

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 210, 229 and 249

[RELEASE NOS. 33-9072; 34-60813; File No. S7-06-03]

RIN 3235-AK48

**INTERNAL CONTROL OVER FINANCIAL REPORTING IN EXCHANGE ACT
PERIODIC REPORTS OF NON-ACCELERATED FILERS**

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: We are amending temporary rules that require companies that are non-accelerated filers to include in their annual reports, pursuant to rules implementing Section 404(b) of the Sarbanes-Oxley Act of 2002, an attestation report of their independent auditor on internal control over financial reporting for fiscal years ending on or after December 15, 2009. The amendments will extend the compliance date for filing attestation reports, so that a non-accelerated filer will be required to file the auditor's attestation report on internal control over financial reporting when it files an annual report for a fiscal year ending on or after June 15, 2010.

EFFECTIVE DATE: This rule is effective December 18, 2009.

The effectiveness of §§ 210.2-02T and 229.308T, which currently terminates on June 30, 2010, is extended through December 15, 2010.

FOR FURTHER INFORMATION CONTACT: Steven G. Hearne, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are amending the following forms and temporary rules to extend the compliance dates for companies that are non-accelerated filers to include an attestation report of their independent auditor on internal control over financial

reporting in their annual reports: Rule 2-02T of Regulation S-X,¹ Item 308T of Regulation S-K,² Item 4T of Form 10-Q,³ Item 9A(T) of Form 10-K,⁴ Item 15T of Form 20-F,⁵ and Instruction 3T of General Instruction B.(6) of Form 40-F.⁶

I. BACKGROUND

On June 5, 2003,⁷ the Securities and Exchange Commission adopted several amendments to its rules and forms implementing Section 404 of the Sarbanes-Oxley Act of 2002.⁸ Among other things, these amendments require companies, other than registered investment companies, to include in their annual reports filed with us a report of management, and an accompanying auditor's attestation report, on the effectiveness of the company's internal control over financial reporting ("ICFR"). Subsequent to the adoption of those rules, the Commission took a number of steps to improve the effectiveness and efficiency of Section 404 implementation.⁹ Among the steps taken, the Commission approved issuance by the PCAOB of Auditing Standard No. 5 ("AS No. 5"), which replaced Auditing Standard No. 2.¹⁰ In addition, we issued interpretive guidance

¹ 17 CFR 210.2-02T.

² 17 CFR 229.308T.

³ 17 CFR 249.308a.

⁴ 17 CFR 249.310.

⁵ 17 CFR 249.220f.

⁶ 17 CFR 249.240f.

⁷ See Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Release No. 33-8238 (June 5, 2003) [68 FR 36636].

⁸ 15 U.S.C. 7262.

⁹ For a more complete discussion of the Commission's actions in this area, see Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, Release No. 33-8934 (June 26, 2008) [73 FR 38094] (the "2008 Adopting Release").

¹⁰ See Order Approving Proposed Auditing Standard No. 5, An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements, a Related Independence Rule, and Conforming Amendments, Release No. 34-56152 (July 27, 2007) [72 FR 42141].

to assist management in complying with the ICFR evaluation and disclosure requirements.¹¹ The approval of PCAOB's AS No. 5 provided revised professional standards and related performance guidance for independent auditors to attest to, and report on, management's assessment of the effectiveness of ICFR. Our management guidance, in combination with AS No. 5, was intended to make ICFR audits and management evaluations of ICFR more cost-effective by being risk-based and scalable to a company's size and complexity.

In the Commission's most recent action, we postponed the Section 404(b) auditor attestation requirement for non-accelerated filers¹² for an additional year in order to allow time for the PCAOB to issue final staff guidance on auditing ICFR of smaller reporting companies and for the Commission staff to undertake a study to help determine whether AS No. 5 and our management guidance on evaluating ICFR are facilitating more cost-effective ICFR evaluations and audits for smaller public companies.¹³ The PCAOB published staff guidance for auditors of smaller public companies on January 23, 2009 describing how auditors can apply the principles described in AS No. 5 and providing examples of approaches to particular issues that might arise in the audits of smaller, less complex public companies.¹⁴

The Commission directed the staff to conduct a study in order to help the Commission assess whether the new management guidance and AS No. 5 are having the intended effect of

¹¹ See 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, Release No. 33-8810 (June 20, 2007) [72 FR 35324].

