

What You Need to Know about the SOX 404(b) Reporting Extension

On October 2, 2009 the Securities and Exchange Commission (SEC) announced an extension of the compliance date for Section 404(b) of the Sarbanes-Oxley Act for public companies who have “non-accelerated filer” status.

Background

On October 2, 2009 the SEC issued Press Release 2009-213, *Small Public Companies to Begin Providing Audited Assessment of Internal Controls Over Financial Reporting in Nine Months*. This release announced the extension of the compliance date for Section 404(b) of the Sarbanes-Oxley Act until years ending on or after June 15, 2010 for those public companies who have “non-accelerated filer” status.

The 404(b) portion of the Section 404 provision requires that the registrant file an independent auditor attestation of the effectiveness of internal controls over financial reporting (ICFR) with their 10-K submission.

In its release the SEC also clarified that all public companies, regardless of size, will be required to comply with Section 404(b), and, as such, there will be no further extensions of the compliance deadline.

The extension was granted so that the SEC’s Office of Economic Analysis could complete a study of whether additional guidance provided to company management and auditors in 2007 was effective in reducing the costs of compliance. Because the study was just published in September 2009, less than three months before the previous December 15, 2009 deadline, the Commission determined that additional time is appropriate and reasonable so that the smallest public companies and their auditors can better plan for the required auditor attestation.

This extension does not impact the Section 404(a) portion of the provision which has been in effect since years ending on or after December 15, 2007. Section 404(a) requires that all registrants furnish a report in Item 9A of their 10-K filing which contains:

- A statement of management’s responsibility for establishing and maintaining adequate ICFR
- A statement identifying the framework used by management to evaluate the effectiveness of ICFR
- Management’s assessment of the effectiveness of ICFR as of the end of the most recent fiscal year, including a statement as to whether or not ICFR is effective

Based on this compliance date extension, current SEC reporting requirements are summarized below.

ICFR Reporting Requirements

The following table excerpted from the SEC’s Division of Corporation Finance *Financial Reporting Manual, Section 1340 – Accelerated Filer Rule*, summarizes the requirements for compliance with Section 404 (Auditor’s Attestation dates reflect the October 2 press release previously described):

	Accelerated Filer Status	Management’s Report	Auditor’s Attestation
U.S. Issuer	Large accelerated filer or accelerated filer	Currently required in annual reports	Currently required in annual reports
	Non-accelerated filer	Currently required in annual reports ¹	Annual reports for years ending on or after June 15, 2010
Foreign private issuer	Large accelerated filer	Currently required in annual reports	Currently required in annual reports
	Accelerated filer	Currently required in annual reports	Currently required in annual reports
	Non-accelerated filer	Currently required in annual reports ¹	Annual reports for years ending on or after June 15, 2010
U.S. or foreign private issuer	Newly public company	Second annual report ²	Second annual report ²

¹ Management’s Report is only “furnished” in this annual report. The Management’s Report is “filed” beginning in the year coinciding with the phase-in of the Auditor’s Attestation.

² A Special Financial Report filed pursuant to Rule 15d-2 of the Exchange Act and a Transition Report on Form 10-K for a change in fiscal year are considered to be an “annual report” for purposes of this phase-in.

Also included in the same section is a recap of public float tests and filing due dates depending upon the category of the filer:

Filer Category	Float to Enter Status	Float to Reduce Status	10-K Due	10-Q Due
Non-accelerated	< \$75M	N/A	90 days after year-end	45 days after quarter-end
Accelerated	≥ \$75M but < \$700M	< \$50M becomes a non-accelerated filer	75 days after year-end	40 days after quarter-end
Large Accelerated	≥ \$700M	< \$500M but ≥ \$50M becomes accelerated < \$50 M becomes non-accelerated	60 days after year-end	40 days after quarter-end

The Float to Enter Status in the above table is calculated as of the end of the fiscal second quarter.

Public Debt Filers

Registrants who do not have registered public equity but have registered public debt are, by definition, non-accelerated filers as they do not meet the criteria of an accelerated or large accelerated filer. Therefore, public debt filers have been granted the compliance date extension.

Transition Rules

The most recent SEC extension for external auditor attestation of an issuer's internal control in accordance with section 404(b) applies to all non-accelerated filers. A non-accelerated filer is an issuer that doesn't meet the requirements of an accelerated or large accelerated issuer.

An issuer becomes an accelerated filer or large accelerated filer if it meets all of the following criteria at the end of its fiscal year:

- It has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months;
- It has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act;
- It is not eligible to apply the provisions for Smaller Reporting Companies for its annual and quarterly reports; and
- For an accelerated filer, the aggregate worldwide market value of its voting and non-voting common equity held by non-affiliates ("public float") was \$75 million or more, but less than \$700 million, as of the last business day of its most recently completed second fiscal quarter.
- For a large accelerated filer, the aggregate worldwide market value of its voting and non-voting common equity held by non-affiliates ("public float") was \$700 million or more, as of the last business day of its most recently completed second fiscal quarter.

Once an issuer becomes an accelerated or large accelerated filer it will maintain this status with the following exceptions:

- An accelerated filer whose public float falls below \$50 million as of the last business day of its most recently completed second fiscal quarter becomes a non-accelerated filer.
- A large accelerated filer whose public float falls below \$500 million, but not below \$50 million, as of the last business day of its most recently completed second fiscal quarter becomes an accelerated filer. Also, a large accelerated filer whose public float falls below \$50 million as of the last business day of its most recently completed second fiscal quarter becomes a non-accelerated filer.

Smaller Reporting Companies

As outlined in the SEC's *Smaller Reporting Company Regulatory Relief and Simplification; Final Rule*, effective February 4, 2008, certain public companies qualify for scaled reporting and disclosure requirements, as defined in Regulation S-K. This designation applies to reporting and disclosure requirements only, and does not impact the registrant's filing status related to Section 404. Smaller reporting companies are non-accelerated filers.

For more information on these and other important SEC reporting issues, please visit www.aclordi.com or call us at 877.672.2100.