

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 240, 249, 270 and 274

[Release Nos. 33–8212, 34–47551, IC–25967; File No. S7–06–03]

RIN 3235–A179

Certification of Disclosure in Certain Exchange Act Reports

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; interim guidance regarding filing procedures.

SUMMARY: We are proposing amendments to our rules and forms under the Securities Exchange Act of 1934 and the Investment Company Act of 1940 to require issuers to provide the certifications required by sections 302 and 906 of the Sarbanes-Oxley Act of 2002 as exhibits to the periodic reports to which they relate. We also are publishing guidance about how the certifications required by section 906 may “accompany” a periodic report to which they relate, pending the adoption of final rules.

DATES: Comments must be received on or before May 15, 2003.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

Comments also may be submitted electronically at the following electronic mail address: rule-comments@sec.gov. To help us process and review your comments more efficiently, comments should be submitted by one method only. All comment letters should refer to File No. S7–06–03; this file number should be included in the subject line if electronic mail is used. Comment letters will be available for public inspection and copying in the Commission’s Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission’s Internet Web site (<http://www.sec.gov>).¹

FOR FURTHER INFORMATION CONTACT:

Mark A. Borges or Andrew Thorpe, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 942–2910, or Carol McGee or Jonathan Ingram, Special Counsel, Office of Chief Counsel, Division of

Corporation Finance, at (202) 942–2900, or, with respect to investment companies, Christian Broadbent, Senior Counsel, Office of Disclosure Regulation, Division of Investment Management, at (202) 942–0721, at the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Item 601² of Regulation S–B,³ Item 601⁴ of Regulation S–K,⁵ Rules 12b–15,⁶ 13a–14,⁷ 13a–15,⁸ 15d–14⁹ and 15d–15¹⁰ under the Securities Exchange Act of 1934,¹¹ Rules 8b–15,¹² 30a–2¹³ and 30a–3¹⁴ under the Investment Company Act of 1940,¹⁵ Forms 10–Q,¹⁶ 10–QSB,¹⁷ 10–K,¹⁸ 10–KSB,¹⁹ 20–F²⁰ and 40–F²¹ under the Securities Exchange Act of 1934 and Form N–CSR²² under the Securities Exchange Act of 1934 and the Investment Company Act of 1940.

I. Background

On July 30, 2002, the Sarbanes-Oxley Act of 2002 (the “Act”) was enacted.²³ Section 302 of the Act required the Commission to adopt final rules to be effective by August 29, 2002 under which the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, of a company filing periodic reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the “Exchange Act”)²⁴ must

certify in each quarterly and annual report, among other things, that, based on his or her knowledge:

- The report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; and
- 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 issuer as of, and for, the periods presented in the report.²⁵

On August 28, 2002, we adopted Exchange Act Rules 13a–14 and 15d–14 and Investment Company Act Rule 30a–2 and amended our periodic report forms to implement this statutory directive.²⁶ These rules and amendments became effective on August 29, 2002. On January 27, 2003, we adopted Form N–CSR to be used by registered management investment companies to file certified shareholder reports with the Commission.²⁷

Section 906 of the Act added new section 1350 to Title 18 of the United States Code,²⁸ which contains federal criminal provisions. Section 906 contains a certification requirement that is separate and distinct from the certification requirement mandated by section 302.²⁹ Section 906 provides that each periodic report containing financial statements filed by an issuer³⁰ with the Commission pursuant to section 13(a) or 15(d) of the Exchange Act must be accompanied by a written statement by the issuer’s chief executive officer and chief financial officer (or the equivalent thereof) certifying that:

pursuant to section 12, unless the duty to file under section 15(d) has been suspended for any fiscal year. See Exchange Act Rule 12h–3 [17 CFR 240.12h–3].

²⁵ See sections 302(a)(2) and (3) of the Act [15 U.S.C. 7241(a)(2) and (3)].

²⁶ See Release No. 33–8124 (Aug. 28, 2002) [67 FR 57276] (the “Adopting Release”).

²⁷ See Release No. IC–25914 (Jan. 27, 2003) [68 FR 5348].

²⁸ 18 U.S.C. 1350.

²⁹ See Release No. 34–46300 (Aug. 2, 2002) [67 FR 51508] containing supplemental information on the Commission’s original certification proposal in light of the enactment of the Sarbanes-Oxley Act of 2002, at n. 11.

³⁰ As defined in section 2(a)(7) of the Act [15 U.S.C. 7201(7)], the term “issuer” means an issuer (as defined in section 3(a)(8) of the Exchange Act [15 U.S.C. 78c(a)(8)]) the securities of which are registered under section 12 of the Exchange Act, that is required to file reports under section 15(d) of the Exchange Act or that files, or has filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn.

¹ We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submission. You should submit only information that you wish to make available publicly.

² 17 CFR 228.601.

³ 17 CFR 228.10 *et seq.*

⁴ 17 CFR 229.601.

⁵ 17 CFR 229.10 *et seq.*

⁶ 17 CFR 240.12b–15.

⁷ 17 CFR 240.13a–14.

⁸ 17 CFR 240.13a–15.

⁹ 17 CFR 240.15d–14.

¹⁰ 17 CFR 240.15d–15.

¹¹ 15 U.S.C. 78a *et seq.*

¹² 17 CFR 270.8b–15.

¹³ 17 CFR 270.30a–2.

¹⁴ 17 CFR 270.30a–3.

¹⁵ 15 U.S.C. 80a–1 *et seq.*

¹⁶ 17 CFR 249.308a.

¹⁷ 17 CFR 249.308b.

¹⁸ 17 CFR 249.310.

¹⁹ 17 CFR 249.310b.

²⁰ 17 CFR 249.220f.

²¹ 17 CFR 249.240f.

²² 17 CFR 249.331; 17 CFR 274.128.

²³ Pub. L. 107–204, 116 Stat. 745 (2002).

²⁴ 15 U.S.C. 78m(a) or 78o(d). Section 13(a) of the Exchange Act requires every issuer of a security registered pursuant to section 12 of the Exchange Act [15 U.S.C. 781] to file with the Commission such annual reports and such quarterly reports as the Commission may prescribe. Section 15(d) of the Exchange Act requires each issuer that has filed a registration statement that has become effective pursuant to the Securities Act of 1933 [15 U.S.C. 77a *et seq.*] (the “Securities Act”) to file such supplementary and periodic information, documents and reports as may be required pursuant to section 13 in respect of a security registered