

penalties, the accuracy of the plan's disclosures under ERISA.¹³⁶

Commenters also addressed other topics related to Section 906. One commenter requested that the Commission allow Section 906 certifications to remain confidential.¹³⁷ That commenter expressed concern that a plaintiff could use a Section 906 certification to create a basis for liability that did not otherwise exist.¹³⁸ One commenter objected to the proposal to deem Section 906 certifications as "furnished," rather than as "filed."¹³⁹ After considering all of the comments, we are adopting the proposals substantially as proposed.

On April 11, 2003, U.S. Senator Joseph Biden introduced a statement into the Congressional Record that discusses Section 906.¹⁴⁰ The statement asserts that Section 906 "is intended to apply to any financial statement filed by a publicly-traded company, upon which the investing public will rely to gauge the financial health of the company," which includes financial statements included in current reports on Forms 6-K and 8-K and annual reports on Form 11-K.¹⁴¹ The language added to Title 18 by Section 906 refers to "periodic reports containing financial statements," and our proposals to require companies to furnish Section 906 certifications as exhibits applied to periodic (annual, semi-annual and quarterly) reports but did not address current reports on Forms 6-K and 8-K.¹⁴² One commenter addressed the statement in the Congressional Record, indicating that the suggested requirements would create substantial practical burdens for companies to provide Section 906 certifications in current reports filed on Forms 6-K or 8-K.¹⁴³ We are also concerned that extending Section 906 certifications to Forms 6-K or 8-K could potentially chill the disclosure of information by companies. As noted above, four commenters argued that Section 906 should not apply to Form 11-K.¹⁴⁴ In light of these developments, we are considering, in consultation with the Department of Justice, the application of Section 906 to current reports on Forms

6-K and 8-K and annual reports on Form 11-K and the possibility of taking additional action.

B. Final Rules

We are amending the exhibit requirements of Forms 20-F and 40-F and Item 601 of Regulations S-B and S-K to add the Section 302 certifications to the list of required exhibits.¹⁴⁵ In the final rules, the specific form and content of the required certifications is set forth in the applicable exhibit filing requirement.¹⁴⁶ To coordinate the rules requiring an evaluation of "disclosure controls and procedures" and "internal control over financial reporting," we are moving the definition of the term "disclosure controls and procedures" from Exchange Act Rules 13a-14(c) and 15d-14(c) and Investment Company Act Rule 30a-2(c) to new Exchange Act Rules 13a-15(c) and 15d-15(c) and Investment Company Act Rule 30a-3(c), respectively.

We are amending Exchange Act Rules 13a-14 and 15d-14 and Investment Company Act Rule 30a-2 to require the Section 906 certifications to accompany periodic reports containing financial statements as exhibits. We also are amending the exhibit requirements in Forms 20-F, 40-F and 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. In addition, we are amending Item 10 of Form N-CSR to add the Section 906 certifications as a required exhibit. Because the Section 906 certification requirement applies to periodic reports containing financial statements that are filed by an issuer pursuant to Section 13(a) or 15(d) of the Exchange Act, the exhibit requirement will only apply to reports on Form N-CSR filed under these sections and not to reports on Form N-CSR that are filed under the Investment Company Act only.¹⁴⁷ 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.¹⁴⁸ In addition, referencing the Section 906 certifications in Exchange Act Rules 13a-14 and 15d-14 and Investment Company Act Rule 30a-2 subjects these certifications to the signature requirements of Rule 302 of Regulation S-T.¹⁴⁹

Section 906 requires that the certifications "accompany" the 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 permitting companies to "furnish," rather than "file," the Section 906 certifications with the Commission.¹⁵⁰ Thus, the certifications would not be subject to liability under Section 18 of the Exchange Act.¹⁵¹ Moreover, the certifications would not be subject to automatic incorporation by reference into a company's Securities Act registration statements, which are subject to liability under Section 11 of the Securities Act,¹⁵² 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 certifications that "accompany" a publicly filed periodic report to be provided publicly in this manner. We believe that Congress intended for Section 906 certifications

15(d) of the Exchange Act); n. 28 above (discussing issuers covered by Sections 13(a) and 15(d) of the Exchange Act). Registered management investment companies that are required to file reports on Form N-CSR pursuant to Section 13(a) or 15(d) of the Exchange Act will be required to provide the Section 906 certifications under Exchange Act Rules 13a-14(b) and 15d-14(b) as well as Investment Company Act Rule 30a-2(b). By contrast, registered management investment companies that are required to file reports on Form N-CSR are required to provide the Section 302 certifications solely under Investment Company Act Rule 30a-2(a), which was adopted under Sections 13(a) and 15(d) of the Exchange Act as well as the Investment Company Act. Release No. 33-8124 (Aug. 28, 2002) [67 FR 57276, 57295]; Release No. IC-25914 (Jan. 27, 2003) [68 FR 5348, 5365].

148 See also Section 3(b)(1) of the Sarbanes-Oxley 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 * * *."

149 See Rule 302(b) of Regulation S-T [17 CFR 232.302(b)]. Among other things, this rule requires that an issuer maintain manually signed certifications or other authenticating documents.

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

151 15 U.S.C. 78r.

152 15 U.S.C. 77k.

¹³⁶ See letters regarding File No. S7-06-03 of: ABA; Cleary; and PwC.

¹³⁷ See ABA letter regarding File No. S7-06-03.

¹³⁸ *Id.*

¹³⁹ See Stalnaker letter regarding File No. S7-06-03.

¹⁴⁰ See 149 Cong. Rec. S5325 (daily ed. Apr. 11, 2003).

¹⁴¹ *Id.* at S5331.

¹⁴² See Release No. 33-8212 (Mar. 21, 2003) [68 FR 15600] at fn. 37.

¹⁴³ See ABA letter regarding File No. S7-06-03.

¹⁴⁴ See letters regarding File No. S7-06-03 of: ABA; Cleary; Intel; and PwC.

¹⁴⁵ We recently adopted Form N-CSR, to be used by registered management investment companies to file certified shareholder reports with the Commission. See Release No. IC-25914 (Jan. 27, 2003) [68 FR 5348]. As adopted, Form N-CSR requires the Section 302 certifications to be filed as an exhibit to a report on Form N-CSR. Item 10(b) of Form N-CSR.

¹⁴⁶ Accordingly, we are revising Exchange Act Rules 13a-14 and 15d-14 to delete from those rules the detailed description of the contents of the required certifications and to revise the instructions to Forms 10-Q, 10-QSB, 10-K, and 10-KSB to delete the references to the Section 302 certification requirements. We are also adopting similar changes to Investment Company Act Rule 30a-2 and Form N-CSR.

¹⁴⁷ 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 and Sections 13(a) or