

SEC Issues Final Rules on CEO/CFO Certification Under Section 302 of the Sarbanes-Oxley Act

As directed by Section 302 of the recently enacted Sarbanes-Oxley Act of 2002 (the “Act”), the Securities and Exchange Commission (the “SEC”) has adopted final rules requiring an issuer’s principal executive and financial officers to certify the accuracy and completeness of both financial and non-financial information contained in the issuer’s quarterly and annual reports.¹ The new rules also require that the certifications include a number of statements by the principal executive and financial officers relating to the issuer’s disclosure and financial reporting controls.² This memorandum describes the new rules and provides a general outline of actions that companies may consider taking to assist their CEOs and CFOs in making the required certifications.

In addition to the CEO/CFO certification rules, the SEC has adopted previously proposed rules requiring issuers to maintain, and regularly evaluate the effectiveness of, “disclosure controls and procedures” designed to ensure that the information required to be disclosed in reports filed under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), including non-financial information, is recorded, processed, summarized and reported on a timely basis.

These rulemaking actions are part of the SEC’s ongoing campaign to improve the quality of reporting of both financial and non-financial information by public companies and to enhance the accountability of senior officers for disclosure of financial and non-financial information. Of particular note:

- the SEC Release containing the new rules (the “Release”) conveys the SEC’s view that, from a disclosure perspective, compliance with generally accepted accounting principles (“GAAP”) is not sufficient if such compliance fails to provide investors with a materially accurate and complete picture of an issuer’s financial condition, results of operations and cash flows;
- the SEC suggests that issuers should establish, if they have not already done so, a disclosure committee comprised of appropriate members of senior management to consider the materiality of information, determine disclosure obligations and report to the CEO and CFO;

¹ The new rules are contained in Release No. 33-8124, 34-46427, IC-25722. A copy of the SEC Release may be obtained from the SEC’s Web site at www.sec.gov/rules/final/33-8124.htm or from your regular contact person at Skadden, Arps.

² The CEO/CFO certification rules adopted by the SEC to implement Section 302 of the Act supercede the CEO/CFO certification rules proposed by the SEC in June 2002.

It should be noted that while the CEO/CFO certification rules implement Section 302 of the Act, they do not affect the separate CEO/CFO certification required by Section 906 of the Act, which became effective July 30, 2002. Section 906 requires each periodic report containing financial statements to be accompanied by a CEO/CFO certification that the report fully complies with the requirements of Section 13(a) or Section 15(d) of the Exchange Act and that the information contained in the report fairly presents, in all material respects, the financial condition and the results of operations of the issuer. Accordingly, where applicable, CEOs/CFOs must provide both the certification required under the new rules, as well as the certification required under Section 906.

If you have any questions or would like any assistance regarding the matters discussed in this memorandum, please feel free to call your regular contact at Skadden, Arps.

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- the SEC notes that while CEOs and CFOs can already be held liable for inadequate disclosure under general antifraud standards, false certifications may provide an independent basis for imposing civil and criminal liability; and
- foreign private issuers will be held to the same standards as U.S. companies — *i.e.*, they must make the same CEO/CFO certifications, establish appropriate disclosure controls and procedures and regularly evaluate such controls and procedures.

EFFECTIVE DATES/TRANSITION PERIODS

- The portion of the certification relating to the accuracy and completeness of the financial and non-financial information is required for quarterly and annual reports **filed after August 29, 2002**. This certification requirement also applies to amendments filed after August 29, 2002, regardless of when the quarterly or annual report being amended was originally filed.
- The portion of the certification relating to the issuer's disclosure and financial reporting controls is required for quarterly and annual reports **filed for periods ending after August 29, 2002**.
- The new rules requiring an issuer to maintain disclosure controls and procedures became **effective as of August 29, 2002**. The new rules requiring an issuer to evaluate the effectiveness of its disclosure controls and procedures and disclose the conclusions of such evaluation apply to quarterly and annual reports **filed for periods ending after August 29, 2002**.³

The different effective dates for different portions of the CEO/CFO certifications are particularly relevant for companies such as those with fiscal years ending at the end of January because those companies will file their quarterly reports in September relating to periods ended prior to August 29, 2002. As a result, CEOs and CFOs of those companies will be required to certify the accuracy and completeness of the financial and non-financial information contained in those reports, but will not be required to certify as to disclosure and financial reporting controls.

