contained in Section 302 of the Act and the related SEC rule. Currently, these certifications appear immediately after the signature block at the end of periodic reports. The SEC is now proposing to amend Item 601 of Regulations S-B and S-K to move the Section 302 certifications from immediately following the signature page of the actual report and make them exhibits to the report. This change is designed to allow investors, and the SEC’s staff, to more expeditiously locate the required certification through EDGAR and other electronic databases. The CEO and CFO’s signatures on the certifications would still be subject to the same signature requirements as for the actual periodic report.

Section 906 Certification

Each periodic report containing financial statements filed by an issuer with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act must currently be “accompanied by” a certification from the CEO and CFO that the report complies with the requirements of the Exchange Act and that the information fairly presents the issuer’s financial condition and results of operations. The SEC is proposing to require that issuers furnish this certification as a separate exhibit to the periodic report to which it relates. Specifically, the SEC is proposing to amend Item 601 of Regulations S-B and S-K to add the Section 906 certification to the list of required exhibits.

While the Section 302 certification is required to be included “in” the periodic report to which it relates, the Section 906 certification is merely required to “accompany” a periodic report to which it relates. In recognition of this difference, the SEC is proposing to require issuers to “furnish,” rather than “file,” the Section 906 certification with the SEC. Thus, the Section 906 certification would not be subject to liability under Section 18 of the Exchange Act nor to automatic incorporation by reference into an issuer’s Securities Act registration statements, unless the issuer takes steps to include the certifications in a registration statement.

Application to Registered Investment Companies

The SEC has recently adopted Form N-CSR for use by registered investment management companies in filing certified shareholder reports. The SEC proposes to amend Investment Company Act rule 30a-2 to require the submission of the Section 906 certifications with the Forms N-CSR to which they relate and to amend Item 10 of Form N-CSR to add the Section 302 and Section 906 certifications as required exhibits.

Interim Guidance Regarding Filing Procedures

To date, companies have used a variety of methods to submit the Section 906 certification with the periodic report to which it relates, including submission as nonpublic paper correspondence or non-public electronic correspondence, as an exhibit to the report or as part of the actual text of the report. Until the adoption of final rules, the SEC is encouraging issuers to submit the Section 906 certification as an exhibit to the periodic report to which it relates. An issuer using this approach should designate the certification as an “Additional Exhibit” under Item 99 of Item 601(b) of Regulation S-B or S-K, or, in the case of a foreign private issuer, satisfy the exhibit requirements of the appropriate reporting form. The issuer should retain the original signature page to the Section 906 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 the issuer] and will be retained by [name of issuer] and furnished to the Securities and Exchange Commission or its staff upon request.”

Comment Period and Effective Date

No effective date was specified in the release containing these proposed amendments. Comments should be submitted within 45 days of publication in the *Federal Register*.

Contact Information

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