SARBANES-OXLEY ACT OF 2002: SUPPLEMENTAL MEMORANDUM NO. 1

SIMPSON THACHER & BARTLETT LLP

AUGUST 8, 2002

This memorandum discusses issues that have arisen since the passage of the Sarbanes-Oxley Act of 2002 (the "Act") and supplements our more comprehensive July 31, 2002 memorandum entitled "*Sarbanes-Oxley Act of 2002: CEO/CFO Certifications, Corporate Responsibility and Accounting Reform*" (the "July 31st Memorandum"). Additional copies of the July 31st Memorandum are available upon request or at our website: *www.simpsonthacher.com*.

We will issue another supplemental memorandum shortly regarding Section 402 of the Act, which prohibits extensions of credit by issuers to their directors and executive officers.

SECTIONS 302 AND 906: CEO/CFO CERTIFICATIONS

Background

As discussed in the July 31st Memorandum, Section 906 of the Act requires that each periodic report containing financial statements filed by an issuer with the Securities and Exchange Commission pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, be accompanied by a written statement by the CEO and CFO of the issuer. The statement (the "906 Certification") must certify that the report fully complies with the reporting requirements of Section 13(a) or 15(d) of the Exchange Act and that the information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

The Act also requires the SEC to adopt final rules *by August 29, 2002*, requiring that CEOs and CFOs of public companies provide additional certifications in each annual or quarterly report filed or submitted under either Section 13(a) or 15(d) of the Exchange Act. As discussed below, these certifications (the "302 Certifications") will be significantly more detailed than those required in the 906 Certifications or by the SEC's June 27, 2002 order (which requires sworn statements to be made by CEOs and CFOs of 947 specified U.S. companies by the first date a Form 10-K or Form 10-Q is required to be filed on or after August 14, 2002).[1]

Form of 906 Certification; No Knowledge Qualifier

We have prepared a form of 906 Certification, attached to this supplemental memorandum as Exhibit A.

In the absence of SEC guidance, companies generally have been delivering two different forms of 906 Certifications. Most of the 906 Certifications that are publicly available conform to the technical requirements of Section 906 of the Act, but a minority of the certifications have included a knowledge qualifier (e.g., "I certify, *to the best of my knowledge*…"). Section 906 requires the CEO and CFO to certify, with each periodic report containing financial statements, that:

- the report *fully complies* with the requirements of Section 13(a) or 15(d) of the Exchange Act; and
- the information contained in the report *fairly presents*, in all material respects, the financial condition and results of operations of the company.

These statements prescribed by Section 906 do not contain any knowledge qualifier. Nonetheless, a false 906 Certification is subject to criminal liability only if the person who made the statement did so *knowing* it was false. Therefore, CEOs and CFOs obtain the benefit of a knowledge qualification without having to modify the language required by Section 906. In addition, to the extent that a civil plaintiff sought to assert a violation of Rule 10b-5 against an issuer, a CEO or a CFO on the basis of a 906

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[1] The SEC order is discussed in our July 15, 2002 memorandum entitled "*New SEC Oath Requirements for CEOs and CFOs Regarding Recent Exchange Act Filings*."

Certification that proved to be incorrect, the plaintiff would have to establish scienter (i.e., intent to deceive or recklessness) in connection with the certification. We recommend that CEOs and CFOs not include a knowledge qualifier in their 906 Certifications because the Act does not provide for a qualifier *within the 906 Certification* and the consequences of delivering a non-conforming certification are unclear. Moreover, the absence of a knowledge qualifier in the 906 Certifications would not prevent the CEO or CFO from asserting knowledge-based defenses to any future claims.

How to File 906 Certifications

Section 906 states only that the periodic report be "accompanied by" the 906 Certifications. As a result, several different practices have emerged regarding the method of filing 906 Certifications. Most companies have included the 906 Certifications either as an exhibit to their periodic report or on the signature page of the report, with substantially more companies opting to file the 906 Certifications as exhibits rather than on the signature page.[2] Presumably, other companies that have filed periodic reports containing financial statements have done so by delivering the certifications to the SEC as correspondence accompanying the filing. The SEC has indicated informally that any of these methods is permissible. In the case of sworn statements submitted under its June 27, 2002 order, however, the SEC has taken the position that the statements generally are material and should be made public.