¹² Although the term "non-accelerated filer" is not defined in our rules, we use it throughout this release to refer to an Exchange Act reporting company that does not meet the Rule 12b-2 [17 CFR 140.12b-2] definition of either an "accelerated filer" or a "large accelerated filer."

¹³ See the 2008 Adopting Release in note 9 above.

¹⁴ See "Staff Views - An Audit of Internal Control that is Integrated with an Audit of the Financial Statements: Guidance for Auditors of Smaller Public Companies," (Jan. 23, 2009), [available at www.pcaobus.org](http://www.pcaobus.org). Topics discussed in the PCAOB's guidance include: entity-level controls, risk of management override, segregation of duties and alternative controls, information technology controls, financial reporting competencies, and testing controls with less formal documentation.

facilitating more cost-effective ICFR evaluations and audits for smaller reporting companies.¹⁵ The study included a web-based survey of companies that are subject to ICFR requirements, as well as in-depth interviews with financial statement users, auditors of issuers, and a subset of companies eligible to participate in the web-based study. The study, analyzing the data provided by the survey, was recently completed by the staff and made public by the Commission on October 2, 2009.

Without today's amendments, a non-accelerated filer would be required to file the auditor's attestation report on ICFR when it files its annual report for a fiscal year ending on or after December 15, 2009. In light of the proximity in time of the publication of the staff study and the end of the year, and concerns that a significant number of smaller public companies may not have prepared to comply with Section 404(b) pending completion of the staff study, we are amending our rules to defer requiring the auditor's attestation report until a non-accelerated filer's annual report for its fiscal year ending on or after June 15, 2010.

The Commission believes that an auditor's attestation to a company's disclosure of its assessment on the effectiveness of the company's internal control is an important safeguard. The obligation of non-accelerated filers to comply with Section 404(b) has been deferred a number of times to more than five years after the date on which compliance was required of accelerated filers.¹⁶ The Commission notes that all steps necessary to implement the requirements of Section 404 of the Sarbanes-Oxley Act have been completed, and non-accelerated filers should work with their auditors to comply with Section 404(b) for annual reports for fiscal years ending on or

¹⁵ See "Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements," available at www.sec.gov.

¹⁶ Accelerated filers were initially expected to comply with the auditor attestation requirement in annual reports filed on or after June 15, 2004.

after June 15, 2010. The Commission does not expect to further defer the obligation of non-accelerated filers to comply with Section 404(b).

We believe at this point that only an immediate deferral of the current filing requirement for non-accelerated filers can address the uncertainty raised by the recent completion of the study and announcement of the new compliance date for the auditor attestation report requirement. In addition, because of the timing of the publication of the study, immediate implementation of Section 404(b) would require non-accelerated filers and their auditors to plan for the auditor attestation under compressed timeframes, resulting in higher costs than would be required with more deliberative planning. Due to the significance and importance of Section 404(b) implementation by non-accelerated filers, especially for the first time, it is critical to provide non-accelerated filers with certainty regarding the filing requirements as soon as possible. On the basis of the timing constraints discussed above and the limited nature of the extension, the Commission, for good cause, finds that notice and solicitation of comment regarding the amendments to defer the filing requirement is impracticable, unnecessary or contrary to the public interest, and the extension is necessary or appropriate in the public interest and consistent with the protection of investors.¹⁷

¹⁷ See Section 553(b)(3)(B) of the Administrative Procedure Act [5 U.S.C. 553(b)(3)(B)] (stating that an agency may dispense with prior notice and comment when it finds, for good cause, that notice and comment are “impracticable, unnecessary, or contrary to the public interest”). In addition, the Commission notes that the U.S. public companies subject to all of the requirements of Section 404 represent an overwhelming majority of the market capitalization of the U.S. equity securities market.

II. EXTENSION OF AUDITOR ATTESTATION COMPLIANCE DATE FOR NON-ACCELERATED FILERS

We are amending Item 308T of Regulation S-K, 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 June 15, 2010. Prior to that time, a non-accelerated filer continues to be required to state in its management report on ICFR that the company's annual report does not include an auditor attestation report.¹⁸ In 2006, we adopted a temporary rule¹⁹ that provided that the management report included in a non-accelerated filer's annual report that did not contain the auditor's attestation report would be deemed "furnished" rather than "filed" and not be subject to liability under Section 18 of the Exchange Act.²⁰ In 2008 we extended the temporary rule.²¹ In light of our action to extend the date for compliance with Section 404(b) to fiscal years ending on or after June 15, 2010, we are likewise extending the temporary rule to treat the management report as "furnished" instead of "filed" for reports that do not include an auditor's attestation in reliance upon the extension of the compliance date.

