

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232, 240 and 249

[Release No. 34-46300; File No. S7-21-02]

RIN 3235-A154

Certification of Disclosure in Companies' Quarterly and Annual Reports

AGENCY: Securities and Exchange Commission.

ACTION: Supplemental information on proposed rule.

SUMMARY: On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002. Section 302 of the Act requires us to adopt rules implementing specified statutory certification requirements for principal executive officers and principal financial officers by August 29, 2002. On June 14, 2002, we had proposed to require a specified certification by a company's principal executive officer and principal financial officer. In addition, we had proposed to require a company to maintain procedures to provide reasonable assurance that the company is able to collect, process and disclose the information required in the company's quarterly and annual reports, as well as current reports on Form 8-K, and also to require periodic review and evaluation of these procedures. This document contains supplemental information regarding those proposals in light of the enactment of the Sarbanes-Oxley Act of 2002.

DATES: You should send us any comments so that they arrive at the Commission by August 19, 2002. This is the same date by which we originally requested comment on the proposals included in Release No. 34-46079. In view of the statutory deadline by which we must adopt final rules, we encourage you to submit any comments as soon as possible since we do not expect to be able to consider comments that arrive after August 19, 2002.

ADDRESSES: Please send three copies of your comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Alternatively, you may submit your comments electronically to the following electronic-mail address: *rule-comments@sec.gov*. To help us process and review your comments more efficiently, comments should be sent by one method (U.S. mail or electronic-mail) only. All comment letters should refer to File No. S7-21-02; please include this file number in the subject

line if you use electronic-mail. We will make all comment letters available for public inspection and copying in our public reference room at the same address. We will post electronically submitted comment letters on the Commission's Internet Web site (*http://www.sec.gov*).¹

FOR FURTHER INFORMATION CONTACT: Mark A. Borges, Special Counsel, or Elizabeth M. Murphy, Chief, Office of Rulemaking, Division of Corporation Finance, at (202) 942-2910, or, with respect to investment company matters, Tara L. Royal, Attorney, Office of Disclosure Regulation, Division of Investment Management, at (202) 942-0721, at the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0312.

SUPPLEMENTARY INFORMATION:

I. Background

On June 14, 2002, we proposed rules² that would require a company's principal executive officer and principal financial officer each to certify the contents of the company's quarterly reports on Forms 10-Q³ and 10-QSB⁴ and annual reports on Forms 10-K⁵ and 10-KSB⁶ filed pursuant to the Securities Exchange Act of 1934.⁷ The proposed rules also would require a company filing quarterly and annual reports on these forms to maintain procedures to provide reasonable assurance that the company is able to collect, process and disclose the information required in these reports and in current reports on Form 8-K.⁸ In addition, the proposed rules would require a periodic review and evaluation of these procedures. The annual evaluation would have to be presented to the company's principal executive officer and principal financial officer. They would have to certify in the company's annual report that they have reviewed the results of the evaluation.

On July 30, 2002, the Sarbanes-Oxley Act of 2002 was enacted.⁹ Section 302 of the Act, entitled "Corporate Responsibility for Financial Reports," requires the Commission to adopt final rules that must be effective by August

¹ We do not edit personal identifying information, such as names or electronic-mail addresses, from electronic submissions. You should only submit information that you wish to make publicly available.

² See Release No. 34-46079 (June 14, 2002) [67 FR 41877].

³ 17 CFR 249.308a.

⁴ 17 CFR 249.308b.

⁵ 17 CFR 249.310.

⁶ 17 CFR 249.310b.

⁷ 15 U.S.C. 78a *et seq.*

⁸ 17 CFR 249.308.

⁹ Pub. L. 107-204, 116 Stat. 745 (2002).

29, 2002, 30 days after the date of enactment, under which the principal executive officer or officers and the principal financial officer or officers, or persons providing similar functions, must provide a specified certification in issuers' annual and quarterly reports. Under the statute, the certification must be provided by the officers of a broader group of issuers, particularly foreign issuers, and is different in certain respects from the certification requirements that we proposed in June. The requirements under section 302 of the Act are set forth in section II of this document, and the principal differences between the form of certification required pursuant to section 302 of the Act and the form of certification set forth in our proposed rules are discussed in section III of this document.

To satisfy the requirements of the Sarbanes-Oxley Act of 2002, we plan to issue and make effective final rules on or prior to August 29, 2002 to require the certification mandated by the Act. However, given the specificity of the requirements of section 302, we wanted to alert interested parties to the rules that we will be required to adopt pursuant to section 302 and to the differences between those rules and our proposed rules.

