

---

## **DISCLOSURE COMMITTEE BEST PRACTICES**

**1:15 PM**

Jeff Brown, Motorola, Inc.

Pat Daugherty, Foley & Lardner LLP

Janet G. Kelley, Family Dollar Stores, Inc.

Luis F. Machado, Wm. Wrigley Jr. Company



---

**JEFFREY BROWN**  
SENIOR CORPORATE COUNSEL  
MOTOROLA, INC.

Jeffrey A. Brown is Senior Corporate Counsel for Motorola, Inc., a global leader in providing wireless and broadband communications headquartered in Schaumburg, Illinois. Mr. Brown provides counsel to Motorola's senior management and Board of Directors and handles a broad range of matters relating to securities laws and corporate governance. In particular, Mr. Brown's practice focuses on disclosure issues, the issuance of public securities, structuring of strategic investments and Board of Directors matters. He has also served as a member of Motorola's 6-person Disclosure Committee throughout the Committee's existence.

Prior to joining Motorola in 1997, Mr. Brown was associated with Winston & Strawn in Chicago, Illinois, where his practice was focused in the areas of securities, mergers & acquisitions and corporate finance. He also has professional experience in industrial engineering and mathematical modeling. Mr. Brown received his J.D. with Honors from The Law School at The University of Chicago, where he was a member of the Order of the Coif. He also graduated with honors from Northwestern University, where he received a B.A. in Economics and a B.S. in Industrial Engineering/Management Sciences. Mr. Brown is a frequent speaker and author on a variety of corporate governance-related topics, including the practical impact of the Sarbanes-Oxley Act, effective compliance programs, the majority vote movement and shareholder activism.



**PATRICK D. DAUGHERTY**  
PARTNER  
FOLEY & LARDNER LLP

Patrick Daugherty is chief strategy partner in the Business Law Department of Foley & Lardner LLP. In practice, Mr. Daugherty directs multi-office, multi-disciplinary teams of lawyers in the planning and execution of public and private offerings of equity, debt and hybrid securities, structured financings, tender offers, exchange offers, restructurings, recapitalizations, mergers, acquisitions, divestitures, management buyouts, "going private" transactions and corporate governance assignments. The publisher of *Best Lawyers in America*<sup>™</sup> first selected him for mention in 1995. According to *Chambers USA: America's Leading Business Lawyers*, he is "top of the class for capital raising and complex off-balance sheet financings." In addition, he was named in the list of 2006 Michigan "Super Lawyers" by *Law & Politics Media, Inc.* for his work in securities and corporate finance.

Mr. Daugherty mainly serves multinational corporations and small-cap domestic companies that he has taken public and nurtured. He regularly coaches corporate boards and committees to make business decisions that comply with the Sarbanes-Oxley Act, securities laws, stock exchange rules, corporate codes and best practices.

In 2005, Mr. Daugherty led the team of lawyers that invented the Euro Currency Trust and brought it to market on the floor of the NYSE. Judged "the trade of the year" by *SmartMoney* magazine, the Euro Currency Trust was the first currency-based exchange-traded fund listed on a stock exchange anywhere in the world.

A recognized thought leader on SEC topics, the capital markets, M&A and corporate governance, Mr. Daugherty lectures frequently to legal, accounting and business groups. He earned a bachelor's degree, with distinction, from Northwestern in 1978 and a law degree, *cum laude*, from Cornell University in 1981.



**JANET KELLEY**  
SENIOR VICE-PRESIDENT &  
GENERAL COUNSEL  
FAMILY DOLLAR, INC.

Janet G. Kelley is the Senior Vice President, General Counsel & Secretary of Family Dollar Stores, Inc. based in Charlotte, North Carolina. She is responsible for all legal matters facing the company and manages a staff of 50. Family Dollar is a Fortune 500 and NYSE listed company with approximately \$5.8 billion in annual sales from over 6,000 stores located in 44 states.

Prior to joining Family Dollar, Ms. Kelley was the Executive Vice President and General Counsel of Kmart Corporation for two years, including the period of the company's bankruptcy reorganization. Ms. Kelley was Senior Counsel at The Limited, Inc. in Columbus, Ohio for a period of two years during which she provided legal advice on all operational, litigation, contract and intellectual property matters to the company's operating divisions, including Bath & Body Works and Victoria's Secret. Prior to that, Ms. Kelley held various positions in the Legal Department of Sunbeam Corporation during her five years with the company, including the position of General Counsel.

Ms. Kelley spent fifteen years in private practice with Wyatt, Tarrant & Combs, before she joined the in-house bar. Her primary practice areas included general corporate, securities laws, real estate, financial practices and acting as outside general counsel to Churchill Downs Incorporated.

Ms. Kelley is a graduate of the University of Kentucky School of Law. She graduated second in her class at UK and was the Notes Editor of the UK Law Journal.



Luis F. Machado is Associate General Counsel – Corporate and Assistant Secretary of the Wm. Wrigley Jr. Company where he is responsible for Securities, Corporate Governance, Finance and Mergers & Acquisitions matters. Before joining Wrigley, he was Senior Counsel at JohnsonDiversey, Inc. in Racine, Wisconsin where he was responsible for Finance, Public Reporting, M&A and managing legal matters relating to Europe, Middle East & Africa and Latin America. Prior to that he was in the Corporate Group at Altheimer & Gray in Chicago. He Graduated Cum Laude from Loyola University School Of Law in Chicago and is admitted to practice in Illinois.

