Federal Securities Law: What Does the SEC Have in Mind? Putting Disclosure Policies and Procedures in Context

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Bond lawyers who assist municipal bond issuers in preparing official statements may have spent the last few months working with their issuer clients in developing new or amending existing disclosure policies and procedures to manage the task of complying with new events 15 and 16 of Rule 15c2-12.[1] Many more bond lawyers may be doing so now or about to do so. SEC guidance as to what issuer disclosure policies and procedures must provide, like SEC guidance regarding the meaning and requirements of the amendments beyond that contained in the adopting release,[2] is largely non-existent. While the SEC has authority to provide the latter guidance (but apparently will not, at least for now), it lacks authority to provide the former guidance, which apparently it quite willingly would do, as explained below. However, strong indications do exist as to what the SEC does have in mind for disclosure policies and procedures. Those indications suggest considerations that should be taken into account when preparing disclosure policies and procedures, as described below.

Overview

This quarter's column explains the origin of disclosure policies and procedures as a securities regulatory concept born in the turn-of-the-millennium Enron and WorldCom debacles. In addition to the obvious goal of promoting quality disclosure to investors – the focus of the SEC – this origin highlights a second purpose of disclosure policies and procedures that is often overlooked by issuers and their lawyers: protection of the council, board, treasurer, comptroller or other governing body or official of an issuer of municipal bonds *having ultimate authority to approve the issuance of securities and related disclosure documents*[3] as well as any board chair, mayor, supervisor or other issuer official signing the official statement, bond purchase agreement, and closing documents. This history of the SEC's interest in disclosure policies and procedures suggests three key elements of effective disclosure policies and procedures: *first*, they should include those public officials having ultimate authority to approve the issuance of securities and related disclosure documents, a focal point of SEC attention since the Orange County, California 21(a) Report; *second*, they should incorporate a series of sub-certifications or similar procedural steps that run from the issuer staff possessing primary knowledge of the matters disclosed to the officials signing the official statement, bond purchase agreement, and closing documents, demonstrating the exercise of reasonable care for their actions and refuting any claim of negligence under the antifraud provisions of Securities Act section 17(a); and *third*, they should not be off-the-shelf forms, but "a process that is consistent with [the issuer's] business and internal management and supervisory practices."[4]

Should an issuer of municipal bonds become the subject of an SEC investigation of its disclosure, the officials described above should not be surprised to be subpoenaed and required to testify under oath regarding their actions. Typically they will be asked whether the issuer has disclosure policies and procedures, whether they were familiar with them, whether they received disclosure training, and further questions as to how the policies were applied to the circumstances particular to the investigation. If there is a negative response to the initial

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[1] 17 CFR 240.15c2-12(b)(5)(i)(C)(15) and (16). For a detailed discussion of the recent amendments to Rule 15c2-12, see previous installment of this column in *The Bond Lawyer,* Vol. 42, No. 3, (Summer 2018).

[2] 83 FR 44700 (Aug. 31, 2018).

[3] *Report of Investigation in the Matter of County of Orange, California as it Relates to the Conduct of the Members of the Board of Supervisors.,* Exchange Act Release No. 36761 (January 24, 1996) (the "Orange County 21(a) Report"), available at: https://www.sec.gov/info/municipal/mbonds/publicof.htm#PO1

[4] Certification of Disclosure in Companies' Quarterly and Annual Reports, Securities Act Rel. No. 33-8124, Exchange Act Rel. No. 34- 46427 (Aug. 29, 2002). Available at: *https://www.sec.gov/rules/final/33-8124.htm*

questions regarding policies and training, the questioning will likely explore how issuer officials could form a reasonable belief in the accuracy of the disclosure before its release. I cannot recall ever meeting an issuer official who enjoyed the experience of an SEC investigation, regardless of its outcome. Properly explained, the task of preparing disclosure policies and procedures and undergoing disclosure training should be a source of relief and assurance to the officials having ultimate authority to approve the issuance of securities and related documents.

