

JUN 24 2009

## SEC Extends Small Company Compliance with Sarbanes-Oxley Internal Control Auditor Attestation

MORRISON | FOERSTER

The SEC has extended until June 30, 2010 the date on which non-accelerated filers must comply with the auditor attestation provisions of Section 404 (b) of the Sarbanes-Oxley Act (Rel. No. 33-8934A, June 18, 2009). This is the second extension in as many years. In June 2008, the SEC postponed for one year the date by which a non-accelerated filer must begin to include in its annual report an auditor attestation report on management's assessment of internal control over financial reporting.

In a recent letter to SEC Chair Mary Schapiro, the Chamber of Commerce Center for Capital Markets Competitiveness urged the Commission to grant an additional one year extension for non-accelerated filers to comply with the auditor attestation provisions. The Chamber noted that, despite recent PCAOB guidance designed to help auditors scale

their audits of smaller public companies, preliminary cost assessments to comply with Section 404(b) indicated that non-accelerated filers could expect a 50-to-100 percent increase in audit fees in 2009 if they were required to comply this year.

Section 404 is a two-prong statute. Section 404(a) requires that annual reports filed with the SEC must be accompanied by a statement by management that it has assessed the effectiveness of the company's internal controls and that management is responsible for creating and maintaining adequate internal controls. Section 404(b) requires that the company's independent auditor report on and attest to management's assessment of the company's internal controls.

*James Hamilton*

## Schapiro Outlines Regulatory Regime for Securities-Related OTC Derivatives

In written testimony, SEC Chair Mary Schapiro told the Senate Subcommittee on Securities that the exclusion of certain securities-related over-the-counter derivatives from the securities regulatory regime has diminished the SEC's ability to uphold its investor protection mandate. The financial crisis of the past two years has exposed the weaknesses in the structure of U.S. financial regulation. Schapiro said that Congress could amend the statutory definition of a security to cover securities-related OTC derivatives and, by so doing, those instruments would be incorporated into the existing regulatory framework.

Treasury Secretary Timothy Geithner outlined the Obama Administration's plan for establishing a

comprehensive framework for regulating OTC derivatives in a May 13 letter to the Congressional leadership. The framework has four main objectives: to prevent activities in the OTC derivatives market from posing risk to the financial system; promoting efficiency and transparency in those markets; preventing market manipulation, fraud and other market abuses; and ensuring that OTC derivatives are not marketed inappropriately to unsophisticated parties.

Schapiro described how the lack of authority over OTC derivatives has made its investigations more difficult. The SEC has used its antifraud authority over security-based swaps to gather



## SEC Did Not Extend Small Company Compliance With Sarbanes-Oxley Internal Control Auditor Attestation

SEC Release No. 33-8934A did not extend until June 30, 2010 the date that non-accelerated filers have to comply with the auditor attestation provisions of Section 404 (b) of the Sarbanes-Oxley Act, as reported previously. The SEC clarified that the effectiveness of §§ 210.2-02T and 229.308T, which currently terminates on June 30, 2009, is extended through June 30, 2010. This technical correction does not affect the effective date for compliance by a non-accelerated filer with the rules implementing Section 404(b) of the Sarbanes-Oxley Act of 2002. Under the amendments adopted in Release No. 33-8934, a non-accelerated filer is 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 December 15, 2009.

Section 404 is a two-prong statute requiring, in 404(a), that annual reports filed with the SEC must be accompanied by a statement by management that it has assessed the effectiveness of the company's internal controls and that management is responsible for creating and maintaining adequate internal controls; and requiring, in 404(b), that the company's independent auditor report on and attest to management's assessment of the company's internal controls.

## Chamber of Commerce Hosts Event on Shareholder Activism

The U.S. Chamber of Commerce yesterday hosted a discussion of a new study conducted by Navigant Consulting which found no evidence that shareholder proposals result in a material increase in a company's market value. Panelists also discussed organized labor's motives in submitting shareholder proposals and the SEC's proposed proxy access rules.

Organized labor has been a large proponent of increased shareholder access and has used the shareholder proposal process to influence corporate behavior. Navigant noted that organized labor's votes have regulatory implications since they involve the use of pension fund assets which are regulated by ERISA.

ERISA requires that fiduciaries may engage in activism only when there is a reasonable expectation that it will result in an economic benefit to the plan. Shareholders have had a degree of success in getting proposals enacted, according to the study,

but there is no conclusive evidence that activism improved the stock market performance of the target companies or provides an economic benefit to those filing or supporting the proposals.

The Department of Labor last October issued an interpretive bulletin which addressed the limited circumstances under which fiduciaries may take into account factors other than the economic interests of the plan in connection with their investment decisions. The Navigant study has been sent to the Department of Labor, according to Steven Law, the Chamber's chief legal officer and general counsel.

Congressman Pete Sessions (R-TX) addressed what he sees as the unions' plans to meddle in corporate governance matters for their own political benefit. Unions and their pension funds are grossly underfunded, he said, and that is a motivating factor behind a number of their initiatives.

Lawrence Hamermesh, a professor of corporate and business law at Widener University School of