**LUIS MACHADO**  
ASSOCIATE GENERAL  
COUNSEL, CORPORATE AND  
ASSISTANT SECRETARY  
WILLIAM WRIGLEY JR.  
COMPANY



---

## **DISCLOSURE COMMITTEE BEST PRACTICES PANEL**

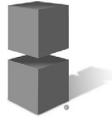
### **Questions for Discussion by Panel**

#### **Organization and Composition of Disclosure Committees:**

1. How do you do “disclosure controls and procedures” at your company?
2. Who is on your disclosure committee?
3. To whom does your disclosure committee report?
4. Who drives the disclosure process in your company – the CEO, CFO, CLO or others?
5. How does your disclosure committee document its deliberations and decisions?
6. Have you augmented the work of your disclosure committee by reason of the new compensation disclosure rules?
7. What is the relationship in your company between the disclosure committee and the audit committee?
8. In your company, does the disclosure committee “do” the disclosure, or does it instead review the disclosure work of others?
9. Do you have one identifiable person who is responsible for the operation of your disclosure controls and procedures, sometimes called a “disclosure controls monitor”?
10. Does your disclosure committee have a charter? If so, who adopted the charter (examples might be the board of directors or the principal executive officers), and what does it cover?

#### **Operation of Disclosure Controls and Procedures:**

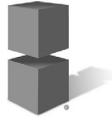
1. How do you do “disclosure controls and procedures” at your company?
2. Do you have a “disclosure committee”? If so, do you disclose that fact?
3. Do you handle 8-Ks differently than longer-fuse SEC reports? What about press releases?
4. Do you have written policies and procedures in this area? Do they change over time? Who changes them?
5. Does your practice include use of “cascading certifications”? Do the certificates describe what steps were taken by the signer?
6. Are disclosure committee deliberations and reports built into the timelines for your company’s periodic reports?



- 
7. To what extent do you use T&R schedules, or timelines, relative to your disclosure program?
  8. How does your disclosure committee document its deliberations and decisions?
  9. Do you track and proactively inquire into SEC “hot topics”?
  10. How does your company evaluate its disclosure controls and procedures?
  11. To what disclosures do your disclosure controls and procedures apply? All SEC filings, or only periodic reports? Do your disclosure controls and procedures apply to “informal” disclosures (such as press releases and investor conferences), too?
  12. Have you augmented your disclosure controls and procedures, or the work of your disclosure committee, by reason of the new compensation disclosure rules?
  13. What is the relationship in your company between the disclosure committee and the audit committee?
  14. Does MD&A get any special disclosure committee handling? What about risk factors?
  15. In your company, does the disclosure committee “do” the disclosure, or does it instead review the disclosure work of others?
  16. What information does the disclosure committee keep available in writing to help it make disclosure judgments? An example might be – analyst research reports.
  17. In your company, how do the CEO and CFO get comfortable with the quarterly certifications that they make? Put another way, what process do they follow before signing their certificates?

#### Interaction Between and Appropriate Roles for “Insiders” and “Outsiders”:

1. What is the proper role of outside securities counsel in connection with periodic and informal disclosure in light of recent regulatory developments?
2. How do you do “disclosure controls and procedures” at your company?
3. Who is on your disclosure committee?
4. Do you handle 8-Ks differently than longer-fuse SEC reports? What about press releases?
5. Do you track and proactively inquire into SEC “hot topics”?
6. To what extent do you involve executives and consultants outside the core disclosure drafting group in the collection of information and the preparation and editing of disclosures?



- 
7. How involved is your board of directors in disclosure? Do they see drafts of 10-Ks, 10-Qs, or other documents? How early in the process do they become involved?
  8. How do you monitor the evolution of new SEC and FAS B disclosure mandates so as to implement them timely?
  9. What is the relationship in your company between the disclosure committee and the audit committee?
  10. Do you have one identifiable person who is responsible for the operation of your disclosure controls and procedures, sometimes called a “disclosure controls monitor”?
  11. In your company, how do the CEO and CFO get comfortable with the quarterly certifications that they make? Put another way, what process do they follow before signing their certificates?



**ACETO CORPORATION  
DISCLOSURE COMMITTEE CHARTER  
September 2003**

This disclosure committee (the "Committee") charter (the "Charter") has been established by Aceto Corporation (the "Company") and ratified by the Company's board of directors to assist the Company's chief executive officer and chief financial officer (the "Certifying Officers").

## **I. Objective**

The Committee has been formed to help ensure that disclosures made by the Company in its United States Securities and Exchange Commission (the "SEC") filings and to the investment community comply with applicable laws and stock exchange rules.

The Committee shall have full access to the Company's books, records and facilities, and the Company's officers and employees, regarding any matter within the scope of the Committee's responsibilities. The Committee shall confer with the Company's independent auditors and outside legal counsel in order to verify the accuracy and completeness of the Company's disclosures.

The Committee will, under the supervision and oversight of the Certifying Officers, facilitate these objectives by:

A. Creating a process (this process shall be referred to as the Company's "Disclosure Controls and Procedures") designed to ensure that information required by the Company to be disclosed in filings with the SEC and other information that the Company discloses to the investment community is recorded, processed, summarized and reported accurately and timely.

B. Supervising the preparation of the Company's: (i) annual report on Form 10-K and each quarterly report on Form 10-Q (collectively, the "periodic reports"), and current reports, proxy statements, information statements, registration statements and other filings with the SEC; (ii) press releases containing financial and other information material to the marketplace for the Company's securities; (iii) presentations to shareholders, analysts and the investment community; and (iv) presentations to rating agencies and lenders (collectively, the "Disclosure Statements"); and (v) the Company's web site.

C. Evaluating the integrity and effectiveness of the Company's Disclosure Controls and Procedures within 90 days before the Company files its periodic reports with the SEC and any amendments to those reports.

D. Reviewing with the Certifying Officers, outside counsel and the public auditors all relevant information with respect to the Committee's proceedings, the preparation of the Disclosure Statements and the Committee's evaluation of the effectiveness of the Company's Disclosure Controls and Procedures.

