

KING & SPALDING CLIENT ALERT

July 12, 2002

CEO and CFO Certification to the SEC: Some Practical Guidelines

On June 27, 2002, the SEC issued an order requiring the CEOs and CFOs of more than 900 of the largest public companies in the United States to file certifications, under oath, confirming the accuracy of certain filings previously made with the SEC. Each officer must certify that, to the best of his or her knowledge, no covered filing contained an untrue statement of a material fact or omitted to state a material fact necessary to make the statements in the filing, in light of the circumstances under which they were made, not misleading.

For calendar year companies, the certifications must be filed with the SEC by the close of business on August 14, 2002. Other covered companies will be required to file the certifications by the close of business on the date after August 14, 2002 on which their next Form 10-Q or Form 10-K is due. In either case, the deadline for filing the certifications would be postponed to the extent that a company uses Rule 12b-25 to delay the due date for the relevant filing.

In this Client Alert, we:

- (a) provide an overview of the SEC Order;
- (b) describe the potential liability of CEOs and CFOs relating to these certifications; and
- (c) provide possible procedures for CEOs and CFOs to consider in preparing to make these certifications (see Exhibit A to this Client Alert).

The SEC Order is available at <http://www.sec.gov/rules/other/4-460.htm>. Related documents also available at that address include the form of the certification (which is attached as Exhibit B to this Client Alert), a list of the companies covered by the Order and Frequently Asked Questions about the Order.

What filings are covered by the certifications?

The certifications must cover the company's most recent Annual Report on Form 10-K and all Quarterly Reports on Form 10-Q, Current Reports on Form 8-K and definitive proxy materials filed after the date of filing of the Annual Report. The certifications must also cover any amendments to these filings. The SEC has indicated that, for calendar year companies filing the certifications prior to the filing date of their second quarter Form 10-Q, the certifications do not need to cover the second quarter Form 10-Q. To the extent that information in a covered

filing is corrected or supplemented by a subsequent filing, the certification covers the information in the subsequent filing, rather than in the original filing.

What portions of the filings are covered?

The entire filing is covered. The certification will apply to the financial statements and the non-financial portions of each filing.

As of what date do the certifications speak?

The certifications confirm the accuracy of the filings as of the end of the period covered by the filing (or, in the case of a Form 8-K or proxy materials, its filing date). There is no requirement to confirm that the covered filings remained accurate as of any subsequent date or as of the date of the certifications.

Are forward-looking statements in the filings covered by the certifications?

Yes. CEOs and CFOs should review carefully any forward-looking statements included in the covered filings, particularly any that are not accompanied by appropriate cautionary language.

Are the certifications to be given in absolute terms or based on the knowledge of the CEO and CFO?

The certifications are to be given to the “best” knowledge of the certifying officer, based upon a review of the covered filings. In order to provide the certification, each certifying officer should make appropriate inquiries relating to the covered filings.

What inquiries and procedures should the CEO and CFO consider undertaking prior to making the certifications?

We have listed possible procedures to consider in Exhibit A attached to this Client Alert. The actual procedures to be followed by each company will be dependent on the unique facts and circumstances of each company and its SEC reporting processes.

What is the definition of “materiality” for purposes of the certifications?

The Order does not speak specifically to a standard of materiality. However, prior to issuing this Order, the SEC had proposed rules that would require the CEO and CFO of every public company to file a similar certification with each of the company’s annual and quarterly reports. In these proposed rules, which are currently pending, the SEC has indicated that the proposed certification should reflect the current standards for materiality. Under these standards, information generally is considered material if:

- there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision; and
- there is a substantial likelihood that the information would be viewed by the reasonable investor as having significantly altered the total mix of available information.

The SEC has stated in previous pronouncements that quantitatively small accounting errors may be material under certain circumstances and that simple percentage thresholds for determining materiality are not appropriate under the law or governing accounting literature.