Advocacy and Opportunistic Enforcement

There is no federal securities law or regulation that requires issuers of municipal bonds to have disclosure policies and procedures. Lacking authority to impose disclosure policies and procedures, the SEC instead has used cease and desist orders settling disclosure-based administrative proceedings to find that the absence of policies and procedures contributed to or caused the fraudulent disclosure involved and to require the settling municipal issuers, such as under the recent MCDC Initiative,[5] to undertake to "establish appropriate policies and procedures and training regarding continuing disclosure obligations within 180 days of the institution of the proceedings."[6] In several settled proceedings, the issuer adopted policies and procedures prior to settlement, and received credit for doing so. In one such proceeding, the order notes:

With the assistance of disclosure counsel, the State has reviewed, evaluated, and enhanced its disclosure process by instituting formal, written policies and procedures. In its written policies and procedures, among other things, the State established a committee comprised of senior Treasury officials, representatives from the Attorney General's Office, and disclosure counsel to oversee the entire disclosure process and to review and make recommendations regarding the State's disclosures and disclosure practices. In addition, the State has implemented an annual mandatory training program conducted by disclosure counsel for the State's employees involved in the disclosure process to ensure compliance with the State's disclosure obligations under the federal securities laws.[7]

NABL's excellent publication, *Crafting Disclosure Policies,*[8] provides a link[9] to several issuers' disclosure policies, including those of New Jersey and Illinois, adopted in connection with a settled enforcement proceeding. The NABL publication provides thoughtful commentary and is, in general, a useful and thorough tool for preparing disclosure policies. It identifies perhaps the only public description with any detail of what the SEC may have in mind for municipal issuer disclosure policies--the speech *Lessons Learned from San Diego* by Linda Chatman Thomsen, then Director of the SEC's Division of Enforcement:[10]

From my perspective in the Enforcement Division, the lessons to be learned from these San Diego cases regarding securities offerings can be summarized as follows: (1) ***adopt written disclosure policies and procedures***; (2) provide appropriate training to city officials and employees; (3) focus on the big picture issues facing the city; (4) disclose the bad with the good; and (5) (perhaps of most immediate importance to this group), hire auditors with the skills and resources necessary to adequately audit the municipality's financials in connection with its securities offerings. [*emphasis added*].

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[5] https://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml
[6] Id.
[7] *In the Matter of State of New Jersey*, Securities Act Release No. 9135 (Aug. 18, 2010), *available at:* https://www.sec.gov/litigation/admin/2010/33-9135.pdf.
[8] National Association of Bond Lawyers (Aug. 20, 2015), *available at:* https://www.nabl.org/DesktopModules/Bring2mind/DMX/Download.aspx?PortalId=0&TabId=176&EntryId=1008.
[9] https://www.nabl.org/About-NABL/Committees-Projects/Securities-Law-and-Disclosure-Committee/Sample-Disclosure-Policies.
[10] https://www.sec.gov/news/speech/2007/spch121107lct.htm.

Later in her speech, Director Thomsen sets out these five lessons in detail, beginning more directly with "I can tell you that the Enforcement Division believes there are five critical lessons that municipalities should learn from our recent actions …" Below are two of the five; see her speech for the other three:

1. Cities should consider whether their internal controls and systems produce financial reports and disclosure documents that are accurate and complete. By internal controls and systems, I mean, among other things, written policies and procedures that, at a minimum:

- clearly identify who is responsible for what;
- clearly state the process by which the disclosure is drafted and reviewed; and
- provide checks and balances so there is adequate supervision and reasonable disbursement of responsibilities so that too much power and information is not placed with just one person.

