SEC ADOPTS NEW CEO/CFO CERTIFICATION RULES PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

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The Securities and Exchange Commission issued final rules on August 29, 2002 for the senior officer certifications required by Section 302 of the Sarbanes-Oxley Act of 2002 (the "Act") and for the establishment of "disclosure controls and procedures" by issuers that file annual and quarterly periodic reports under the Securities Exchange Act of 1934, as amended. The certification rules, as described in SEC Release Nos. 33-8124 and 34-46427 (the "SEC Release"), apply to all annual or quarterly periodic reports filed after August 29, 2002 under either Section 13(a) or 15(d) of the Exchange Act.[1]

EXECUTIVE SUMMARY

Statutory Background of CEO/CFO Certifications

The Act requires two different certifications from chief executive officers and chief financial officers of issuers:

- Section 906 of the Act amended the U.S. Criminal Code to require that each periodic report containing financial statements filed by an issuer with the SEC

[1] This memorandum supplements our general memoranda dated July 31, 2002 entitled "*Sarbanes-Oxley Act of 2002: CEO/CFO Certifications, Corporate Responsibility and Accounting Reform*" (our "July 31st Memorandum") and August 8, 2002 entitled "*Sarbanes-Oxley Act of 2002: Supplemental Memorandum No. 1*" (our "August 8th Memorandum"). We have also prepared four additional memoranda addressing specific issues under the Act: "*Sarbanes-Oxley Act of 2002 Supplemental Memorandum No. 2: The Insider Lending Provisions*" dated August 9, 2002, "*Sarbanes-Oxley Act of 2002 Supplemental Memorandum No. 3 – Registered Investment Companies*" dated August 9, 2002, "*SEC Adopts Accelerated Section 16 Reporting Rules Under the Sarbanes-Oxley Act of 2002*" dated August 29, 2002 and "*New Rules Applicable to Registered Investment Companies Including CEO/CFO Certifications and Reporting of Trades by Insiders*" dated September 6, 2002. These memoranda are available upon request or at our website: *www.simpsonthacher.com*.

pursuant to Section 13(a) or 15(d) of the Exchange Act be accompanied by specified certifications by the chief executive officer and chief financial officer of the issuer (the "906 Certifications").

- Section 302 of the Act separately required the SEC to adopt rules requiring that the principal executive officer and principal financial officer of companies provide certifications in each annual or quarterly periodic report filed or submitted under either Section 13(a) or 15(d) of the Exchange Act (the "302 Certifications").[2]

The SEC has indicated that it will not be adopting rules regarding the 906 Certifications because Section 906 is a criminal statute and is not expressly part of the securities laws. At the open meeting at which the SEC and its staff discussed the 302 Certifications, the SEC staff indicated that it had not adopted a position as to whether the 906 Certifications and 302 Certifications could be combined. The SEC Release makes clear, however, that the form of 302 Certifications now made part of the forms of various Exchange Act reports may not be altered in any way. Accordingly, for the time being, CEOs and CFOs of reporting companies generally will need to make separate 906 Certifications and 302 Certifications with respect to their periodic reports.

As discussed below, the 302 Certifications are significantly more detailed than those required in the 906 Certifications[3] or by any other officer statements required by the SEC.

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[2] The SEC, pursuant to a June 27, 2002 order, also requires a one-time sworn statement 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 was or is required to be filed on or after August 14, 2002. The sworn statement requirement is separate and distinct from the 302 Certification and the 906 Certification requirements. 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*." This memorandum is available upon request or at our website: *www.simpsonthacher.com*.

[3] Section 906 requires the CEO and CFO to certify, with each periodic report containing financial statements filed by an issuer with the SEC pursuant to Section 13(a) or 15(d) of the Exchange Act, 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.

For more information regarding the 906 Certifications (including our recommended form of 906 Certification), please see our July 31st Memorandum and our August 8th Memorandum.

302 Certification Rules

The SEC rules regarding the 302 Certifications provide for the following:

- Principal executive officers and principal financial officers must make written certifications in the form now specified as part of the annual and quarterly periodic report forms.

- The 302 Certifications must be included in annual or quarterly periodic reports on Forms 10-K, 10-KSB, 10-Q, 10-QSB, 20-F and 40-F.

- There are no exemptions from the 302 Certification requirements for foreign private issuers, small business issuers, registered investment companies or issuers of asset-backed securities. Registered investment companies and asset-backed issuers, however, are required to make different certifications that are specifically tailored to those types of issuers.[4]

- Issuers subject to the 302 Certification rules are required to maintain controls and other procedures to ensure that all information required to be disclosed in their annual, quarterly or current reports (and, in the case of U.S. issuers, proxy and information statements) filed or submitted under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms. The new rules refer to these procedures as "*disclosure controls and procedures*."

  - The 302 Certification contains statements regarding the adequacy of an issuer's "disclosure controls and procedures," as well as an issuer's "internal controls," a pre-existing term under the Exchange Act relating to internal controls for financial reporting purposes and control over assets.

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[4] The special certification compliance rules for registered investment companies are discussed in our separate memorandum dated September 6, 2002 entitled "*New Rules Applicable to Registered Investment Companies Including CEO/CFO Certifications and Reporting of Trades by Insiders*." The special certification compliance process for asset-backed issuers is discussed in Annex A to this memorandum.

- The term "disclosure controls and procedures" is much broader than (and presumably includes most) "internal controls." "Disclosure controls and procedures" encompass *all* information required to be disclosed in Exchange Act reports, while "internal controls" only address financial information reporting and assets.

- The 302 Certification rules apply to annual and quarterly periodic reports filed after August 29, 2002. The 302 Certifications contained in reports filed in respect of fiscal periods that ended on or before August 29, 2002 may omit the certifications regarding "disclosure controls and procedures" and "internal controls."