Correspondence to the SEC is not immediately available to the public on EDGAR because it is not part of the filing, while signature pages and exhibits are publicly available on EDGAR upon filing. Accordingly, some practitioners have asserted that there may be somewhat less civil liability exposure if a 906 Certification is made in the form of correspondence (because the correspondence would not be a part of a publicly filed periodic report). Issuers should, however, consider filing the 906 Certifications publicly as an exhibit to the relevant filing in order to address investor interest in whether such certifications were made and any related selective-disclosure issues posed by responding to specific inquiries. Moreover, for a New York Stock Exchange-listed

[2] Including the 906 Certification on the signature page of the report might be deemed an alteration of the form of the signature page from that which is prescribed by the rules under the Exchange Act. We would not recommend including the 906 Certification in this manner.

company, there may be no meaningful advantage to a correspondence filing because the NYSE recently adopted proposed changes to its listing standards that would require disclosure in the company's annual report of a CEO's certifications[3] made pursuant to the Exchange Act.

In lieu of filing the certification as an exhibit to a periodic filing, some companies have submitted their 906 Certifications as correspondence and then included copies on a Form 8-K report furnished under Item 9 of that form. This alternative enables a company to disclose the fact that the certifications have been made without the necessity of incorporating the certifications by reference into existing and future registration statements.

302 Certifications; SEC Request for Comments

On August 2, 2002, the SEC announced that it would issue final rules regarding the 302 Certifications and requested that public comments be made by August 19, 2002. On June 14, 2002, before the enactment of the Act, the SEC had proposed periodic officer certification rules that differ from the significantly broader requirements of Section 302 of the Act. The SEC stated that it intends to revise those proposed rules to conform to the Act. In addition, the August 2, 2002 announcement indicated that the SEC intends to retain the requirement in its proposed rules[4] that companies maintain sufficient procedures to provide a reasonable assurance that they are able to collect, process and disclose, within the required time periods required in the SEC's forms and rules, the information, including non-financial information, required to be disclosed in periodic and current reports. The SEC's proposed rules also require certifications in the Form 10-K that the CEO and CFO have reviewed within the past 12 months an evaluation of the issuer's internal reporting procedures. We plan to distribute an additional memorandum regarding 302 Certifications after the SEC adopts final rules later this month.

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[3] The proposed NYSE listing standards do not appear to require disclosure of CFO certifications.

[4] The proposed rules are discussed in our July 31st Memorandum and in our June 27, 2002 memorandum entitled "*SEC Proposes New Rules Relating to 8-K Disclosure and Officer Certification*."

In the meantime, we advise CEOs and CFOs to begin taking the steps necessary to review and, as necessary, institute procedures to enable them to make the 302 Certifications described in the Act. Because of the requirement that CEOs and CFOs state that they are responsible for establishing and maintaining internal controls and evaluating the effectiveness of the controls, CEOs and CFOs should not wait for additional guidance from the SEC before commencing those evaluations. The Act mandates that the SEC's rules on 302 Certifications require that each CEO and CFO states that:

- the signing officer has reviewed the annual or quarterly report that is the subject of the certification;
- based on that officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which the statements were made, not misleading;
- based on that officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report;
- the signing officer is responsible for establishing and maintaining internal controls and has:
  - designed the internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to the officer by others within those entities, particularly during the period in which the periodic reports are being prepared;
  - evaluated the effectiveness of the issuer's internal controls as of a date within 90 days prior to the report; and
  - presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date;

- the signing officer has disclosed to the issuer's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function):

  - all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer's ability to record, process, summarize, and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls; and

  - any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and

- the signing officer has indicated in the 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 their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

The 302 Certifications requirement, as further clarified by SEC rules, will apply to *all* annual and quarterly reports filed on or after August 29, 2002. The SEC has indicated that the final rules will apply to foreign private issuers filing annual reports on Form 20-F and Canadian issuers filing Form 40-F. The SEC has also asked for comments as to how the 302 Certifications requirement should apply to registered investment companies.

