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## SUMMARY OF SEC FINAL RULES ON CEO/CFO CERTIFICATIONS OF DISCLOSURE IN QUARTERLY AND ANNUAL REPORTS

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By Joseph W. LaPlume

**O**n August 29, 2002, the SEC issued new rules, which became effective immediately, to implement Section 302 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), which requires every reporting company's principal executive and financial officers to certify the information contained in the reporting company's quarterly and annual reports. The following is a summary of those rules.

### The Certifications

New rules under the Securities Exchange Act of 1934 (the "Exchange Act") (for most of our clients the applicable rule will be Rule 13a-14), require a company's CEO and CFO (or persons fulfilling the equivalent functions) to certify to six separate matters. Under transition rules, the statements in the first three bullet points below will be required for certifications filed with the SEC after August 29, 2002 but for periods ended on or before August 29, 2002. The full certifications are required for reports filed with the SEC for periods ending after August 29, 2002. For most companies, this will mean that the first full CEO and CFO certifications will be for the quarter ended September 30, 2002. The full certifications must include the following statements:

- He or she has reviewed the report being filed;
- Based on his or her knowledge, the 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 the report;
- Based on his or her knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition,

results of operations and cash flows of the issuer as of, and for, the periods presented in the report;

- He or she and the other certifying officers are responsible for establishing and maintaining disclosure controls and procedures for the issuer and have:

Designed such disclosure controls and procedures to ensure that material information relating to the issuer, including its consolidated subsidiaries, is made known to them by others within those entities, particularly during the period in which the periodic reports are being prepared; evaluated the effectiveness of the issuer's disclosure controls and procedures as of a date within 90 days prior to the filing date of the report ("Evaluation Date"); and presented in the report their conclusions about the effectiveness of the disclosure controls and procedures based on their evaluation as of the Evaluation Date;

- He or she and the other certifying officers have disclosed, based on their most recent evaluation, to the issuer's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function):

All significant deficiencies in the design or operation of internal controls which could adversely affect the issuer's ability to record, process, summarize and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls, and any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and

- He or she and the other certifying officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

The SEC has developed revised Forms 10-K and 10-Q that include the certifications.

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## Disclosure Controls and Procedures

The new rules require every reporting company to maintain "disclosure controls and procedures." In its release adopting the new rules, the SEC commented that "disclosure controls and procedures" are different from "internal controls," which relate to financial reporting and control of assets and were required before Sarbanes-Oxley (and will continue to be required). While there are no specific standards set forth for disclosure controls and procedures, they are required to be designed to ensure the timely collection and evaluation of information that may require disclosure under federal securities laws or that may be relevant to the assessment and disclosure of risks affecting the issuer. The SEC release recommends that a reporting company create a committee with responsibility for considering the materiality of information and determining disclosure obligations on a timely basis. The SEC noted that officers with the expertise to serve on such a committee could include the controller or principal accounting officer, the general counsel, the principal risk management officer, the chief investor relations officer, and officers associated with the company's business units.

The new rules require a periodic evaluation of these controls and procedures, which would form the basis for the required CEO/CFO certifications. New disclosure requirements for Forms 10-K and 10-Q include the certifying officers' evaluation of the reporting company's disclosure controls and procedures and changes in internal controls.

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## Interpretation of "Fairly Presents"

The SEC reiterated its current view that fair presentation is something distinct from and in addition to a presentation in accordance with generally accepted accounting principles. The certification of fair presentation covers the financial statements (including footnote disclosure), selected financial data, MD&A, the selection of appropriate accounting policies, the proper application of accounting policies and the inclusion of any additional disclosure necessary to provide investors with a materially accurate and complete understanding of the company's financial condition, results of operations and cash flows. The SEC also extended the scope of the statutory requirement by including cash flow as a financial statement item that is included in the determination of whether the presentation is fair.

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## Liability Issues

The SEC's commentary on liability indicates that the new certification requirement may expose certifying officers to direct liability for misstatements and omissions in quarterly and annual reports under both the Exchange Act's reporting requirements and its anti-fraud provisions.

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## Other Certifications

The other certification requirement in Sarbanes-Oxley, found in Section 906, has been in effect since Sarbanes-Oxley was signed into law, and both Section 302 and Section 906 certifications are required to be made by each reporting company's CEO and CFO in the reporting company's quarterly and annual reports. The Section 906 certification is required to be included in any report containing financial statements, so it must accompany not only Forms 10-K and 10-Q, but current reports on Form 8-K that include financial statements.

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**J**oseph W. LaPlume is an associate in the Business Group at Goulston and Storrs. For more information about the Sarbanes-Oxley Act of 2002, please contact Timothy B. Bancroft at [tbancroft@goulstonstorrs.com](mailto:tbancroft@goulstonstorrs.com) or at 617.574.3511.

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