COMPANIES SUBJECT TO THE NEW RULES

As mandated by Section 302 of the Act, the certification requirements apply to the principal executive officers and principal financial officers, or persons performing similar functions,⁴ of any issuer that files quarterly and annual reports with the SEC under either Section 13(a) or Section 15(d) of the Exchange Act,⁵ including foreign private issuers,⁶ small business issuers, issuers of asset-backed securities⁷ and registered investment companies.⁸

³ Although the evaluation of disclosure controls is not required for periods ending on or prior to August 29, 2002, the Staff of the SEC has confirmed orally that, as contemplated by the Release, the related new requirement to disclose significant changes and other matters relating to financial controls (as further discussed below) became applicable as of August 29, 2002.

⁴ Both Section 302 of the Act and the new certification rules apply to "the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions." In light of the use of the plural "officers," any company that has more than one person performing the CEO or CFO roles must give appropriate consideration to identifying the proper persons to make the certifications.

The new rules requiring issuers to maintain and regularly evaluate the effectiveness of their disclosure controls and procedures apply to any issuer (other than Asset-Backed Issuers) that files quarterly and annual reports with the SEC under Section 13(a) or Section 15(d) of the Exchange Act, including foreign private issuers that file annual reports on Form 20-F or 40-F.

REPORTS SUBJECT TO THE CERTIFICATION REQUIREMENTS

The certification requirements apply to annual reports on Form 10-K, 10-KSB (small business issuers), 20-F (foreign private issuers) and 40-F (Canadian issuers) and to quarterly reports on Form 10-Q and 10-QSB, as well as to amendments to any of the foregoing (*i.e.*, each amendment requires a new certification). Thus, an issuer whose Exchange Act filings are reviewed and required to be amended (whether in connection with an SEC review of a registration statement filed under the Securities Act of 1933, as amended (the “Securities Act”), as part of the SEC’s systematic review of Exchange Act filings or otherwise) would be required to provide the certification in the amended annual or quarterly report, even if the original filing was made prior to the effectiveness of the new rules.

5 Section 13(a) of the Exchange Act requires every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the SEC such annual and quarterly reports as the SEC may prescribe. Section 15(d) of the Exchange Act requires each issuer that has filed a registration statement that has become effective pursuant to the Securities Act of 1933, as amended, to file such supplementary and periodic information, documents and reports as may be required pursuant to Section 13 in respect of a security registered pursuant to Section 12. With certain exceptions, an issuer’s duty to file reports under Section 15(d) is automatically suspended for any fiscal year if an issuer’s securities are held of record by less than 300 persons.

6 The new rules, however, do not apply to foreign private issuers that *furnish* materials to the SEC pursuant to Exchange Act Rule 12g3-2(b). These are foreign private issuers — typically issuers whose stock is the subject of a Level 1 ADR program — who have not sought a public market for their securities in the United States through a public offering or a market listing. In general, these issuers “furnish” to the SEC information that they are required to make public in their home country, but this information is not deemed “filed” for purposes of Section 18 of the Exchange Act.

7 Due to significant differences in the reported information for issuers of asset-backed securities as compared to other issuers, the certification requirements for “Asset-Backed Issuers” have been modified. The certification is only required annually with respect to reporting done during the period covered by the annual report. The certification may be signed by the trustee of the trust (if it signs the periodic report), the senior officer in charge of securitization of the depositor (if the depositor signs the periodic report) or the senior officer in charge of the servicing function of the master servicer. The content of the certification is more limited than that applicable to issuers generally. See “Statement by the Staff of the Division of Corporation Finance of the Securities and Exchange Commission Regarding Compliance by Asset-Backed Issuers with Exchange Act Rules 13a-14 and 15d-14,” which may be obtained from the SEC’s Web site at www.sec.gov/divisions/corpfin/8124cert.htm. The term “Asset-Backed Issuers” has been defined by the SEC in Exchange Act Rules 13a-14(g) and 15d-14(g) in a narrow manner (*i.e.*, issuers whose securities “are primarily serviced by the cash flows of a discrete pool of receivables or other financial assets . . . that by their terms convert into cash within a finite time period”), consistent with the asset-backed requirement for use of registration statements on Form S-3. This definition may exclude certain issuers of asset-backed securities, including those whose assets include leases or balloon loans. For additional information on the impact of the new rules on Asset-Backed Issuers, please contact your regular contact person at Skadden, Arps.