Applicability of 302 and 906 Certifications to 8-Ks, 6-Ks and Voluntary Filings

Form 8-K

The Act requires that 906 Certifications accompany "periodic reports containing financial statements *filed* by an issuer," while the 302 Certifications apply to each "annual or quarterly report *filed or submitted*" by a company. We do not believe the phrase "periodic reports" in Section 906 is intended to be any broader than the phrase

"annual or quarterly report" in Section 302. Therefore, we do not advise delivering 906 Certifications with current reports submitted on Form 8-K.[5]

Form 6-K

In our July 31st Memorandum, we indicated that there is a basis to conclude that the 906 Certifications requirement generally did not apply to Form 6-K reports, although the matter is not free from doubt. This view was premised on the fact that Form 6-K reports are not deemed to be "filed" for purposes of certain liability provisions of the Exchange Act, but are rather "furnished" or "submitted" to the SEC under that Act. In addition, Form 6-K reports may not be deemed "periodic" reports to the extent that the obligation to file a Form 6-K report arises not from the lapse of a period of time, but rather from home country and foreign securities exchange reporting requirements and the distribution, or required distribution, of information to security holders. The necessity of filing 906 Certifications may be more complex, however, in the context of registration statements under the Securities Act of 1933, as amended, which provide for incorporation by reference of Exchange Act filings. While the general instructions to Form 6-K provide, for example, that

> "the information and documents furnished in this report shall not be deemed to be 'filed' for the purposes of Section 18 of the [Exchange] Act or otherwise subject to the liabilities of that section,"

the incorporation by reference requirements contained in Form F-3 contemplate the incorporation by reference of reports *filed* with the SEC. Accordingly, if a Form 6-K contains information that will be incorporated by reference in a Securities Act filing,

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[5] In addition, Section 906 only applies to periodic reports containing financial statements. Form 8-K generally would not include financial statements, except with respect to an Item 2 filing for the acquisition or disposition of assets for which financial statements *of the business acquired* may be appropriate. It would not seem reasonable to require a CEO or CFO of an acquiror to provide a certification of the financial statements of the acquired business. Form 8-K also requires pro forma financial information for Item 2 transactions, but we do not believe pro forma financial information should constitute "financial statements" for purposes of Section 906. In addition, many issuers report earnings announcements on Form 8-K. Section 906 does not clearly address whether these earnings releases would constitute "financial statements" under Section 906, but the CEO and CFO will be certifying the reported earnings in the subsequently filed Form 10-Q or 10-K, and we do not believe Section 906 was intended to require multiple certifications of the same financial information.

such as a shelf registration statement, then either the whole report or the portion to be incorporated by reference may need to be deemed "filed." Nevertheless, foreign private issuers may continue to assert that 906 Certifications are still not required as the Form 6-K reports are not periodic for the reasons discussed above and the deemed filing is just in the context of the registration statement. As stated above, this matter is not free from doubt.

Voluntary Filings

Many clients have requested advice regarding whether Sections 302 and 906 of the Act apply to companies that file Forms 10-K and 10-Q, but are not required to do so by the Exchange Act. Some companies file periodic reports with the SEC not because they are required to do so by the Exchange Act, but to fulfill obligations under an indenture or similar debt instrument that requires the filing of reports on Forms 10-K and 10-Q. Other companies may have been required to file under Section 15(d) for one year after a public offering of securities, but the one-year period has elapsed and the company has continued to file, probably also continuing to check the box on the cover page of the form indicating that the filing is made pursuant to Section 13 or 15(d) of the Exchange Act. We believe the Act at this time does not require voluntary filers to deliver 906 Certifications because (1) voluntary filers are not required to *file pursuant to* Section 13(a) or 15(d) of the Exchange Act and (2) Section 906 applies only to "issuers," and voluntary filers are not "issuers," as that term is defined in the Act.[6] Notwithstanding the fact that Section 906 may not technically apply to voluntary filers, these companies may nevertheless wish to consider making 906 Certifications for investor relations purposes or in anticipation of a possible correction of the legislation (or SEC guidance) to expressly include such filers within the scope of the requirements.

Unlike Section 906, Section 302 applies to "each annual or quarterly report *filed or submitted under*" Section 13(a) or 15(d) of the Exchange Act. We expect that the SEC may provide guidance regarding this issue in its final rules on 302 Certifications later this month. In the meantime, voluntary filers may wish to take steps necessary to be in

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[6] The term "issuer" under Section 2(a)(7) of the Act means an issuer, the securities of which are registered under Section 12 of the Exchange Act, or that is *required* to file reports under Section 15(d) of the Exchange Act, or that files or has filed a registration statement that has not yet become effective under the Securities Act and that it has not withdrawn.

a position to make the officer certifications required by Section 302 and, though less likely, Section 906 should the SEC issue rules or guidance applicable to these filers.

