CEO/CFO CERTIFICATION UPDATE:
NEW SECTION 302 CERTIFICATION TEXT AND
NEW EXHIBIT REQUIREMENTS FOR SECTION 302 AND 906 CERTIFICATIONS

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On June 5, 2003, the Securities and Exchange Commission released new rules under the Sarbanes-Oxley Act of 2002 (the "Act") with respect to the principal executive officer and principal financial officer certifications required under Sections 302 and 906 of the Act.[1] The new rules:

- amend the text of the certifications required under Section 302 of the Act; and
- require that certifications pursuant to both Sections 302 and 906 of the Act be included in relevant filings as exhibits.

The SEC has revised the text of the officer certifications required under Section 302 of the Act in order to conform the certifications with the new requirements under Section 404 of the Act regarding internal control over financial reporting.[2] The SEC adopted the

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[1] SEC Release Nos. 33-8283, 34-47986 and IC-26068 (June 6, 2003) (the "Release").

[2] The SEC's new rules regarding internal control over financial reporting, which have been promulgated pursuant to Section 404 of the Act, will be discussed in a separate firm memorandum that we expect to be available shortly. Although registered investment companies are not subject to Section 404 of the Act, the SEC adopted technical changes to the rules and forms implementing Section 302 of the Act requiring investment companies to, among other things, maintain internal control over financial reporting. These changes will also be discussed in the separate firm memorandum mentioned above.

revised exhibit rules with the objective of standardizing compliance and thereby making it easier for the SEC and investors to locate and review officer certifications.

Statutory and Regulatory Background

As discussed in our prior memoranda[3], the Act requires two different officer certifications:

- Section 302 of the Act required the SEC to adopt rules requiring that the principal executive officer and principal financial officer of reporting 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").

- 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 pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, be accompanied by specified certifications by the chief executive officer and chief financial officer of the issuer (the "906 Certifications").

In August 2002, the SEC adopted Rules 13a-14 and 15d-14 to implement Section 302 of the Act. These rules required reporting companies to include 302 Certifications by both their principal executive officer and principal financial officer immediately following the signatures at the end of all quarterly and annual periodic reports. Heretofore, the SEC had not prescribed the form of 906 Certifications or the method by which such certifications might accompany relevant filings as required by Section 906 of the Act.

New Rules

How to File. The SEC amended Item 601 of Regulation S-K, which prescribes the exhibits that must accompany filings on the various SEC report forms, to require that the 302 Certifications be included as Exhibit No. 31 in all annual and quarterly reports filed with the SEC and that the 906 Certifications be included as Exhibit No. 32 in all periodic reports containing financial statements filed by an issuer with the SEC.[4] In

[3] All of our memoranda regarding the Act and other corporate governance and disclosure developments are available upon request or at our website: *www.simpsonthacher.com*.

[4] The SEC adopted corresponding form amendments to Forms 20-F and 40-F for foreign private issuers and Form N-CSR for registered investment companies.

addition, the SEC has amended Rules 13a-14 and 15d-14 to conform to the substantive requirements of Item 601.

Text of Certifications. The SEC deleted the form of the 302 Certification from the annual and quarterly periodic report forms and relocated the certification form to Item 601(b)(31) of Regulation S-K. While Item 601(b)(31) sets forth the exact text of the 302 Certification, the SEC has elected not to mandate precise language for the 906 Certification. Instead, Item 601(b)(32) and Rules 13a-14(b) and 15d-14(b) simply require certification in the form required under Section 906 of the Act.

In addition to changing the location of the 302 Certification, the SEC has amended the required text to conform to new rules under Section 404 of the Act regarding internal control over financial reporting. Companies filing annual and quarterly reports with the SEC should, however, delete portions of the new form of 302 Certification until the new Section 404 rules become applicable to them. For "accelerated filers,"[5] the new internal control rules will become effective with respect to annual reports filed for fiscal years ending on or after June 15, 2004 (and quarterly reports filed thereafter). For other companies (including all foreign private issuers), the new internal control rules will become effective with respect to annual reports filed for fiscal years ending on or after April 15, 2005 (and quarterly reports filed thereafter). For registered investment companies, the text of the new 302 Certification that refers to

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Although the required officer certifications are commonly referred to as "302 Certifications" and "906 Certifications," the SEC has identified the certifications in Item 601 as, respectively, the "Rule 13a-14(a)/15d-14(a) Certifications" (referencing the SEC rule implementing Section 302 of the Act adopted on August 28, 2002) and the "Section 1350" Certifications (referencing the applicable section of the U.S. Criminal Code added by Section 906 of the Act).

[5] Exchange Act Rule 12b-25 defines an "accelerated filer" as a company that must file Forms 10-K and 10-Q and meets, as of the end of its fiscal year, the following criteria:

- the company's common equity public float was $75 million or more as of the last business day of its most recently completed second fiscal quarter (e.g. June 30 for companies with a fiscal year ending December 31);
- the company has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months;
- the company has previously filed at least one annual report under the Exchange Act; and
- the company is not a small business issuer eligible to use Forms 10-KSB and 10-QSB.

