

MARKET CALLS

CEO Certifications: 16,000 Unexploded Landmines

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Today's deadline is being portrayed as a non-event -- but the certification requirement is worse than you think.

All eyes today are on the 697 public companies whose CEO/CFO certifications are due under the **SEC's** order of June 27 (out of 947 companies, selected as the largest US companies by revenues, to whom the order applies). The media is keeping a breathless tally of the growing number of certifications, and by the end of the day most of them will be in, with perhaps a small number taking advantage of the permitted 5-day extension.

But this is only the tip of the certification iceberg. The submerged part is Section 906 of the **Sarbanes Oxley** Bill. Section 906 imposes an entirely separate and more stringent certification requirement applying to *all* public companies, and it's effective immediately.

That means that every public company filing a periodic financial report for the period ending June 30, 2002 will be required to certify that report by today at the latest (August 14 is the normal deadline for reports for the period ended June 30). Up to approximately 16,000 additional companies are therefore due to certify today.

The original 947 companies have had since June 27, when the SEC's order was first published, to get their ducks in a row for certification. But the Section 906 certification was added to Sarbanes Oxley at the last moment, and became effective only when **President Bush** signed the bill a couple weeks ago. So there are up to 16,000 companies who will have to certify having had only about two weeks of time to prepare.

Certifications under Section 906 are much more stringent than those under the SEC's order. The SEC order requires CEO's and CFO's only to certify "to the best of my knowledge." But Section 906 offers no such safe harbor. Under 906, fines and prison terms (up to 20 years) can only be imposed for "knowing" mis-statements -- but a CEO or CFO may still be found guilty in the guilt-or-innocence phase of an enforcement action regardless of his lack of knowledge of the infraction.

And according to an SEC staff attorney I spoke to, under 906 it is not clear which reports or statements must be certified, and which must not. The statute refers to "periodic reports containing financial statements" -- but the SEC staff attorney told me no one knows whether that should include technically "non-periodic" reports such as proxy statements or 8-k's.

Adding to the confusion, Section 302 of Sarbanes Oxley instructs the SEC to create rules for certification -- but no matter what rules it creates, those rules will always be trumped by the statutory power of Section 906. And when those rules are eventually enacted there will be *two* certification requirements, each with different and potentially conflicting requirements.

The SEC staff attorney told me that "some very sleepy senators decided to add Section 906." Be that as it may, there must be a lot of fire drills going on today, and there will probably be a lot of innocent mistakes made. But under 906, innocence is no excuse. Yes, the dreaded August 14 deadline will pass, and the media will declare it a non-event. But that will leave thousands upon thousands of unexploded landmines, most of them with the smaller companies who had the least time to prepare for the deadline. The legislative war on capitalism may be over for the moment, but those landmines are going to continue to get stepped on. Somebody's going to get hurt. **TM**