

## Saying you're in compliance with SOX is not enough. You may need to prove it.

Since 2002, CFOs and CEOs have submitted as many as 20 quarterly 302 and 906 certificates, stating that their company's disclosure controls and procedures and internal controls are adequately designed, operating effectively, and have not materially changed from the previous period. Recently, SOX requirements expanded to include a more comprehensive annual certification of the effectiveness of a company's internal controls for registrants of all sizes.

These certifications initially created apprehension on the part of CFOs, who faced the possibility of criminal sentences and significant, personal monetary fines if found guilty of certifying inaccurate or deliberately falsified information. Many wondered whether financial restatements would trigger investigations into 302 liability, since restating prior financial statements meant that the prior assertions about the effectiveness of the company's internal controls may have been erroneous or false.

This prevalence of financial restatements, however, did not trigger many widely publicized enforcement actions, contrary to the initial expectations of industry watchers. Our research has shown that this has resulted in an increasingly relaxed attitude toward the possible risk of liability. Because of the high volume of filings, some CFOs tend to go on "autopilot" when signing certifications. As one former CFO and current Board member of a public company noted, "these operating guys have to sign multitudes of 404, 302, and 906 certificates and sub-certifications—so many signatures for every 10-Q and 10-K—it's no wonder that they go a little numb and just start signing away, which is scary."

Contrary to what it may seem, government officials are, in fact, pursuing certification violations with increasing vigor. According to defense attorneys specializing in corporate securities law, false or misleading certifications have already played a significant part in the prosecutions of securities fraud and other corporate wrongdoings. Because of the substantial penalties associated with Sections 302 and 404, false certifications provide a great leverage point for the government. As a former SEC enforcement attorney noted, "not only are Section 302 and Section 404 inaccuracies used as a tool in forcing settlements from companies, they are used to negotiate 'broad compliance actions'." Further, enforcement of the

1977 Foreign Corrupt Practices Act, with its Section 13(b) internal accounting control provision, reached record highs in 2006 and 2007. Our research has found that the government may be opting to bring Section 302 and 404(a) certification enforcement actions under the more time-tested FCPA.

Since there is no explicit indication that the certification may be limited to what a CEO or CFO is "aware of" or has "knowledge of," it is important to put safeguards in place so that issues do not surface in the first place. And again, with smaller company CFOs now signing off on an additional certification for the first time this year—Section 404—it is clear that there must be a shift away from the rubber stamp mentality.

Visit [www.strategicSOXcompliance.com](http://www.strategicSOXcompliance.com) to request a complimentary copy of our research and our recommended best practices to informed certification sign-off.

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