The SEC excludes the following companies from the definition of "accelerated filer": companies that have only debt securities publicly traded; foreign governments; foreign private issuers; registered investment companies; and small business issuers.

internal control over financial reporting must be included in the first annual report filed on Form N-CSR for a fiscal year ending on or after June 15, 2004.

We have included, for reference, the text of the new 302 Certification in Annex A to this memorandum. Portions of the form that may be deleted by a company until the 404 rules become applicable to that company are marked in bold italics and square brackets in Annex A. In addition, we have included an example of a suggested 906 Certification.

Signature. The rules require that the principal executive officer and principal financial officer sign the certifications themselves. The certifications cannot, for example, be signed by an attorney-in-fact pursuant to a power of attorney. Furthermore, the SEC's rules under Regulation S-T require reporting companies to maintain manually signed copies of the certifications for a five-year period.

906 Certification 'Furnished' and Not 'Filed.' The SEC's rules provide that the 906 Certification attached as an exhibit to an annual or quarterly report is automatically be deemed "furnished" and not "filed" (thus not subjecting the 906 Certification to separate liability under Section 18 of the Exchange Act or automatic incorporation by reference under Section 11 of the Securities Act of 1933, as amended).

Effective Dates; Interim Procedures

The SEC's new rules regarding Sections 302 and 906 of the Act become effective with respect to periodic reports due on or after August 14, 2003. Reports due prior to that date should comply with the following interim procedures:

- **302 Certifications**: Reporting companies should continue to make their certifications in the form and location currently required by the relevant Exchange Act forms—premature compliance with the changes with respect to 302 Certifications may result in the filing not complying as to form with the current requirements, notwithstanding a company's good intentions.

- **906 Certifications**: We recommend that reporting companies consider complying with the new Section 906 requirements as soon as possible. In the Release, the SEC encourages companies, before August 14, 2003, to furnish 906 Certifications as "Additional Exhibits" under Item 99 of Item 601(b) of Regulation S-K.[6] For electronic filings, the SEC advises companies to insert the following legend after the text of each 906 Certification:

  A signed original of this written statement required by Section 906, or other document authenticating, acknowledging, or otherwise adopting the signature that appears in typed form within the electronic version of this written statement required by Section 906, has been provided to [name of issuer] and will be retained by [name of issuer] and furnished to the Securities and Exchange Commission or its staff upon request.

  For paper filings, companies should furnish signed originals and conformed copies of each 906 Certification in accordance with the requirements of the relevant report form.

If the EDGAR system is not equipped to accept filings with Exhibit Nos. 31 and 32 at the time of any filing required to include such exhibits, companies should file the 302 and 906 Certifications under Exhibit 99.

Impact on Voluntary Filers

We believe that the new rule and form changes do not effect the certification obligations of principal executive officers and principal financial officers of so-called "voluntary filers." Voluntary filers are companies that file periodic reports with the SEC solely to comply with covenants under debt instruments, to facilitate sales of securities under Rule 144 or for other corporate purposes rather than pursuant to statutory or regulatory requirements to make such filings.

As discussed in one of our prior memoranda,[7] we have concluded that the 906 Certification requirements are not applicable to voluntary filers, principally on the

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[6] Foreign private issuers are encouraged to file the 906 Certifications under the exhibit requirements applicable to Forms 20-F and 40-F.

[7] See "*Application of the Sarbanes-Oxley Act to Voluntary Filers of Periodic Reports with the SEC*" dated June 23, 2003.

basis of a Frequently Asked Questions (the "FAQ") posted by the SEC on its website in November 2002.[8] We believe that this FAQ makes clear that voluntary filers are not "issuers" for the purposes of the Act. Because the 906 Certification requirements apply by their terms only to "issuers," we believe that one can conclude that the 906 Certification requirements do not apply to voluntary filers, in contrast to the 302 Certification requirements, which apply to all reporting companies.

Notwithstanding the new requirement that companies include 906 Certifications as exhibits to their filings, Rules 13a-14(b) and 15d-14(b) preserve the distinction between companies obligated to include 302 Certifications and 906 Certifications and voluntary filers obligated to include only 302 Certifications. Rules 13a-14(b) and 15d-14(b) require the furnishing of 906 Certifications with "each periodic report containing financial statements filed by an *issuer*" [emphasis added]. Accordingly, voluntary filers should not be subject to an obligation to include 906 Certifications in their filings, even though the exhibit table in Item 601 might otherwise suggest that 906 Certifications must be included with all annual reports and all quarterly reports.

Impact on Filings on Forms 6-K, 8-K and 11-K

The SEC's rules do not require 302 Certifications in connection with filings on Forms 6-K, 8-K and 11-K.[9] Similarly, most commentators had concluded, until recently, that Section 906 of the Act (which applies to "*periodic* reports containing financial statements" [emphasis added]) did not apply to Forms 6-K, 8-K and 11-K. On April 11, 2003, Senator Joseph Biden inserted statements purporting to be legislative history for the Act into the Congressional Record to the effect that Section 906 of the Act applies to many types of filings with the SEC that are not commonly known as "periodic reports," including filings on Forms 6-K, 8-K and 11-K.

