
Dodd-Frank Act Exempts Non-Accelerated Filers from Auditor Attestation Requirement

by Jeffrey B. Grill

Under legislation sent to President Obama today, non-accelerated filers will be permanently exempt from the requirement to file auditor attestation reports on management's assessment of internal control over financial reporting.

Section 404(a) of the Sarbanes-Oxley Act of 2002 requires annual reports on Form 10-K filed under the Securities Exchange Act of 1934 (Exchange Act) to contain a report from management on the effectiveness of a company's internal control over financial reporting. Separately, Section 404(b) requires the company's regular auditor to attest to and report on management's assessment.

Non-Accelerated Filers Have Enjoyed Temporary Deferrals

The Securities and Exchange Commission (SEC), charged with implementing Section 404, provisionally allowed "non-accelerated filers" to postpone their compliance with these requirements. A non-accelerated filer is an Exchange Act reporting company that does not meet the definition of either an accelerated filer or a large accelerated filer. It includes, but is not limited to, "smaller reporting companies", as defined in Exchange Act Rule 12b-2.

Non-accelerated filers were permitted to defer compliance with Section 404(a)'s requirement to provide management's report on the effectiveness of internal control over financial reporting until their annual report filed for a fiscal year ending on or after December 15, 2007. Deferrals of the auditor attestation requirement under Section 404(b) have extended even longer. In October 2009, the SEC issued what it described as the last such deferral. Non-accelerated filers would be required to include an auditor's attestation report in their annual report filed for a fiscal year ending on or after June 15, 2010, absent an act of Congress.

Non-Accelerated Filers Will Be Permanently Exempt From Auditor Attestation

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) is just such an act. Among its 2,300 pages is a provision, Section 989G(a), adding Section 404(c) to the Sarbanes-Oxley Act. Effective immediately upon enactment, the new subsection provides that the auditor attestation requirement of Section 404(b) will permanently apply only to accelerated filers and large accelerated filers.

Although the Dodd-Frank Act does not provide non-accelerated filers with relief from Section 404(a), it should still significantly reduce their costs of being public companies. The SEC's 2009 survey of public companies with a history of compliance with the Sarbanes-Oxley Act revealed that issuers with a public float under \$75 million, which generally describes non-accelerated filers, experienced a median annual cost of almost \$440,000 in complying with Section 404(b).

The next chapter will most likely be written in 9 months when, also under the Dodd-Frank Act, the SEC has been directed to report on ways to reduce Section 404(b) compliance costs for companies with public floats between \$75 million and \$250 million.

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work or the author below.

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