The revised compliance dates for the Section 404 internal control requirements are presented in the table below:

¹⁸ See Item 308T(a)(4) of Regulation S-K, Item 15T(b)(4) of Form 20-F and Instruction 3T to the Instructions to paragraphs (b), (c), (d), and (e) of General Instruction B.(6) of Form 40-F.

¹⁹ See Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies, Release No. 33-8760 (Dec. 15, 2006) [71 FR 76580].

²⁰ Section 18 of the Exchange Act [15 U.S.C. 78r] imposes liability on any person who makes or causes to be made in any application or report or document filed under the Act, or any rule thereunder, any statement that "was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact." As a result of temporary Item 308T of Regulation S-K and the temporary amendments to Forms 20-F and 40-F, however, during the applicable periods, management's report would be subject to liability under this section only in the event that a non-accelerated filer specifically states that the report is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act.

²¹ See the 2008 Adopting Release in note 9 above.

Filer Status		Compliance Dates for the Internal Control Over Financial Reporting Requirements	
		Management report on ICFR	Auditor attestation on management's report on ICFR
U.S. Issuer	Non-accelerated filer (public float under \$75 million)	Annual reports for fiscal years ending on or after December 15, 2007	Annual reports for fiscal years ending on or after June 15, 2010
U.S. Issuer	Large accelerated filer and accelerated filer (public float above \$75 million)	Annual reports for fiscal years ending on or after November 15, 2004	Annual reports for fiscal years ending on or after November 15, 2004
Foreign private issuer	Non-accelerated filer (public float under \$75 million)	Annual reports for fiscal years ending on or after December 15, 2007	Annual reports for fiscal years ending on or after June 15, 2010
Foreign private issuer	Accelerated filer (public float above \$75 million and below \$700 million)	Annual reports for fiscal years ending on or after July 15, 2006	Annual reports for fiscal years ending on or after July 15, 2007
Foreign private issuer	Large accelerated filer (public float above \$700 million)	Annual reports for fiscal years ending on or after July 15, 2006	Annual reports for fiscal years ending on or after July 15, 2006
U.S. or Foreign private issuer	Newly public company	Second annual report	Second annual report

III. PAPERWORK REDUCTION ACT

In connection with our earlier proposal and adoption of the rules and amendments implementing the Section 404 requirements,²² we submitted cost and burden estimates of the collection of information requirements of the amendments to the Office of Management and Budget (“OMB”). We published a notice requesting comment on the collection of information requirements in the proposing release for those rule amendments. We submitted these requirements to the OMB for review in accordance with the Paperwork Reduction Act of 1995 (“PRA”)²³ and received approval of these estimates. We do not believe that the amendments will result in any change in the collection of information requirements of the amendments implementing Section 404 and we previously received no comments suggesting the amendments would result in any change. Therefore, we are not revising our PRA burden and cost estimates submitted to the OMB.

IV. COST-BENEFIT ANALYSIS

A. Benefits

The amendments postpone the date by which a non-accelerated filer would be required to include in its annual report an auditor attestation report on ICFR. As a result, non-accelerated filers will be required to complete only management’s assessment of compliance with the Section 404 requirements during the deferral period. We believe that the additional time will benefit non-accelerated filers and could thereby indirectly benefit investors in non-accelerated filers by easing the burden on those companies as follows:

²² See Release Nos. 33-8238 in Note 7 and 33-8760 in Note 19 above.

²³ 44 U.S.C. 3501 et seq. and 5 CFR 1320.11.

- Providing non-accelerated filers more time, in light of the uncertainty in the timing due to the recent completion of the study and the announcement, to better prepare for compliance with the Section 404(b) requirements; and
- Providing more time for the Section 404(b) audit to be properly planned, scoped and executed.

B. Costs

Investors in non-accelerated filers will have to wait longer than they would in the absence of the deferral for the assurances provided by the auditor's attestation report and the added investor confidence that could result from obtaining an independent Section 404(b) attestation. The amendments may extend the existing risk that, without the auditor's attestation report, some non-accelerated filers may erroneously conclude that the company's ICFR is effective, when an ICFR audit might reveal that it is not. In addition, some companies may continue to conduct an assessment that is not as thorough, careful and as appropriate to the company's circumstances as they would perform if the auditor were also conducting an audit of ICFR. Finally, the amendments may also extend the existing risk that weaknesses in a company's ICFR will go undetected for a longer period of time.

V. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 23(a)(2) of the Exchange Act²⁴ requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition,

²⁴ 15 U.S.C. 78w(a).

Section 2(b)²⁵ of the Securities Act and Section 3(f)²⁶ of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

We expect that this additional extension of the auditor attestation report requirement will promote capital formation and efficiency by making the implementation process more efficient and less costly for non-accelerated filers by:

- Providing non-accelerated filers more time to prepare for compliance with the Section 404(b) requirements; and
- Providing more time for the Section 404(b) audit to be properly planned, scoped and executed.

We acknowledge, however, that it is possible for the deferral of the auditor attestation requirement to cause some investors to have less confidence in the financial reports of non-accelerated filers, and that this could possibly make it more difficult for these companies to raise capital in the public markets.

The additional extension for non-accelerated filers should have no impact on competition between non-accelerated filers, as the extension is being provided to all non-accelerated filers. It is possible that a competitive impact could result from the differing treatment of non-accelerated filers and larger companies that already have been complying with the Section 404 requirements, but we have not received any information suggesting that this type of impact has occurred as a result of prior extensions.

²⁵ 15 U.S.C. 77b(b).

²⁶ 15 U.S.C. 78c(f).

VI. STATUTORY AUTHORITY AND TEXT OF THE AMENDMENTS

The amendments described in this release are made under the authority set forth in Section 19 of the Securities Act, Sections 3, 12, 13, 15, 23 and 36 of the Exchange Act, and Sections 3(a) and 404 of the Sarbanes-Oxley Act.

List of Subjects

17 CFR Part 210

Accountants, Accounting, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 229 and 249

Reporting and recordkeeping requirements, Securities.

TEXT OF AMENDMENTS

For the reasons set out in the preamble, the Commission is amending title 17, chapter II, of the Code of Federal Regulations as follows:

PART 210 - FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for Part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202 and 7262, unless otherwise noted.

2. Section 210.2-02T is amended by:

- a. Removing the date “December 15, 2009” in paragraph (a) and adding in its place “June 15, 2010”; and

b. Removing the date “June 30, 2010” in paragraph (b) and adding in its place “December 15, 2010”.

PART 229 – STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 – REGULATION S-K

3. The authority citation for Part 229 continues to read, in part, as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

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4. Section 229.308T is amended by:

a. Removing the date “December 15, 2009” in the “Note to Item 308T” and adding in its place “June 15, 2010”; and

b. Removing the date “June 30, 2010” in paragraph (c) and adding in its place “December 15, 2010”.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

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6. Form 20-F (referenced in §249.220f), Part II, Item 15T is amended by:

a. Removing the date “December 15, 2009” in paragraph (2) to the “Note to Item 15T” and adding in its place “June 15, 2010”; and

b. Removing the date “June 30, 2010” in paragraph (d) and adding in its place “December 15, 2010”.

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

7. Form 40-F (referenced in §249.240f) is amended by:

a. Removing the date “December 15, 2009” in “Instruction 3T(2)” to the “Instructions to paragraphs (b), (c), (d) and (e) of General Instruction B.(6)” and adding in its place “June 15, 2010”; and

b. Removing the date “June 30, 2010” in the paragraph following “Instruction 3T” to the “Instructions to paragraphs (b), (c), (d) and (e) of General Instruction B.(6)” and adding in its place “December 15, 2010”.

Note: The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.

8. Form 10-Q (referenced in §249.308a) is amended by revising Item 4T to Part I to read as follows:

Note: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-Q

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PART I – FINANCIAL INFORMATION

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Item 4T. Controls and Procedures.

(a) If the registrant is neither a large accelerated filer nor an accelerated filer as those terms are defined in §240.12b-2 of this chapter, furnish the information required by Items 307 and 308T(b) of Regulation S-K (17 CFR 229.307 and 229.308T(b)) with respect to a quarterly

report that the registrant is required to file for a fiscal year ending on or after December 15, 2007 but before June 15, 2010.

(b) This temporary Item 4T will expire on December 15, 2010.

* * * * *

9. Form 10-K (referenced in §249.310) is amended by:

a. Removing the date “December 15, 2009” in paragraph (a) to Item 9A(T) to Part II and adding in its place “June 15, 2010”; and

b. Removing the date “June 30, 2010” in paragraph (b) to Item 9A(T) to Part II and adding in its place “December 15, 2010”.

Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.

By the Commission.

Elizabeth M. Murphy
Secretary

October 13, 2009