8 In order to implement Section 302 of the Act with respect to registered investment companies that file periodic reports under Section 13(a) or Section 15(d) of the Exchange Act, the SEC has adopted new Investment Company Act Rule 30a-2 and has amended Form N-SAR. In addition, the SEC has proposed in a companion release amending Form N-SAR so that the certification requirement will apply to all registered investment companies, including those that do not file periodic reports under Section 13(a) or Section 15(d) of the Exchange Act (because their securities were offered in private placements). Also, the SEC has proposed that registered management investment companies be required to file certifications (similar to the certifications required under the new rules) as part of the shareholder reports that they file under the Investment Company Act. Business development companies and face amount certificate companies, which currently file reports on Form 10-K and 10-Q, will make the same certifications under the new rules as issuers generally. For additional information on the impact of the new rules and the proposed rules on registered investment companies and business development companies, please contact your regular investment company contact person at Skadden, Arps.

According to the Release, when the disclosure obligations under Part III of Form 10-K and 10-KSB (relating to directors and executive officers, executive compensation and security ownership) are satisfied by incorporating the required information by reference from an issuer's subsequently filed definitive proxy or information statement, the certification in the annual reports on Form 10-K or 10-KSB will be deemed to cover the Part III information in the proxy or information statement as of the time such statement is filed. As a result of this advance certification, the proxy or information statement disclosure to be incorporated by reference should be subject to the same review and internal processes that companies apply to their annual and quarterly reports.

The Release confirms that the certification requirements of Section 302 of the Act apply only to periodic reports (*i.e.*, annual and quarterly reports) and do not apply to current reports such as reports on Form 8-K or 6-K (filed by foreign private issuers). The distinction drawn by the SEC between periodic reports and current reports may bear upon the interpretive question under Section 906 of the Act as to whether reports on Form 8-K and 6-K containing financial statements are "periodic reports" for purposes of the separate CEO/CFO certification required by Section 906. Since Section 906 is part of the federal criminal code, it is administered by the Department of Justice, rather than the SEC, and, therefore, the Release makes no mention of Section 906. Nevertheless, the SEC's distinction between periodic reports (*i.e.*, annual and quarterly reports) and current reports on Form 8-K and 6-K lends support to the conclusion that the CEO/CFO certification requirement under Section 906 of the Act does not apply to either Form 8-K or Form 6-K filings.

The SEC is continuing to consider whether to extend, in a more direct manner, the certification requirements to other documents filed under the Exchange Act, such as definitive proxy and information statements.

THE REQUIRED CERTIFICATION

The certification is required under new Exchange Act Rules 13a-14 and 15d-14. The actual text of the certification has been added to each of the SEC forms for annual and quarterly reports, in each case immediately following the signature sections of those reports. The new rules and the amended forms provide that the certification must be exactly as set forth in the amended SEC forms and may not be changed in any respect. In addition, the certifying officer must sign the certification himself or herself,⁹ and is not permitted to have the certification signed on his or her behalf pursuant to a power of attorney or other form of confirming authority.

Other than minor variations based on the actual form of annual or quarterly report being filed, the certifications are virtually identical. The certification to be used in connection with annual reports on Form 10-K is as follows:¹⁰

⁹ For purposes of filing the report on the SEC's EDGAR system, the signature appears in typed form. The certifying officer must manually execute the certification at or prior to the time the electronic filing is made and the issuer must retain the manually signed copy on file for five years and provide it to the SEC upon request.

