



**FENWICK & WEST LLP**

*CORPORATE & SECURITIES LAW UPDATE*

## Sarbanes-Oxley Act of 2002 Requires Certification of August Forms 10-Q

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As you know, the Sarbanes-Oxley Act of 2002 was signed into law on July 30, 2002. The Act contains two provisions requiring CEO and CFO certification of information included in SEC reports. Much confusion has surrounded these certification requirements. Section 302 of the Act requires the SEC to adopt certification rules by August 29, 2002, and specifies content of the certification. Section 906 requires somewhat different certifications for all Forms 10-Q and 10-K, and possibly Forms 8-K that contain financial statements, that are filed after July 30. Today the SEC confirmed that Section 906 is in effect.

Please note that these two certifications are completely separate, and in addition to, the certifications that the SEC recently required from the CEOs and CFOs of approximately 1,000 large companies.

Section 906 requires that each periodic report containing financial statements be accompanied by a written statement of the company's CEO and CFO certifying that:

- the report fully complies with the requirements of Sections 13(a) or 15(d) of the Securities Exchange Act of 1934; and
- information contained in the report fairly presents, in all material respects, the financial condition and results of operation of the company.

Criminal penalties may be imposed for knowing or willful violations of the certification. If a CEO or CFO certifies a periodic report containing financial statements under Section 906 and knows that the periodic report does not satisfy the requirements of the certification, a fine of up to \$1 million and a prison term of up to 10 years may be imposed. A willful violation is punishable by a fine of up to \$5 million and a prison term of up to 20 years.

A form of Section 906 certification appears at the end of this memo. The Act gives no guidance as to how the certifications should "accompany" the periodic filing. Three methods are currently being used: (1) placing the certification below the signature section of the periodic report; (2) attaching the certification as Exhibits 99.01 and 99.02 to the periodic reports; or (3) sending the certifications with the periodic report as "correspondence" on the EDGAR system. Using the last option, the certifications would not be part of the company's periodic report and would not show up on the EDGAR website. Of course, companies may prefer the certifications to be publicly available, in which case either the signature page or exhibit approach would be feasible, or the certification could be promulgated by press release or Form 8-K (Item 9).

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In order for CEOs and CFOs to be in a position to sign the certification, they should carefully review the periodic filing and discuss the filing with the drafters, auditors and others who provided information for the filing.

Once the SEC adopts final rules related to Section 302 certification, it is possible that practices involving Section 906 certifications will change.

If you have any questions about this proposal, please contact any member of your Fenwick & West team. You may also contact Horace Nash ([hnash@fenwick.com](mailto:hnash@fenwick.com)), Jeffrey Vetter ([jvetter@fenwick.com](mailto:jvetter@fenwick.com)) or Robert Freedman ([rfreedman@fenwick.com](mailto:rfreedman@fenwick.com)) all of whom helped to prepare this update, or send an inquiry to: [fwcsu@fenwick.com](mailto:fwcsu@fenwick.com).

## **Certification Pursuant to 18 U.S.C. Section 1350, As Adopted Pursuant To Section 906 of The Sarbanes-Oxley Act of 2002**

In connection with the Quarterly Report of \_\_\_\_\_ (the "Company") on Form 10-Q for the period ending June 30, 2002 as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, \_\_\_\_\_, Chief Executive Officer of the Company, certify, pursuant to 18 U.S.C. § 1350, as adopted pursuant to § 906 of the Sarbanes-Oxley Act of 2002, that:

- (1) The Report fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
- (2) The information contained in the Report fairly presents, in all material respects, the financial condition and result of operations of the Company.

/s/ \_\_\_\_\_

\_\_\_\_\_  
Chief Executive Officer