

November 2, 2009

Additional Extension of Compliance Date of Auditor Attestation Requirement for Non-Accelerated Filers

On October 2, 2009, the U.S. Securities and Exchange Commission (the "SEC") extended by six months the compliance date for non-accelerated filers¹ to provide in their annual reports on Form 10-K an auditor attestation report on internal control over financial reporting.² Previously, those attestation reports would have been required for fiscal years ending on or after December 15, 2009. Now, non-accelerated filers must file the independent auditor's attestation report in their annual reports for fiscal years ending on or after June 15, 2010.

Background

Section 404(b) of the Sarbanes-Oxley Act requires public companies to include in their annual reports on Form 10-K an independent auditor's attestation report on the company's internal control over financial reporting. The independent auditor conducts an audit of the company's internal controls in accordance with the auditing standards set by the Public Company Accounting Oversight Board.³ These audits have resulted in significant costs to reporting companies with earlier compliance deadlines.⁴ The SEC originally deferred applying Section 404(b) to non-accelerated filers while the SEC's Office of Economic Analysis studied whether additional guidance that the SEC provided in 2007 had successfully reduced public companies' Section 404(b) compliance costs.⁵ The study's results were published in September 2009; less than three months before Section 404(b) was scheduled to apply to non-accelerated filers. The SEC therefore extended the Section 404(b) deadline so that non-accelerated filers and their auditors could better prepare for the auditor attestation requirement.

Delayed Effectiveness

This six-month extension of the compliance date effectively gives non-accelerated filers with fiscal years ending before June 15, 2010 an additional year in which to prepare to comply with Section 404(b). For example, a non-accelerated filer with a fiscal year ending December 31 will have until its 2010 annual report on Form 10-K to satisfy the Section 404(b) requirement, rather than in its 2009 report. Until Section 404(b) applies to a non-accelerated filer, the company must state in management's report on internal control over financial reporting that the annual report does not include the independent auditor's attestation report.

¹ Non-accelerated filers are not defined in SEC rules, but generally include reporting companies that have an unaffiliated market capital under \$75 million.

² See <http://www.sec.gov/news/press/2009/2009-213.htm>.

³ See Auditing Standard No. 2 and Auditing Standard No. 5 available at <http://pcaobus.org/>.

⁴ The compliance dates for the auditor's attestation report varied, depending on whether the company is a large accelerated filer, an accelerated filer or a non-accelerated filer. Non-accelerated filers are the last to be required to comply with Section 404(b).

⁵ See SEC Release No. 33-8810, Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (June 20, 2007). <http://www.sec.gov/rules/interp/2007/33-8810.pdf>

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