E. Certifying to the Certifying Officers before filing each periodic report as to: (i) the Committee's compliance with this charter and the Disclosure Controls and Procedures; and (ii) the Committee's

conclusions resulting from its evaluation of the effectiveness of the Disclosure Controls and Procedures.

## **II. Membership, Process**

A. Committee members shall include the Company's chief financial officer, controller, vice president of administration, vice president of international, and other appropriate Aceto employees as determined by the Certifying Officers.

B. The Certifying Officers (acting with such members of the Committee as they shall determine) may, at any time, assume any or all of the duties of the Committee identified in this Charter, including, for example, approving the Disclosure Statements when time or other factors do not permit the full Committee to review the Disclosure Statement.

C. The chief financial officer shall serve as the Committee Chair. The Committee Chair shall schedule and preside over meetings and prepare agendas. Any interpretation of the Charter or the Committee's procedures shall be made by the Committee Chair.

D. As soon as practicable, the Committee shall prepare and submit for the approval of the Certifying Officers and the Company's Board of Directors, a set of Disclosure Controls and Procedures, including policies and procedures of the Committee and policies and procedures to test the effectiveness of the Disclosure Controls and Procedures.

E. The Committee shall meet as necessary to: (i) ensure the accuracy and completeness of the Disclosure Statements; and (ii) evaluate the Disclosure Controls and Procedures.

## **III. Periodic Evaluation**

The Committee shall review and reassess this Charter and the performance of the Committee annually and recommend any proposed changes to the Certifying Officers and the Board of Directors for approval.

## **IV. Other Responsibilities, Delegation**

The Certifying Officers may assign other responsibilities, consistent with this Charter, to the Committee, and may delegate as they consider appropriate.

**PEPSICO**

Company

**Investors**

News

Citizenship

Diversity

Careers

Cont

Home ▶ Investors ▶ Corporate Governance ▶ **Disclosure Committee Cha**

## Disclosure Committee Charter

[Print This Page](#)

### ▶ Purpose

### ▶ Organization

### ▶ Other Responsibilities

This Disclosure Committee Charter (the "**Charter**") has been adopted by the Chief Executive Officer and Chief Financial Officer (the "**Senior Officers**") of PepsiCo (the "**Company**"). The Disclosure Committee (the "**Committee**") shall review and reassess this Charter annually and recommend any proposed changes to the Senior Officers for approval.

## I. Purpose

It is the Company's policy that all disclosures made by the Company to its security holders or the investment community should accurate and complete and fairly present the Company's financial condition and results of operations in all material respects, and should be made on a timely basis as required by applicable laws and stock exchange requirements.

The Committee shall assist the Senior Officers in fulfilling their responsibility for oversight of the accuracy and timeliness of the disclosures made by the Company by being responsible for the following tasks, in each case subject to the supervision and oversight of the Senior Officers:

- ▣ Design and establish controls and other procedures (which may include procedures currently used by the Company) that are designed to ensure that (1) information required by the Company to be disclosed to the Securities and Exchange Commission ("**SEC**") and other written information that the Company will disclose to the investment community is recorded, processed, summarized and reported accurately and on a timely basis and (2) information is accumulated and communicated to management, including the Senior Officers, as appropriate to allow timely decisions regarding such required disclosure ("**Disclosure Controls**").
- ▣ Monitor the integrity and effectiveness of the Company's Disclosure Controls.
- ▣ Review and supervise the preparation of the Company's (i) periodic and current reports, proxy statements, information statements, registration statements and any other information filed with the SEC, (ii) press releases containing financial information, earnings guidance, information about material acquisitions or dispositions or other information material to the Company's security holders, and (iii) correspondence containing financial information broadly disseminated to shareholders (collectively, the "**Disclosure Statements**") and review disclosure policies for financial information displayed on the Company's corporate/investor relations website.
- ▣ Evaluate the effectiveness of the Company's Disclosure Controls within 90 days prior to the filing of the Company's Annual Report on Form 10-K and each Quarterly Report on Form 10-Q (collectively, the "**periodic reports**").
- ▣ Discuss with the Senior Officers all relevant information with respect to the Committee's proceedings, the preparation of the Disclosure Statements and the Committee's evaluation of the effectiveness of the Company's Disclosure Controls.
- ▣ Provide a certification to the Senior Officers prior to the filing with the SEC of each periodic report as to (i) the Committee's compliance with its policies and procedures and proper performance of the responsibilities that have been assigned to it and (ii) the Committee's conclusions resulting from its evaluation of the effectiveness of the Disclosure Controls.

In discharging its duties, the Committee shall have full access to all Company books, records, facilities, and personnel, including the internal auditors.

## II. Organization

The membership of the Committee shall initially consist of the Company's Controller, General Counsel, General Auditor and Head Investor Relations. Such members may be replaced, or new members added, at any time and from time to time by the Senior

Officers. Notwithstanding the foregoing, the Senior Officers at their option may at any time assume any or all of the responsibilities of the Disclosure Committee identified in this Charter, including, for example, approving Disclosure Statements when time does not permit the full Committee to meet. The Committee may designate two or more officers, at least one of whom shall be an attorney knowledgeable about SEC rules and regulations with respect to disclosure and at least one of whom shall be knowledgeable about financial reporting, who can, acting together, approve Disclosure Statements (other than periodic reports) when time does not permit the full Committee to meet.

One member of the Committee shall be appointed by the Senior Officers as chair. The chair shall be responsible for scheduling and presiding over meetings and preparing agendas. Any question of interpretation of this charter or the Committee's procedures shall be determined by any Senior Officer or, in their absence from any meeting, the chair.

