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June 2002

SEC Proposes Management Certification of Periodic Reports of Domestic Reporting Companies

The Securities and Exchange Commission (the "SEC") has proposed changes in corporate governance rules that are designed to improve the financial reporting and disclosure system for U.S. companies that are subject to the reporting requirements of the Securities Exchange Act of 1934. The intended result of the proposals is increased investor confidence that is consistent with President Bush's "Plan to Improve Corporate Responsibility and Protect America's Shareholders."

Specifically, the proposed rules would:

- require a domestic reporting company's principal executive officer and principal financial officer to make certifications with respect to the contents of the company's quarterly and annual reports and with respect to a mandated company evaluation of compliance procedures (see next item); and

- require a domestic reporting company to maintain procedures to provide reasonable assurance that the company is able to collect, process and disclose the information required by the Exchange Act's reporting requirements, and to review and evaluate the procedures periodically.

These requirements would not apply to foreign private issuers that file annual reports on Form 20-F.

The proposed rules are subject to a 60-day comment period.

I. Proposed Requirements for Certification of Quarterly and Annual Reports

The proposed change to Exchange Act Rule 13a-14 would require both the principal executive and principal financial officer of a domestic reporting company to certify, with respect to the company's quarterly and annual reports, that:

- he or she has read the report;

- to his or her knowledge, the information in the report is true in all important respects, as of the last day of the period covered by the report; and the report contains all information about the company of which he or she is aware that he or she believes is important to a reasonable investor (or, in the case of a quarterly report, important to a reasonable investor in light of the subjects required to be covered by a quarterly report) as of the last day covered by the report.

The SEC considers information to be "important to a reasonable investor" if there is a substantial likelihood that a reasonable investor would view the information as significantly altering the total mix of information in the report and if the omission of such information would make the report misleading to a reasonable investor. This explanation would form part of the certification.

The SEC believes that the proposed certification follows the standard of "materiality" as set forth in leading court cases on the subject. The proposed certification, however, would speak in terms of knowledge and belief of the officer making the certification. The SEC explained that it does not believe that the proposed certification would change underlying liability standards as to materiality or create an unacceptable risk of increased liability.

The SEC emphasized the subjective nature of the proposed certification. The SEC stated that the principal executive officer or principal financial officer would not, as a result of the proposed requirement, have to separately inquire as to information not known to him orher. However, the SEC noted that these corporate officers should be involved in the approvalprocess for quarterly and annual reports and that they should not approve them without firstreviewing them thoroughly and thinking critically about the disclosures that they shouldcontain. In particular, a critical review of a report would include other inquiries where appropriate, including regarding disclosures they do not understand and levels of materiality known to them.

The proposed certification requirements would not alter the current signature requirements for Form 10-Ks or 10-Qs. They would, however, require the principal executive officer to sign a Form 10-Q, which is not currently expressly required (a duly authorized representative, which may or may not be the principal executive officer, and the principal financial or accounting officer must sign the Form 10-Q report).

II. Internal Compliance Procedures

Proposed new Exchange Act rules would require a domestic reporting company to maintain procedures to provide reasonable assurance that the company is able to collect, process and disclose the information required to be included in annual, quarterly and current reports by the Exchange Act. In addition, the proposed rules would require that before filing of the Form 10-K, the company evaluate the effectiveness of the design and operation of these procedures under the supervision of management and ensure that those conducting the evaluation communicate the results of the evaluation to the principal executive officer, the principal financial officer and the board of directors.

The company's principal executive officer and principal financial officer would have to review the annual evaluation and then certify in the company's annual report that they have reviewed the results of the evaluation. The SEC believes that it would be beneficial if the board of directors also participates in the review of the evaluation; it did not however mandate such a review.

The evaluation proposal is meant to complement internal procedures and controls with respect to financial information. The procedures should be designed to capture information required by the Regulation S-K disclosure rules, including information required for the MD&A, and information relevant to an assessment of risk disclosure.

The SEC is not proposing to require any particular procedure for conducting the evaluation. It does recommend, however, that companies create a committee responsible for considering materiality of information and determining disclosure obligations on a timely basis. This committee might include the principal accounting officer, general counsel, principal risk management officer and chief investor relations officer.

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This memorandum provides only a general overview of the proposed disclosure rules. It is not intended to provide or constitute legal advice, and no legal or business decision should be based on its contents. Any questions concerning the foregoing should be addressed to members of the Paul Weiss Securities Group (see below). In addition, memoranda on related topics may be accessed under Securities Group publications on our web site (www.paulweiss.com).

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