

## SARBANES-OXLEY ACT OF 2002 AND ITS EFFECT ON REGISTERED INVESTMENT COMPANIES

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”). This summarizes certain aspects of the Sarbanes-Oxley Act that may directly impact registered investment companies.

### Section 906 CEO/CFO Certification of Periodic Reports

Section 906 of the Sarbanes-Oxley Act provides that each periodic report containing financial statements filed by an issuer with the Securities and Exchange Commission (the “SEC”) pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the “1934 Act”) must be accompanied by a written statement by both the chief executive officer and chief financial officer of the issuer. Their written statement must certify that the report “fully complies” with the requirements of Section 13(a) or 15(d) of the 1934 Act and that the information contained in the periodic report “fairly presents, in all material respects, the financial condition and results of the issuer.”

Section 906 became effective July 30, 2002 and imposes criminal penalties on chief executive officers and chief financial officers who file a certification “knowing” that it does not comply with its provisions.

This Section 906 certification requirement does not appear to apply to registered investment companies. Open-end investment companies, the shares of which are registered under the Securities Act of 1933, file annual reports pursuant to Section 15(d) of the 1934 Act. Closed-end investment companies that are listed on a national securities exchange file annual reports pursuant to Section 13(a) of the 1934 Act. Rule 30a-1 under the Investment Company Act of 1940, as amended (the “1940 Act”), provides that investment companies that are required to file annual reports pursuant to either Section 13(a) or 15(d) under the 1934 Act are deemed to have satisfied those requirements by filing annual and semi-annual reports on Form N-SAR. Investment companies are not required to include their financial statements as part of the Form N-SAR filing. Given that Section 906 of the Sarbanes-Oxley Act requires certifications only for *periodic reports containing financial statements*, it does not seem to apply to investment companies filing on Form N-SAR.

Please note that pursuant to Section 30(e) of the 1940 Act, investment companies are required to file annual and semi-annual reports to shareholders that contain financial statements. These reports are made pursuant to Section 30(e) of the 1940 Act. Since Section 906 of the Sarbanes-Oxley Act applies only to periodic reports made pursuant to Section 13(a) or 15(d) of the 1934 Act, the certification requirements do not appear to apply to an investment company’s annual and semi-annual reports to shareholders.

### **Section 302 Certification Requirements and Solicitation Period for SEC Comments**

Section 302 of the Sarbanes-Oxley Act requires the SEC to adopt rules implementing a separate certification requirement for chief executive officers and chief financial officers. Section 302 of the Sarbanes-Oxley Act requires these officers to personally certify, to the best of their knowledge, that their company's periodic reports do not contain an untrue statement of a material fact or omit a material fact necessary to make the statements in the report not misleading. These officers must also certify, based on their knowledge, that the financial information in their periodic reports presents in all material respects the financial condition and results of operations of the company. It further requires these officers to make certain certifications as to their company's internal controls. The Sarbanes-Oxley Act mandates that the SEC establish implementing rules by August 29, 2002.

In response, the SEC issued its proposed rules for the "Certification of Disclosure in Companies' Quarterly and Annual Reports" on August 2, 2002.<sup>1</sup> The SEC has announced that it will solicit comments on such proposed rules through August 19, 2002. The SEC asked commenters to address the way in which the certification requirement should apply to registered investment companies. In particular, the SEC asked for comments on which periodic report should include the certification, which individuals should provide the certification and how the SEC's proposed rules should apply to different types of investment companies. Although technical arguments can be made as to why Section 302 may not apply to investment companies, the SEC has indicated that the Section 302 certification requirements would apply to investment companies.

If it is determined that the Section 302 certification requirements do apply to investment companies, for your convenience we have included a Willkie Farr & Gallagher memo to clients, dated July 15, 2002, that discusses generally the actions a company should consider taking to support any required certifications.

Given the current state of flux in the law, registrants that are scheduled to file a Form N-SAR at the end of August may want to consider targeting a filing date prior to August 29, if practicable, so that the first filing that will be subject to the new rules will be due after the registrant has had an adequate opportunity to give due consideration to any required changes in the Form N-SAR.

### **Revised Section 16 Filing Requirements - Closed-End Investment Companies**

As you know, Section 30(h) of the 1940 Act subjects directors, officers and principal stockholders ("Corporate Insiders"), as well as advisory board members, investment advisers and affiliated persons of the investment adviser, of closed-end investment companies to disclosure required by Section 16(a) of the 1934 Act with respect to transactions in the issuer's securities. Section 403(a) of the Sarbanes-Oxley Act amends Section 16(a) of the 1934 Act.

Under the Sarbanes-Oxley Act, Corporate Insiders must now file with the SEC statements ("Section 16(a) Reports") indicating their ownership if there has been a change in ownership, or

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<sup>1</sup> See SEC Release No. 34-46300 (August 2, 2002).

if such person has purchased or sold a derivative involving such equity security, “before the end of the second business day following the day on which the subject transaction has been executed.” The SEC, in a release issued on August 6, 2002, has confirmed that these amendments apply to investment companies. These Section 16(a) Reports must indicate the filing person’s ownership at the date of filing, any such changes in ownership, and any such purchases and sales of the security-based swap agreements as have occurred since the most recent such filing. These requirements will go into effect on August 29, 2002, 30 days after the enactment of the Sarbanes-Oxley Act.

The Sarbanes-Oxley Act allows the SEC to promulgate rules that extend the filing period for Section 16(a) Reports in cases in which the SEC determines that the two-business day filing period is “not feasible.” While the SEC has announced that it does not intend to consider rules providing exemptions from the two-business day filing requirement based on non-feasibility for transactions categorized by type of issuer, type of insider, or size of transaction, we believe that the SEC may consider granting some relief to investment companies.<sup>2</sup> The SEC is also considering a longer filing period for certain narrowly defined transactions.<sup>2</sup>

Section 403(a) of the Sarbanes-Oxley Act also provides that by July 30, 2003:

- all such Section 16(a) Reports must be filed electronically with the SEC;
- the SEC will provide each Section 16(a) Report on a publicly accessible Internet site not later than the end of the business day following the filing; and
- the issuer (if it maintains a corporate website) must provide that Section 16(a) Report on its website not later than the end of the business day following the filing.

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If you wish to obtain additional information regarding the Sarbanes-Oxley Act of 2002 and its effect on registered investment companies, please contact Burton M. Leibert (212-728-8238, bleibert@willkie.com), Daniel Schloendorn (212-728-8265, dschloendorn@willkie.com), or Rose F. DiMartino (212-728-8215, rdimartino@willkie.com).

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<sup>2</sup> See SEC Release No. 34-46313 (August 6, 2002).