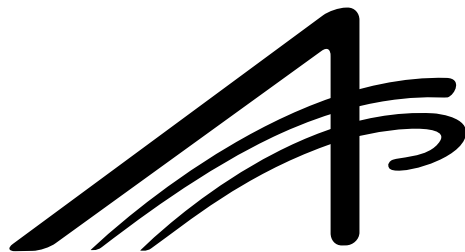


**The Buck Stops... With Me?**  
A White Paper on Subcertification Issues  
from the Association for Financial  
Professionals

July 28, 2003



***Association for  
Financial Professionals***

## **About AFP**

The Association for Financial Professionals in Bethesda, MD ([www.AFPonline.org](http://www.AFPonline.org)), supports more than 14,000 individual members from a wide range of industries throughout all stages of their careers in various aspects of treasury and financial management. AFP is the preferred resource for financial professionals for continuing education, financial tools and publications, career development, certifications, research, representation to legislators and regulators, and the development of industry standards.



7315 Wisconsin Avenue  
Suite 600 West  
Bethesda, MD 20814  
Phone: 301.907.2862  
Fax: 301.907.2864  
[www.AFPonline.org](http://www.AFPonline.org)

## Introduction

When Congress passed the groundbreaking Sarbanes-Oxley Act of 2002, the financial media heralded the new law as a lethal weapon in the war against fuzzy accounting and executive duty-shirking. Responsibility for the accuracy of a company's financial reports now falls squarely on the shoulders of its highest-ranking employees—its chief financial and chief executive officers.

Before any company files a quarterly or annual report with the Securities and Exchange Commission (SEC), these two leaders must personally certify that, to the best of their knowledge, all of the statements contained in those documents are accurate and complete. Further, both must vow that their company has instituted internal controls sufficient enough to support that belief.

The Act includes crystal-clear consequences for chiefs who fail to provide certifications, or worse, certify documents they know to be flawed: fines as high as \$5 million and up to 20 years in prison.

But the new law didn't anticipate how companies would respond to its mandate. In Sarbanes-Oxley (SOX), company CEOs and CFOs bear the responsibility for filing accurate reports alone. In reality, many companies are asking lower level employees to "subcertify" any reported information that originates in their department. One-third of the financial professionals the Association for Financial Professionals (AFP) surveyed in June said they'd been asked to sign an affidavit vouching for information that ultimately appeared in their company's financial reports. The majority of these professionals worried about the legal liability those affidavits could trigger, but just 12% said their employer advised them on how providing "subcertification" could affect them personally.

Chances are, the employer doesn't really know. While the Security Acts of 1933 and 1934 have inspired reams of case law, no legal precedents exist to demonstrate the scope and impact of Sarbanes-Oxley. In question-and-answer format, this paper will address the specific concerns employees might have. It will also offer some important points to ponder and steps employees can take before signing on the dotted line.

## **Will I be asked to provide subcertification?**

The odds increase significantly for professionals with certain job titles and responsibilities and those who work for publicly-traded companies. While 59% of financial professionals AFP surveyed provided information used in their companies' quarterly and financial reports, just 34% of that group were asked to sign an affidavit vouching for that information's accuracy. At publicly traded companies, 69% of the financial professionals surveyed provided information for financial reports, and 37% were later asked to certify those results. Subcertification occurs far less at privately held companies, where just 34% of financial professionals contributed information to periodic reports, and only one in five were asked to certify that information.

Although employers have requested subcertifications from financial professionals of nearly all stripes, our survey results indicate that most of the requests have centered on a few job titles. Assistant treasurers represent nearly a quarter of those asked to subcertify results, cash managers, 21%, and treasurers, 13%. Corporate practitioners holding either a director or manager title make up another 20%. Of course, companies will frequently ask their controllers and assistant controllers to sign certifications. For the most part, employees below the "middle management" level have not been asked to supply subcertifications. While some companies first responded to SOX by issuing rapid-fire subcertification requests throughout their financial staffs, most have fine-tuned the process and now ask only a few key employees.

