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Advisory

July 29, 2002

SECURITIES LAW

SEC Orders Certification of Periodic Reports by Principal Executive and Financial Officers of Largest Public Companies

Also Proposes Rules for Certification of Future Reports by All Public Companies

In order to help bolster diminishing confidence in the system of periodic public company reporting in the United States, and in accordance with President Bush's Plan to Improve Corporate Responsibility, the Securities and Exchange Commission (SEC) has issued an order and proposed rules that would require a company's principal executive officer and principal financial officer to certify as to the accuracy and completeness of reports filed with the SEC under the Securities Exchange Act of 1934, as amended (Exchange Act).¹ The SEC states in the Release that, in light of the now well-documented problems with the veracity of reports and financial statements prepared by companies such as Enron Corp. and WorldCom, Inc., it believes the time has come to "reinforce the responsibility of corporate officers to security holders for the content of companies' ...reports."

In the Order, published on June 28, 2002, the SEC states that it will require the principal executive officer and principal financial officer of the largest public companies to certify personally to the SEC that their companies' most recent periodic reports are both complete and accurate, using a certification form prescribed by the SEC.²

In contrast to the Order, which requires a one-time certification of recent past Exchange Act filings, the Release is forward-looking, proposing rules that would require the principal executive officer and principal financial officer of *all* domestic companies that are required to file periodic reports under the Exchange Act to certify personally as to the accuracy and completeness of their companies' future quarterly and annual reports. The Release would also require companies to maintain and periodically evaluate internal procedures concerning the collection, processing, and disclosure of information required in SEC reports.

¹ Commission Order File No. 4-460, dated June 28, 2002 (the "Order"); Proposed Rule, "Certification of Disclosure in Companies' Quarterly and Annual Reports," Release No. 34-46079, dated June 17, 2002 (the "Release").

² The form of certification is attached as Annex A to this Client Alert. The SEC has stated that companies must use the exact language set forth in the attached form in making their certifications; any modifications to the language will require an explanation to the SEC of why the changes were made. The SEC has posted a chart of the certifications that have been filed under the Order at <http://www.sec.gov/rules/extra/ceocfo.htm>

The topic of officer certification of SEC reports was also addressed in the Sarbanes-Oxley Act of 2002, which is expected to be signed into law by President Bush in the next several days. Once the Sarbanes-Oxley Act has become law, the proposals set forth in the Release have been conformed to the requirements of the Act, and the final rules relating to officer certification have been issued, Mintz Levin will distribute a Client Advisory describing these rules in detail.

SEC Order Regarding Companies Whose Officers Must Certify Recent SEC Reports

The Order requires the principal executive officer and principal financial officer of 947 publicly traded companies with reported annual revenues exceeding \$1.2 billion during their last fiscal year to certify personally as to the material accuracy and completeness of their companies' most recent reports filed with the SEC. A list of the affected companies has been posted on the SEC's web site, and all affected companies should have received separate notice of this obligation from the SEC by mail.

The certification requirement will apply to:

- the company's most recent annual report on Form 10-K;
- any quarterly reports on Form 10-Q, current reports filed under Form 8-K³, and definitive proxy

materials filed after the company's most recently filed Form 10-K; and

- any amendments to these reports and proxy materials.

Any information incorporated by reference into these reports and proxy materials will also be covered by the certification.

The principal executive officer and principal financial officer of the affected companies must each file a separate, sworn, written statement with the SEC personally attesting that, to the best of the officer's knowledge, based on a review of the reports listed above:

- the filings did not contain an untrue statement of a material fact as of the end of the periods covered by the reports (or, in the case of current reports on Form 8-K or definitive proxy materials, as of the dates on which they were filed); and
- the filings did not omit to state a material fact necessary to make the statements in the reports, in light of the circumstances under which they were made, not misleading as of the end of the periods covered by the reports (or, in the case of current reports on Form 8-K or definitive proxy materials, as of the dates on which they were filed).

If the officers cannot truthfully make these statements, they must file a statement describing why they are

unable to do so. Both officers must also disclose whether their certifications have been reviewed by their companies' audit committees, or, in the absence of an audit committee, the independent members of the board of directors. In order to make this statement, both the principal executive officer and the principal financial officer must personally review their certifications with the members of the audit committee (or the independent members of the board of directors). If the company has replaced the principal executive officer or the principal financial officer since the company filed any of the covered reports, the current principal executive officer or principal financial officer must make the certification based on his or her knowledge.