2. Cities should provide training to their officials and employees regarding the applicable disclosure requirements of the federal securities laws and GASB financial reporting provisions. The SEC has repeatedly said that the ultimate responsibility for preparing disclosure documents cannot be assigned to the independent auditor, disclosure counsel, or other professionals. The ultimate responsibility rests with the issuer and its officials. Since the buck stops with municipalities and their officials, it [is] essential to provide training. By training, I mean:

- practical training on the disclosure and financial reporting requirements of the federal securities laws and GASB;
- specific training on the particular person's role and responsibilities in the disclosure and financial reporting process; and
- training for everyone involved in the disclosure process-from the city council members to the staff members who are involved in the initial drafting of the disclosure documents.[11]

Though she was speaking at an AICPA conference, the focus on accountants and auditors in her advice was not merely speaking to the crowd. The previous day the SEC announced its settled federal court action against the City of San Diego's former audit firm.[12] The Thomsen speech was not an articulation of new SEC policy, but rather it built upon a Town Hall speech approximately five months earlier by then Chairman Cox.[13]

Chairman Cox delivered his speech, *Integrity in the Municipal Market*, in Los Angeles, with Orange County and San Diego a short distance south on the California coast. He pointed directly to the disclosure enforcement proceedings against both Orange County and San Diego, noting that "it's not enough to punish fraud; we've got to work to prevent it," and "while the SEC has anti-fraud authority - allowing us to come in and clean up messes like these after the fact - neither we nor any other federal regulator has the authority in the municipal market that we have in the corporate securities market to insist on full disclosure of all material information to investors at the time the securities are being sold." What he had in mind came a few paragraphs later:

In the post-Enron world, we've all concluded that one of the best ways to prevent securities fraud is setting the right tone at the top. We have made CEOs and other top officials sign their names to the financial disclosures they make to investors, and we've let them know they face criminal penalties if they don't responsibly execute

[11] Id.

[12] *SEC v. Thomas J. Saiz, and Calderon, Jaham & Osborn, An Accountancy Corporation*, Civil Action No. 07 CV 2308 L (JMA) (S.D. Cal.) (filed December 10, 2007), available at: https://www.sec.gov/litigation/litreleases/2007/lr20394.htm.

[13] Chairman Christopher Cox, *Integrity in the Municipal Market*, (July 18, 2007), *available at:* https://www.sec.gov/news/speech/2007/spch071807cc.htm.

that obligation. But nothing like this environment exists in the world of municipal finance. There is simply inadequate participation by public officials in the preparation of offering disclosures.

He pointed out that eleven years earlier, in the Orange County 21(a) Report,[14] the Commission explicitly stated what was expected of the "public officials of the issuer who have ultimate authority to approve the issuance of securities and related disclosure documents," quoting the report:

"The Supervisors . . . had a duty to take steps appropriate under the circumstances to assure accurate disclosure was made to investors regarding . . . material information. The Supervisors, however, failed to take appropriate steps. For example . . . they never questioned [the County's] officials, employees or other agents regarding the disclosure of this information; nor did they become familiar with the disclosure regarding the County's financial condition.

"Had they taken such or similar steps, it should have been apparent to each Supervisor, in light of his or her knowledge, that the disclosure regarding the County's financial condition may have been materially false or misleading."[15]

Yet, the Chairman continued, "our experience in recent enforcement actions suggests that not much has changed. Too many municipal issuers - and in particular the members of their governing bodies - remain inadequately involved in disclosure." He then provided examples of findings in SEC enforcement actions in which issuer officials were not familiar with disclosure requirements and didn't participate in preparation of or read disclosure documents, including one instance in which an official testified that she signed a non-arbitrage certificate "pretty much having no idea what the document meant."[16] He concluded:

When the responsible officials of a municipal issuer don't know what's in their disclosure documents, it's often a symptom of an even broader problem: the lack of disclosure controls, policies, and procedures for municipal issuers. And the fact is, even large issuers of municipal securities generally don't have policies and procedures to ensure accurate disclosure.[17]