THE 302 CERTIFICATIONS

Text of the 302 Certifications

New SEC Rules 13a-14 and 15d-14 under the Exchange Act require that each periodic report on Forms 10-K, 10-KSB, 10-Q, 10-QSB, 20-F or 40-F filed under Sections 13(a) or 15(d) of the Exchange Act include a 302 Certification.[5] Each principal executive officer and principal financial officer of the issuer (or persons performing similar functions) must sign a separate 302 Certification included with each applicable report filed.

The 302 Certification must be in the exact form specified in the applicable SEC form. The text of the certification required to be made by each certifying officer is set forth below:[6]

1. I have reviewed this [*specify type of report*] of [*identify registrant*];

[5] Transition reports related to changes in an issuer's fiscal year and amendments filed after August 29, 2002 to previously filed annual and quarterly periodic reports must also include 302 Certifications.

[6] Registered investment companies and asset-backed issuers must use different forms that the SEC has specifically tailored for them. Also, note that there currently are slight differences in the actual certification text in each of the annual and quarterly periodic report forms. While we believe that none of the differences is substantive, issuers should use the exact language specified in the applicable form.

2. Based on my knowledge, this [annual][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 [annual][quarterly] report;

3. Based on my knowledge, the financial statements, and other financial information included in this [annual][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 [annual][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 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][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 [annual][quarterly] report (the "Evaluation Date"); and

   c) presented in this [annual][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 functions):

   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

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][quarterly] 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.

Effective Date

The SEC's rules require inclusion of 302 Certifications in all applicable reports filed after August 29, 2002.

Reports filed in respect of fiscal periods that ended on or before August 29, 2002 are not required to include the certifications set forth in Paragraphs (4), (5) and (6) above. The statements in Paragraphs (4), (5) and (6) regarding disclosure controls and procedures and internal controls are not required with respect to these periods because of concern that issuers would not have had sufficient time to comply with the new procedural requirements. [7]

The SEC's rules also require 302 Certifications to be included in any amendment filed after August 29, 2002 to previously filed annual and quarterly periodic reports. We believe that an amendment with respect to reports filed in respect of fiscal periods that ended on or before August 29, 2002 need not include the certifications set forth in

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[7] The SEC Release provides for two conflicting dates relating to the effective date. Paragraph 9 of Part II-B-3 of the SEC Release provides that the "disclosure controls and procedures" and "internal controls" statements are required only for periods ending "***on or after*** August 29." Part V of the SEC Release, on the other hand, refers to periods ending "***after*** August 29." In telephone conversations with the SEC staff, we have been advised that these certifications are required only with respect to fiscal periods ending *after* August 29, 2002.

Paragraphs (4), (5) and (6) of the 302 Certification regarding disclosure controls and procedures and internal controls.

Filing of 302 Certifications; Signatures

The SEC has amended its annual and quarterly periodic report forms to set forth the exact text of the applicable 302 Certification immediately following the signature sections. The certifying officers may not change the wording in the required certification in any respect. The certification text for most of the reports is generally identical, except that registered investment companies and issuers of asset-backed securities will use different statements than those used by other types of companies. The 302 Certification applicable to issuers of asset-backed securities is described in Annex A to this memorandum; the form applicable to registered investment companies can be found in our separate memorandum regarding investment company certifications.

The principal executive officer and principal financial officer must sign the 302 Certifications themselves. Certifying officers may not have someone else sign on their behalf pursuant to a power of attorney or other form of authority.

Applicability of 302 Certifications to Various Filings

Foreign Private Issuers and Forms 20-F and 40-F

The SEC is requiring 302 Certifications for reports on Forms 20-F and 40-F despite the objections and lobbying efforts of many foreign private issuers. These issuers have argued, among other things, that the certifications constitute an inappropriate burden on these companies and also represent an improper extraterritorial application of U.S. law. The SEC Release states that Section 302 of the Act makes no distinction between domestic and foreign issuers and hence, by its terms, applies to foreign private issuers.

Forms 6-K and 8-K

The 302 Certifications are not required in reports submitted, filed or furnished on:

- Form 6-K, on which a foreign private issuer furnishes material information that it distributes to security holders or that it makes public or is required to

make public under its home country laws or the rules of its home country stock exchange; or

- Form 8-K, on which a domestic issuer makes current reports.

The SEC characterized Forms 6-K and 8-K as "current reports" in the SEC Release, in contrast to reports that are "periodic (quarterly and annual)." Although the SEC has not provided guidance regarding the applicability of 906 Certifications to reports on Forms 6-K or 8-K, we believe that the SEC's recognition of the different character of Form 6-K and 8-K reports as non-periodic reports supports our view that the 906 Certifications required for periodic reports containing financial statements need not accompany filings or submissions of Forms 6-K or 8-K.

Forms 10-KSB and 10-QSB

The SEC's rules regarding the 302 Certifications and the maintenance of disclosure controls and procedures do not distinguish between small business issuers and larger companies. Accordingly, issuers filing on Forms 10-KSB and 10-QSB will need to provide the same 302 Certifications required of issuers filing on Forms 10-K and 10-Q.

Proxy Statements

The SEC currently is not requiring 302 Certifications in proxy statements or information statements. The SEC has sought comment, however, on whether it should extend a certification requirement to other documents filed under the Exchange Act, such as proxy and information statements and registration statements on Forms 10 and 10-SB.

Under certain circumstances, the 302 Certification already would cover some information included in proxy and information statements. Information required in Part III of Form 10-K (*e.g.*, regarding directors and executive officers, executive compensation, beneficial ownership and related party transactions) may be incorporated by reference into an annual report from a subsequently filed definitive proxy statement or information statement involving the election of directors if the statement is filed by 120 days after the end of the fiscal year covered by the report. The SEC Release states that a 302 Certification in an annual report would be considered to cover the Part III information "as and when filed."