All written statements must be delivered in hard copy to SEC Secretary Jonathan Katz⁴ by the SEC's close of business on the first day, on or after August 14, 2002, that companies are required to file a report on Form 10-K or 10-Q. Officers of companies on the list that have fiscal years ending on December 31 will be required to file their certifications in conjunction with the due date of their Forms 10-Q for the quarter ended June 30, which this year is August 14, 2002. Companies who request filing extensions under Rule 12b-25 for their Forms 10-K or 10-Q will receive a corresponding extension for the certifications required under the Order.

Once filed, the SEC will post the statements on its web site for public

³ Current Reports on Form 8-K that are furnished, but not filed, under Item 9 of Form 8-K for purposes of complying with Regulation FD will not be treated as covered reports under the certification, unless they are incorporated by reference into a filing under the Securities Act of 1933, as amended, or the Exchange Act.

⁴ The statements may not be filed electronically on the EDGAR system or e-mailed to the SEC. They may be faxed, hand-delivered, or sent by mail; if sent by mail we recommend delivery by a means that would enable the company to prove receipt (such as a nationally recognized overnight delivery service). Fax transmissions sent on August 13, 14 and 15 may be sent to 202-824-5090 or 202-824-5091; faxes sent on any other day should be sent to 202-942-9651.

review. The statements will be divided into two categories: statements that follow the exact form of the certification (set forth in Annex A), and “all others.” If a company files a certification along with a cover letter, the cover letter will also be posted on the SEC’s web site. A cover letter that attempts to qualify or explain statements in the certification will result in the certification being placed in the “all other,” or non-complying, category on the web site.

The SEC intends this measure to assure both the investing public and the SEC that corporate disclosure in filed reports is either in compliance with federal securities laws, or, where such a statement cannot be made, that the SEC and the public have knowledge of these failures as soon as possible.

It is not clear what additional risk of liability these sworn statements will create for the principal executive officers and principal financial officers who are required to sign them. Federal securities law already provides for individual criminal and civil liability for making false or misleading statements in documents filed with the SEC. For signers of these certifications, individual liability could arise from several areas of existing federal law, including:

- criminal liability for making a materially false statement to the SEC, under 18 U.S.C. §1001;
- criminal liability for willfully and knowingly making a false statement in a document required to be filed with the SEC, under Section 32 of the Exchange Act; and
- civil liability and risk of SEC enforcement action for making an

untrue statement of material fact or for omitting to state a material fact necessary to make statements made in the certification not misleading, under Section 10(b) and Rule 10b-5 of the Exchange Act.

Companies whose principal executive officer or principal financial officer fail to provide a clean certification under the Order are also likely to find themselves the subject of an SEC enforcement investigation, depending on the reasons for the failure. Accordingly, as described in further detail below, counsel should be consulted as soon as possible if it becomes apparent that these principal officers of the company will be unable to file a clean certification.

SEC Proposal for Additional Certification and Procedural Requirements

In the Release, the SEC proposes certification requirements for the principal executive officer and principal financial officer of all domestic companies that are required to file annual and quarterly reports under the Exchange Act. The proposal would require these officers each to certify personally that, to their knowledge, their company’s quarterly and annual reports are true in all important respects and contain all information about the companies, of which they are aware, that they believe is important to a reasonable investor.

The SEC also proposes to require companies to maintain procedures that would provide reasonable assurance that the company is able to collect, process, and disclose all information required in the company’s periodic and current reports.

The proposal would also require companies to periodically review and evaluate these procedures.

If approved, these requirements would apply to all domestic companies, including small business issuers, that are subject to the reporting requirements of the Exchange Act. The rules would not, however, apply to foreign private issuers, regardless of whether they are subject to the reporting requirements of the Exchange Act.