Having identified what he considered a need for substantial improvements in municipal disclosure procedures, Chairman Cox then explored possible solutions. He considered possible SEC regulations to mandate the use of sound policies and procedures, but admitted "the problem is, the SEC simply does not have the authority to do that." So, he concluded, "the best way to address the problems and needs of municipal securities investors in a coherent manner is through legislation designed with the modern realities of today's $6 trillion annual trading market in mind." Among other things, in that legislation "it should be established that at least for large, complex, and frequent issuers of municipal securities, ***the issuer should have policies and procedures for disclosure that are appropriate to its circumstances***."[18] [emphasis added]

Several days later, the Chairman delivered an SEC staff whitepaper, "Disclosure and Accounting Practices in the Municipal Securities Market,"[19] to Congress. In a paragraph captioned "Disclosure Policies and Procedures," the whitepaper stated:

The staff is concerned that, regardless of size, issuers of municipal securities may lack policies or procedures adequate to ensure accurate and full disclosure in their offering documents and are not legally required to certify the accuracy of their disclosures. Furthermore, the Commission lacks the authority directly to require

[14] *Supra,* n. 3.
[15] Id., quotations in original.
[16] Id.
[17] Id.
[18] Id.
[19] *Available at:* https://www.sec.gov/news/press/2007/2007-148wp.pdf.

issuers to establish disclosure policies and procedures or to provide certifications. Unlike in the corporate context, in which there are requirements for disclosure controls, evidence obtained in many enforcement actions suggests that issuer officials who vote to approve the use of disclosure documents often assume the accuracy of disclosure documents and approve them with little or no review. Furthermore, the staff has observed that issuer representatives often have limited involvement in the preparation of disclosure documents.

In a footnote to this statement, the staff observed that:

Often, bond purchase contracts require issuers to provide a certification to the underwriter regarding the accuracy of portions of official statements. However, these certifications often are directed to the underwriter alone and, because they are only required by contract, not law, the level of importance ascribed to them by issuer officials may be less than if they were required by federal law or regulation.

In the Whitepaper's conclusion, the staff called for legislation that, among other things, would include:

- Ensuring that issuers of municipal securities establish policies and procedures for disclosure appropriate for the particular issuer [and]

- Clarifying the legal responsibilities of issuer officials for the disclosure documents that they authorize, the responsibilities of underwriters with respect to the offering statements they use in underwriting municipal offerings, and the securities law responsibilities of bond counsel and other participants in offerings.

Recent History

The SEC's settlements with San Diego and its audit firm were reached after the massive corporate accounting and disclosure scandals. When Chairman Cox, Director Thomsen and the SEC staff called for "policies and procedures for disclosure" in the municipal securities market and "clarifying the legal responsibilities of issuer officials for the disclosure documents that they authorize," they had in mind – and knew Congress would understand – one of the key steps to restoring investor faith in corporate financial disclosure--enacted by Congress five years earlier, i.e., certification of disclosure in companies' quarterly and annual reports, as called for by President George W. Bush. Here's a bit more history.

On October 17, 2001, Enron announced a third quarter loss of $618 million because of more than $1 billion of one time charges.[20] Two weeks later, Enron announced that the SEC opened a formal investigation into transactions among the corporation and partnerships headed by its former chief financial officer.[21] By early June 2002, Global Crossing, Tyco, ImClone, Xerox and Adelphia had joined Enron in the ranks of large public companies embroiled in financial reporting scandals.[22] A federal jury convicted Arthur Andersen of obstruction of justice for impeding an investigation into Enron on June 15, 2002, and the firm announced it would cease auditing public companies by the end of August.[23] In Congress, Representative Mike Oxley of Ohio introduced H.R. 3763, the Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002, on Valentine's Day, February 14, 2002. The bill passed the House on April 24, 2002. In between, in a speech on March 7, 2002, President Bush alluded to the Enron bankruptcy and called upon the SEC to take action. "Reform should begin with accountability, and reform should start at the top" he said. "Currently, a CEO signs a nominal