¹⁰ The text of the certification contained herein is based on the text as printed in the Release. It is possible, however, that minor inconsistencies in the various certifications printed in the Release will be conformed when printed officially in the Federal Register. Accordingly, clients are urged to review the form of certification they propose to include in their periodic filings with the final published version of the certification.

I, [identify the certifying individual], certify that:

1. I have reviewed this annual report on Form 10-K of [identify registrant];
2. Based on my knowledge, this annual report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this annual report;
3. Based on my knowledge, the financial statements, and other financial information included in this annual report, fairly present in all material respects the financial condition, results of operations and cash flows¹¹ of the registrant as of, and for, the periods presented in this annual report;
4. The registrant's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the registrant and have:
 - a) designed such disclosure controls and procedures to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this annual report is being prepared;
 - b) evaluated the effectiveness of the registrant's disclosure controls and procedures as of a date within 90 days prior to the filing date of this annual report (the "Evaluation Date"); and
 - c) presented in this annual report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date;
5. The registrant's other certifying officers and I have disclosed, based on our most recent evaluation, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent functions):
 - a) all significant deficiencies in the design or operation of internal controls¹² which could adversely affect the registrant's ability to record, process, summarize and report financial data and have identified for the registrant's auditors any material weaknesses in internal controls; and

¹¹ The SEC has added the reference to cash flows, which it believes is consistent with Congressional intent, even though Section 302 of the Act does not include this reference.

¹² The term "internal controls" is a pre-existing term relating to internal controls regarding financial reporting, and is distinguishable from the newly defined term "disclosure controls and procedures" used in paragraph 4 of the certification.

- b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls; and
6. The registrant's other certifying officers and I have indicated in this annual report whether there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Date: _____

 [Signature]
 [Title]

The certification to be used in connection with quarterly reports on Form 10-Q is attached hereto as Appendix I.

Materiality and Completeness. The Release provides that the certification as to the material accuracy and completeness of the report covered by the statement “mirrors” existing disclosure standards for materiality, which deem information material if there is a “substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.”¹³ The Release further provides that the completeness of disclosure is to be determined through application of standards derived from existing rules, forms and interpretations. In other words, the certification requirement is not intended to require the expansion of quarterly reports to contain the complete level of disclosure required in annual reports.

Financial Information. The certification, as it relates to the fair presentation of “financial information” included in the report, is not limited to the financial statements. Rather, financial information includes the financial statements (including footnotes), selected financial data, management's discussion and analysis of financial condition and results of operations and any other financial information contained in the report.

In addition, the certification with respect to financial information is not limited to a representation that such information is fairly presented in accordance with GAAP. The Release notes, in fact, that presenting financial information in conformity with GAAP may not satisfy obligations under the

¹³ *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

antifraud provisions of federal securities laws.¹⁴ Rather, the certification that such information is a “fair presentation” is meant to apply a standard of overall material accuracy and completeness that is broader than GAAP. According to the Release, a “fair presentation” of an issuer’s financial condition, results of operations and cash flows encompasses:

- the selection of appropriate accounting policies;
- proper application of appropriate accounting policies; and
- disclosure of financial information that is informative and reasonably reflects the underlying transactions and events and the inclusion of any additional disclosure necessary to provide investors with a materially accurate and complete picture of an issuer’s financial condition, results of operations and cash flows.

Disclosure Controls and Procedures. For purposes of paragraph 4 of the certification, the SEC has developed a new defined term — “disclosure controls and procedures” — meant to incorporate a broad concept of controls and procedures designed to ensure compliance with disclosure requirements generally, including the quality and timeliness of disclosure. Although this new term is meant to differentiate the concept from the pre-existing concept of “internal controls,” which relates to an issuer’s financial reporting and control of its assets (which are the subject of paragraphs 5 and 6 of the required certification),¹⁵ the definition of disclosure controls and procedures encompasses all information — *i.e.*, both financial and non-financial — required to be disclosed under the Exchange Act.