In making the certifications required by the Order, CEOs and CFOs should measure materiality with these considerations in mind.

How should a company correct a material misstatement or omission discovered by the CEO or CFO in preparing the certifications?

To the extent that information in a covered filing is corrected or supplemented by a subsequent covered filing, the certification will relate to the information in the subsequent filing rather than to the original filing. Accordingly, if the CEO or CFO finds that a covered filing contained a material misstatement or omission as of the relevant date, the company may correct the error in the second quarter Form 10-Q that is due August 14, 2002 (for a calendar year company). Alternatively, the company may file an amendment to the original report or a Current Report on Form 8-K prior to filing the certifications. The SEC Order also permits a third approach, under which the CEO and CFO would file sworn statements describing the facts and circumstances that would make the required certifications incorrect. However, because the sworn statement itself is not part of the company's Exchange Act reporting stream, correcting errors by filing a subsequent report or an amendment to the erroneous filing is the preferable course of action.

What are the consequences of an incorrect certification?

CEOs and CFOs will be required to certify reports personally, not just on behalf of the company, in many cases with respect to filings that they did not originally sign. The actions of such officers may, therefore, be subject to greater scrutiny in shareholder litigation than they otherwise would have in the absence of the certifications. In addition, an incorrect certification might give rise to SEC enforcement actions or possible criminal prosecution for perjury, false filings with a government agency, obstruction of justice or other charges, especially in light of the SEC's recent referrals to the U.S. Department of Justice of matters concerning Enron, WorldCom and other companies. Accordingly, the utmost care should be given to constructing and following thorough certification processes and recording compliance with such processes. Management should also review D&O insurance policies and consider possible implications of these certifications under these policies.

Is there any chance that industry groups or other organizations might challenge the authority of the SEC to require these certifications?

Various commentators have questioned the authority of the SEC to require these certifications, and have cited several bases on which the Order could be challenged. However, to date, we are not aware of any formal action to challenge the Order. We are monitoring this situation and will provide updates regarding any developments that provide relief to corporate officers.

If you would like more information regarding the topics discussed in this Client Alert, please call your primary contact partner at King & Spalding or any of the King & Spalding lawyers listed below:

Mary A. Bernard	New York	(212) 556-2175
Christine B. LaFollette	Houston	(713) 751-3239
Andrew C. Lynch	Washington, D.C.	(202) 626-5614
Jeffrey M. Stein	Atlanta	(404) 572-4729

King & Spalding's Corporate Finance Practice Group consists of over 35 lawyers in our Atlanta, New York, Houston and Washington, D.C. offices whose practices focus principally on corporate finance transactions and advising corporate clients regarding SEC reporting and disclosure requirements, securities transactions and other compliance matters. The lawyers in the group have substantial experience in public and private corporate finance transactions and represent underwriters and issuers in the full range of securities transactions, including initial and secondary public offerings, Rule 144A offerings, shelf offerings, high-yield debt offerings, tax-advantaged trust preferred securities offerings, American depositary share offerings, eurodollar offerings, registered exchange offers and consent solicitations.

EXHIBIT A

Guidelines and Possible Procedures to Consider in Preparing to Sign Sworn Statements Pursuant to June 27 SEC Order¹