## **What will I be asked to certify?**

The precise information your employer asks you to certify could be something as fundamental as whether you and/or your department comply with company policies and procedures. Or it could be as specific as an account balance or a department or a subsidiary's results. Fifty-eight percent of all respondents asked to sign an affidavit indicated that they were asked to verify the adequacy of internal controls in their department.

Frequently, companies rely on a standard form that states that, to the best of the signee's knowledge, the referenced reports contain no untrue statements and omit no facts that could bring the veracity of the reports' information into question.

## **Why am I being asked?**

The reasoning behind subcertification looks sound, especially in large companies, where it's not realistic to expect top officers to have intimate knowledge of the workings of each and every field office and subsidiary. Clearly, CEOs and CFOs must rely on direct reports and the "chain of command" throughout their organization. On a positive note, employees could thus consider a request to subcertify as proof of their importance of the work they do for the company.

Establishing a formal, multi-level certification process also suggests the company takes its internal control protocols seriously. But while such cross-checks might make a senior officer feel more secure about filing his own certification, extracting them from subordinates doesn't let him off the hook. For a CEO or CFO accused of committing, suborning or tolerating fraud, an underling's assertion of accuracy provides an extremely weak defense.

On the other hand, one has only to look at the millions of dollars in civil suits pending against disgraced energy trader Enron and its officers to imagine another reason for asking additional employees to vouch for a company's results. Sarbanes-Oxley only establishes punitive measures for top officers, but disgruntled shareholders can attempt to sue virtually anyone connected with a company. By identifying other people who could possibly be held responsible for faulty financial reporting, a company can deflect some of the rage that might otherwise be directed at the corporation as a whole and its most senior executives.

## **Should I sign?**

Probably. If you have reason to doubt the accuracy of any material your department reports, hopefully you'll have raised the issue long before anyone asks you to sign a subcertification. While raising a red flag could possibly trigger recriminations, there are federal, state and local laws on the books to protect "whistleblowers" from discrimination and job loss. In the best case scenario, your company's internal inquiry could even prove its numbers are on the up-an-up, alleviating your concerns.

For someone already comfortable with his or her company's financial reports, signing the document shows that you understand and accept the responsibility that comes with being a participant in a corporate enterprise. This responsibility carries even greater significance in companies that sell their stock on the open market. While no law requires you to sign such a document, your employer could easily make doing so a company policy and a condition of your employment. If that happens, refusing to sign could create justification for terminating you.

## **Should I talk to a lawyer before I sign?**

These are uncharted waters, and attorneys have little concrete information to provide. Perhaps that explains why just 23% of employees asked to provide subcertification talked to an attorney before they made their decision. Of those that did, almost all spoke only with their company's attorney—a mere 2% spoke with a personal attorney.

If you decide to start with corporate counsel, understand that while he or she must answer all questions you pose truthfully, his or her primary client is your company, not you. Since the certifications officially stem from the implementation of Sarbanes-Oxley, your company attorney will probably focus on the Act's limitations, ignoring the somewhat greater risk of your exposure to civil suits.

Outside attorneys may give you more guidance in terms of your civil suit risk, but the cost of consulting a civil defense attorney could be significant. If you suspect misconduct within your organization, speak with your supervisor first. If you aren't satisfied with his or her response, consider approaching his or her supervisor or your company's audit committee. If you're still uncomfortable, you can contact an outside attorney. But if your primary concern is protecting yourself in the unlikely event of trouble down the line, your best bet is to pay careful attention to the precise language of the document you're asked to sign.

## **What kind of language should I look out for?**

Beware of signing statements that use vague or broad language. If you're not privy to enterprise-wide information, make sure any certification you sign applies only to information regarding your own department. The certification should include the phrase "to the best of my knowledge." That way, even if actions unbeknownst to you led to the filing of a fraudulent report, it's harder for others to suggest that you had any malicious intent.

Make sure you understand exactly which filings the document covers, too. If it includes a report that predates your tenure or an obscure addendum you can't attest to, don't sign the affidavit—at least not in that form.

