SOX Subcertification Poses Personal Risks

Many treasury professionals are not as informed as they should be about how Sarbanes-Oxley (SOX) may expose them to increased liability.

SOX requires the CEOs and CFOs of public companies to certify that, to their knowledge, their companies' quarterly and annual filings with the Securities and Exchange Commission (SEC) contain no omissions of material fact and fairly represent their companies' financial position. To protect themselves, many companies are requiring treasurers and other financial professionals to "subcertify" information they provide to the company. Subcertifications may expose treasury professionals to increased risk, but that risk is controllable if subcertifiers understand it and make use of available resources.

More Asked to Subcertify
The number of non-CEOs/CFOs being asked to subcertify is rising. According to a July 2003 Association for Financial Professionals (AFP) survey, 33% of respondents were asked to subcertify. That figure jumped to 50% when the association resurveyed members in December 2004.

With this number expected to continue rising, treasury professionals must understand their potential personal liability.

Potentially Severe Consequences
SOX increased the fines and prison terms for committing criminal securities fraud. In a civil setting, individuals who knowingly or recklessly make a false or misleading statement or omission of material fact, including a false subcertification that is subsequently incorporated into a public company's financial statement, may face fines, loss of professional licenses and a life-time bar from serving as an officer or director of a public company.

"Saying that your boss instructed you to subcertify is a poor defense if the SEC investigates your company," warns Julia McDonough, an Associate at Bryan Cave LLP.

Despite these risks, few respondents to AFP's survey consulted a lawyer or colleague in advance of signing subcertifications. Some 63% of survey respondents from public companies believe their jobs would be jeopardized if they refused to sign an affidavit, says Kraig Conrad, Director of Corporate Finance for AFP. "Some
fear the perception that refusing to sign indicates they aren't able to perform their job and ensure financial controls," he says. "Others simply don't know where to look for help."

Manage Your Risks
Experts recommend that treasury managers take the following steps to minimize subcertification risks:

**Read certification documents carefully.** "Subcertify only those areas for which you are responsible or have direct knowledge or expertise," McDonough counsels. A treasury professional, for example, is not usually in a position to subcertify that a company's Form 10-K complies with the securities laws.

**Report misconduct in writing as soon as you become aware of it.** Reporting misconduct before you're asked to certify gives you credibility if you later refuse to sign. "Even if you're not subcertifying, alert people up the chain of command about financial fraud or misconduct, no matter how uncomfortable it is to confront management," McDonough urges. "Failure to communicate known wrongdoing could increase your vulnerability in an SEC investigation."

**Become familiar with your state's and your company's indemnification provisions.**

**Review your company's Director's and Officer's (D&O) insurance policy for existing protections.**

If you are uncomfortable about a subcertification that you are being asked to make, talk to industry colleagues or independent counsel, McDonough suggests. They can help you analyze the subcertification and strategize with you about the best way to discuss your concern with your employer.