New Exchange Act Rules 13a-14 and 15d-14 define “disclosure controls and procedures” as:

controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the [Exchange Act] is recorded, processed, summarized and reported, within the time periods specified in the [SEC’s] rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the [Exchange Act] is accumulated and communicated to the issuer’s management, including its principal executive officer or officers and principal financial officer or officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.

¹⁴ In this regard, the Release cites *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969) (conformity to GAAP does not prevent jury from finding that financial statements failed to fairly present the financial condition of a company); *In re Caterpillar, Inc.*, Release No. 34-30532 (March 31, 1992) (failure to separately discuss the results of a foreign subsidiary in MD&A, where material to results of the consolidated company, violated the Exchange Act even though GAAP did not require separate financial statements); and *In re Edison Schools, Inc.*, Release No. 34-45925 (May 14, 2002) (use of gross revenue and expense items, instead of net revenue, violated the Exchange Act since it failed to provide an accurate view of the company’s financial operations). The Release also cites Exchange Act Rule 12b-20, which requires disclosure of all material information in addition to any information expressly required in an annual or quarterly report.

¹⁵ Section 13(b)(2) of the Exchange Act and the rules promulgated thereunder establish the requirement that companies maintain accurate books and records and a system of internal controls to provide reasonable assurances that the company’s financial statements are accurate.

Whereas the certification requirements apply only to quarterly and annual reports (and, indirectly, to other information incorporated therein by reference), the Release makes it clear that an issuer's disclosure controls and procedures are required to ensure full and timely disclosure in all Exchange Act filings, *i.e.*, quarterly reports, annual reports, current reports, definitive proxy materials, definitive information statements and, in the case of foreign private issuers, reports on Form 6-K, as well as amendments to any of the foregoing.

Disclosure Committee. The SEC is not requiring any particular controls or procedures, nor any particular methods for conducting the required evaluation of the procedures. The SEC expects that each issuer will develop a process suited to its business and management. The SEC does recommend, however, that issuers create a committee with responsibility for considering the materiality of information and determining disclosure obligations on a timely basis. The Release observes, in a footnote, that the members of such a disclosure committee might include the principal accounting officer or controller, the general counsel or other senior legal official with responsibility for disclosure matters who reports to the general counsel, the principal risk management officer, the chief investor relations officer and such other officers and employees, including individuals associated with the issuer's business units, as the issuer deems appropriate. Such a committee would then report to the principal executive and financial officers.

LIABILITY FOR FALSE CERTIFICATIONS

The Release notes that an issuer's principal executive and financial officers already are responsible for the issuer's disclosure under the Exchange Act and can be liable under the general antifraud standards. Nevertheless, the Release makes clear that an officer providing a false certification could be subject to civil and criminal liability for violating Section 13(a) or Section 15(d) of the Exchange Act and to both SEC and private actions for violating Section 10(b) of the Exchange Act and Rule 10b-5. In addition, there may be liability under Sections 11 and 12(a)(2) of the Securities Act where a quarterly or annual report is incorporated by reference into a registration statement or into a prospectus filed pursuant to Rule 424(b).

ISSUERS' OBLIGATIONS RELATING TO DISCLOSURE CONTROLS

New Exchange Act Rules 13a-15 and 15d-15 require each issuer filing reports under Section 13(a) or Section 15(d) of the Exchange Act — including foreign private issuers as a result of their obligation to file annual reports on Form 20-F or 40-F, as applicable — to maintain disclosure controls and procedures. The new requirement works in tandem with the CEO/CFO certification requirement to further the goal of improving the quality of reporting both financial and non-financial information by imposing directly on issuers the obligation to maintain procedures designed to ensure that information required in Exchange Act filings is recorded, processed, summarized and reported on a timely basis. The new requirement also complements existing requirements that issuers establish and maintain systems of internal controls with respect to their financial information. The Release notes that a company that fails to maintain adequate disclosure controls and procedures, review them and otherwise comply with the rule could be subject to SEC action for violating Section 13(a) of the Exchange Act even where the failure does not lead to flawed disclosure.