- **Covered Filings.** Identify the filings to be certified by the CEO and CFO.
- **Timetable.** Consider establishing a timetable to ensure that all necessary work is completed in advance of the certification date (August 14, 2002 for calendar year companies).
 - Consider sending copies of all covered filings well in advance of any planned meeting dates to each member of the company’s audit committee and any members of management or outside advisors with whom the CEO and CFO intend to meet in preparing for their certifications.
- **Read the Filings.** The CEO and CFO should read the covered filings.
- **Review of Procedures.** The CEO and CFO should consider reviewing the company’s processes and procedures under which each of the filings was prepared.
 - In its pending rule proposal, the SEC has proposed similar certifications to be filed on an ongoing basis with each Form 10-K and Form 10-Q, which would require officers to annually certify that they have reviewed “procedures to provide reasonable assurance that the company is able to collect, process and disclose the information required in the company’s quarterly and annual reports [and Forms 8-K].” To implement these procedures, the rule proposal further recommends that the company create a committee made up of senior accounting, legal, risk management and investor relations staff to “consider the materiality of information and determin[e] disclosure obligations on a timely basis.”
 - In the process of preparing the required CEO and CFO certifications to be filed August 14, 2002, companies may wish to be mindful of the considerations reflected in this SEC proposal.
- **Meetings with Management.** The CEO and CFO should consider meeting with appropriate members of management to inquire as to the preparation of the covered filings and the contents thereof and to resolve any questions arising out of the review of the covered filings.

¹ *These possible procedures are not tailored to any specific company. Many of these potential actions should be revised or reconsidered entirely, depending on the facts and circumstances of a particular company. This is not intended to be a baseline or a set of minimum standards that must be followed. Specific advice of counsel should be sought in implementing any of these procedures.*

- **Meetings with Advisors.** Consider whether meeting with auditors or counsel would be helpful to the CEO and CFO in preparing to sign the certification.
- **Meeting with Audit Committee.** Schedule a meeting where the CEO and CFO can review the contents of the certifications and any other matters with the company's audit committee. The certification must state whether the CEO and the CFO reviewed its contents with the audit committee.
- **Form Check.** Consider asking counsel to confirm that each of the covered filings complies as to form with the requirements of the federal securities laws and addresses each of the line items required by the respective form of the filing.
- **Issues To Consider.** Those reviewing and discussing the company's covered filings should consider, among other things, the SEC's recent focus on the following disclosure issues:
 - critical accounting policies;
 - liquidity needs;
 - off-balance sheet arrangements;
 - contractual obligations and commercial commitments;
 - non-exchange traded commodity or derivative contracts; and
 - related party transactions.
- **Written Record.** Consider keeping a written record of the steps that are taken to prepare for the certification.
- **Amended Filings.** Any required corrections should be made by filing a corrective statement, either in an amendment to the original filing or in a separate covered filing.
- **Certification Filing.** Paper copies of the certifications are to be delivered to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549 and must arrive by the close of business on August 14, 2002 for calendar year companies. Certifications are not to be filed via EDGAR.

EXHIBIT B

**STATEMENT UNDER OATH OF PRINCIPAL EXECUTIVE OFFICER AND
PRINCIPAL FINANCIAL OFFICER REGARDING FACTS AND
CIRCUMSTANCES RELATING TO EXCHANGE ACT FILINGS**

I, [Name of principal executive officer or principal financial officer], state and attest that:

(1) To the best of my knowledge, based upon a review of the covered reports of [company name], and, except as corrected or supplemented in a subsequent covered report:

- no covered report contained an untrue statement of a material fact as of the end of the period covered by such report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed); and
- no covered report omitted to state a material fact necessary to make the statements in the covered report, in light of the circumstances under which they were made, not misleading as of the end of the period covered by such report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed).

(2) I [have/have not] reviewed the contents of this statement with [the Company's audit committee] [*in the absence of an audit committee*, the independent members of the Company's board of directors].

(3) In this statement under oath, each of the following, if filed on or before the date of this statement, is a "covered report":

- [identify most recent Annual Report on Form 10-K filed with the Commission] of [company name];
- all reports on Form 10-Q, all reports on Form 8-K and all definitive proxy materials of [company name] filed with the Commission subsequent to the filing of the Form 10-K identified above; and
- any amendments to any of the foregoing.

[Signature*]
[Name]
[Date]

Subscribed and sworn to
before me this _____ day of
_____ 2002.

/s/ _____
Notary Public

My Commission Expires:

[* Separate statements to be signed by each of the Principal Executive Officer and the Principal Financial Officer.]