Promptly after the date hereof, the Committee shall meet with the Senior Officers and submit for their approval an initial set of Disclosure Controls, including policies and procedures of this Committee, as well as policies and procedures to test the effectiveness of the Disclosure Controls. The Committee shall meet as frequently as circumstances dictate to (i) ensure the accuracy and completeness of the Disclosure Statements and (ii) evaluate the Disclosure Controls and determine whether any changes to the Disclosure Controls are necessary or advisable in connection with the preparation of the Company's upcoming periodic reports or other Disclosure Statements, taking into account developments since the most recent meeting, including changes in the Company's organization and business lines and any change in economic or industry conditions.

### III. Other Responsibilities

The Committee shall also have such other responsibilities as the Senior Officers may assign to it from time to time.

[Back to top](#)

## TRANSACTIONAL AND SECURITIES UPDATE:

Design and Evaluation of Disclosure Controls and Procedures; Basis for CEO/CFO Certifications under the Sarbanes-Oxley Act

As a result of the SEC's new rules implementing the CEO/CFO certification requirements of Section 302 of the Sarbanes-Oxley Act and the independent CEO/CFO certification required under Section 906 of the Sarbanes-Oxley Act, CEOs and CFOs of public companies must now make certifications with respect to each annual and quarterly report filed with the SEC. In addition, the SEC's new rules require every public company to maintain and continuously evaluate "disclosure controls and procedures" designed to ensure that a company gathers, analyzes and discloses all information that is required to be disclosed in its SEC reports. Accordingly, public companies should review, refine and formalize their existing disclosure controls and procedures and adopt steps to evaluate these controls and procedures to comply with the SEC's new rules. That process, when combined with taking steps to comply with those disclosure controls and procedures and to confirm that compliance before filing relevant reports, should give CEOs and CFOs a basis to make the required certifications.

This Update first addresses disclosure controls and procedures on a conceptual level. The Update then provides, as Appendix A, a checklist of procedures that public companies should consider in developing and evaluating their disclosure controls and procedures. These suggested procedures are intended to:

- Assist companies in refining and, as appropriate, supplementing their procedures for preparing the non-financial statement portions of Form 10-Ks and 10-Qs and improving the overall quality of disclosures in these reports; and
- Assist CEOs and CFOs in making required certifications with respect to (1) the adequacy of the substantive disclosures in Form 10-Ks and 10-Qs and (2) their responsibility for the design and operation of the company's disclosure controls and procedures.

## DISCLOSURE CONTROLS AND PROCEDURES VS. INTERNAL CONTROLS

The SEC's adopting release for the new Section 302 rules makes the distinction between *disclosure controls and procedures* and *internal controls*. The concept of *disclosure controls and procedures*, in the SEC's view, is broader than the pre-existing concept of *internal controls*. *Internal controls* relate to a company's controls and procedures for financial reporting purposes and control of its assets, while *disclosure controls and procedures* relate to controls and procedures addressing the quality and timeliness of disclosure generally. Under the SEC's new rules, a company is required to design *disclosure controls and procedures* to ensure that information required to be disclosed in periodic and current reports and proxy statements is accumulated and communicated to the company's management, including its CEO and CFO, as appropriate "to allow timely decisions regarding required disclosure." While there is a distinction between the two terms, one could argue that *disclosure controls and procedures* include *internal controls*, at least to some extent, because financial information, which is heavily reliant on *internal controls*, remains a critical part of issuers' reports, with respect to which *disclosure controls and procedures* are intended to facilitate good disclosure in general.

The CEO/CFO certifications that Section 906 and Section 302 require each contain certifications that relate to *disclosure controls and procedures* and *internal controls*. The Section 906 certification requires CEOs and CFOs to certify that the report complies with Section 13(a) or 15(d) of the Securities Exchange Act of 1934. The Section 906 certification also requires CEOs and CFOs to certify that information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the company. The required Section 302 certifications include statements to the effect that (1) CEOs and CFOs are responsible for establishing and maintaining, and have designed and evaluated the effectiveness of, *disclosure controls and procedures* and (2) the periodic report in question does not contain untrue statements of material fact or omit material facts. Similarly, the required Section 302 certifications include language reflecting that (1) the officers have disclosed information to the company's auditors and audit committee about *internal controls* and have disclosed information in the report regarding changes in *internal controls* and (2) information in the report fairly presents the financial condition and results of operations of the company.

Public companies and their CEOs and CFOs, in connection with the Section 302 certifications covering *internal controls*, may wish to seek guidance from their own internal audit staff as well as their independent certified public accountants with respect to the maintenance and evaluation of such *internal controls*.

## DEVELOPING AND EVALUATING DISCLOSURE CONTROLS AND PROCEDURES

The SEC noted in its adopting release for the new rules governing Section 302 certifications that it expects that "issuers already maintain procedures, whether formal or informal, to comply with their Exchange Act disclosure procedures and for their own internal purposes." The new SEC rules may merely require some companies to formalize their existing procedures. Others may need to formalize and also enhance their existing procedures, and the remainder who have no real procedures will have to implement such procedures. Although the new rules require each company to maintain disclosure controls and procedures, language in the new CEO/CFO certifications places responsibility for establishing and maintaining disclosure controls and procedures on the CEO and CFO.



The new SEC rules also require companies to evaluate at least every 90 days, and to report their CEO's and CFO's conclusions about, the effectiveness of the design and operation of their disclosure controls and procedures. While many companies may have maintained disclosure controls and procedures, it was probably less common in the past for companies to have formal mechanisms in place for the regular review and assessment of these controls and procedures. The evaluation now required must be conducted under the supervision and with the participation of the issuer's management, including the CEO and CFO.

