

Investment Company Act only.⁴¹ Just as with the section 302 certifications, an exhibit requirement would enable investors and the Commission staff, as well as the Department of Justice, to monitor compliance with this certification requirement more easily and efficiently.

Unlike the section 302 certifications, the section 906 certifications are required only in periodic reports that contain financial statements. In addition, unlike the section 302 certifications, the section 906 certifications may take the form of a single statement signed by an issuer's chief executive and financial officers.⁴² Issuers with unusual structures may contact the Office of Chief Counsel in the Commission's Division of Corporation Finance for further guidance on compliance with the section 906 certification requirement.

We propose to amend Exchange Act Rules 13a-14 and 15d-14 and Investment Company Act Rule 30a-2 to require the section 906 certifications to be provided with periodic reports containing financial statements. We also propose to amend Item 601 of Regulations S-B and S-K to add the section 906 certifications to the list of required exhibits to be included in reports filed with the Commission. Each form specified in the exhibit table in Item 601(a) requires a registrant to include as part of the report the exhibits required by Item 601.⁴³ Consequently, a failure to furnish the section 906 certifications would cause the periodic report to which they relate to be incomplete, thereby violating section 13(a) of the Exchange Act.⁴⁴ In addition, referencing the section 906 certifications in Exchange Act Rules 13a-14 and 15d-14 and Investment Company Act Rule 30a-2 would subject these certifications to the signature requirements of Rule 302 of Regulation S-T.⁴⁵

We note that section 906 merely requires that the certifications

"accompany" a periodic report to which they relate. This is in contrast to section 302, which requires the certifications to be included "in" the periodic report. In recognition of this difference, we are proposing to require issuers to "furnish," rather than "file," the section 906 certifications with the Commission.⁴⁶ Thus, the certifications would not be subject to liability under section 18 of the Exchange Act.⁴⁷ Moreover, the certifications would not be subject to automatic incorporation by reference into an issuer's Securities Act registration statements, which are subject to liability under section 11 of the Securities Act,⁴⁸ unless the issuer takes steps to include the certifications in a registration statement. Although section 906 does not explicitly require the certifications to be made public, we believe that it is appropriate to require the certifications to accompany a periodic report in the proposed manner.

III. Interim Guidance Regarding Filing Procedures

As previously discussed, section 906 requires that the written statements of an issuer's chief executive and financial officers "accompany" any periodic report containing financial statements filed by the issuer pursuant to section 13(a) or 15(d) of the Exchange Act. To date, issuers have employed a variety of methods to submit the section 906 certifications with the periodic reports to which they relate.⁴⁹

Until we adopt final rules, we encourage issuers to submit the section 906 certifications as an exhibit to the periodic reports to which they relate. An issuer using this approach should designate the certifications as an "Additional Exhibit" under Item 99 of Item 601(b) of Regulation S-B or S-K⁵⁰ or, in the case of a foreign private issuer, satisfy the exhibit requirements of the appropriate report form.⁵¹ Where the

periodic report to which the section 906 certifications relate is being filed electronically via our EDGAR system, which will generally be the case, an issuer should retain the manual signature page for each certification or another document authenticating, acknowledging or otherwise adopting the signature that appears in typed form within the electronic version of the certification. In order to treat these electronically filed signed statements consistent with other electronically filed signed statements, the issuer should insert the following legend after the text of each certification: "A signed original of this written statement required by section 906 has been provided to [name of issuer] and will be retained by [name of issuer] and furnished to the Securities and Exchange Commission or its staff upon request." Where the periodic report to which the section 906 certifications relate is being filed in paper form (where a paper submission is permitted by Regulation S-T), an issuer should file signed originals and conformed copies of each section 906 certification in accordance with the requirements of the relevant report form. A Section 906 certification submitted in this manner will be treated as "accompanying" the periodic report to which it relates rather than "filed" as part of the report.

IV. General Request for Comment

We are proposing these amendments to enhance the accessibility of the certifications that must be provided in connection with periodic reports filed pursuant to the Exchange Act. We solicit comment, both specific and general, upon each aspect of the proposed amendments. If you would like to submit written comments on the proposed amendments, to suggest changes or to submit comments on other matters that might affect the proposed amendments, we encourage you to do so.

In particular, we solicit comment on the following specific aspects of the proposed amendments:

- Will the inclusion of the section 302 certifications and the section 906 certifications as exhibits make it easier for investors to access this information?
- Are there any means other than those proposed to enhance investor or Commission staff access to the certifications?

investment companies other than SBICs must either file Form N-CSR or continue to comply with the certification requirements of Form N-SAR. See Release No. IC-25914 (Jan. 27, 2003) [68 FR 5348, 5356] (discussing transition provisions and compliance dates for requirement to file Form N-CSR).

⁴¹ See General Instruction A of Form N-CSR (Form N-CSR is a combined reporting form to be used for reports of registered management investment companies under section 30(b)(2) of the Investment Company Act of 1940 and sections 13(a) or 15(d) of the Exchange Act); n. 24 above (discussing issuers covered by sections 13(a) and 15(d) of the Exchange Act).

⁴² See proposed Exchange Act Rules 13a-14(b) and 15d-14(b).

⁴³ See for example, Item 6(a) of Form 10-Q and Item 15(a)(3) of Form 10-K.

⁴⁴ See also section 3(b)(1) of the Act, which provides that "[a] violation by any person of this Act . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 . . . and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act * * *

⁴⁵ See Rule 302(b) of Regulation S-T [17 CFR 232.302(b)].

⁴⁶ See, for example, proposed Item 601(b)(32)(ii) of Regulation S-K.

⁴⁷ 15 U.S.C. 78r.

⁴⁸ 15 U.S.C. 77k.

⁴⁹ These methods include: (1) Submitting the statement as non-public paper correspondence; (2) submitting the statement as non-public electronic correspondence with the EDGAR filing of the periodic report; (3) submitting the statement under (1) or (2) above supplemented by an Item 9 Form 8-K report so that the statement is publicly available; (4) submitting the statement as an exhibit to the periodic report; or (5) submitting the statement in the text of the periodic report (typically, below the signature block for the report).

⁵⁰ 17 CFR 228.601(b)(99) and 17 CFR 229.601(b)(99).

⁵¹ For a registered management investment company filing reports on Form N-CSR that uses this approach, the EDGAR document type should be EX-99.906CERT for the section 906 certifications. For fiscal annual or semi-annual periods ending on or before March 31, 2003, registered management