Voluntary Filings

Many companies have requested advice regarding whether Section 302 of the Act would apply to companies that file Forms 10-K and 10-Q, but that are not required to do so by the Exchange Act. Some companies file periodic reports with the SEC solely to comply with covenants included in indentures or other debt instruments. 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, although the duty to file under Section 15(d) may have been suspended, the company has continued to file. Many of these companies continue 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.

The SEC Release did not provide any express guidance regarding whether these voluntary filers need to make 302 Certifications. We believe that voluntary filers will be required to make 302 Certifications. The text of new SEC Rules 13a-14 and 15d-14 states that each report *filed under* Section 13(a) or 15(d) of the Exchange Act *must* include a certification. While a voluntary report is not *required* to be filed pursuant to Section 13(a) or 15(d) of the Exchange Act, it could be deemed to be *filed under* such Sections. In addition, because the SEC amended its annual and quarterly periodic report forms to include the 302 Certifications *within* the form, we believe that it is very likely that the contractual obligation to file these reports under many indentures and other debt instruments will be broad enough to require, as a contractual obligation, the inclusion of the 302 Certifications in the report.

In contrast, as discussed in our July 31st Memorandum and our August 8th Memorandum, we believe the Act does not require voluntary filers to deliver 906 Certifications because (1) voluntary filers do not file periodic reports *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, because they are not *required* to file reports under Section 15(d) of the Exchange Act. Section 302 of the Act, on the other hand, applies to companies "*filing periodic reports under*" Section 13(a) or 15(d) of the Exchange Act.

New Item 307 under Regulation S-K

The SEC, in connection with its mandate under Section 302 of the Act, also amended its disclosure requirements for annual and quarterly periodic reports to require periodic disclosure of:

- conclusions of the issuer's principal executive officer and principal financial officer about the effectiveness of the issuer's disclosure controls and procedures based on their evaluation of these controls and procedures as of a date within 90 days of the filing date of the report; and

- whether or not there were significant changes in the issuer'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.

These disclosure requirements are codified in Item 307 of Regulation S-K (and, with respect to small business issuers, Regulation S-B).

PREPARING FOR THE 302 CERTIFICATION

The 302 Certification for issuers (other than registered investment companies and asset-backed issuers) contains six statements regarding the conduct of the certifying officers, the adequacy and completeness of the annual or quarterly periodic report and the existence and quality of disclosure controls and procedures and internal controls. We recommend that issuers and certifying officers take the steps necessary to review and institute procedures to enable them to make each of the six statements. Not surprisingly, many of the processes that companies have undertaken for complying with the 906 Certifications and/or the sworn statement under the June 26, 2002 SEC order will be useful in complying with the 302 Certification rules, although some of these steps will now need to be routinized given the requirements that all future annual and quarterly periodic reports contain such certifications and that disclosure controls and procedures be evaluated with each filing.

Analysis of the Six 302 Certification Paragraphs

We have set forth below the six certification paragraphs, each followed by an analysis of the paragraph and a description of some suggested compliance procedures. The specific procedures necessary to permit certifying officers to sign 302 Certifications will vary from issuer to issuer. Policies that work for a manufacturing company with a few similar product lines operating in one or two locations will be different than those necessary for an industrial conglomerate or global financial services company.

Because there is substantial overlap between the paragraphs of the 302 Certifications, we expect that many of the suggested compliance procedures will be helpful in making the certifications contained in more than one paragraph. No single paragraph and no single process should be considered without reference to the other paragraphs and processes. Officers and issuers should view these procedures as integrated building blocks, with the procedures described under each paragraph providing additional foundation for the 302 Certification in its entirety.

1. **Review the Report**: I have reviewed this report of the registrant.

In order to make the statement in Paragraph 1, the certifying officers should carefully read the entire report. The "report" includes all financial statements and footnotes, all information incorporated by reference in the report and any exhibits to the report. The certifying officers' review should take place as far in advance of the filing deadline for the report as possible so as to permit time to make inquiries, correct mistakes, or enhance or clarify insufficient or opaque disclosure.

2. **Material Accuracy and Completeness of the Report**: Based on my knowledge, this 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 report.

Analysis of Statement

The statement in Paragraph 2 addresses the material accuracy and completeness of the entire report, not simply the financial statements or financial information contained in the report. The SEC Release indicates that the completeness of a report should be evaluated in the context of the type of report being certified and not based only on the language in the statement. For example, the SEC Release states that the certification of the material accuracy and completeness of a quarterly report (the rules for which require less information than an annual report) is not intended to require the expansion of the report to contain all of the information included in an annual report. Instead, the completeness of the disclosure will be measured by reference to the applicable disclosure requirements.

Paragraph 2 raises special issues for companies that wish to incorporate by reference into their annual reports Part III information (*e.g.*, regarding directors and

executive officers, executive compensation, beneficial ownership and related party transactions) from a subsequently filed proxy statement or information statement. In such cases, the annual report would omit information at the time of the certification, but the 302 Certification would be deemed to apply prospectively to the information to be filed in the future. While issuers may continue to incorporate Part III information into their annual reports, we would suggest that issuers give serious consideration to filing their annual reports concurrently with their proxy or information statements or including the required information in the annual report itself. These practices may be necessary or prudent because the officers required to make the 302 Certifications in the annual report may be unwilling or unable to certify information they have not had the opportunity to review.