## Can I modify the agreement?

If your company uses the same boilerplate language for all employee certifications, management might resist making changes for an individual employee. Some employees have successfully tweaked their subcertifications before signing. While your employer probably won't allow you to insert language absolving you of any responsibility for false material, you may be able to line-edit the document before you sign it. By editing the agreement instead of refusing to sign it, you demonstrate your commitment to your company's goal of improved reporting. Edits help ensure that filings are as accurate as possible.

Let's say the material in question draws from meetings you never attended or groups with which you have little or no contact. Draw up your own certification document noting that to the best of your knowledge, "with the exception of the items noted below," the information contained in the reports is correct and complete. Then itemize the points you feel uncomfortable verifying. Most likely, your employer will realize you're simply not in the loop on those issues and will seek verification elsewhere. It's also possible that your reluctance to sign off on those points indicates a gap in responsibility. Your honesty will give your company the chance to establish a stronger chain of information before filing its official reports to the SEC.

For examples of both a boilerplate letter and a modified one, see Exhibits 1 and 2 at the end of this paper.

## Can I get insurance to cover me in the event of a lawsuit?

Not on your own—but you may not need to. Thirty percent of our survey respondents indicated their companies' directors and officers (D&O) insurance policies covered them. Corporations buy D&O policies to spare themselves and top employees and advisers the high costs of defending and settling lawsuits—without insurance, they'd have trouble attracting qualified people to fill those posts.

Forty-five percent of AFP members surveyed said they weren't covered, but 25% didn't know for sure. An early step is to find out—knowing you're covered saves a great deal of stress. By definition, D&O policies cover a limited pool of people, so your employer probably won't—or can't—add you. Unfortunately, umbrella personal liability policies generally don't cover work-related claims, and only business owners can buy business liability policies.

The good news: Your employer should hold an “employee liability” policy to cover errors made by its employees. Shareholders and creditors won’t waste their time filing suits against individuals—they’ll go after the company first and attach individual defendants’ names to that suit. As a result, the employees’ and the company’s interests are linked, and companies usually provide employees named as codefendants with legal representation. Your company’s leaders won’t want to alienate employees who could support its side. Ask your company attorney how its employee liability insurance works. An important note: This insurance covers legitimate mistakes, not fraud. If you’ve contributed intentionally misleading information, you risk significant penalties and damage awards.

Employee liability insurance should still cover you even if you’ve resigned or been fired. Most of these policies focus on the company make up when the alleged activity occurred. This insurance only covers you for alleged acts committed in the course of following legal company policy. Employees engaging in “rogue” behavior won’t get company support.

## **What happens to me if the SEC later challenges my CEO and CFO’s certifications?**

If the SEC decides to scrutinize your CEO and CFO’s certifications, you’ll almost certainly be called as a witness. If you’ve provided some of the information in question, you’ll be deposed whether you sign a subcertification or not. In that case, assuming you have no reservations about the company’s reporting procedures, you can rely on company counsel to provide you with the advice you need. Again, if you do have doubts about your company’s financial reporting, you should contact your company’s audit committee and seek outside legal advice immediately. Don’t wait until someone asks you to certify possibly erroneous information.

## Conclusion

In your concerns about your own liability in the wake of Sarbanes-Oxley, don't forget that the roles and responsibilities of financial professionals remain largely the same. NOT being asked to subcertify doesn't mean you're off the hook if you've been helping your company feed false information to the SEC. It's always been illegal (not to mention unethical) for anyone to fudge financial reports—SOX didn't change that. It simply requires a company's top two officers to assume greater responsibility for ferreting out fraud and fostering accuracy within their organizations. It's unlikely that eventual amendments to the law will expand its reach to other employees. The law's central purpose requires top officers to take ownership of their companies' results.

Still, subcertification may expose lower level employees to greater notoriety and a greater likelihood of being included in a civil lawsuit. But for employees and companies committed to improving financial reporting, subcertification allows lower-level employees to help demonstrate their companies' thorough internal controls and policies. In the long run, following those kinds of procedures can help companies avoid the hornet's nest of a civil suit in the first place.