The SEC has stated that there is no single recommended procedure for maintaining and evaluating the necessary disclosure controls and procedures. Each company must "develop a process that is consistent with its business and internal management and supervisory practices." Moreover, each company will need to decide what best suits its own business, culture, size, accounting practices and internal structure. For example, a decentralized company with multiple operating segments or geographically dispersed operations or a company that has recently made significant acquisitions will need different types of controls and procedures than a company with centralized operations, a single operating segment or a single geographic location.

Further, procedures will need to evolve as the company's business changes and as a company discovers any deficiencies in existing processes through the evaluation process. **Thus, while checklists are useful, they should continually be reassessed and refined.** The procedures suggested in Appendix A are offered in that spirit as a starting point, not as a definitive list.

In addition to tailoring disclosure controls and procedures to their businesses, companies will need to refine and modify these controls and procedures in response to ever-changing SEC reporting requirements. For example, companies with a public float of at least \$75 million may need to revise procedures to accommodate the accelerated due dates for Form 10-Ks and 10-Qs for fiscal years ending on or after December 15, 2003. All companies will also need to change their procedures when the SEC expands the types of reportable Form 8-K events and accelerates the time periods in which companies must file Form 8-Ks, whether on the SEC's own initiative or in response to Section 409 of the Sarbanes-Oxley Act, which requires real time disclosure "on a rapid and current basis" and in plain English of material changes in financial condition and results of operations. In that regard, while the new SEC rules do not require CEO/CFO certifications in connection with Form 8-Ks (or proxy statements), the SEC's adopting release makes it clear that disclosure controls and procedures must also ensure timely and accurate disclosure in these documents.

It is unclear how the evaluation is separate from the design and operation of disclosure controls and procedures. But, for example, companies might consider including as part of the evaluation something akin to "audit procedures" regarding disclosure controls and procedures to confirm compliance with them and/or to attempt to confirm that there was no deficiency that the disclosure controls and procedures failed to uncover. On the other hand, compliance with disclosure controls and procedures for a subsequent period may serve a dual purpose of assisting in the evaluation of disclosure controls and procedures as they applied in a prior period.

It is also unclear whether it is necessary to evaluate *internal controls* every 90 days as part of the evaluation of *disclosure controls and procedures*. To the extent *internal controls* are, at least in part, a subset of *disclosure controls and procedures*, it would be appropriate to evaluate *internal controls* as part of the evaluation of the overall *disclosure controls and procedures*. However, depending on the procedures to evaluate *disclosure controls and procedures* and how they apply over the course of a year, a specific evaluation of *internal controls* might not occur every 90 days.



## **DOCUMENTING PROCEDURES, COMPLIANCE AND EVALUATIONS**

Companies should consider preparing the following types of documentation with respect to disclosure controls and procedures: (1) design of disclosure controls and procedures; (2) evidence of operational compliance with such controls and procedures; (3) development of the evaluation process; and (4) evidence of the evaluation of the effectiveness of both design and operation of the disclosure controls and procedures. The evaluation process should address both the design and the operation of disclosure controls and procedures since such controls and procedures may be well-designed but not followed in practice. If there are disclosure deficiencies despite well-enforced procedures, then there likely are deficiencies in the design of the disclosure procedures. As noted in the SEC's adopting release, the evaluation "should help to identify potential weaknesses and deficiencies in advance of a system breakdown." We recommend that companies begin by documenting their existing disclosure controls and procedures and then evaluate and refine these controls and procedures over time.

Written disclosure controls and procedures and the evaluation process will need to navigate between being so detailed as to be honored only in the breach and being so general as to be of little use. Similarly, documentation regarding the operation of and compliance with disclosure controls and procedures and the required evaluation process should be summary in nature but sufficient to evidence the processes followed. For example, documenting every question raised every step of the way in evaluating information for a report is too time consuming and may clutter the files with unnecessary detail that could be misconstrued by a plaintiff's attorney. We encourage companies to consult with their counsel as to appropriate form and substance of this documentation.

A company should request outside securities counsel and the company's external auditors to review its proposed written disclosure controls and procedures. Then, the audit committee should have the opportunity to review the disclosure controls and procedures. Finally, the CEO and CFO should approve the disclosure controls and procedures.

## **INTERNAL CERTIFICATIONS**

Some companies have started requiring internal written certifications from officers, business unit and division heads and key accounting personnel as to the accuracy and adequacy of information with respect to the areas for which they are responsible. In some instances, these back-up certifications may also address the adequacy of procedures and processes. If these certifications are consistent with the company's size and culture, they may enhance the quality of its SEC reports, as well as provide written evidence of the diligence and evaluation processes. The internal certifications also help CEOs and CFOs to form a basis for making their required certifications.

However, internal certifications are not a substitute for CEO and CFO involvement in (1) supervising the design and evaluation of the reporting process and (2) assessing the quality and completeness of disclosures. The central thrust of the new Section 302 certifications is to prevent CEOs and CFOs from delegating ultimate responsibility for these tasks.

An example of such a certification in general form is attached to this Update as Appendix B. Some companies are also requiring more detailed, individualized certifications that address areas of specific responsibility (e.g., human resources or environmental) or accounting matters typically found in management representation letters to the auditors.



