

July 31, 2002

## CEO/CFO Certifications - An Update Certifications are Effective Immediately

Notwithstanding (i) the language in Section 302 of the Sarbanes-Oxley Act of 2002, which directs the SEC to adopt within 30 days rules for CEO/CFO certifications and (ii) that CEOs/CFOs of 947 U.S. public companies will be required to make sworn statements that comply with the requirements of the June 27<sup>th</sup> SEC Order commencing with the filing of quarterly or annual reports on or after August 14, the SEC has informally confirmed that under the criminal penalty provisions of the Act (Section 906), effective immediately:

- each periodic report containing financial statements filed by an issuer must be accompanied by a written statement by the CEO and CFO; and
- such statement must certify that such 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 such periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

For purposes of this certification, the term "issuer" would include, based on the definition set forth in the Act:

- any company with securities registered under Section 12; and
- any company that is required to file reports under Section 15(d) (e.g. issuers with only a class of public debt outstanding).

This requirement would apply to non-U.S. issuers (at least when they file an annual report on Form 20-F, a periodic report containing financial statements under the MJDS or a Form 10-K or 10-Q), as well as U.S. issuers. It is unclear how this requirement will apply to non-U.S. issuers submitting quarterly or semi-annual financial statements to the SEC under a Form 6-K, as Form 6-Ks are "made" and are not deemed "filed" for liability purposes of Section 18 of the Exchange Act. It is also unclear as to whether a current report filed on Form 8-K by a U.S. issuer, which includes financial statements, would be deemed a "periodic report" subject to the certification requirements. The SEC declined to express an opinion on either question.

The SEC declined to clarify what "accompanied" means. Issuers are considering as alternatives: filing the certification as correspondence; making the certification as part of the report (above the signature line); filing the certification as an exhibit to the report or filing the certification under cover of a Form 8-K. The SEC has pointed out, again informally, that dissemination of Section 906 certifications (like the sworn statements under the Order), other than in compliance with Regulation FD, could raise

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issues of selective disclosure. The preferred approaches appear to be to include the required text as part of the report or as an exhibit to the report.

The SEC also declined to address what is encompassed by a statement that a report fully complies with the requirements of Section 13(a) or 15(d), though presumably the standard encompasses all information specified by the applicable form (including those items of Regulation S-K cross-referenced in the form).

The CEOs/CFOs of the 947 companies subject to the June 27<sup>th</sup> SEC Order, it appears, will be required to make a certification that complies with Section 906 of the Act, as well as the sworn statements mandated by the Order. The SEC also declined to address how the Section 302 certifications (to be effective within 30 days) will interact with the Section 906 certification covering the same report. If the SEC acts before August 14 on the Section 302 certifications, some CEOs/CFOs may have three certifications to make, while others may have two certifications to make, in respect of filings made on August 14 (each using a different standard).

This entire area is in flux, and the SEC appears to have been taken by surprise. Only two days ago, the SEC issued a press release and a separate Staff statement on the sworn statements required under the Order (suggesting that due to selective disclosure implications, the companies file an Item 9 or Item 5 Form 8-K disclosing the filing of the sworn statements and attaching them as exhibits). No reference was made to the parallel certifications.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. Any questions concerning the foregoing should be addressed to any of the following members of our Securities Group ("SG"), M&A Group ("MA") or Securities, Futures and Derivatives Litigation Group ("LG"):

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In addition, memoranda on related topics, including our memorandum summarizing the Act, may be accessed under Securities Group publications on our web site: [www.paulweiss.com](http://www.paulweiss.com).

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