Points to consider:

- Do you contribute any information ultimately used in your company's SEC filings?
- If approached, which specific information are you being asked to verify?
- Have all of your contributions conformed to company policy?
- Can you document all the information you've contributed?
- Are you familiar with all the items covered by the subcertification document?
- If not, can you exclude certain points?
- Are you covered by your company's D&O policy?
- Have you asked your company attorney what happens if the company (and you) are sued?
- What happens if you don't sign?
- Worst case scenario: Your company accuses you of malfeasance and refuses to support you—can you afford your own attorney?

## **Appendix**

The following exhibits provide an example of a boilerplate agreement and a modified letter. These are actual documents used at a corporation subject to Sarbanes-Oxley. Exhibit 2 is a genuine example of a modified agreement used when a financial executive chose not to sign the standard letter. The names have been changed to protect the identity of the individuals and the company involved.

## **Exhibit 1. A boilerplate subcertification affidavit**

I, John Smith, knowing that Messrs. Michael Doe and George Jones shall rely on this document in connection with their upcoming certifications to the U.S. Securities and Exchange Commission, state and attest that:

- 1) To the best of my knowledge, based upon a review of the attached balance sheet and income statement and top level entries posted on behalf of the division (or regional portion thereof) by the Controller's department (including the supplementary financial schedules used to prepare the financial notes) which collectively form the basis of the actual results of and for the year ended December 2001 and as of and for the year-to-date periods ended March 31, 2002 and June 30, 2002 (the foregoing items are collectively referred to as the "Submission") the submission is accurate in all material respects.
  
- 2) To the best of my knowledge, based upon a review of the attached letters of representation as of and for the year ended December 2001 and as of and for the year-to-date periods ended March 31, 2002 and June 30, 2002 (the foregoing items are collectively referred to as the "Representation Letters"), the Representation Letters are accurate in all material respects.

Signed by me this date of 15 July, 2002.

\_\_\_\_\_  
John Smith

## Exhibit 2. A modified subcertification affidavit likely signed by a very senior employee

I, John Smith, certify to Doe Manufacturing, Inc. that:

1) To the best of my knowledge, with the exception of the comments noted in separate paragraph below, based upon a review of the covered reports of Doe Manufacturing, Inc., and, except as corrected or supplemented in a subsequent covered report:

- No covered report contained an untrue statement of a material fact at the end of the period covered by such report
- 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

Exceptions to this statement include the following:

- All transactions that may pertain at any time to Doe Manufacturing Inc.'s overseas operations.
- The discussion and comments made by me at the meeting with the governance task force on January 10, 2002 on the need for continued monitoring of and adherence to strict accounting controls and the need for developing a sense of ownership by divisional managers over the data integrity, including estimates made by them in the submission of their financial reports.

2) In this statement under oath, each of the following, if filed on or before the date of this statement, is a "covered report":

- The Annual Report on Form 10-K for the year ended December 31, 2001 of Doe Manufacturing, Inc. filed with the Commission
- All reports on Form 10-Q, all reports on Form 8-K and all definitive proxy materials of Doe Manufacturing, Inc, filed with the Commission subsequent to the filing of the Form 10-K identified above; and
- Any amendments to the foregoing

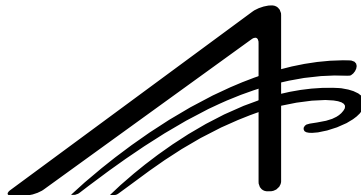
---

John Smith

Subscribed and sworn before me this 15th day of July, 2002.

---

Susan Kelly  
Notary Public



***Association for  
Financial Professionals***

7315 Wisconsin Avenue, Suite 600 West

Bethesda, MD 20814

Tel: 301.907.2862

Fax: 301.907.2864

[www.AFPonline.org](http://www.AFPonline.org)

COPYRIGHT © 2003 BY THE ASSOCIATION FOR FINANCIAL PROFESSIONALS (AFP).

ALL RIGHTS RESERVED.