

SEC Grants One Year Postponement of §404(b) Attestation Report Requirement For Non-Accelerated Filers

The SEC has adopted amendments to temporary rules that will now require non-accelerated filers¹ to include an auditor's attestation report on management's assessment of internal control over financial reporting ("ICFR") beginning in annual reports for fiscal years ending on or after December 15, 2009.² The attestation is required pursuant to rules implementing Section 404(b) of the Sarbanes-Oxley Act of 2002.³ Absent the extensions, non-accelerated filers would have had to include the attestation reports in annual reports for fiscal years ending on or after December 15, 2008.

The amendments were adopted, according to the SEC, to accomplish several goals:

1. To enable non-accelerated filers more time to gain efficiencies in management's evaluation of the effectiveness of internal control over financial reporting;
2. To provide the SEC with time to review the findings of a study on whether its new management guidance on evaluating ICFR and Accounting Standard 5 are having the intended effect of facilitating more cost-effective ICFR evaluations and audits for smaller reporting companies,⁴ and to consider whether further action to improve the effectiveness and efficiency of Section 404 implementation is warranted;
3. To provide the Public Company Accounting Oversight Board time to issue its guidance for ICFR audits of smaller companies in final form;⁵ and

¹ The term "non-accelerated filer" is not defined in the SEC's rules, but generally refers to a reporting company covered by the Securities Exchange Act of 1934 that does not meet the Rule 12b-2 definition of either an "accelerated filer" or a "large accelerated filer."

² *Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers*, Exchange Act Release No. 33-8934 at 1 (June 26, 2008), available at <http://www.sec.gov/rules/final/2008/33-8934.pdf>.

³ Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7262 (2002).

⁴ A "small reporting company" is defined as an issuer that is not an investment company, an asset-backed issuer (as defined in 17 CFR 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) Had a public float of less than \$75 million as of the last business day of its most recently completed second fiscal quarter, computed by multiplying the aggregate worldwide number of shares of its voting and nonvoting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; or (2) In the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than \$75 million as of a date within 30 days of the date of the filing of the registration statement, computed by multiplying the aggregate worldwide number of such shares held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement by the estimated public offering price of the shares; or (3) In the case of an issuer whose public float as calculated under (1) or (2) was zero, had annual revenues of less than \$50 million during the most recently completed fiscal year for which audited financial statements are available. *Internal Control over Financial Reporting*, Exchange Act Release No. 33-8934 at 17, note 51.

⁵ The PCAOB issued preliminary staff guidance in October 2007 on new accounting standards for auditing ICFR of smaller public companies. The SEC reports that the PCAOB is currently reviewing comments received during a public comment period and working on final guidance. *Internal Control over Financial Reporting*, Exchange Act Release No. 33-8934 at 5.

CAHILL

4. To provide the auditors of non-accelerated filers additional time to consider such guidance.⁶

The adopted amendments amend Item 308T of Regulations S-K and S-B, Rule 2-02T of Regulation S-X, and Forms 10-Q, 10-K, 20-F and 40-F to require non-accelerated filers to provide their auditor's attestation in their annual reports filed for fiscal years ending on or after December 15, 2009.⁷ The temporary rules will become effective sixty days after publication in the *Federal Register*, and in the case of: Form 10-QSB, will expire on October 31, 2008; Form 10-KSB, will expire on March 15, 2009; and Form 20-F, Form 40-F, Form 10-Q and Form 10-K, will expire on June 30, 2010.⁸

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

⁶ *Internal Control over Financial Reporting*, Exchange Act Release No. 33-8934 at 5, 15-16.

⁷ *Id.* at 8.

⁸ *Id.* at 1.