SECTION 403: TWO-DAY DEADLINE FOR FORM 4 FILINGS

Background

Section 403 of the Act amends Section 16(a) of the Exchange Act to shorten to two business days the length of time that certain corporate "insiders" with equity securities registered pursuant to Section 12 of the Exchange Act have to report changes in ownership of the issuer's equity securities on Form 4. Under existing law, officers and directors of a company with equity securities registered pursuant to Section 12 of the Exchange Act and "beneficial owners" of 10% or more of any class of those equity securities (other than exempt securities) generally have to report changes in their ownership of any equity securities of the issuer or the purchase or sale of a security-based swap agreement involving equity securities of the issuer before the 10th day after the close of the calendar month during which the change occurs. Section 403 amends the Exchange Act to provide that officers and directors of these companies and the 10% beneficial owners described above must file with the SEC (and any applicable exchange) a statement before the end of the second business day following the day on which the reportable transaction is executed, except for cases in which the SEC determines that this reporting deadline is not feasible.

The Act provides that this amendment to Section 16(a) of the Exchange Act will become effective August 29, 2002.

SEC Guidance; Narrow Exceptions

In supplemental information issued by the SEC on August 6, 2002, the SEC stated that it is considering rules that provide exemptions from the two business day reporting deadline for Form 4 only for narrowly specified types of transactions where objective criteria prevent the insider from controlling (or in many cases even knowing) the timing of the transaction execution and where it has concluded that the two-day period would not be feasible. The SEC anticipates that the new rules will become effective by the August 29, 2002 effective date of Section 403.

The supplemental information states that the SEC is considering calculating the Form 4 filing deadline differently for the following types of transactions:

- a transaction pursuant to a single market order that is executed over more than one day, not to exceed a specified number of days;
- a transaction involving a pre-existing arrangement the timing of which is outside the knowledge of the insider before a confirmation or other notice is sent to the insider, with a delay not to exceed a specified number of days; and
- a discretionary transaction involving an employee benefit plan, where the delay in filing Form 4 would also be tied to notice of the transaction.

The SEC's supplemental information indicates that the SEC does not intend to consider rules providing exemptions from the two-business day request based on non-feasibility for transactions categorized by type of issuer, type of insider or size of transaction.

The SEC's supplemental information makes it clear that insiders no longer will be permitted to defer reporting of transactions just because they are of a type that the SEC has determined to be exempt from the "short-swing" liability provisions of Section 16(b) of the Exchange Act. Thus, insiders will be subject to accelerated reporting even for grants and cancellations of securities, such as stock options, and transactions in employee benefit plans, that are exempt from Section 16(b) pursuant to Rule 16b-3, and even for small acquisitions. The language of the SEC's notice indicates that even transfers by gift or inheritance may no longer be permitted to be reported on the year-end Form 5. Reporting on Form 5 may be limited to (1) transactions that were required to be reported on a Form 4 during the past fiscal year but were not and (2) for the current fiscal year, transactions that occurred prior to August 29, 2002 for which deferred reporting was formerly permitted. It is possible, however, that certain transactions, such as acquisitions under dividend reinvestment plans or as a result of stock dividends and mere changes in the form of ownership, may continue to be exempt from reporting at any time.

Insiders and issuers should accordingly make preparations to comply with the new time-sensitive Form 4 filing requirements for all changes in an insider's holdings of equity securities. To encourage and facilitate electronic filing of Forms 4 and other Section 16 reports, the SEC has announced that it will accept EDGAR filings of reports

that are not presented in the standard box format and omit the horizontal and vertical lines separating information items, so long as all required information is presented in the proper order.

INDEPENDENCE STANDARDS FOR AUDIT COMMITTEE MEMBERS

Under Section 301 of the Act, the SEC is required, by April 26, 2003, to adopt rules having the effect of prohibiting any issuer from having its securities listed on any national securities exchange (such as the NYSE) or traded on the automated quotation facility of any national securities association (such as the Nasdaq Stock Market) if that issuer is not in compliance with requirements set forth in the Act relating to independent audit committees. One of these requirements is that audit committees must be comprised solely of independent board members.[7]

The Act defines an "independent" director for this purpose as one who, except in his or her capacity as a member of the audit committee, another board committee or the board:

- does not accept *any* consulting, advisory or other compensation from the issuer;[8] and
- is not an affiliated person of the issuer or its subsidiaries.

