DODD-FRANK ACT PERMANENTLY EXEMPTS NON-ACCELERATED FILERS FROM SOX AUDITOR ATTESTATION REQUIREMENT

July 29, 2010

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), signed into law last week, permanently exempts smaller public companies from the auditor attestation requirement of Section 404(b) of the Sarbanes-Oxley Act of 2002 (or "SOX").[1] The Act also directs the Securities and Exchange Commission (the "SEC") to conduct a study to determine how the burdens of compliance with Section 404(b) can be reduced for other public companies.

Exemption of Non-Accelerated Filers from Auditor Attestation Requirement

Under SOX Section 404(a), public companies are required to include in their annual reports on Form 10-K an assessment from management of the effectiveness of the company's internal control over financial reporting. SOX Section 404(b) requires the company's auditor to attest to, and report on, management's assessment. While all public companies are currently subject to the Section 404(a) requirement, the SEC had given non-accelerated filers, which include public companies with a public float below $75 million, extra time to design, implement and document their internal controls before the auditor attestations are required. The SEC has repeatedly deferred the Section 404(b) compliance date for non-accelerated filers, most recently extending the compliance date to fiscal years ending on or after June 15, 2010.[2] In an apparent recognition of the burden of Section 404(b) for smaller public companies, the Act adds a new Section 404(c) to SOX, permanently exempting from Section 404(b) any company that is neither a "large accelerated filer" nor an "accelerated filer."[3]

SEC Study of Section 404(b)

The Act also directs the SEC to conduct a study within the next nine months to determine how the burden of compliance with Section 404(b) could be reduced for companies with market capitalizations between $75 million and $250 million. The study should also consider whether any methods of reducing the compliance burden (or a complete exemption for such companies) would encourage companies to list on U.S. exchanges in their initial public offerings.

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[1] The final version of the Act can be found at: http://www.gpo.gov/fdsys/pkg/BILLS-111hr4173ENR/pdf/BILLS-111hr4173ENR.pdf. See Title IX, Section 989G for the provisions affecting SOX Section 404(b). See our client alerts discussing other corporate and securities law aspects of the Act at: http://www.wcsr.com/resources/pdfs/cs072210.pdf and http://www.wcsr.com/resources/pdfs/cs072810.pdf.

[2] See our client alert at: http://www.wcsr.com/resources/pdfs/cs100609.pdf.

[3] An "accelerated filer" has a public float of at least $75 million and less than $700 million. A "large accelerated filer" has a public float of at least $700 million.

Additional Information

If you have any questions regarding this provision of the Act, please contact Meredith Burbank (http://www.wcsr.com/MeredithBurbank), the principal drafter of this client alert, or you may contact the Womble Carlyle attorney with whom you usually work or one of our Corporate and Securities attorneys at the following link: http://www.wcsr.com/profSearch?team=corporateandsecurities.

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