

SEC PROPOSES MODIFIED OFFICER CERTIFICATION RULE

By Curtis R. Hearn and Allison C. Bell

On August 2, 2002, the SEC issued a release announcing that its previously proposed rule that would require CEO and CFO certification of a company's 1934 Act periodic reports has been modified to conform to the specific requirements for civil certification set forth in the Sarbanes-Oxley Act of 2002.

The Act requires the SEC to adopt final rules on the civil certification requirements no later than August 29, 2002. In its August 2nd release, the SEC indicated that its final rule will require certification that conforms to the requirements of the Act, which are somewhat different than those originally proposed by the SEC in June. ([Click here to link to our E*Zine regarding the SEC's original proposed officer certification rule.](#))

Specifically, under the SEC's modified proposal, CEOs and CFOs will be required to make a certification:

- that the signing officers have reviewed the company's periodic report;
- that, based on the officers' knowledge, the periodic report does not misstate or omit a material fact, and that 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 company;
- that the signing officers are responsible for and have established and examined the company's internal controls to ensure that material information relating to the company is made known to the signing officers;
- that the signing officers have evaluated the effectiveness of the company's internal controls as of a date that is not more than 90 days from the date of the report;
- that the signing officers have disclosed to the company's auditors and audit committee any significant deficiencies in the company's internal controls and any fraud that involves management or other employees who have a significant role in the company's internal controls; and
- that the signing officers have disclosed whether or not there were any

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- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
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- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
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significant changes in the company's internal controls or other factors that could significantly affect the internal controls.

It is not clear from the release, or from the Act, how the certification would "accompany" a company's periodic report. The SEC's original proposed rule would have required the certification to be included as part of the Form 10-Q itself. We expect that the final rule will clarify the manner by which the certification is to be filed with the SEC.

While the foregoing certification requirements will replace the certification requirements originally proposed by the SEC, the SEC is still proposing to place additional requirements on public companies that are not specifically mandated by the Act. Specifically, these proposals would require companies to institute procedures to ensure the timely collection and evaluation of information potentially subject to disclosure in the periodic and current reports filed under the 1934 Act. Currently, an SEC-registered company is only required to establish and maintain systems of internal procedures and controls with respect to its financial information. The SEC's additional proposals would require companies to implement adequate procedures for gathering *all information*, including non-financial information, required to be included in its periodic reports.

If these proposals are adopted, companies would be required each year to evaluate, under management's supervision, the effectiveness of procedures relating to the development of information necessary to prepare its quarterly and annual reports. While the SEC's proposed rule would not dictate particular procedures for conducting the evaluation, the SEC has recommended that each company *create a committee* with responsibility for considering the materiality of the information and determining disclosure obligations on a timely basis. The SEC has indicated that this committee should report to senior management, and members of the committee could include the controller, general counsel, principal risk management officer and chief investor relations officer.

Finally, if adopted, the SEC's proposed rule would also require the board of directors, in addition to the CEO and CFO, to review the results of the evaluation of the company's reporting procedures. However, as stated above, only CEOs and CFOs would have to certify, in connection with the filing of the required report, that they have reviewed the results of the evaluation. Companies would be required to retain these annual certification statements for five years.

Comments on the modified proposed rule should be delivered to the SEC no later than August 19, 2002.

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PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

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SEC PROPOSES RESEARCH ANALYST CERTIFICATIONS

By Amos J. Oelking III

On August 2, 2002, the SEC proposed Regulation AC which would require research analysts to make certain certifications in research reports and in connection with public appearances. By requiring the certifications, the SEC aims to "promote the integrity of research reports and investor confidence in the research analyst's recommendations."

Research Reports

Specifically, proposed Regulation AC would require broker-dealers to include the following disclosures in their research reports:

- certification by the research analyst that the views expressed in the report "accurately reflect such research analyst's personal views" about the subject security and issuer; and
- a certification by the analyst as to whether any part of his compensation was or will be, directly or indirectly, related to his *specific* recommendation or views contained in the research report. If any part of the analyst's compensation was or will be so related, disclosure of the source, amount and purpose of the compensation would also be required, as would a statement that such compensation may have influenced the analyst's recommendation.

The SEC expects these certifications (or a page reference thereto) to be included on the front page of the research report.

Public Appearances

Regulation AC would also require broker-dealers to maintain records with respect to public appearances by research analysts. Specifically, a broker-dealer who publishes or circulates an analyst's research report would be required to "make a record" within 30 days after each calendar quarter in which the analyst made a public appearance during which he offered a specific recommendation or opinion concerning the security or issuer covered in the research report. This record would be required to include:

- a written certification by the analyst that the views expressed during the appearance "accurately reflected such research

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analyst's personal views" about the subject security and issuer; and

- a written certification by the analyst that no part of his compensation was or will be, directly or indirectly, related to any *specific* recommendations or views expressed in any public appearance.

If the analyst is unable to make these certifications, the broker-dealer must obtain a written statement from the analyst that he is unable to provide the certifications and the reasons therefor. Moreover, the broker-dealer must also disclose in all research reports for the following 120 days that the analyst did not comply with these certification requirements and the reasons therefor.

If adopted, Regulation AC would cover research reports and public appearances relating to *both* debt and equity securities and, thus, is broader than current rules governing broker-dealers and research analysts. The SEC encourages broker-dealers to consider voluntarily disclosing the certifications that proposed Regulation AC would require.

Comments regarding proposed Regulation AC should be delivered to the SEC no later than September 23, 2002.

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The certifications that proposed Regulation AC would require would supplement the analyst rules approved by the SEC in May. These approved rules, some of which are now effective, seek to address concerns regarding the potential for conflicts of interest as a result of the relationships between firms' investment banking and research departments. ([Click here to link to our E*Zine regarding the analyst rules approved by the SEC.](#))

Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:

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HOSPITAL LIABILITY

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PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

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