If you have any questions concerning the matters discussed in this Foley & Lardner Update, please contact your Foley & Lardner attorney, or contact:

**Chicago:** Edwin D. Mason, Todd B. Pfister or George T. Simon  
**Detroit:** Patrick D. Daugherty, Steven H. Hilfinger or Yvette M. VanRiper  
**Jacksonville:** Gardner F. Davis, Miriam K. Greenhut or Linda Y. Kelso  
**Los Angeles:** Lance Jon Kimmel or Richard W. (Jack) Lasater II  
**Madison:** Joseph P. Hildebrandt, Anne E. Ross or Paul T. Wrycha  
**Milwaukee:** Steven R. Barth, Benjamin F. Garmer, III, Phillip J. Hanrahan, John M. Olson, Patrick G. Quick, Jay O. Rothman, Russell E. Ryba, Luke E. Sims or John K. Wilson  
**San Diego:** Kenneth D. Polin  
**San Francisco:** Frederick K. Koenen or Paul A. Stewart  
**Tampa:** Martin A. Traber or Steven W. Vazquez  
**Washington, DC:** Arthur H. Bill, Jay W. Freedman or Thomas E. Hartman

---

Foley & Lardner Updates are intended to provide information (not legal advice) about important new legislation or other legal developments. The great number of legal developments does not permit the issuing of an Update for each one, nor does it allow the issuing of a follow-up on all subsequent developments.



**DISCLOSURE CONTROLS AND PROCEDURES  
AND CERTIFICATION  
CHECKLIST ITEMS**

The checklist items below, which companies should consider including in their formal disclosure controls and procedures, are divided into three parts:

- (1) the process for collecting and assessing the information required for the SEC report and for preparing and reviewing the SEC report;
- (2) the process for evaluating the effectiveness of the company's disclosure controls and procedures; and
- (3) suggested specific actions of CEOs and CFOs with respect to preparation of the reports and making of required certifications.

While the checklist includes certain "hot topic" substantive issues that all preparers of SEC reports should consider, the checklist is not intended as a comprehensive substantive checklist for the content of these reports.

**Collecting and Assessing Information; Preparing and Reviewing the Report**

1. Identify the individuals involved in collecting information to be disclosed, determining the need for disclosure of information, preparing disclosures to be included in the report and reviewing and confirming the accuracy of information in the report. Evaluate whether additional internal or external personnel should be involved in general or in special cases due to particular circumstances.
2. Create a formal committee, a step the SEC has recommended, with responsibility for "evaluating the materiality of information and determining disclosure obligations on a timely basis." The "disclosure committee" should report to the CEO and/or CFO. In smaller companies, the committee might also include the CEO and/or CFO. Depending on the company, other members of the committee could include:
  - ◆ The principal accounting officer or the controller;
  - ◆ The general counsel or principal legal officer responsible for disclosure matters;
  - ◆ The principal risk management officer;
  - ◆ The chief investor relations officer;
  - ◆ Senior personnel responsible for finance/treasury and internal audit; and
  - ◆ Other appropriate officers or employees, including individuals associated with the company's business units.

External auditors and outside securities counsel could attend one or more meetings at the committee's request.

3. Consider and document the practices and procedures to be used by members of the disclosure committee to identify categories of information requiring disclosure and to evaluate specific matters requiring disclosure.
4. Create a timeline for collecting information, determining whether disclosure is required, preparing and reviewing the report and giving others the opportunity to review the report, building in adequate time for disclosure committee meetings and all necessary reviews and to address disclosure issues. Permit sufficient time to ensure that deficiencies and unexpected developments can be corrected prior to the required CEO/CFO certifications and ideally before an earnings release.
5. Evaluate and revise procedures to accommodate, and ensure that personnel are aware of, the reporting requirements and deadlines when new SEC rules expand the scope of reportable Form 8-K events and accelerate Form 10-K, 10-Q and 8-K filing deadlines.
6. Consider and document the process to collect and generate information for the report, including non-financial data. Consider replicating procedures for the collection and verification of financial data so that they apply to the collection and verification of non-financial data, such as liquidity, operational and regulatory risks. Procedures for Form 10-Qs generally should be as extensive as procedures for Form 10-Ks.
7. Review for purposes of assessing disclosures and preparing the report, and provide as appropriate to the CEO and CFO for purposes of their certifications, supplemental materials such as:
  - ◆ Last year's report for the same period and the most recent report;
  - ◆ Other public disclosures and SEC filings for the current year, including earnings releases, prospectuses, proxy statements (pay particular attention to MD&A, trends and forward-looking statements not borne out by subsequent developments) and conference call scripts;
  - ◆ Financial statements for the period and the corresponding prior period by segment, division and product line;
  - ◆ Budgets and variances from budget, especially material unexplained deviations;
  - ◆ Cash flow and capital expenditure projections;
  - ◆ Previous SEC staff comment letters to the company;
  - ◆ Reports filed with other governmental agencies;
  - ◆ Other company files and records (e.g., board and audit committee minutes, litigation summaries and company brochures and publications);
  - ◆ Attorney responses to audit letter requests;
  - ◆ Investor roadshow presentations;
  - ◆ Board materials;