The SEC Release indicates that the "materiality" standard in Paragraph 2 of the certification statement should be interpreted in a manner consistent with materiality interpretations in the context of SEC Rules 10b-5 and 12b-20 under the Exchange Act, citing established U.S. Supreme Court precedents. The cited cases provide that a misleading statement or omission is material if there is a substantial likelihood that a reasonable investor would have viewed the statement or omission "as having significantly altered the 'total mix' of information made available,"[8] and that an omitted fact is material if there is a "substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder."[9]

The statement in Paragraph 2 is limited to the knowledge of the certifying officer and to his or her belief as to whether information would be important to a reasonable investor. The SEC Release does not elaborate on the meaning of "knowledge" for purposes of the 302 Certification, but one can reasonably conclude that making the certification imposes a level of reasonable inquiry on the certifying officers. This conclusion is consistent with the adoption of new SEC Rules 13a-15 and 15d-15, which require that issuers maintain disclosure controls and procedures. The SEC has, in the past, taken the position that an officer may rely upon the company's procedures for determining what disclosure is required only if the officer has a reasonable basis for

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[8] *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988).

[9] *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

believing that those procedures have resulted in full consideration of the relevant issues.[10]

Suggested Procedures

As a means to ensure the material accuracy and completeness of the periodic reports, certifying officers should also generally take, or consider taking, the following steps:

- meet with the persons responsible for preparing the Exchange Act reports and discuss the process by which information contained in the reports was collected, processed and described in the reports;

- inquire and become familiar with information regarding the issuer that is not contained in the reports and become comfortable that any omitted information is not material;

- where appropriate, make inquiries of other management personnel regarding disclosure they do not understand or as to the materiality of information known to them;

- meet with the heads and/or chief financial officers of business units whose businesses are described in the reports and financial, legal and other relevant personnel to become familiar with potentially material information affecting the issuer;

- request written certifications from the heads and/or chief financial officers of business units and any other officers and employees who participate in the preparation of the reports (these certifications, however, are not required and companies should weigh their benefits against the burdens of obtaining them);

- meet with the issuer's audit committee (or, if there is no audit committee, persons fulfilling the equivalent function) and other members of management to discuss the report, including material related to areas that have recently

[10] See *In re W.R. Grace & Co.*, SEC Release No. 34-39157 (Sept. 30, 1997).

drawn the focus of investors and regulators (*e.g.*, revenue and expense recognition, off-balance sheet transactions, related party transactions, reserves, pro forma reporting and disclosures regarding critical accounting practices);

- review any issues and internal control concerns raised by auditors, including in their review of the issuer's financial reporting and disclosure processes in connection with the Statement on Auditing Standards No. 61 (*Communication with Audit Committees*) and the independent auditor's most recent management review letter, and any responses by management;

- in connection with quarterly reports, review with the independent auditors their review of the interim financial statements pursuant to Statement on Auditing Standards No. 71 (*Interim Financial Information*);

- review any negative comments about the issuer's accounting practices by analysts or the financial press and evaluate how the comments were addressed by management, the issuer's auditors and the audit committee;

- review any communications by employees or shareholders raising concerns about accounting, management or other issues and the issuer's responses to such communications; and

- to the extent that the reports include information regarding less than wholly-owned subsidiaries, review the procedures for incorporating the less than wholly-owned subsidiaries' information in the reports.

In addition, the SEC recommends that issuers form a disclosure committee with responsibility for considering the materiality of information and determining disclosure obligations on a timely basis.[11] The SEC does not require the formation of a committee, but certifying officers and issuers should consider whether the failure to establish one

[11] The SEC Release suggests that officers and employees of an issuer who have the expertise to serve on the committee could include the principal accounting officer (or the controller), a senior legal official with responsibility for disclosure matters, the principal risk management officer, the chief investor relations officer (or an officer with equivalent responsibilities) and such other officers or employees, including individuals associated with the issuer's business units, as the issuer deems appropriate.

may create an implication that disclosure controls and procedures are insufficient, particularly in circumstances where a disclosure problem has arisen. We do not believe a disclosure committee is necessary for all issuers – smaller companies may not require the same degree of internal coordination required for larger, more diverse enterprises. In some cases, an informal committee of the relevant persons already does exist on an *ad hoc* basis or likely will exist as a result of the process required by the 302 Certifications. Issuers will need to evaluate the benefits of establishing more formal committees and/or lines of authority. If a disclosure committee is established, the issuer should take care to give its members adequate resources and internal authority to carry out its responsibilities, and consider whether and how the committee should document its activities.

Many of the procedures described below under Paragraphs 3 and 4 will also be relevant to the certification process for Paragraph 2.

3. **Fair Presentation of Financial Information in the Report**: Based on my knowledge, the financial statements, and other financial information included in this 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 report.

Analysis of Statement

Unlike the statement in Paragraph 2, the certification in Paragraph 3 does not apply to the entire report. Rather, it applies only to financial disclosure contained in the report. The SEC Release states that financial disclosure includes financial statements, including footnotes, selected financial data in the text of the report, management's discussion and analysis of financial condition and results of operations and *any other* financial information included in the report. This other financial information may include, for example, ratios of earnings to fixed charges and pro forma financial information, if included in the report. It also could include non-issuer financial information, such as financial information regarding a business being acquired by the issuer.

The statement regarding fair presentation is not limited to any specified standard, such as generally accepted accounting principles. The SEC Release states that the open-ended phrase "fairly presents" requires that the financial information, viewed in its entirety, meet a standard of "overall material accuracy and completeness" that is

broader than the financial reporting requirements under generally accepted accounting principles. Further, the SEC Release cites court and administrative precedents for the proposition that "[p]resenting financial information in conformity with generally accepted accounting principles may not necessarily satisfy obligations under the antifraud provisions of the federal securities laws."

The SEC Release further states that 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;
- 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.

