

SEC Extends Date of Auditor Attestation for Non-Accelerated Filers



On June 26, 2008, the SEC announced it extended the date for non-accelerated¹ filers to include in Annual Reports on Form 10-K and Form 10-KSB the auditor attestation required under Section 404(b) of the Sarbanes-Oxley Act of 2002. Non-accelerated filers will now be required to include the attestation of auditors in Annual Reports on Forms 10-K and 10-KSB for fiscal years ending after December 15, 2009.

It is important to note that the management's report on internal control over financial reporting will still required to be filed for Annual Reports for fiscal years ending prior to December 15, 2009². Additionally, the SEC confirmed that this management report would not be deemed to be "filed" with the SEC until after the extension period, and therefore not subjecting the non-accelerated filer to liability under Section 18 of the Securities Exchange Act.

The full text of the SEC release can be found at <http://sec.gov/rules/final/2008/33-8934.pdf>. The new requirements can be found in Item 308T of Regulations SK and SB, as well as in Item 9A(T) of Form 10-K and Item 8A(T) of 10-KSB.

If you have any questions about this memorandum, please contact corporate partners Rob Freedman (rfreedman@fenwick.com), Jeff Vetter (jvetter@fenwick.com) or the primary contact on your Fenwick & West team.

(1) For purposes of the extension of the attestation requirement, a non-accelerated filer is defined as a company that is not a "large accelerated filer" or an "accelerated filer" under Rule 12b-2 of the General Rules and Regulations under the Securities Exchange Act of 1934. An "accelerated filer" is an issuer that: (1) had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$75 million or more, but less than \$700 million, as of the last business day of its most recently completed second fiscal quarter; (2) has been subject to the reporting requirements of the Securities Exchange Act for a period of at least twelve months; (3) has filed at least one annual report; and (4) is not eligible to use Form 10-KSB or Form 10-QSB. A "large accelerated filer" is an issuer that meets the requirements of an accelerated filer, but that had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of its most recently completed second fiscal quarter.

(2) This requirement applies to the second Annual Report filed by a non-accelerated filer.