- ***Certification of Disclosure in Quarterly and Annual Reports.***

The SEC’s current rules require that authorized officers of reporting companies sign quarterly and annual reports on behalf of their company prior to filing the reports with the SEC. Proposed Rules 13a-14 and 15d-14 would require, in addition to the existing signature requirements, that personal certifications from a company’s principal executive officer and principal financial officer accompany the annual report on Form 10-K and the quarterly report on Form 10-Q. The principal executive officer and principal financial officer of a company would be required to certify that:

- ♦ the officer has read the annual or quarterly report;
- ♦ to the officer’s knowledge, the information in the report is true and complete 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 the officer is aware that he or she believes is important to a reasonable investor, as of

the last day of the period covered by the report⁵. The certification requirement for the quarterly report on Form 10-Q limits this certification's scope in light of the limited subjects required to be addressed in a quarterly report.

According to the Release, information is "important to the reasonable investor" if: the information is substantially likely to significantly alter the total mix of information in the report in the eyes of the reasonable investor, and omitting the information would cause the report to be misleading to a reasonable investor. The SEC stated in the Release that it intends this phrasing to reflect current disclosure standards for what constitutes "material" information.

Current antifraud standards and disclosure rules already place responsibility for the accuracy and completeness of SEC reports with companies' management and directors. Under the proposed rules, a principal executive officer or principal financial officer providing a false certification could potentially be subject to SEC action for violating Section 13(a) of the Exchange Act, and to both SEC and private actions for violating Section 10(b) of the Exchange Act and Rule 10b-5 under the Exchange Act. Liability under the certification, however, would have to be premised on a failure to include information that is both *known* to the officer and *believed* by

the officer to be important to the reasonable investor.

• **Internal Controls and Procedures.**

Under the SEC's current rules, reporting companies must maintain sufficient internal procedures for collecting and disclosing required financial information.⁶ Proposed Rules 13a-15 and 15d-15 would broaden this requirement to require an issuer to maintain sufficient procedures to provide reasonable assurance that the company is able to collect, process and disclose, in a timely manner, all information, both financial and non-financial, required to be disclosed in its periodic and current reports under the Exchange Act.

While the proposed rule would not require issuers to adopt particular information-gathering procedures, the SEC does expressly recommend that companies create committees that would be charged with considering the materiality of information, determining disclosure requirements, and reporting their findings to senior management. Those named by the SEC as potential members of such committees include the company's principal accounting officer or the controller, the general counsel or other officer with responsibility for disclosure matters, the principal risk management officer, and

the chief investor relations officer.

- **Periodic Review and Evaluation of Internal Controls and Procedures.** Under proposed Rules 13a-15 and 15d-15, companies would also be required to review and evaluate their information-gathering procedures before each filing of an annual report on Form 10-K. These evaluations would be required to take place under the supervision of management and potentially the board of directors, and would address, at a minimum, any material weaknesses in procedures and any other deficiency that would hinder the timely collection, processing, or disclosure of required information. The review would also need to describe any material changes in the internal procedures and controls, such as corrective actions taken in light of identified deficiencies.

As part of their certifications of the disclosure to be included in each annual report, companies' principal executive and financial officers would be required to state that they have reviewed the results of the internal controls and procedures evaluation. The officers would only be required to certify that they have performed the review. No certification relating to the substance or results of the evaluations would be required.

As noted above, on July 25, 2002, the United States Congress approved the Sarbanes-Oxley Act of 2002 for

⁵ If this proposed requirement in the Release were read literally, it would require officers to certify that *all* information that would be important to a reasonable investor regarding the company has been provided in its annual and quarterly reports, whether or not the rules of the SEC called for disclosure on a particular topic. This would significantly broaden the provisions of existing Exchange Act Rule 12b-20, which states that companies must provide, in addition to the disclosure that is expressly required in an SEC statement or report, "...such further material information, if any, as may be necessary to make *the required statements*, in the light of the circumstances under which they are made, not misleading" (emphasis added). We do not believe that the SEC intended in the Release to change the scope of disclosure in periodic reports beyond the express requirements of the reports and Exchange Act Rule 12b-20. We expect that this distinction will be clarified in the final rules on this topic. The text of the Sarbanes-Oxley Act did capture this distinction.

