

enable the Department of Justice, which has responsibility for enforcing section 1350, to efficiently review the form and content of the certifications required by that provision.

B. Legal Basis

We are proposing the amendments under the authority set forth in sections 13, 15(d), 23(a) and 36 of the Exchange Act, sections 8, 30 and 38 of the Investment Company Act and sections 3(a), 302 and 906 of the Sarbanes-Oxley Act of 2002.

C. Small Entities Subject to the Proposed Rule and Form Amendments

The proposed amendments would affect small entities that are subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act. For purposes of the Regulatory Flexibility Act, the Exchange Act defines the term "small business," other than an investment company, to be an issuer that, on the last day of its most recent fiscal year, has total assets of \$5 million or less.⁶⁹ We estimate that there are approximately 2,500 companies subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act that are not investment companies and that have assets of \$5 million or less.⁷⁰

For purposes of the Regulatory Flexibility Act, an investment company is a "small entity" if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.⁷¹ We estimate that there are approximately 205 registered management investment companies that, together with other investment companies in the same group of related investment companies, have net assets of \$50 million or less as of the end of the most recent fiscal year.⁷²

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments would require issuers, including "small businesses," to provide the certifications required by Exchange Act Rules 13a-14 and 15d-14, as well as the certifications required by section 906, as exhibits to the periodic reports to which they relate. Depending on how an

issuer's chief executive and financial officers presently satisfy the section 906 certification requirements, issuers, including "small businesses," may incur some additional costs in submitting these certifications as an exhibit to these reports. While these costs are difficult to quantify, we believe that they would be nominal.

E. Duplicative, Overlapping or Conflicting Federal Rules

Presently, Exchange Act Rules 13a-14 and 15d-14 require an issuer to include in the text of its quarterly and annual reports filed or submitted under section 13(a) or 15(d) of the Exchange Act the required certifications of its principal executive and financial officers. While section 906 requires that written statements of an issuer's chief executive and financial officers certifying the contents of a periodic report to which the certifications relate "accompany" the report when it is filed with the Commission, issuers have used a variety of different methods to submit these certifications to the Commission.

F. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In that regard, we are considering the following alternatives: (a) Establishing different compliance or reporting requirements that take into account the resources of small entities, (b) clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities and (c) exempting small entities from all or part of the proposed rule and form amendments. Both the section 302 and section 906 certifications are required by the Sarbanes-Oxley Act of 2002 and the legislative history does not reflect a Congressional intent to exempt small entities from these requirements. We are not aware of means to further simplify these requirements. After discussions with the Department of Justice, we believe a design standard for how the section 906 certifications are to "accompany" a periodic report is necessary to monitor compliance. We solicit comment as to whether small business issuers should be excluded from the proposed amendments or if other changes are warranted to accommodate the interests of small business issuers.

G. Request for Comments

We encourage the submission of comments with respect to any aspect of

the IRFA. In particular, we request comment on the number of small businesses that would be affected by the proposed amendments, the nature of the impact, how to quantify the number of small businesses that would be affected and how to quantify the impact of the proposed rule and form amendments. Commenters are requested to describe the nature of any effect and provide empirical data and other factual support for their views to the extent possible. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments.

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"⁷³ we must advise the Office of Management and Budget as to whether the proposed amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries;
- or
- Significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposed amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

IX. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act⁷⁴ requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The proposed amendments would relocate the certifications required by Exchange Act Rules 13a-14 and 15d-14 from the text of quarterly and annual reports filed or submitted under section 13(a) or 15(d) of the Exchange Act to the

⁶⁹ 17 CFR 240.0-10(a). A similar definition is provided under Securities Act Rule 157 [17 CFR 230.157].

⁷⁰ This estimate is based on filings with the Commission.

⁷¹ 17 CFR 270.0-10.

⁷² This estimate is based on figures compiled by the Commission staff regarding investment companies registered on Forms N-1A, N-2, and N-3, which will be required to file reports on Form N-CSR.

⁷³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

⁷⁴ 15 U.S.C. 78w(a)(2).