[20] Kenneth N. Gilpin, The New York Times *Enron Reports $1 Billion In Charges And a Loss* (Oct. 17, 2001), available at: https://www.nytimes.com/2001/10/17/business/enron-reports-1-billion-in-charges-and-a-loss.html.
[21] Alex Berenson, The New York Times *S.E.C. Opens Investigation into Enron* (Nov. 1, 2001), available at: https://www.nytimes.com/2001/11/01/business/sec-opens-investigation-into-enron.html
[22] For a sense of magnitude and scope, see *List of reported accounting scandals* at https://en.wikipedia.org/wiki/Accounting_scandals.
[23] Kurt Eichenwald, The New York Times *ANDERSEN GUILTY IN EFFORT TO BLOCK INQUIRY ON ENRON* (June 16, 2002), available at: https://www.nytimes.com/2002/06/16/business/andersen-guilty-in-effort-to-block-inquiry-on-enron.html.

certification of annual financial statements, and does so merely in its capacity on behalf of the company. In the future, the CEO's signature should also be his personal certification, vouching for the voracity and fairness of the financial disclosures. When he signs a statement, he's giving his word, and should stand behind it."[24]

The SEC staff was not idle. On June 14, 2002, the SEC proposed a rule:

to require a company's principal executive officer and principal financial officer to certify that, to their knowledge, the information in the company's quarterly and annual reports is true in all important respects and that the reports contain all information about the company of which they are aware that they believe is important to a reasonable investor. In addition, we propose to require a company to maintain procedures to provide reasonable assurance that the company is able to collect, process and disclose the information required in the company's quarterly and annual reports, as well as current reports on Form 8-K, and also to require periodic review and evaluation of these procedures. We believe that it is important both to the quality of disclosure and investor confidence for a company's principal executive officer and principal financial officer to provide the proposed certification and for companies to maintain procedures that enable the company to satisfy its disclosure obligations under the federal securities laws and that are subject to periodic evaluation by senior management.[25]

On June 26, 2002, The New York Times reported that "WorldCom, the nation's second-largest long-distance carrier, said last night that it had overstated its cash flow by more than $3.8 billion during the last five quarters in what appears to be one of the largest cases of false corporate bookkeeping yet."[26] Then SEC Chairman Harvey Pitt did not take this lightly. Speaking that evening at the Economic Club of New York, he told his audience that WorldCom:

puts a sharper point on all the concerns we have been expressing — that our system has had serious dysfunctional aspects for quite some time. It leads me to offer you a simple message this evening, from the movie "Network," a message in which I encourage you all to join: "I'm mad as hell, and I'm not going to take it anymore." What happened at WorldCom — and we do not yet know all that happened at WorldCom — is an outrage. What we also know we're looking at isn't a mistake, it's a fraud.[27]

He told the audience that "we've ordered the company to file under oath, before the opening of the market this coming Monday morning, a detailed report of all the specifics, including the relevant circumstances that led to the restatements" and "also have filed a fraud suit against WorldCom in federal district court here in New York seeking the appointment of a corporate monitor to ensure WorldCom does not destroy any documents or information related to the SEC's pending investigation, and to assure no asset dissipation occurs to any affiliates, or current or former officers, directors or employees from the Company while it is in the process of restating its financial statements."[28] He also announced several other "immediate steps to restore faith in our markets," the first of which was a "plan to require our 1000 largest companies to file a formal certification with us on the accuracy and completeness of their last annual reports . . . by the time most companies file their next quarterly report — August 15."[29]

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[24] Remarks by the President at Malcom Baldridge National Quality Award Ceremony (March 7, 2002), available at: *https://www.nist.gov/speech-testimony/remarks-president-malcolm-baldrige-national-quality-award-ceremony*.
[25] Release No. 34-46079 Certification of Disclosure in Companies' Quarterly and Annual Reports (June 14, 2002), available at: *https://www.sec.gov/rules/proposed/34-46079.htm*.
[26] Simon Romero and Alex Berenson, The New York Times *WorldCom Says It Hid Expenses, Inflating Cash Flow $3.8 Billion* (June 26, 2002), available at: *https://www.nytimes.com/2002/06/26/business/worldcom-says-it-hid-expenses-inflating-cash-flow-3.8-billion.html*.
[27] Chairman Harvey Pitt *Remarks Before the Economic Club of New York* (June 26,2002) available at: *https://www.sec.gov/news/speech/spch573.htm*.
[28] Id.
[29] Id.