Section 301 amends the Exchange Act, which defines an "affiliated person" to have the meaning assigned to it in the Investment Company Act of 1940, including, among other things, any officer, director, partner, copartner or employee of any person

[7] As described in Section 302 of the Act, this requirement would apply to any issuer with listed securities, even if the issuer only lists its debt securities. We note that many issuers that are subsidiaries of public companies (such as financing subsidiaries) have listed one or more classes of their debt securities in order to perfect a Blue Sky exemption permitting these and their other senior or pari passu debt securities to be sold to investors in the United States without additional approvals by state regulators.

[8] The Act does not specifically address relationships that may exist between directors and the CEO, although the SEC rulemaking process may address this issue.

directly or indirectly owning, controlling or holding the power to vote 5% or more of the issuer's outstanding voting securities.[9] In comparison, the new listing standards approved by the NYSE on August 1, 2002 (the "proposed NYSE rules") provide that no director who directly or indirectly owns 20% or more of a listed company's stock can chair or be a voting member of the company's audit committee.

Both prongs of the Act's definition of independent director present *per se* bars on qualifying as an independent director, as contrasted with the proposed NYSE rules, which generally require that the independence of any director be determined by the board of directors based on all relevant facts and circumstances.[10]

Until the SEC adopts rules pursuant to Section 301, we recommend that all issuers examining the independence of audit committee members review broadly all relationships that could be implicated by these standards, including relationships between affiliates of a director and the issuer, as well as relationships between the issuer's directors and its CEO.

The Act gives the SEC authority to exempt a particular relationship with respect to audit committee members, as the SEC determines appropriate in light of the circumstances. While it is possible that the SEC may entertain requests for exemptive

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[9] Section 2(a) of the Investment Company Act provides that an "affiliated person" of another person is:

- any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of such other person;
- any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person;
- any person directly or indirectly controlling, controlled by, or under common control with, such other person;
- any officer, director, partner, copartner, or employee of such other person;
- if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and
- if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

[10] The NYSE's proposed criteria for determining audit committee member independence are set forth in the report from the NYSE's Corporate Accountability and Listing Standards Committee dated June 6, 2002, and are discussed in our June 11, 2002 memorandum entitled "*Report of the New York Stock Exchange Corporate Accountability and Listings Standards Committee*."

relief on a case-by-case basis, we think this is unlikely due to both the many pressing tasks before the SEC staff at this time as well as the potential volume of requests for relief. We believe that it is more likely that, if any relief is to come at all, it would come through the rulemaking process and would address categories of 5% holders that could pass an objective test for "independence."

SEC SWORN STATEMENTS

Some CEOs and CFOs of U.S. companies that are subject to the June 27, 2002 order issued by the SEC[11] are planning to deliver their sworn statements to the SEC before the applicable deadline. For CEOs and CFOs of companies on a calendar fiscal year, the deadline for submitting the sworn statements is August 14, 2002. Although the sworn statements of CEOs and CFOs of other companies are not due until after August 14, 2002,[12] many CEOs and CFOs are nonetheless planning to deliver their statements on or about August 14, 2002, so that their companies are not distinguished from the majority of other subject companies. As a matter of investor relations, CEOs and CFOs of other companies that have fiscal years other than a calendar year may also want to accelerate the filings of their sworn statements.

[11] The SEC order is discussed in our July 15, 2002 memorandum entitled "*New SEC Oath Requirements for CEOs and CFOs Regarding Recent Exchange Act Filings*."

[12] See the SEC website at *www.sec.gov* for a complete list of the 947 companies subject to the sworn statement order. The SEC has added a column to the list of companies indicating the due date of the sworn statements of each company's CEO and CFO.

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Please contact your relationship partner or any of the individuals listed below if we can be of assistance regarding these important developments.

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EXHIBIT A:
FORM OF 906 CERTIFICATION

CERTIFICATION PURSUANT TO
18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002

In connection with the [Quarterly][Annual] Report of _____ (the "Company") on Form [10-Q][10-K][20-F] for the [period][year] ended _____ as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, _____, Chief [Executive][Financial] Officer of the Company, certify, pursuant to 18 U.S.C. § 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that:

(1) The Report fully complies with the requirements of Section [13(a)][15(d)] of the Securities Exchange Act of 1934; and

(2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

/s/_____
Chief [Executive][Financial] Officer
Date: _____