There can be little doubt that the SEC believes that a "fair presentation" requires more than simply that the information in the report is not fraudulent (*i.e.*, that it does not intentionally have material misstatements or omissions) and more than simply that the financial statements are in technical compliance with generally accepted accounting principles.[12]

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[12] In addition to traditional securities law concepts, the SEC Release also cites several accounting industry publications for guidance in determining which elements are relevant in evaluating "fair presentation." These factors include, among others, that:

- the accounting principles selected and applied have general acceptance and are appropriate in the circumstances;
- the financial statements, including the related notes, are informative of matters that may affect their use, understanding and interpretation;
- the information presented in the financial statements is classified and summarized in a reasonable manner, that is, neither too detailed nor too condensed; and

Suggested Procedures

In light of the requirement that certifications be given as to the fair presentation of certain information in the report, certifying officers should consider, among others, the following:

- Are the company's reports, including financial statements, selected financial data, MD&A and footnotes, written with a sufficient level of transparency that investors can understand them?

- Are there disclosures that technically inform the reader of facts, but that fail to provide sufficient detail to make a meaningful disclosure?

- Are accounting policies being utilized that, although technically in compliance with GAAP, obscure material trends or information about the financial condition of the issuer or the results of operations?

This list is merely illustrative of the inquiries that officers may wish to consider as they prepare to certify that the financial statements and other financial information in a report "fairly presents" the company's financial condition, results of operations and cash flows. The inquiries that are appropriate for any given issuer must be issuer-specific.

Although it is too soon to determine what standards will be used in deciding whether the financial information in a report is "fairly presented," it is clear that the more difficult it is to understand the information, the more difficult it will be for the issuer (and its certifying officers) to explain to the SEC how the financial information "fairly presented" a company's financial condition, results of operations and cash flows.

The inquiries and procedures recommended with respect to Paragraph 3 likely will overlap with many of the procedures described with respect to the certification in

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- the financial statements reflect the underlying transactions and events in a manner that presents the financial position, results of operations and cash flows stated within a range of acceptable limits – that is, limits that are reasonable and practicable to attain in financial statements.

American Institute of Certified Public Accountants Codification of Statements on Auditing Standards AU §411.04. The SEC Release also cites International Accounting Standard IAS 1, ¶14 and 15 for guidance. The SEC Release directs issuers to consider these standards, for purposes of a 302 Certification, without reference to generally accepted accounting principles.

Paragraph 2. As a related matter, most of the procedures described in Paragraphs 1, 2 and 3 will overlap with our suggested procedures for complying with the portion of the 906 Certification relating to *all* of the information in the periodic report fairly presenting, in all material respects, the financial condition and results of operations of the issuer.[13] These procedures are described in detail in our July 31st Memorandum and our August 8th Memorandum. Although the 302 Certifications and the 906 Certifications contain different formulations of the "fairly presents" standard, certifying officers may establish and carry out one set of procedures that encompasses both certifications.

4. **Establishing, Maintaining, Designing and Evaluating Disclosure Controls and Procedures**: 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 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 report (the "Evaluation Date") and (c) presented in this report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date.

New SEC Rules Requiring Disclosure Controls and Procedures

Paragraph 4 of the 302 Certification requires certifying officers to provide several statements regarding their personal involvement with the issuer's disclosure controls and procedures. In addition, two separate new SEC rules also impose a primary

[13] We note that the certification language in the "fairly presents" paragraph of the 302 Certification is sufficiently different than the language in the "fairly presents" portion of the 906 Certification that it is impracticable to combine the two certifications into a single statement. The differences between the two "fairly presents" certifications include: (1) the 906 Certification is not expressly limited to the officer's knowledge, (2) the 906 Certification relates to all "information contained in the report," while the 302 Certification only relates to financial statements and other financial information included in the report and (3) the 302 Certification addresses the "fair presentation" of the financial condition, results of operations *and cash flows* of the issuer, while the 906 Certification addresses only financial condition and results of operations.

obligation on issuers to maintain these controls and procedures. Under new SEC Rules 13a-15 or 15d-15, issuers that are subject to the new requirements for disclosure controls and procedures are those that either (1) have a class of securities registered pursuant to Section 12 of the Exchange Act or (2) file reports under Section 15(d) of the Exchange Act, respectively.

Under the new SEC rules, the term "disclosure controls and procedures" is defined to mean 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 this information is accumulated and communicated to the issuer's management, including its principal executive officer and principal financial officer, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure. Disclosure controls and procedures would also include an issuer's internal controls for financial reporting purposes.

The SEC Release states that disclosure controls and procedures should address a broad range of information, including not only financial information, but *any* material information included in annual, quarterly or current reports, as well as, in the case of U.S. issuers, proxy and information statements, even though these forms do not themselves currently require a 302 Certification. The controls and procedures must capture information that is relevant to an assessment of the need to disclose developments and risks that pertain to the issuer's business. In addition, the controls and procedures should ensure that an issuer's systems are capable of producing reports that are timely, accurate and reliable, including an assessment of operational and regulatory risks, if necessary.[14]

New SEC Rules 13a-15 and 13d-15 require that an evaluation of the effectiveness of the design and operation of the issuer's disclosure controls and procedures take place

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[14] The SEC Release does not address the implications of requiring officers to provide 302 Certifications in filings that are not timely made. Because the form of certification cannot be altered, a certifying officer of an issuer making a late filing apparently is required to make the certifications regarding disclosure controls and procedures despite the fact that those procedures could be considered to have failed.

under the supervision and with the participation of the issuer's management, including the issuer's principal executive officer and principal financial officer. This evaluation must take place within the 90-day period before the filing date of each report requiring 302 Certifications. Pursuant to new Item 307 of Regulations S-K and S-B, the results of this evaluation must be disclosed in the relevant report.

The SEC Release indicates that a company that fails to maintain, and review, adequate procedures and otherwise comply with the procedural rules could be subject to SEC action for violating the Exchange Act, even if the failure did not lead to flawed disclosure.