The new rules also require the issuer, under the supervision of the principal executive and financial officers, to conduct an evaluation of the effectiveness of the design and operation of the issuer's disclosure controls and procedures within 90 days prior to the filing date of any quarterly or annual report filed under the Exchange Act. The Release articulates the SEC's expectation that this evaluation will be conducted in a manner that will form the basis for certain of the statements required in the CEO/CFO certifications.

Finally, as the CEO/CFO certification required by the new rules makes reference to certain disclosures regarding both disclosure controls and procedures and internal controls that must be made in the annual and quarterly reports in which the certification is contained, the SEC has amended its rules and forms to require the issuer to make the referenced disclosures in those reports. Accordingly, the SEC has adopted a new Item 307 of Regulation S-K (and a corresponding provision for small business issuers) that requires issuers (other than Asset-Backed Issuers) to make the following disclosures in their annual and quarterly reports:

- (a) Evaluation of disclosure controls and procedures. Disclose the conclusions of the registrant's principal executive officer or officers and principal financial officer or officers, or persons performing similar functions, about the effectiveness of the registrant's disclosure controls and procedures (as defined in [Exchange Act Rules 13a-14(c) and 15d-14(c)]) based on their evaluation of these controls and procedures as of a date within 90 days of the filing date of the quarterly or annual report that includes the disclosure required by this paragraph.
- (b) Changes in internal controls.¹⁶ Disclose whether or not there were significant changes in the registrant'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.

WHAT COMPANIES SHOULD DO NOW

In light of the new rules implementing Section 302 of the Act, as well as the independent CEO/CFO certification required under Section 906 of the Act, CEOs and CFOs of public companies will now be required, on a regular basis, to certify all quarterly and annual reports filed with the SEC. In addition, companies will be required to maintain, and periodically evaluate the effectiveness of, disclosure controls and procedures and to make disclosures in their quarterly and annual reports relating to the conclusions of such evaluations as well as significant changes and other matters relating to their internal controls. Accordingly, it is important that all companies promptly review their procedures for verifying the accuracy and completeness of periodic reports and refine those procedures as appropriate so that they may serve as a starting point and baseline for future filings. Once the procedures are refined, companies should revise their internal schedules for the preparation of periodic reports (including the schedule of meetings of the audit committee of the board of directors) to accommodate these procedures.

¹⁶ Note that the requirement to disclose changes in internal controls is separate from the new requirement for an "internal control report," mandated by Section 404 of the Act to be included in annual reports required by Section 13(a) or Section 15(d) of the Exchange Act (*i.e.*, reports on Form 10-K, 10-KSB, 20-F and 40-F). Section 404 calls for SEC rulemaking to require inclusion of internal control reports, but does not set a deadline for SEC action.

In refining their procedures, companies should also incorporate steps necessary to evaluate, on a periodic basis, their disclosure and financial reporting controls and to prepare the disclosure required under the new rules concerning the results of such evaluation and other matters relating to internal controls. In addition, time should be built into the internal schedule to allow for timely disclosure to the auditors and the audit committee of the internal control-related matters contemplated by the certification.

Lastly, as suggested by the SEC in the Release, prompt consideration should be given to the establishment of a “disclosure committee” to help ensure the accuracy and completeness of reports and the implementation of appropriate disclosure and financial reporting controls.

While, as recognized by the SEC, each company must adopt procedures that fit with its business, structure and circumstances, set forth below are certain steps that companies may find helpful to consider as they comply with the new rules.

Review Current Procedures for Collecting, Processing and Disclosing Information

- Identify appropriate members for, and thereafter constitute, a disclosure committee.
 - Consider, if such a committee is already in existence, any necessary modifications in the membership of the committee.
 - Consider the practices and procedures to be used by the committee in identifying and considering matters that may require disclosure.
- Assess the adequacy of current procedures for preparing disclosure documents.
 - Consider the appropriateness of engaging outside consultants to evaluate the adequacy and effectiveness of disclosure and financial reporting controls.
- Modify current procedures as appropriate to assist the CEO and CFO in making the required certifications.
- Confirm that procedures provide for the assessment of disclosure and financial reporting controls and the preparation of required disclosure for periodic reports.

