

their certifications that they have “presented in the quarterly or annual report their conclusions about the effectiveness of the disclosure controls and procedures based on their evaluation.”

Paragraph (b) of Item 307 requires the company to disclose in each quarterly and annual report whether or not there were significant changes in the company’s internal controls or in other factors that could significantly affect these controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses. This disclosure enables the certifying officers to satisfy the representation made in their certifications that they have “indicated in the quarterly or annual report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.”

2. Proposed Amendments to the Disclosure Requirements

In the Proposing Release, we proposed several revisions to the existing disclosure requirements regarding: (1) The certifying officers’ evaluation of the company’s disclosure controls and procedures; and (2) changes to the company’s internal control over financial reporting. We also proposed to require quarterly disclosure regarding the conclusions of the certifying officers about the effectiveness of the company’s internal control over financial reporting.

Moreover, we proposed to require evaluations of both types of controls as of the end of the period covered by the quarterly or annual report, rather than “as of a date within 90 days of the filing date” of the quarterly or annual report, as currently required with respect to disclosure controls. With respect to the disclosure about changes to the company’s internal control over financial reporting, we proposed to require a company to disclose “any significant changes made during the period covered by the quarterly or annual report” rather than “whether or not there were significant changes in the company’s internal control over financial reporting that could significantly affect these controls subsequent to the date of their evaluation.”

The commenters were mixed in their reaction to these proposed changes. A couple of the commenters remarking on

the point at which a company must undertake an evaluation of its controls “strongly agreed” with the proposed change to require evaluations as of the end of the period. Several other commenters preferred the existing “90 days within the filing date” evaluation point, noting that it provides more flexibility than the fixed point. Some of these commenters expressed concern that it would be hard to conduct evaluations on the last day of the period. One of the commenters suggested that the proposed requirement that a company disclose changes to its internal control over financial reporting that occurred at any time during a fiscal quarter was inconsistent with the proposed requirement that management evaluate such changes “as of the end of each fiscal quarter.”⁹⁵ An additional commenter asserted that it was critical that we offer companies some guidance as to the types of changes that constitute “significant changes.”⁹⁶ Finally, a few commenters noted that while we had proposed to delete the words “or other factors” from Exchange Act Rules 13a–14(b)(6) and 15d–14(b)(6) regarding disclosure of “significant changes in internal controls or in other factors that could significantly affect internal controls, * * *” we had not likewise proposed to delete those words from the actual certification language.

3. Final Disclosure Requirements

After consideration of the comments, we are adopting the proposals with several modifications. We are adopting as proposed the change of the evaluation date for disclosure controls to “as of the end of the period” covered by the quarterly or annual report. We are not specifying the point at which management must evaluate changes to the company’s internal control over financial reporting. Given that the final rules do not require a company to state the conclusions of the certifying officers regarding the effectiveness of the company’s internal control over financial reporting as of a particular date on a quarterly basis as proposed, as the company must with respect to disclosure controls and procedures, it is unnecessary to specify a date for the quarterly evaluation of changes in internal control over financial reporting. We believe that this change is consistent with the new accelerated reporting deadlines.⁹⁷

⁹⁵ 95 See ABA letter regarding File No. S7–40–02.

⁹⁶ See Intel letter regarding File No. S7–40–02.

⁹⁷ See Release No. 33–8128 (Sept. 16, 2002) [67 FR 58480]. The final rule amendments do not require that the evaluation take place on the last day of the period, but that the statement of effectiveness of the issuer’s disclosure controls and

We are amending the proposal that would have required companies to disclose any significant changes in its internal controls. Under the final rules, a company must disclose any change in its internal control over financial reporting that occurred during the fiscal quarter covered by the quarterly report, or the last fiscal quarter in the case of an annual report, that has materially affected, or is reasonably likely to materially affect, the company’s internal control over financial reporting.⁹⁸ Furthermore, we have deleted the phrase “or in other factors” from Exchange Act Rules 13a–14 and 15d–15 and the form of certification. Although the final rules do not explicitly require the company to disclose the reasons for any change that occurred during a fiscal quarter, or to otherwise elaborate about the change, a company will have to determine, on a facts and circumstances basis, whether the reasons for the change, or other information about the circumstances surrounding the change, constitute material information necessary to make the disclosure about the change not misleading.⁹⁹

While an evaluation of the effectiveness of disclosure controls and procedures must be undertaken on a quarterly basis, we expect that for purposes of disclosure by domestic companies, the traditional relationship between disclosure in annual reports on Form 10–K and intervening quarterly reports on Form 10–Q will continue. Disclosure in an annual report that continues to be accurate need not be repeated. Rather, disclosure in quarterly reports may make appropriate reference to disclosures in the most recent annual report (and, where appropriate, intervening quarterly reports) and disclose subsequent developments required to be disclosed in the quarterly report.

We note that, as required by the Sarbanes-Oxley Act, the quarterly certification regarding disclosure that the certifying officers must make to the company’s auditors and audit committee provides:¹⁰⁰

internal control over financial reporting be as of the end of the period.

⁹⁸ 98 We have also made conforming changes to Forms 20–F and 40–F to clarify that the management of a foreign private issuer must disclose in the issuer’s annual report filed on Form 20–F or 40–F any change in the issuer’s internal control over financial reporting that occurred during the period covered by the annual report and that materially affected, or is reasonably likely to affect, this internal control. See Item 15(d) of Form 20–F and General Instruction B(6)(e) of Form 40–F.

⁹⁹ See Exchange Act Rules 10b–5 and 12b–20 [17 CFR 240.10b–5 and 17 CFR

¹⁰⁰ This is the disclosure required by paragraph 5 of the certification form.