In the Release, the SEC notes that the SEC and Department of Justice are continuing to consider the application of Section 906 of the Act to reports filed or furnished on Forms 6-K, 8-K and 11-K. Furthermore, SEC staff members, privately and informally, have advised that employee benefit plans should include the 906 Certifications with Forms 11-K. In response to Senator Biden's comments, the

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[8] *Question 1*, SEC's Division of Corporation Finance: Sarbanes-Oxley Act of 2002 – Frequently Asked Questions, posted November 8, 2002 (revised November 14, 2002) at www.sec.gov/divisions/corpfin/faqs/soxact2002.htm.

[9] Form 6-K is a current report form used by foreign private issuers. Form 8-K is a current report form used by domestic issuers. Form 11-K is an annual report form used by certain employee benefit plans.

Release and this informal guidance from SEC staff, we suggest that companies include 906 Certifications with filings on Forms 11-K. A 906 Certification furnished with Form 11-K should be signed by the persons acting in the capacity most closely resembling that of chief executive officer and chief financial officer for the benefit plan. We continue to believe, however, that, pending clarification to the contrary, Section 906 certifications need not be made with respect to reports filed or furnished on Forms 6-K and 8-K.

Impact on Registered Investment Companies

The SEC recently adopted Form N-CSR for registered investment companies to use for filing certified shareholder reports with the SEC. As adopted, Item 10(b) of Form N-CSR already required 302 Certifications to be filed as an exhibit. The SEC's new rules continue to require that 302 Certifications be filed as an exhibit to Form N-CSR, but re-designate current Item 10(b) as Item 10(a)(2). In addition, the SEC has amended Investment Company Act Rule 30a-2 to delete the text of the 302 Certifications that was already included on Form N-CSR, require that 906 Certifications be provided with reports on Form N-CSR that contain financial statements and that are filed pursuant to Section 13(a) or 15(d) of the Exchange Act (but not Forms N-CSR filed solely pursuant to the Investment Company Act) and to prohibit a certification from being signed pursuant to a power of attorney or other form of conforming authority. New Item 10(b) of Form N-CSR adds the 906 Certifications as a required exhibit. The new rules do not affect small business investment companies or unit investment trusts because they are not required to file Form N-CSR and are not required to provide a 302 Certification with their Form N-SAR.

As previously discussed, registered investment companies must comply with amendments to Exchange Act Rules 13a-15(a) and 15d-15(a) and Investment Company Act Rule 30a-3(a) that require them to maintain internal control over financial reporting and the text of the new 302 Certification regarding internal control over financial reporting with respect to fiscal years ending on or after June 15, 2004. For reports due on or before August 13, 2003 (after which time the new rules become effective), the SEC encourages registered investment companies to include the 906 Certifications as an exhibit and those using this option should use Exhibit 99.906CERT in their EDGAR filings.

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This memorandum is for general informational purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of

assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate governance developments, can be obtained from our website, *www.simpsonthacher.com*.

SIMPSON THACHER & BARTLETT LLP

ANNEX A
FORM OF 302 CERTIFICATION*

EXHIBIT 31
CERTIFICATIONS

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

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

2. 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;

3. 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;

4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) ***[and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f))]***** for the registrant and have:

(a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, 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) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;]**

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* Provide a separate certification for each principal executive officer and principal financial officer of the registrant. See Rules 13a-14(a) and 15d-14(a).

** A reporting company should delete the bracketed text until the company is subject to the new rules under Section 404 of the Act regarding internal control over financial reporting. The new internal control rules will be applicable to most U.S. companies for their first annual report for a fiscal year ending on or after June 15, 2004 (or, for foreign private issuers and some smaller companies, April 15, 2005).

(c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

(d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

(a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

(b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: .....

_____
[Signature]
[Title]

ANNEX B
FORM OF 906 CERTIFICATION*

EXHIBIT 32
SECTION 1350 CERTIFICATIONS

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 [*specify report*] of [*identify registrant*] (the "Company") on Form [10-Q][10-K][20-F][40-F] for the [period][year] ended _____ as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, [*identify the certifying individual*], 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 [based on my knowledge]**:

1. The Report fully complies with the requirements of Section 13(a) or 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.

Date: .....

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[Signature]
[Title]

* The SEC and Department of Justice have **not** prescribed a precise form of 906 Certification. Issuers may modify the text of this form, subject to compliance with Rule 13(a)-14(b) or 15(d)-14(b), as applicable, and 18 U.S.C. § 1350, as adopted pursuant to Section 906 of the Act.

** Some companies have elected to limit the 906 Certifications to the knowledge of the certifying officer(s). It is not clear whether such a limitation is permissible under Section 906 of the Act.