Analysis of Statement

Paragraph 4(a) of the 302 Certification specifically requires the certifying officers to state that *they* are responsible for:

- establishing and maintaining the disclosure controls and procedures; and
- designing the disclosure controls and procedures to ensure that material information is made known to *them*.

Similarly, Paragraphs 4(b) and 4(c) require statements by the officers that *they*:

- have evaluated the effectiveness of the issuer's disclosure controls and procedures within the 90 days prior to filing; and
- presented in the report *their* conclusions about the effectiveness of the disclosure controls and procedures based on *their* evaluation.

The date on which the evaluation is measured can be a date during the applicable fiscal period or after the close of the period covered by the report.

The language of the 302 Certification – with respect to Paragraph 4 and Paragraphs 5 and 6 below – seems to require that certifying officers provide a statement as to the conduct and belief of each of the certifying officers, not simply his or her own conduct and belief. Therefore, the language of the 302 Certification suggests that certifying officers, as a practical matter, may need to conduct much of their work regarding the disclosure controls and procedures in concert.

Suggested Procedures

Establishment, Maintenance and Design of Disclosure Controls and Procedures. Paragraph 4(a) of the 302 Certification requires a statement that the certifying officers are responsible for *establishing* and *maintaining* the disclosure controls and procedures and *designing* the disclosure controls and procedures to ensure that material information is made known to the officers. We believe that it would be impractical and inappropriate for certifying officers to establish and design a new set of procedures without giving consideration to an issuer's existing procedures. Instead, we believe certifying officers may adopt the existing procedures of the issuer to the extent that the certifying officers reasonably believe such procedures satisfy the requirements of new SEC Rules 13a-15 and 15d-15.

The SEC has not provided any guidance regarding the steps to be followed by certifying officers in relation to this element of the 302 Certification. We believe, however, that prior to adopting disclosure controls and procedures, the certifying officers would be well served by considering taking the following steps:

- familiarize themselves with the issuer's existing practices by, first, requiring documentation of the various actions currently undertaken with respect to the preparation of Exchange Act reports and, second, meeting with personnel responsible for collecting, processing and describing information required to be disclosed to discuss their disclosure activities;

- review previous Exchange Act reports, as well as auditor internal control reports to management, with internal personnel and, as appropriate, outside legal counsel and auditors to determine whether there appear to have been weaknesses in the issuer's existing procedures for preparing those reports;

- meet with internal personnel to solicit opinions regarding the adequacy of existing procedures and suggestions for improving the process; and

- make adjustments to existing controls, as necessary, to adopt disclosure controls and procedures that ensure material information relating to the issuer and its consolidated subsidiaries is made known to the certifying officers by others within those entities, particularly during the periods required for the disclosure of such information under the Exchange Act.

We also recommend that certifying officers consult with the audit committee or its chairperson (or, if there is no audit committee, one or more independent board members) as to their views with respect to the adequacy of the disclosure procedures and controls.

Evaluation of Effectiveness of Disclosure Controls and Procedures. The SEC Release does not specify particular procedures for conducting the required review and evaluation. Instead, the SEC Release advises an issuer to develop a process that is consistent with its "business and internal management and supervisory practices." At a minimum, we believe this process should include an evaluation of any material change in circumstances relating to disclosure controls and procedures since the last evaluation, including a review of any deficiencies in disclosure controls and procedures identified by internal personnel, auditors or the audit committee. If an issuer forms a disclosure committee, as recommended by the SEC, the disclosure committee would be an integral participant in the certifying officers' evaluations. In conducting each evaluation, we also suggest that certifying officers review, in particular, the impact on the issuer's disclosure controls and procedures of any significant changes to the business, such as:

- installation of new information systems;
- material acquisitions or dispositions;
- changes in lines of business;
- geographic expansion; and
- changes in personnel involved in the disclosure controls and procedures.

5. **Reporting Deficiencies and Material Weaknesses in, and Fraud related to, the Issuer's Internal Controls**: 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 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 (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls.

Analysis of Statement

The statement in Paragraph 5 addresses "internal controls," an existing term under the Exchange Act that is meaningfully different from disclosure controls and procedures. The SEC Release distinguishes between the new phrase "disclosure controls and procedures," which means procedures designed to collect *any* material information (financial or otherwise), and the term "internal controls," which principally involves systems of controls and procedures for an issuer's financial reporting and control of its assets. The SEC Release also summarizes accounting industry definitions of "internal controls" to mean a process – effected by an entity's board of directors, management and other personnel – designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

- reliability of financial reporting;
- effectiveness and efficiency of operations; and
- compliance with applicable laws and regulations.

Paragraph 5(a) requires the certifying officers to disclose to the issuer's auditors and audit committee any significant deficiencies in internal controls that could adversely affect financial reporting, as well as identify for the issuer's auditor's any material weaknesses in internal controls. There is no specific requirement in the Act to make these disclosures public or otherwise describe them in any report. Further, these disclosures only are required regarding the more narrow controls identified as internal controls (*i.e.*, those that affect an issuer's financial reporting and control of its assets, as opposed to its other reporting obligations under the Exchange Act).

Statement on Accounting Standards No. 78 (*Consideration of Internal Control in a Financial Statement Audit*) provides helpful guidance regarding the meaning of "significant deficiencies," as well as several internal control topics for certifying officers to evaluate. SAS No. 78 states that auditors should communicate to an issuer's audit committee "significant deficiencies" in the design or operation of internal controls that could adversely affect an organization's ability to record, process, summarize and report financial data consistent with assertions of management in the financial statements.[15] Deficiencies may involve aspects of five internal control components:

- the control environment;
- risk assessment;
- control activities;
- information and communication; and
- monitoring.