- ◆ Analysts reports (e.g., do any analysts request clearer disclosures of specific matters?); and
  - ◆ Recent industry data and SEC reports of other companies in the same industry.
8. Analyze the selection and implementation of critical accounting policies and the judgments involved. Discuss the impact of different policies or estimates on the financial statements. Compare the company's critical accounting policies with those of its competitors. Consider whether estimates need to be revised in light of changing conditions (e.g., goodwill impairment or reserves). Evaluate whether estimates are supported by reliable information and reasonable assumptions and whether application is consistent from period to period. Discuss these matters with the company's auditors and the audit committee. Consider implications of the report the auditor must submit to the audit committee regarding critical accounting policies and practices.
  9. Discuss any new accounting pronouncements with the company's auditors and the audit committee.
  10. Consider current "hot topics" that should be discussed with the CEO, CFO, audit committee and/or auditors, in addition to critical accounting policies, such as: the transparency of financial reporting, related party transactions, off-balance sheet arrangements, earnings management, "cookie jar" reserves, pro forma financial information, credit rating triggers and liquidity concerns.
  11. Make subject specific inquiries to executive officers, financial and accounting personnel, "special interest" personnel (e.g., sales, R&D, labor relations, special litigation counsel, etc.), other important company personnel and, possibly, third parties (e.g., the bank officer in charge of the company's line of credit) regarding matters within their scope of responsibility. Request quarterly as well as annual written updates from outside counsel concerning material litigation.
  12. Update the company's annual officers' and directors' questionnaires. Ask securities counsel to check for compliance with SEC rules. Consider expanding the questions about related party transactions beyond Regulation S-K requirements.
  13. Analyze whether management or the board of directors has spent considerable time discussing any material business development and, if so, whether it should be disclosed. Ask "what keeps management up at night worrying" and has it been, or should it be, disclosed?
  14. Consider preparing as much of the report as possible in plain English.
  15. In preparing MD&A, consider the following:
    - ◆ Draft MD&A as if from scratch to describe the key drivers of the company's business and results of operations, as viewed through the eyes of management.
    - ◆ Check MD&A for consistency with the President's letter in the annual report, press releases, conference call scripts and other appropriate publicly disclosed materials.

- ◆ Consider disclosure of known trends and uncertainties.
  - ◆ Ensure that procedures to generate information from various levels of the organization elicit appropriate input regarding potential subjects for MD&A disclosure.
16. Ensure that procedures obtain all information necessary to develop and update reasonable projections and forecasts if the company includes such information in its reports.
  17. Consider including plain English risk factors disclosures (especially in the Form 10-K) and update them for each filing.
  18. Update forward-looking statement disclosures in each filing to avoid a claim that they are mere boilerplate.
  19. Include a statement in the report required by the new SEC rules (1) summarizing the CEO and CFO's conclusions about the effectiveness of the company's *disclosure controls and procedures* based on their evaluation within the last 90 days, and (2) stating whether there were significant changes in *internal controls* or other factors that could significantly affect *internal controls* after the date of their most recent evaluation of those controls.
  20. Ask senior officers, business unit and division heads and key accounting personnel to review a draft of the report and advise the disclosure committee as to whether it is accurate and complete with respect to the business functions for which they are responsible. Include a bring-down procedure for any material developments from the date of the initial inquiry until the date of filing.
  21. Request that an appropriate legal and finance team conduct a careful check of the report to confirm that it fully complies with the requirements of Sections 13(a) or 15(d) of the Securities Exchange Act of 1934, including that the report addresses each of the line items required in the report.
  22. Request the company's external auditors to review financial statement disclosure, MD&A and other relevant disclosures.
  23. Obtain certifications from other senior officers, business unit or division heads and key accounting personnel with respect to their areas of responsibility. A sample form of internal certification is attached as Appendix B.
  24. Provide a draft of the Form 10-K to the full board with sufficient lead time for its review. Discuss the contents of the Form 10-Q with the audit committee in advance of filing.
  25. Determine appropriate procedures to "sign-off" on the final disclosure contained in the report.
  26. Keep a written record of compliance with the disclosure controls and procedures.

### **Evaluation of Disclosure Controls and Procedures**

1. Include a separate section in the disclosure controls and procedures regarding the evaluation process.
2. Determine a schedule for quarterly evaluations of disclosure controls and procedures with sufficient time to ensure that deficiencies and unexpected developments can be corrected prior to the required CEO/CFO certifications and to allow review by the CEO and CFO.
3. Identify the individuals, who may include the members of the disclosure committee, who will conduct the evaluation of the disclosure controls and procedures. If senior management decides to make the committee an integral part of the evaluation process, then it should devise mechanisms besides committee self-evaluation for monitoring the disclosure committee's performance.
4. Evaluate whether the financial reporting team is adequately staffed to handle accounting and disclosure responsibilities and to still have sufficient resources to address on a timely basis any problems that arise.
5. Consider appointing a compliance officer who functions like an internal auditor, but for non-financial statement matters, is primarily responsible for monitoring compliance with disclosure controls and procedures and reports directly to the CEO and CFO with access to the audit committee. Alternatively, consider charging the internal audit function (or creating or outsourcing one, if none exists presently) with responsibility in this area and staffing the function accordingly.
6. To avoid any risk that meeting solely as a group will be an obstacle to some input, the compliance officer might also periodically meet one-on-one with members of the disclosure committee or others responsible for information gathering and preparation of SEC reports, to ask them if they have any concerns about the quality of the disclosures or the operation or design of disclosure controls and procedures.
7. Review prior disclosures to reevaluate the accuracy of such disclosures with the benefit of 20/20 hindsight and to consider whether any process modifications might be appropriate in light of that review.
8. Consider establishing a hotline or other means for employees' anonymous submission of concerns, including concerns about the conduct of senior management in the disclosure process. Prepare written summaries for all complaints and their resolution. Make periodic reports on the process to the board of directors or an appropriate board committee.
9. Document the steps followed in, and the results of, the evaluation of disclosure controls and procedures. Schedule periodic updates to the disclosure committee, the CEO and CFO and the board of directors or a board committee, as appropriate, for issues raised during the evaluation process and for prompt follow-through on corrective actions. Create a written summary of problems fixed.
10. Include an evaluation of internal controls in the evaluation process as appropriate.