II. Required Certification Under Section 302 of the Sarbanes-Oxley Act of 2002

Section 302(a) of the Sarbanes-Oxley Act of 2002 provides that the Commission shall, by rules that become effective not later than August 29, 2002, require, for each company filing periodic reports under section 13(a) or 15(d) of the Exchange Act,¹⁰ that:

The principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, certify in each annual or quarterly report filed or submitted under either such section of such Act that—

(1) The signing officer has reviewed the report;

(2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;

(3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of,

¹⁰ 15 U.S.C. 78m(a) or 78o(d).

and for, the periods presented in the report;

(4) the signing officers—

(A) are responsible for establishing and maintaining internal controls;

(B) have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared;

(C) have evaluated the effectiveness of the issuer's internal controls as of a date within 90 days prior to the report; and

(D) have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date;

(5) the signing officers have disclosed to the issuer's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function)—

(A) all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer's ability to record, process, summarize, and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls; and

(B) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and

(6) the signing officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

III. Certain Differences From Our Certification Proposal

There are several substantive differences between the form of certification mandated by section 302 of the Sarbanes-Oxley Act of 2002 and the version that we proposed in June.¹¹ As indicated above, we will adopt a form of certification that conforms to the statutory requirements. Both our proposed form of certification and that required by the Act address the material accuracy and completeness of the periodic reports that they cover.

¹¹ Section 906 of the Sarbanes-Oxley Act of 2002 adds new section 1350 to chapter 63 of title 18 of the United States Code. Section 1350 requires a written statement to accompany all periodic reports filed with us that contain financial statements. This release does not relate to section 906 of the Act, which, by its terms, is effective on enactment of the Act, July 30, 2002.

However, our proposed form of certification used a "plain English" approach to reflect the applicable disclosure standard for "material" information,¹² while the Act uses the formulation found in Exchange Act Rules 10b-5(b)¹³ and 12b-20.¹⁴ In addition, the Act requires an additional attestation regarding the financial disclosure included in these reports. Further, while our proposed certification contains an attestation regarding the completion of a review of internal procedures and controls aimed at assuring adequate disclosure, the attestations required by the Act require additional information regarding certain aspects and results of that review.

There is also a difference regarding the companies to whom the certification requirements are applicable, in respect of foreign issuers. Our proposed rules would only have applied to issuers subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act that filed annual reports on Forms 10-K and 10-KSB and quarterly reports on Forms 10-Q and 10-QSB. Thus, our proposed rules would have applied to U.S. companies and to companies domiciled in foreign jurisdictions that have a majority of U.S. security holders and U.S.-based businesses or management. Section 302 of the Act, however, also applies to foreign private issuers.¹⁵ We, therefore, intend to adopt final rules that would apply the certification requirement to foreign private issuers filing annual reports on Form 20-F¹⁶ and Canadian issuers filing Form 40-F¹⁷ under the Commission's Multijurisdictional Disclosure System.¹⁸

¹² See Release No. 34-46079 at section II.2.

¹³ 17 CFR 240.10b-5(b).

¹⁴ 17 CFR 240.12b-20.

¹⁵ For purpose of the Exchange Act, a "foreign private issuer" is any foreign issuer (other than a foreign government) except an issuer meeting the following conditions: (1) more than 50% of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the U.S.; and (2) the majority of the executive officers or directors are U.S. citizens or residents; or more than 50% of the assets of the issuer are located in the U.S.; or the business of the issuer is administered principally in the U.S. See Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)].

¹⁶ 17 CFR 249.220f.

¹⁷ 14 CFR 240.240f.

¹⁸ Section 302(b) of the Sarbanes-Oxley Act of 2002 states that nothing in the section can be interpreted or applied in any way to allow any issuer to lessen the legal force of the certification required by the Act by an issuer that has reincorporated or engaged in any other transaction resulting in the transfer of the corporate domicile or offices of the issuer from inside of the United States to outside of the United States. Our rules as adopted will, of course, assure compliance with this requirement by applying the certification requirement to all reporting companies, including

While section 302 of the Act requires the principal executive officer or officers and principal financial officer or officers to make specific attestations in their certifications as to the company's internal controls, it does not directly address the maintenance of these requirements. Our proposed rules would require maintenance of sufficient procedures to provide reasonable assurance that the company is able to collect, process and disclose, within the time periods specified in our rules and forms, the information, including non-financial information, required to be disclosed in their periodic and current reports. We do not propose to modify, and continue to solicit comment on, our proposed Rules 13a-15(a) and 15d-15(a) that would impose this requirement.

We are considering the manner of application of section 302 of the Act to registered investment companies. We ask commenters to address the manner in which the certification requirement should address registered investment companies, including the appropriate location for the certification (for example, Form N-SAR;¹⁹ reports to shareholders), the appropriate individuals to provide the certification (for example, officers of the investment company itself and/or the investment adviser, administrator or depositor of the registered investment company), how the rule should apply to different types of investment companies (for example, managed investment companies; unit investment trusts) and any other matters that are specific to registered investment companies.

IV. Request for Comment

As indicated above, we continue to solicit comment on proposed Rules 13a-15(a) and 15d-15(a), as proposed on June 14, 2002 in Release No. 34-46079.

Dated: August 2, 2002.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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any issuer that would seek to lessen the legal force of the certification as described above.

¹⁹ 17 CFR.330; 17 CFR 274.101.