The following day, using its investigative and enforcement authority under Securities Exchange Act §21(a)(1), the Commission ordered the principal executive officer and principal financial officer of each of the companies in an attached list to either:

(a) file a statement in writing, under oath, in the form attached as an exhibit, stating and attesting that to the best of his/her knowledge based upon a review of the covered reports of the company (the last annual report and subsequent quarterly and 8-K reports), and except as corrected or supplemented in a subsequent report, that

(i) no covered report contained an untrue statement of a material fact as of the end of the period covered by such report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed); and

(ii) no covered report omitted to state a material fact necessary to make the statements in the covered report, in light of the circumstances under which they were made, not misleading as of the end of the period covered by such report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed), or

(b) file a statement in writing, under oath, describing the facts and circumstances that would make such a statement incorrect.

In either case, the statement must further declare in writing, under oath, whether or not the contents of the statement have been reviewed with the Company's audit committee, or in the absence of an audit committee, the independent members of the Company's board of directors.[30]

The Commission order followed through on the request of President Bush. The CEOs and CFOs of the approximately 1000 companies now had to take personal responsibility for the accuracy of their company's reports already on file with the SEC. The order's reference to "except as corrected or supplemented in a subsequent report" and the inclusion of reports filed on or before the required certification within "covered report," permitted corporations to file a correction or supplement to any filed report in order to correct errors identified upon review, but the time available for personal review and discussion with the audit committee or independent board members before the due date of August 14 (about a month and a half) was short. In some instances, the CEO or CFO had assumed office after some or all of the covered reports. "To the best of my knowledge" was not much for a CEO one week into the job. Sub-certifications, that is certifications by employees with primary knowledge of the facts and accuracy of reported numbers, provided a source of support for the executive's "best knowledge," but the required certification was immutable, and no reference could be made to the sub-certifications in the statement to the SEC.

Two weeks later, the Senate passed the Public Company Accounting Reform and Investor Protection Act of 2002. That bill, together with a bill to enact the Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002, went to a joint conference committee. What emerged was the Sarbanes-Oxley Act of 2002,[31] which was signed into law by President Bush on July 30, 2002.

Section 302 of the Sarbanes-Oxley Act specifically directed, with substantial detail, the SEC to adopt a rule requiring certifications of periodic reports by the principal executive officer and principal financial officer.[32] The SEC modified its proposed rule, Certification of Disclosure in Companies' Quarterly and Annual Reports,[33] on

[30] File No. 4-460: Order Requiring the Filing of Sworn Statements Pursuant to Section 21(a)(1) of the Securities Exchange Act of 1934 (June 27, 2002), available at *https://www.sec.gov/rules/other/4-460.htm*.
[31] Public Law 107-102.
[32] Id.
[33] *Supra*, n. 25.

August 2, 2002, to conform the proposal to Section 302.[34] Section 906 of the Sarbanes-Oxley Act added new Section 1350 to title 18, chapter 63 of the United States Code. Section 1350 requires a written statement to accompany all periodic reports filed with the Commission that contain financial statements. Knowing certification of a report "that does not comport with all the requirements set forth in" Section 906 became a crime punishable by fine "not more than $1,000,000 or imprisonment not more than 10 years, or both."[35] The SEC August 2, 2002 release did not relate to Section 906 of the Act. The Act added 18 U.S.C. 1350 and required no rulemaking. By its terms, it was effective on enactment of the Act, July 30, 2002.