Review of the Report by the CEO and CFO

- Review carefully the periodic report in its entirety and do so sufficiently in advance of the filing date so that any concerns identified can be addressed.
- Think critically about the disclosures contained in the report and identify areas for further review and assistance by company officers or outside advisors.
- Consider whether the report adequately describes the company and, in particular, important risks and contingencies related to the company’s business.
- Consider whether the financial information in the report fairly presents, in all material respects, the company’s financial position, results of operations and cash flows.
- Meet with the disclosure committee.

Review of the Report by Others

- Have the disclosure committee engage in a critical review of the processes and procedures that were followed in preparing the report (including for both financial and non-financial information) and implement any additional steps deemed necessary or advisable.
 - Consider the appropriate timing for meetings by the disclosure committee.
- Have the disclosure committee and other appropriate persons review the disclosures to be made in the report generally, and in MD&A in particular, with similar goals as indicated above for the CEO and CFO and ensure that the results of the review are communicated to the CEO and CFO.
 - Give appropriate attention to “sensitive” areas such as related party transactions and critical accounting policies.
 - Consider the appropriateness of including “risk factor” type disclosure or, if already included, the adequacy of such disclosure.
- Have the disclosure committee evaluate the disclosure and financial reporting controls and ensure that the results of such evaluation are communicated to the CEO and CFO.
 - Review, among other things, any management or similar letters received from the company’s independent auditors relating to internal controls and assess whether any corrective actions are required.
- Have the outside auditors review the financial statement disclosure, MD&A and other appropriate areas, including critical accounting policies, and ensure that the results of the review are communicated to the disclosure committee and/or the CEO and CFO.

Documentation

- Determine the appropriate method to document the steps taken and procedures followed in carrying out the review, as well as the results obtained from the review process.

Prepare the Disclosure for the Annual or Quarterly Report

- Finalize the necessary disclosure for the annual or quarterly report, disclosing the conclusions of the evaluation of disclosure controls and procedures and any matters required with respect to the company’s internal controls.

* * *

This memorandum is by its nature a general summary that may not include all information relevant to any particular legal question. It is not intended to be a substitute for reference to the detailed provisions of the federal securities laws, the rules, regulations and forms designated by the SEC for various reports and statements to be made thereunder, or for the assistance of counsel in complying with such laws, rules and regulations. As a general matter, counsel should be consulted in interpreting or applying the requirements described in this memorandum, particularly in connection with the preparation of documents to be filed with the SEC.

APPENDIX I:

**FORM OF CERTIFICATION FOR
QUARTERLY REPORTS ON FORM 10-Q¹⁷**

I, [identify the certifying individual], certify that:

1. I have reviewed this quarterly report on Form 10-Q of [identify registrant];
2. Based on my knowledge, this quarterly report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this quarterly report;
3. Based on my knowledge, the financial statements, and other financial information included in this quarterly report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this quarterly report;
4. The registrant's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the registrant and we have:
 - a) designed such disclosure controls and procedures to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this quarterly report is being prepared;
 - b) evaluated the effectiveness of the registrant's disclosure controls and procedures as of a date within 90 days prior to the filing date of this quarterly report (the "Evaluation Date"); and
 - c) presented in this quarterly report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date;
5. The registrant's other certifying officers and I have disclosed, based on our most recent evaluation, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
 - a) all significant deficiencies in the design or operation of internal controls which could adversely affect the registrant's ability to record, process, summarize and report financial data and have identified for the registrant's auditors any material weaknesses in internal controls; and

¹⁷ The text of the certification contained herein is based on the text as printed in the Release. It is possible, however, that minor inconsistencies in the various certifications printed in the Release will be conformed when printed officially in the Federal Register. Accordingly, clients are urged to review the form of certification they propose to include in their periodic filings with the final published version of the certification.

- b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls; and
6. The registrant's other certifying officers and I have indicated in this quarterly 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 our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Date: _____

[Signature]

[Title]