**Suggested Specific CEO/CFO Actions**

1. Read each report in its entirety.
2. Review supplemental materials that the disclosure committee used in preparing the report.
3. Devote adequate time to thinking critically about and commenting on quarterly and annual reports with sufficient lead time to address concerns. Consider whether the report adequately describes the company and material risks and contingencies related to the company's business.
4. Ask questions of, and identify areas for further review and assistance by, senior management and/or outside advisors.
5. Meet with the disclosure committee and personnel responsible for preparing the report to discuss the process by which the report was generated, to resolve disclosure issues and questions about matters the CEO or CFO do not understand and to analyze MD&A. Review with the disclosure committee and other relevant personnel significant business developments and trends, potential contingent liabilities and impacts of factors external to the business.
6. Ask the individuals responsible for preparing the report if they are aware of any reason why the reliability or accuracy of the report should be questioned.
7. Review the accuracy of non-financial statement disclosure in the report and the company's performance and trends in its business with business unit and division heads with a view toward disclosure of trends in the MD&A section of the report.
8. Meet with the company's accounting personnel, the company's external auditors and/or the audit committee, as appropriate, to discuss:
  - ◆ Critical accounting policies, including revenue recognition, off-balance sheet liabilities, special purpose entities, capitalization of expenses, write-offs, adequacy of reserves and exposure to customers and suppliers with financial difficulties;
  - ◆ Strengths and weaknesses of, and issues regarding, internal controls;
  - ◆ Contingent liabilities, liquidity concerns and compliance with debt covenants and credit rating triggers;
  - ◆ Accounting and audit adjustments;
  - ◆ Significant tax issues; and
  - ◆ New SEC guidelines or accounting pronouncements.

9. Discuss the contents of Form 10-Ks and Form 10-Qs and the due diligence process for the required CEO and CFO certifications with the audit committee in advance of filing. Meet with the audit committee on request to review Form 10-Ks and Form 10-Qs. Be available for questions from directors about the preparation process and substance of Form 10-Ks and Form 10-Qs.
10. Consider whether the information in the report fairly presents, in all material respects, the company's financial position, results of operations and cash flows.
11. Review and approve the company's disclosure controls and procedures to be able to make the certification that the CEO and CFO have designed the company's disclosure controls and procedures to ensure that material information is made known to them. Approve all changes to disclosure controls and procedures, including changes to the evaluation process.
12. Participate in and supervise the evaluation of the company's disclosure controls and procedures to be able to make the certification that the CEO and CFO have evaluated the effectiveness of the design and operation of the company's disclosure controls and procedures within 90 days prior to the filing of the report. Request an evaluation of the disclosure controls and processes after the end of each reporting cycle by the disclosure committee or other personnel responsible for the disclosure process, with suggestions for improvements for the next reporting cycle. Request a report during the following reporting cycle of any necessary remedial actions taken.
13. Review the conclusions about the effectiveness of the company's disclosure controls and procedures as presented in the report to be filed with the SEC.
14. Disclose to the company's auditors and the audit committee any significant deficiencies in the design or operation of internal controls that could adversely affect the company's ability to record, process, summarize and report financial data and identify for the company's auditors any material weakness in internal controls.
15. Disclose to the company's auditors and the audit committee any fraud that involves management or other employees who have a significant role in internal controls.
16. Document the process and procedures that were undertaken to form the basis for making the required certifications.

**CERTIFICATE OF EMPLOYEE REGARDING  
SEC FILINGS OF \_\_\_\_\_**

---

**Background:** In connection with \_\_\_\_\_'s (the "Company") [Annual/ Quarterly] Report on Form 10-\_\_ for the [year/quarter] ended \_\_\_\_\_ (the "covered filing"), \_\_\_\_\_, as principal executive officer, and \_\_\_\_\_, as principal financial officer, will file a certification with the Securities and Exchange Commission (the "SEC"), each to the best of his or her knowledge, as to, among other things, the accuracy and completeness of the covered filing.

Your careful completion of this Certificate will help assure that these certifications that \_\_\_\_\_ and \_\_\_\_\_ will file with the SEC will be complete and accurate. A substantially final draft of the covered filing accompanies this Certificate.

In considering your response to this Certificate, you should consider information that you believe would be important to a reasonable investor, including (without limitation) significant business developments and trends, the Company's liquidity, capital resources, critical accounting policies, executive compensation and related party transactions.

**Certification:** Understanding that \_\_\_\_\_ and \_\_\_\_\_ intend to rely upon these statements, the undersigned hereby certifies, represents and warrants to each of them and to the Company as follows:

1. I have read those portions of the accompanying draft of the covered filing that relate directly to the scope of my responsibilities as an employee of the Company (the "certified information").
2. Based on my knowledge, the certified information, as of the end of the period covered by such filing, did not contain an untrue statement of a material fact or omit to state a material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading.
3. Based on my knowledge, to the extent of the scope of the certified information, the certified information fairly presents, in all material respects, the financial condition, results of operations and cash flows of the Company as of the close of and for the period presented in the covered filing.
4. [Based on my knowledge, the financial statements of the \_\_\_\_\_ Group for the period covered by the covered filing have been prepared in accordance with generally accepted accounting principles in the United States and fairly present, in all material respects, the financial position and results of operations of the \_\_\_\_\_ Group as of the close of and for such period.]
5. I am not aware of any deficiencies in the effectiveness of the Company's disclosure controls and procedures that could adversely affect the Company's ability to record, process, summarize and report information required to be disclosed in the covered filing.
6. I am not aware of any significant deficiencies or material weaknesses in the design or operation of the Company's internal controls that could adversely affect the Company's ability to record, process, summarize and report financial data.



7. I am not aware of any fraud, whether or not material, that involves the Company's management or other employees who have a significant role in the Company's internal controls.

8. I understand that \_\_\_\_\_ and \_\_\_\_\_ will be filing their certifications with the covered filing with the SEC on or about \_\_\_\_\_. If, at any time before \_\_\_\_\_, I become aware that this Certificate is incorrect for any reason, I will furnish immediately to \_\_\_\_\_ any necessary or appropriate correcting information.

Dated this \_\_\_\_ day of \_\_\_\_\_, 200\_.

\_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

