

Capital Markets and Securities

A bulletin prepared by the Capital Markets Group at Vedder Price designed to keep corporate executives and investment banking professionals informed of major developments in the securities industry.

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THE NEW CEO/CFO CERTIFICATION REQUIREMENTS

A confusing array of CEO/CFO certification requirements for public companies has emerged. This memorandum updates the certification requirements and provides some preliminary thoughts to assist in applying the current requirements to your company.

The Certification Requirements; Section 906 Certifications Required Immediately

On June 27, 2002, the SEC issued an order requiring the CEOs/CFOs of 947 U.S. public companies to make sworn statements commencing with the filing of quarterly or annual reports on or after August 14, 2002. In addition, Section 302 of the Sarbanes-Oxley Act of 2002 (the "Act"), signed by President Bush on July 30, 2002, directs the SEC to adopt rules for CEO/CFO certifications on or before August 30, 2002. However, **effective immediately**, under the criminal penalty provisions of Section 906 of the Act, periodic reports filed by any U.S. public company with the SEC pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (eg, 10Ks and 10Qs) must be accompanied by a written statement of the chief executive officer ("CEO") and the chief financial officer ("CFO") of the company. This Section 906 Certification must state that "the periodic report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operation of the issuer." All calendar year companies currently readying second quarter Form 10Q's for filing on or prior to August 14th must include the Section 906 Certification. This requirement is different from the certification requirements of Section 302 of the Act, the SEC Order issued on June 27th and the proposed revisions to the listing rules of the New York Stock Exchange now under consideration.

Criminal Penalties

Section 906 imposes criminal penalties on a certifying person who:

- knows that the report accompanying the statement does not comport with all of the requirements of Section 906, and such person shall be fined not more than \$1 million or imprisoned not more than 10 years or both; or

- willfully certifies a statement knowing that the periodic report that accompanies the statement does not comport with all the requirements of Section 906, and such person shall be fined not more than \$5 million or imprisoned not more than 20 years, or both.

Recommendations

The SEC has not yet provided substantive guidance on the “new” certification requirements, including Section 906 Certifications. Some preferred approaches and recommendations follow:

1. Be sure to submit a certificate pursuant to Section 906 on all covered reports filed with the SEC subsequent to July 29th. If a report was filed subsequent to July 29th without a Section 906 certificate, the report should be amended.
2. File the Section 906 statement(s) via Edgar as Exhibit 99 to the report.
3. Consider the advisability of expanding internal due diligence procedures appropriate for your company to support the certifications. These procedures may include the following:
 - The CEO should get a written “shadow” certificate from the CFO.
 - The CEO and the CFO should get written shadow certificates from each person materially involved in preparing the report including the financial information contained in the report.
 - When applicable, the CEO and the CFO should discuss the report with the chairman of the company’s Audit Committee, internal auditors and external auditors.
 - Counsel or a person or persons within the Company designated by the CEO or the CFO should prepare and complete a compliance checklist for each report.

The entire arena of CEO/CFO Certifications is evolving rapidly, and we will keep you informed as clarifications are made as to the relationship and standards of the various certification requirements for public companies. Please check our website, www.vedderprice.com, for updates as well.

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- debt and equity offerings, including initial public offerings, structured debt financings, aircraft securitizations, dual-class equity structures, and sophisticated preferred stock instruments;
- capital formation for initial capitalization, financing ongoing operations, and acquisitions;
- corporate disclosure, periodic reporting, proxy solicitations, and insider trading and beneficial ownership compliance matters;
- private placement of securities, including Rule 144A and Regulation S transactions;
- tender offers, mergers and acquisitions, and recapitalizations and restructurings;
- international offerings of securities and compliance by foreign issuers with U.S. securities laws;
- litigation and administrative and arbitration proceedings involving various securities fraud claims, disclosure issues, and regulatory enforcement matters; and
- municipal bond financings.

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