The SEC adopted the final rule, Certification of Disclosure in Companies' Quarterly and Annual Reports, on August 29, 2002.[36] In the rule, the SEC required that filers establish and maintain policies and procedures to back up the disclosure certifications provided by issuer officials. As the SEC explained:

We believe that, to assist principal executive and financial officers in the discharge of their responsibilities in making the required certifications, as well as to discharge their responsibilities in providing accurate and complete information to security holders, it is necessary for companies to ensure that their internal communications and other procedures operate so that important information flows to the appropriate collection and disclosure points in a timely manner.[37]

The SEC explained that, rather than dictate a specific format,

We expect each issuer to develop a process that is consistent with its business and internal management and supervisory practices. We do recommend, however, that, if it has not already done so, an issuer create a committee with responsibility for considering the materiality of information and determining disclosure obligations on a timely basis. As is implicit in Section 302(a)(4) of the Act, such a committee would report to senior management, including the principal executive and financial officers, who bear express responsibility for designing, establishing, maintaining, reviewing and evaluating the issuer's disclosure controls and procedures.[38]

Because the issuer's principal executive and financial officers are required to certify that, based on her knowledge,

- the disclosure does not contain any untrue statement of a material fact or omit to state a material fact necessary in order 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, and

- 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,

the officers are required to certify, in support of the adequacy of their knowledge, that they:

- are responsible for establishing and maintaining the disclosure controls and procedures,

- have designed such disclosure controls and procedures to ensure that material information is made known to them, particularly during the period in which the periodic report is being prepared,

[34] Release No. 34-46300, Supplemental Action on Proposed Rule (Aug. 2, 2002)
[35] *Supra*, n. 31.
[36] *Supra,* n. 4.
[37] Id.
[38] Id.

- have 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; and

- have presented in the report their conclusions about the effectiveness of the disclosure controls and procedures based on the required evaluation as of that date.[39]

The final rule adopted new Exchange Act Rules 13a-15 and 15d-15. They require each issuer filing reports under Section 13(a) or Section 15(d) of the Securities Exchange Act to maintain disclosure controls and procedures. Rule 13a-15(e) defines disclosure controls and procedures:

(e) For purposes of this section, the term *disclosure controls and procedures* means controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the Act (15 U.S.C. 78a *et seq.*) is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the Act is accumulated and communicated to the issuer's management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.[40]

The use of sub-certifications described above, initially sought to support chief executive and financial officers in complying with the Commission's extraordinary July 27, 2002 Order Requiring the Filing of Sworn Statements, was subsequently adopted by many corporate filers to support the Sarbanes-Oxley Section 302 and 906 certifications, because they provided an effective means of sourcing back to primary knowledge.

Sarbanes-Oxley Section 302 and the final rule, Certification of Disclosure in Companies' Quarterly and Annual Reports, formed the basis for the disclosure policies and procedures adopted by the City of San Diego on October 11, 2004, the first such ordinance adopted by a U.S. municipality. Those policies have been amended on several occasions since, reflecting changes in the structure of city government and improvements in procedures identified subsequently.

When Chairman Cox and Director Thomsen advocated use of disclosure policies and procedures in 2007, they did so with a brief but rich history of disclosure controls and procedures in the background. Of course, the SEC regulations requiring public companies to have disclosure controls and procedures do not apply to municipal issuers. Nevertheless, there may be much to learn from them, including the SEC's expectations that, for a Section 302 disclosure committee, "each issuer . . . develop a process that is consistent with its business and internal management and supervisory practices." Municipal disclosure procedures and the corporate disclosure controls and procedures required by SEC regulation have the same goal: to provide fair and accurate information to investors. Municipal issuers and their officials should not overlook the benefit of protection afforded to them by disclosure policies and procedures: the ability to demonstrate the reasonable care necessary to fend off a negligence claim under the antifraud provisions of Section 17 of the Securities Act. They may secure the benefit by assuring, through well prepared disclosure policies and procedures, that the public officials having ultimate authority to approve the issuance of securities and related disclosure (including continuing disclosure) documents, as well as issuer officials signing official statements and representations as to disclosure, have a reasonable base of knowledge to support their statements, authorizations and certifications, evidencing due care in making them.

[39] Id.
[40] 17 CFR 240.13a-15(e).