SAS No. 78 provides an extensive list of examples of potential deficiencies in, and failures in the operation of, internal controls, including, for example:

- absence of appropriate reviews and approvals of transactions, accounting entries or systems output;
- evidence of failure of identified controls in preventing or detecting misstatements of accounting information;
- evidence of intentional override of internal controls by those in authority to the detriment of the overall objectives in the system; and
- evidence of significant or extensive undisclosed related party transactions.

Notably, SAS No. 78 envisions that a company's audit committee may consciously decide to permit the continuation of a significant deficiency known to it –

[15] Significant deficiencies that meet this standard are "reportable conditions" under SAS No. 78.

i.e., to accept a degree of risk as part of a cost-benefit analysis. The 302 Certification, likewise, does not require correction of all significant deficiencies. Rather, the certifying officers must disclose to the audit committee and the auditors these deficiencies so the audit committee and the auditors, instead of management, can make the cost-benefit evaluation.

SAS No. 78 provides that deficiencies and other problems may be of such magnitude as to constitute a material weakness. A material weakness in internal controls is described in SAS No. 78 as a reportable condition in which "the design or operation of one or more of the internal control components does not reduce to a relatively low level the risk that misstatements caused by error or fraud in amounts that would be material in relation to the financial statements being audited may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions."

Paragraph 5(b) requires the certifying officers to report to the issuer's auditor and audit committee (or persons fulfilling the equivalent function) *any* fraud, without regard to the officer's judgment as to the materiality of the fraud, that involves management or employees who have a significant role in internal controls. The SEC Release is not clear with respect to whether this requirement covers fraud regarding any member of management or only those members of management who have a significant role in internal controls. We do not believe, however, that any distinction should be made among members of management and would advise the certifying officers to report any known fraud by any member of management to its auditor and audit committee. For purposes of the 302 Certifications, the requirement to report fraud by non-management employees clearly applies only to fraud involving employees who have a "significant role" in internal controls.

The SEC Release does not provide a guideline for determining whether a particular employee's role is "significant." Accordingly, we believe that any known fraud should be reported if it involves an employee who participates in the operation of internal controls and may in any significant way affect the gathering, analyzing and disclosing of financial information for Exchange Act reports.

Suggested Procedures

We expect that in connection with their review of an issuer's disclosure controls and procedures for purposes of the Paragraph 4 certification, certifying officers will

undertake an evaluation of the issuer's internal controls. Following completion of this evaluation, the certifying officers should meet with the audit committee (or persons fulfilling the equivalent function) and the auditors of the issuer and present their findings, if any, with regard to the matters described in the Paragraph 5 certification.

Related Future Requirements under the Act

In addition to the Section 302 requirements, Section 404 of the Act requires the SEC to prescribe rules mandating that annual reports required by Section 13(a) or 15(d) of the Exchange Act contain internal control reports that:

- state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and

- contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.

Section 404 of the Act also requires that an issuer's public accounting firm attest to, and report on, the assessment of internal controls made by management.[16]

6. **Disclosure of Significant Changes in Internal Controls:** The registrant's other certifying officers and I have indicated in this 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.

Analysis of Statement

The certifying officers must disclose in the annual or quarterly report whether there have been any significant changes in internal controls since the date of the

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[16] The attestation by a public accounting firm must be made in accordance with standards for attestation engagements to be promulgated by the Public Company Accounting Oversight Board (discussed in more detail under the caption "Regulation of the Accounting Profession – Audit Quality Control and Independence Rules" in our July 31st Memorandum).

evaluation described in Paragraph 4 above. The SEC Release does not provide guidance as to the meaning of "significant changes."

The certifying officers also must report any significant changes in any "other factors that could significantly affect internal controls." The SEC Release does not elaborate on the nature of such other factors, nor does it specify a "reasonable belief" qualification with respect to whether or not factors could significantly affect internal controls. The lack of guidance regarding "other factors" likely reflects the issuer-specific character of internal controls.

Finally, the certifying officer must report any corrective actions with regard to significant deficiencies and material weaknesses in the internal controls.

While identification of any significant deficiencies or material weaknesses in internal controls must be made to an issuer's audit committee, public disclosure is only required with respect to any significant steps taken to remedy those deficiencies and weaknesses.

Suggested Procedures

During the process of evaluating an issuer's disclosure controls and procedures for purposes of the Paragraph 4 certification and disclosing to the audit committee any fraud or significant deficiencies or material weaknesses in internal controls for purposes of the Paragraph 5 certification, the certifying officers should work with employees responsible for implementing modifications to the issuer's internal controls in order to respond, if considered necessary, to any identified deficiencies or weaknesses. The certifying officers should identify whether there have been any corrective actions undertaken since the date of the last evaluation with regard to significant deficiencies and material weaknesses in the internal controls, as well as any significant changes in internal controls or in other factors involving the issuer's internal controls since such date. The certifying officers should review the applicable report to ensure that it appropriately reflects any such changes or other corrective actions.

LIABILITY FOR FAILURE TO FILE A 302 CERTIFICATION OR FOR FILING A FALSE CERTIFICATION

A certifying officer who willfully fails to sign the 302 Certification or willfully files a false 302 Certification subjects the officer and the issuer to criminal and civil liability.

Criminal liability exists for any willful violation of the Exchange Act or regulations issued pursuant to the Exchange Act. Thus, if a company or a certifying officer willfully fails to file a 302 Certification in a covered periodic report as required by the new rules, either or both could be charged with violating the Exchange Act, a felony that is punishable by a fine of up to $5,000,000 and imprisonment for 20 years for individuals and a fine of up to $25,000,000 for corporations. Additionally, the SEC could pursue a civil enforcement action against either the officer or the company or both. In those circumstances, the SEC could seek an injunction against further violations and fines.

