

# defining issues<sup>TM</sup>

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## ALERT

### Final Rules on Officers' Certifications of Periodic Reports & Accelerated Filing Deadlines

The SEC's revised filing deadlines will be phased in over three years, with the first year having no accelerated deadlines.<sup>1</sup> Its new rules on officers' certifications of periodic reports and controls bear the marks of the Sarbanes-Oxley Act, which created requirements while the SEC's proposal on the same subject was still in its comment period.<sup>2</sup> This Alert describes the major new requirements.

#### CERTIFICATIONS

Certifications by principal executive and financial officers are required immediately in the periodic reports of U.S. and foreign public companies, that is, annual and interim period reports. The certifications pertain to the content of each report and to a company's system of controls designed to enable it to meet its periodic disclosure obligations. A separate certification is required for each principal officer, and the certifications must use the exact wording prescribed in the rules. The certification requirements are summarized below.

<sup>1</sup> Release No. 33-8128, Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports, September 5, 2002, [www.sec.gov/rules/final/33-8128.htm](http://www.sec.gov/rules/final/33-8128.htm).

<sup>2</sup> Release No. 33-8124, Certification of Disclosure in Companies' Quarterly and Annual Reports, August 28, 2002, [www.sec.gov/rules/final/33-8124.htm](http://www.sec.gov/rules/final/33-8124.htm). This rulemaking implements Section 302 of the Sarbanes-Oxley Act.

***Certifying Periodic Reports.*** In every periodic report filed after August 29, 2002, each officer will affirm, based on his or her knowledge, that the filed report is accurate and complete and the financial statements and other financial information are in all material respects fairly presented. The standard for these affirmations goes beyond presentation in accordance with GAAP to the concept of a “fair presentation.”

***Certifying Controls.*** The remaining elements of the newly required certification cover the company’s controls. In every periodic report filed for periods ending after August 29, 2002, each officer will affirm that he or she and the other certifying officer or officers:

- Are responsible for establishing and maintaining “disclosure controls and procedures” (a new term broader than “internal controls”),
- Designed the disclosure controls and procedures to ensure that material information is known to them,
- Evaluated the effectiveness of the disclosure controls and procedures within 90 days prior to the filing date and presented in the periodic report their conclusions on the effectiveness of these controls and procedures,
- Informed the auditors and audit committee of (a) all significant deficiencies in the design or operation of “internal controls” (the narrower term from AICPA professional standards pertaining to financial reporting) and (b) any fraud (material or not) by those who have a significant role in the registrant’s internal controls, and
- Indicated in the filed periodic report whether or not anything significantly affected the internal controls subsequent to the date of their most recent evaluation.

Companies will have to establish and maintain a system of “disclosure controls and procedures.” The term refers to controls and procedures designed to ensure that the company has the information required to meet its reporting obligations under the Exchange Act. The concept includes controls and procedures with respect to material nonfinancial information.

***Applicability and Effective Date.*** The certification requirements described above apply to annual reports on Forms 10-K, 10-KSB, 20-F, and 40-F; to semi-annual reports on Form N-SAR; to quarterly reports on Forms 10-Q and 10-QSB; and to amendments of any of these reports and transition reports relative to a change in fiscal year. Registered investment companies required to file periodic reports under the Exchange Act are required to include certifications in their filings.

As noted above, certain of the certification provisions of the new rules apply to periodic reports filed after August 29, 2002, while others apply to periodic reports filed for periods ending after August 29, 2002. Companies should consult with securities counsel on the transition provisions for required certifications.

The requirements described above implement Section 302 of the Sarbanes-Oxley Act. Section 906 of the Sarbanes-Oxley Act currently requires separate certifications by chief executive and financial officers, and it was effective July 30, 2002. The SEC has held discussions with the Department of Justice about the two requirements. We understand that legal counsels are advising registrants to include both certifications in their periodic reports.

Another provision of the Sarbanes-Oxley Act requires companies to evaluate their internal controls, report on them in annual filings, and have the evaluations reported on by the company’s auditor. It directs the SEC to prescribe the rules for these reports.<sup>3</sup> No proposal has yet been issued.

## FILING DEADLINES

The accelerated filing deadlines for certain larger domestic companies will be phased in over a three-year period. For companies that meet the definition of an “accelerated filer” as of the end of their first fiscal year ending on or after December 15, 2002, the annual report deadline will remain 90 days for year one and will then be reduced 15 days per year over two years to 60 days. The quarterly report deadline for accelerated filers will remain 45 days for year one and will then be reduced five days per year over two years to 35 days. The boxed table illustrates the new deadlines for accelerated filers.

<sup>3</sup> Sarbanes-Oxley Act, Section 404.



### Filing Deadlines for Accelerated Filers

For Fiscal Years Ending On or After	Form 10-Q Deadline	Form 10-K Deadline
December 15, 2002	45 days after fiscal quarter end	90 days after fiscal year end
December 15, 2003	45 days after fiscal quarter end	75 days after fiscal year end
December 15, 2004	40 days after fiscal quarter end	60 days after fiscal year end
December 15, 2005	35 days after fiscal quarter end	60 days after fiscal year end

The new rules apply to domestic companies with a common equity public float of at least \$75 million, measured as of the last business day of the most recently completed second fiscal quarter, if they meet three other criteria. They must have been subject to the Exchange Act's Section 13(a) or 15(d) reporting requirements for at least a year, have filed one annual report under those requirements, and must not be eligible to use Forms 10-KSB and 10-QSB (annual and quarterly reports of small business issuers). Companies meeting these criteria are defined as accelerated filers. Companies must initially determine whether they are accelerated filers for fiscal years ending on or after December 15, 2002. Once they become accelerated filers, companies will continue to adhere to the accelerated deadlines, unless they become eligible to use Forms 10-KSB and 10-QSB

Based on the criteria above, the public companies that will not be required to accelerate filings under the new rules will include small business issuers, foreign registrants, and companies that only have public debt or preferred stock.

The age of financial statements included in registration statements and proxy statements will also be shortened over the three-year period. Financial statements included in a registration statement or proxy statement must be as current as a company's annual and quarterly financial statements filed on Form 10-K and Form 10-Q.

The rule also requires accelerated filers to disclose in Form 10-K filings whether their periodic and current reports (e.g., Form 8-K) are available on their Web sites soon after they are filed with the SEC and, if not, to explain why. This requirement is effective for Form 10-K filings for fiscal years ending on or after December 15, 2002.

The descriptive and summarizing statements above are not intended to substitute for the official texts of the requirements. All relevant facts and circumstances should be brought to bear when complying with the SEC releases and the Sarbanes-Oxley Act of 2002. Companies should consult with their legal and accounting advisors.

Additional information on the SEC's initiatives is available from your local KPMG representative or office.

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