⁶ Section 13(b)(2) and Rules 13b2-1 and 13b2-2 issued thereunder.

signature by President Bush. The Sarbanes-Oxley Act includes its own requirements relating to officer certification of SEC reports, which, if the Act is signed into law by the President as expected, would require the SEC to harmonize the proposals in the Release to the provisions of the Act. The provisions in the Sarbanes-Oxley Act relating to disclosure certification closely track the proposed rules set forth in the Release, with the following additional or differing requirements in the Act as to the obligations of the certifying officers:

- the officers must state that the company's 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 as of and for the periods set forth in the report;
- the officers must evaluate the adequacy of the company's internal reporting procedures within 90 days of each report that is submitted to the SEC;
- the officers must state in the report their conclusions as to the effectiveness of the company's internal reporting procedures; and
- the officers must disclose to the company's independent auditors and audit committee any deficiencies in the internal reporting procedures or any fraud involving management or the employees who have a significant role in the company's internal reporting procedures.

What to Expect Next and What We Recommend

The Order must be complied with by companies who are subject to it in connection with the filing of the next Form 10-Q or 10-K that is due on or after August 14, 2002. The proposed rules set forth in the Release have been posted for public comment until August 19, 2002. We expect that final rules, as they may be revised to conform to the requirements of the Sarbanes-Oxley Act, will be adopted shortly thereafter.⁷

Both the Order and the Release have been the subject of a substantial amount of debate in the press and among members of the securities bar. A number of companies have already filed their certifications under the Order in advance of the deadline and, given the current level of investor interest in issues surrounding corporate governance, even companies which are not subject to the Order have been volunteering to provide certifications.⁸

The SEC staff noted, in a statement issued on July 29, 2002, that because the contents of the statements to be filed under the Order are nearly certain to be material, companies that are subject to the Order should:

- file a Current Report on Form 8-K under either Item 5 or Item 9 of that form, attaching the filed certifications as exhibits;
- post the certifications on their web sites; and
- take whatever additional steps that they consider appropriate to accomplish broad public disclosure

of the statements in compliance with Regulation FD, as soon as the statements are filed.

Steps to Take in Preparation for Filing Certifications under the Order

We expect that companies which are subject to the Order will require their senior managers and others in charge of operating divisions or units to provide their own certifications to the principal executive officer and principal financial officer regarding the information included within the companies' periodic reports, which certifications will then be relied upon by the principal executive officer and principal financial officer in making their own certifications regarding the reports to the SEC. Many companies have stated that they believe it is unrealistic, in a large and complex organization, to expect the principal executive officer and principal financial officer to make the certifications required by the SEC without corresponding certifications from the managers who are in charge of the actual operating units.

- We recommend that companies with complex internal reporting structures require their executive officers, senior managers and employees in charge of significant operating divisions or internal functions (such as the treasury and internal audit departments) to sign their own certifications to the principal executive officer and principal financial officer, concerning the review that they have undertaken of the disclosure in

⁷ The Sarbanes-Oxley Act requires that rules regarding prospective certifications for reports filed with the SEC must be implemented within 30 days of the enactment of the Act.

⁸ The SEC has requested that companies not subject to the Order refrain from submitting statements to the Secretary of the Commission. The SEC has noted, however, that companies not subject to the Order may file a Current Report on Form 8-K under Item 5 or Item 9 regarding the matters addressed by the Order.

the periodic reports to be covered by the certification. A model form of certification from the subordinate officers and managers is attached as Annex B to this Advisory. This form should be tailored as appropriate to reflect a company's internal reporting structure and practices.

- Before submitting the certifications, companies should conduct due diligence meetings to determine that the process of gathering and confirming information for purposes of providing the certifications has been thorough and complete. At a minimum, the meetings should involve the principal executive officer, the principal financial officer, the chief accounting officer, the general counsel, representatives of the internal audit and investor relations departments, representatives of significant operating divisions, the outside audit partner from the company's independent public accountants, and the individuals who are required to provide the certifications described in the previous paragraph. Companies should document the facts that the meetings have taken place and a general description of the topics discussed.
- The members of the audit committee should be kept apprised of the process, and notified that the company will be contacting them to discuss the outcome of the process and the contents of the certification.

Steps to Take if a Clean Certification under the Order Cannot be Given

If information comes to light in connection with the review of periodic reports that indicates a clean certification under the Order cannot be made, companies should consult with their legal counsel as soon as possible. Depending on the nature of the information, the problem may be addressable by filing an amendment to one or more of the company's periodic reports prior to the due date of the certification. The SEC has indicated that it is willing to work with companies to help them resolve any questions they have regarding difficult disclosure issues under the Order. Any discussions with the SEC staff should be conducted with the assistance of legal counsel and, if appropriate, the company's independent public accountants.