A false 302 Certification may also expose both the company and the certifying officer to criminal liability under a variety of other statues that make it unlawful to knowingly and willfully: make a false statement to any federal department or agency (18 U.S.C. § 1001); transmit materials though the mail or over interstate wires as part of a fraudulent scheme (18 U.S.C. §§ 1341 and 1343); or aid and abet or conspire to commit any of those crimes (18 U.S.C. §§ 2 and 371). These offenses carry penalties of up to 25 years imprisonment and a $5,000,000 fine for individuals and up to a $25,000,000 fine for a corporation.[17]

In terms of civil liability, the very act of filing new certifications creates additional factual predicates on which governmental authorities or private plaintiffs may premise complaints for false and misleading information. Moreover, an officer's verification that he or she was personally involved in reviewing and approving the periodic filings may diminish the defenses available to claims made under the Exchange

[17] Our July 31st Memorandum provides a more detailed description of the specific criminal statues and penalties that may be implicated by violations of the Act.

Act, including Section 10(b) (and Rule 10b-5 promulgated thereunder). For example, a certifying officer who personally attests to having reviewed the subject statements will have a less credible argument that he or she did not directly or indirectly induce the acts constituting the alleged violation or was not a "control person" under Section 20 of the Exchange Act.

* * *

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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ANNEX A:
PROVISIONS APPLICABLE TO
ASSET-BACKED ISSUERS

The new SEC rules implement special provisions for asset-backed issuers.[1] The rules clarify that the only report that must be accompanied by a 302 Certification on behalf of an asset-backed issuer is the annual report.[2]

As adopted, the SEC rules applicable to asset-backed issuers do not specify the exact language required for the 302 Certification.[3] Instead the rules specify only the items required to be addressed in the 302 Certification. The required items are:

- review by the certifying officer of the annual report and other reports containing distribution information for the period covered by the annual report;

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[1] The term "asset-backed issuer" is defined in the new rules to mean any issuer whose reporting obligation results from the registration of securities it issued that are primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders.

[2] As noted by the SEC staff, the modified reports filed by asset-backed issuers are based upon a series of no-action positions adopted by the staff over the years. These no-action positions generally require asset-backed issuers to disclose specific information about the performance of the underlying assets that service the payment obligations of the asset-backed securities, rather than the information specified in Form 10-K and Form 10-Q. Required disclosure in the reports of asset-backed issuers includes: a copy of the servicing or distribution report required by the pooling and servicing agreement; and information on the performance of the assets, payments on the asset-backed securities and any other material developments that affect the issuer. The modified Form 10-K also includes annual statements from the servicer or other relevant entity as to its compliance with its obligations under the pooling and servicing agreement and from the certified public accountants as to compliance by the servicer with particular servicing standards. Financial statements are not required. Some asset-backed issuers that are organized as corporations or statutory business trusts, however, have been required by the staff to comply with the reporting requirements applicable to ordinary issuers. While the SEC rules and staff guidance do not address this issue, it is unlikely that the modified reporting requirements would apply to issuers that fall into this category.

[3] This lack of specificity may give the staff some flexibility to tailor the exact words of the certification to evolving asset-backed structures by interpretative action rather than SEC rulemaking.

- the absence in these reports, to the best of the certifying officer's knowledge, of any untrue statement of material fact or omission of a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;

- the inclusion in these reports, to the best of the certifying officer's knowledge, of the financial information required to be provided to the trustee under the governing documents of the issuer; and

- compliance by the servicer with its servicing obligations and minimum servicing standards.

The 302 Certification for asset-backed issuers may be signed by the trustee of the trust (if the trustee signs the periodic report) or the senior officer in charge of securitization of the depositor (if the depositor signs the periodic report). Alternatively, the senior officer in charge of the servicing function of the master servicer (or entity performing equivalent functions) may sign the 302 Certification.

While the new SEC rules do not prescribe the exact form of the 302 Certification required by the new rules, the SEC staff issued an interpretive statement (the "Interpretive Statement") concurrent with the SEC Release in which the SEC staff indicated that it was their view that an asset-backed issuer would be in compliance with the 302 Certification requirement if the issuer includes the following form of certification in each Form 10-K that it files with the SEC:

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

1. I have reviewed this annual report on Form 10-K, and all reports on Form 8-K containing distribution or servicing reports filed in respect of periods included in the year covered by this annual report, of [identify registrant];
2. Based on my knowledge, the information in these reports, taken as a whole, 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 as of the last day of the period covered by this annual report;
3. Based on my knowledge, the [distribution or servicing] information required to be provided to the trustee by the servicer under the pooling and servicing agreement is included in these reports;

4. I am responsible for reviewing the activities performed by the servicer under the pooling and servicing agreement and based upon the review required under the pooling and servicing agreement, and except as disclosed in the report, the servicer has fulfilled its obligations under the servicing agreement; and

5. I have disclosed to the registrant's certified public accountants all significant deficiencies relating to the servicer's compliance with the minimum servicing standards in accordance with a review conducted in compliance with the Uniform Single Attestation Program for Mortgage Bankers or similar standard as set forth in the pooling and servicing agreement.

As implemented by the staff, the annual 302 Certification requirement includes the servicing reports that asset-backed issuers file on Form 8-K on a monthly basis. However, the certification as to the accuracy of the annual report, together with the Forms 8-K, is made only as of the last day of the annual reporting period.

Asset-backed issuers are exempt from the two new disclosure rules in Item 307 of Regulation S-K (or, with respect to small business issuers, Regulation S-B).

We believe that asset-backed issuers are not required to make 906 Certifications because these issuers do not include financial statements in their periodic reports. This position is supported by the acknowledgement in the Interpretive Statement that "financial statements are not required" in modified Form 10-K filings by asset-backed issuers.