

applicable requirements. In addition, the changes will enable the Department of Justice, which has responsibility for enforcing Section 906, to review effectively the form and content of the certifications required by that section.

B. Costs

The final rules related to Section 404 of the Sarbanes-Oxley Act require companies, other than registered investment companies, to include in their annual reports a report of management on the company's internal control over financial reporting. The management report on internal control over financial reporting must include: a statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting; a statement identifying the framework used to evaluate the effectiveness of the company's internal control over financial reporting; management's assessment of the effectiveness of the company's internal control over financial reporting as of the end of the company's most recent fiscal year; and a statement that the registered public accounting firm that audited the company's financial statements included in the annual report has issued an attestation report on management's evaluation of the company's internal control over financial reporting. The final rules will increase costs for all reporting companies. These costs are mitigated somewhat because companies have an existing obligation to maintain an adequate system of internal accounting control under the FCPA. Moreover, one commenter noted that some companies already voluntarily include management reports on their internal controls in their annual reports. The preparation of the management report on internal control over financial reporting will likely involve multiple parties, including senior management, internal auditors, in-house counsel, outside counsel and audit committee members.

Many commenters believed that our proposal to require quarterly evaluations of a company's internal control over financial reporting would significantly increase the costs of preparing periodic reports. Several commenters also were concerned that the proposals would result in increased audit fees. We have limited data on which to base cost estimates of the final rules.

Using our PRA burden estimates, we estimate the aggregate annual costs of implementing Section 404(a) of the Sarbanes-Oxley Act to be around \$1.24

billion (or \$91,000 per company).¹⁷⁴ We recognize the magnitude of the cost burdens and we are making several accommodations to address commenters' concerns and to ease compliance, including:

- Requiring quarterly disclosure only of any change that has materially affected, or is reasonably likely to materially affect, a company's internal control over financial reporting; and
- An extended transition period for the new internal control reporting requirements.

We originally proposed to require a company to include an internal control report in its annual report for fiscal years ending on or after September 15, 2003. Under the final rules, a company that is an "accelerated filer" under the definition in Exchange Act Rule 12b-2 must begin to comply with the internal control report requirement in its annual report for its first fiscal year ending on or after June 15, 2004. All other companies must begin to comply with the requirement in their annual reports for their first fiscal year ending on or after April 15, 2005.

A longer transition period will help to alleviate the immediate impact of any costs and burdens imposed on companies. A longer transition period may even help to reduce costs as companies will have additional time to develop best practices, long-term processes and efficiencies in preparing management reports. Also, a longer transition period will expand the period of availability of outside professionals that some companies may wish to retain as they prepare to comply with the new requirements.

The PRA burden estimate, however, excludes several costs attributable to Section 404. The estimate does not include the costs associated with the auditor's attestation report, which many commenters have suggested might be substantial. It also excludes estimates of likely "indirect" costs of the final rules. For instance, the final rules increase the cost of being a public company; therefore the final rules may discourage some companies from seeking capital from the public markets. Moreover, the final rules may also discourage non-U.S.

firms from seeking capital in the United States.

The incremental costs of the amendments related to Section 302 of the Sarbanes-Oxley Act are minimal. Since companies must already include the certifications required by Exchange Act Rules 13a-14 and 15d-14 in their quarterly and annual reports, there should be no incremental cost to relocating the certifications from the text of the reports to the "Exhibits" section of these reports. Requiring the Section 906 certifications to be included as an exhibit to the periodic reports to which they relate will lead to some additional costs for companies that currently are submitting the certifications to the Commission in some other manner. While these costs are difficult to quantify, we estimate that the annual paperwork burden of the amendments will be approximately \$23.4 million.¹⁷⁵

One commenter has expressed concern that companies may assume greater legal risk by making their Section 906 certifications publicly available.¹⁷⁶ To the extent that companies may assume greater legal risk by including the Section 906 certifications as part of their periodic reports filed pursuant to the Exchange Act where these reports are incorporated by reference into Securities Act registration statements, we address this risk by requiring companies to "furnish," rather than "file," the certifications with the Commission for purposes of Section 18 of the Exchange Act or incorporation by reference into other filings. Thus, the amendments should mitigate this potential indirect cost of compliance. We believe that it is appropriate to require the certifications that accompany a periodic report to be publicly available. We believe that Congress intended for Section 906 certifications to be publicly available. Civil liability already exists by virtue of the pre-existing signature requirements and Section 302 certifications. In addition, any Section 906 certification submitted to the Commission as correspondence is subject to the Freedom of Information Act.¹⁷⁷

¹⁷⁴ This estimate is based on the estimated total burden hours of 5,396,266, an assumed 75%/25% split of the burden hours between internal staff and external professionals, and an hourly rate of \$200 for internal staff time and \$300 for external professionals. The hourly cost estimate is based on consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing periodic reports with the Commission. Our PRA estimate does not reflect any additional cost burdens that a company will incur as a result of having to obtain an auditor's attestation on management's internal control report.

¹⁷⁵ This calculation is based on an estimate of burden hours multiplied by a cost of \$200.00 per hour. (117,048 hours multiplied by \$200.00 per hour). The hourly cost estimate is based on consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing periodic reports with the Commission.

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

¹⁷⁷ 5 U.S.C. 552 *et seq.*