Any problem areas identified in a certification should be described with extreme care, and companies should identify a time frame for resolving any issues set forth in the certification, if possible.

Steps to Take to Comply with the Proposed Rules

Mintz Levin is preparing forms of internal control and procedure guidelines in order to help companies comply with the requirements of proposed Rules 13a-15 and 15d-15. These forms will need to be tailored to work within the framework of the company's specific needs and, if available and appropriate, existing

procedures. Your Mintz Levin attorney will be able to assist you with the tailoring and implementation process. Any internal control and procedure guidelines should be reviewed and approved by the company's audit committee prior to their implementation.

The SEC has stated that it hopes that the proposed rules, if approved, will improve the quality of disclosure by encouraging principal executive and financial officers to think even more critically than they already do about the disclosures that SEC reports should contain before approving them. The SEC also hopes that the proposed certification and procedural requirements will increase investor confidence by preventing the real or perceived absence of senior corporate official participation in the disclosure process.

* * * * *

Please contact the Mintz Levin attorney who handles your corporate and securities law matters if you have any questions or concerns regarding the SEC Order or the Release.

Statement Under Oath of Principal Executive Officer and Principal Financial Officer Regarding Facts and Circumstances Relating to Exchange Act Filings

I, [*Name of principal executive officer or principal financial officer*], state and attest that:

(1) To the best of my knowledge, based upon a review of the covered reports of [company name], and, except as corrected or supplemented in a subsequent covered report:

- no covered report contained an untrue statement of a material fact as of the end of the period covered by such report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed); and
- no covered report omitted to state a material fact necessary to make the statements in the covered report, in light of the circumstances under which they were made, not misleading as of the end of the period covered by such report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed).

(2) I [have/have not] reviewed the contents of this statement with [the Company's audit committee] [*in the absence of an audit committee*, the independent members of the Company's board of directors].

(3) In this statement under oath, each of the following, if filed on or before the date of this statement, is a "covered report":

- [identify most recent Annual Report on Form 10-K filed with the Commission] of [company name];
- all reports on Form 10-Q, all reports on Form 8-K and all definitive proxy materials of [company name] filed with the Commission subsequent to the filing of the Form 10-K identified above; and
- any amendments to any of the foregoing.

[Signature*] _____

[Name] _____

[Date] _____

Subscribed and sworn to before me
this ____ day of _____ 2002.

/s/ _____ Notary Public

My Commission Expires: _____

[* Separate statements to be signed by each of the Principal Executive Officer and the Principal Financial Officer.]



Certification of Senior Managers, Executive Officers and Other Employees Regarding Facts and Circumstances Relating to Exchange Act Filings

I, [Name of senior manager or employee in charge of significant operating division or internal function], [Title], of [Name of Company], state and attest that:

- (1) I have reviewed and reassessed the adequacy of the disclosure in the Company's covered reports with respect to [state area of responsibility of signing officer, *e.g.*, "the Company's instrumentation division"; "the Company's treasury function"], based upon my knowledge of that area;
- (2) To the best of my knowledge, based upon such review and reassessment of the covered reports of the Company, and, except as corrected or supplemented in a subsequent covered report:
 - no covered report contained an untrue statement of a material fact as of the end of the period covered by such report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed) with respect to the area described in paragraph (1) above; and
 - no covered report omitted to state a material fact necessary to make the statements in the covered report, in light of the circumstances under which they were made, not misleading as of the end of the period covered by such report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed), with respect to the area described in paragraph (1) above.
- (3) Attached to this certification is a list of the people who participated under my direction in the review of the Company's covered reports for purposes of making this certification. [Also attached is a list of dates, times and locations of meetings held to discuss the review of covered reports, including participants at those meetings.]
- (4) In this statement, each of the following, if filed on or before the date of this statement, is a "covered report":
 - [identify most recent Annual Report on Form 10-K filed with the Commission] of [company name];
 - all reports on Form 10-Q, all reports on Form 8-K and all definitive proxy materials of [company name] filed with the Commission subsequent to the filing of the Form 10-K identified above; and
 - any amendments to any of the foregoing.

Name: _____ Title: _____

Date: _____