

## ACCELERATED FILERS WITH PUBLIC FLOAT OF LESS THAN \$700M GRANTED 45-DAY EXTENSION TO FILE INTERNAL CONTROL REPORTS

December 7, 2004

The Securities and Exchange Commission (the "SEC") has granted accelerated filers with a public float of less than \$700 million a 45-day extension to file internal control reports with their Annual Reports on Form 10-K.<sup>1</sup>

### Extension

On November 30, 2004, the SEC issued an exemptive order extending for such issuers the deadline for filing their management's report on internal control over financial reporting (the "Management Report") and the related attestation of the issuer's registered public accounting firm on management's assessment of internal control over financial reporting (the "Control Attestation"). The Management Report and the Control Attestation are now generally required by Section 404 of the Sarbanes-Oxley Act of 2002 and the SEC rules and regulations promulgated thereunder to appear in Annual Reports on Form 10-K.

An accelerated filer must currently file its Annual Report on Form 10-K within 75 days of the end of its fiscal year. Beginning with fiscal years ending on or after November 15, 2004 the Management Report and the Control Attestation were to become a part of that Annual Report. The exemptive order leaves unchanged the 75-day deadline for filing the Annual Report but grants to an accelerated filer with a public

float of less than \$700 million and a fiscal year-end between (and including) November 15, 2004 and February 28, 2005 an additional 45 days after the 75th day from the end of such filer's fiscal year to submit the Management Report and the Control Attestation.<sup>2</sup>

### Conditions

An issuer utilizing the exemptive order to file the Management Report and the Control Attestation after filing its Annual Report on Form 10-K must:

- file its Annual Report on Form 10-K with all required information, including Item 9A (Controls and Procedures), other than the Management Report and the Control Attestation, within 75 days of the end of its fiscal year (or the extended period permitted by Rule 12b-25 of the Securities Exchange Act of 1934 if the provisions of such rule are satisfied);
- identify in its Annual Report on Form 10-K any information not filed pursuant to the exemptive order;
- disclose in its Annual Report on Form 10-K any material weakness in its internal control over financial reporting identified by the accelerated filer or its registered public accounting firm prior to filing its Annual Report on Form 10-K;
- file the Management Report and the Control Attestation within 120 days after the end of its fiscal year regardless of whether it extended the 75 day filing period for its Annual Report on Form 10-K pursuant to

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- Rule 12b-25 of the Securities Exchange Act of 1934; and
- file the Management Report and the Control Attestation as an amendment to its Annual Report on Form 10-K.

The exemptive order leaves unchanged the requirement that an issuer file its registered public accounting firm's report on the issuer's financial statements (the "Audit Report") with the Annual Report on Form 10-K. As a result, the registered public accounting firm may prepare the Audit Report separately from the Control Attestation. Additionally, for purposes of the Form S-2 and S-3 eligibility requirements, an accelerated filer will not be considered to have timely filed its Annual Report on Form 10-K until it has filed the Management Report and the Control Attestation.

## **PCAOB**

On November 30, 2004, the Public Company Accounting Oversight Board ("PCAOB") adopted a temporary transitional rule, in conjunction with the SEC exemptive order and subject to approval by the SEC, relating to PCAOB Auditing Standard No. 2, "An Audit of Internal Control Over Financial Reporting Performed In Conjunction with an Audit of Financial Statements."<sup>3</sup> The temporary transition rule will allow the registered public accounting firm of an issuer relying on the SEC exemptive order (i) to date its Control Attestation later than its Audit Report; and

(ii) to not refer to its Control Attestation in its Audit Report.

## **Proxy Consequences**

The exemptive order raises issues with respect to certain issuers who avail themselves of the SEC exemptive order and whose registered public accounting firms agree to issue the Audit Report and the Control Attestation Report separately. More specifically, at least the following issues can arise with respect to an issuer whose annual meeting has been set for a date (e.g., in April or early May for an issuer whose fiscal year is the calendar year) that will require the mailing of proxy materials, including an annual report to shareholders, before the Management Report and the Control Attestation have been prepared and who, therefore, will not be able to include these documents in its annual report.

## ***Financial Statement Requirements for Annual Report to Shareholders***

We have confirmed with the staff of the Office of Chief Accountant at the SEC that the financial statement requirement for annual reports to shareholders will be met if an issuer includes audited financial statements that are not accompanied by the Management Report and the Control Attestation, subject to the further discussion below.

The staff of the Office of Chief Accountant and the Division of Corporation

Finance issued on October 6, 2004 a revised set of Frequently Asked Questions (“FAQs”) on Management’s Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports.<sup>4</sup> In FAQ 22, the staff encouraged issuers to include both the Management Report and the Control Attestation in the annual report to shareholders when their audited financial statements are included, especially if the Management Report states that the issuers’ internal controls are ineffective.

The staff of the Division of Corporation Finance has orally advised that the exemptive order has not changed the staff’s position stated in FAQ 22. However, the staff recognizes that it may be difficult or impracticable for an issuer to postpone the date of a long-planned annual meeting to enable the issuer to include in its annual report to shareholders the Management Report and the Control Attestation. The staff advised that an issuer who is relying on the exemptive order and who is required, due to the date of its annual meeting, to mail its proxy materials at a time when the Management Report and the Control Attestation are not yet available would still be able to “comply with the spirit of FAQ 22” by mailing the Management Report and the Control Attestation to shareholders as soon as these materials become available. It seems unlikely that such a second mailing would have to be received by

shareholders before the annual meeting if the Management Report and the Control Attestation first became available only a few days before the annual meeting.

Additional issues arise if such an issuer has identified a material weakness. Under the exemptive order, the issuer is required to disclose the material weakness in its Annual Report on Form 10-K even though the report does not include the Management Report and the Control Attestation. The SEC staff has advised that it would expect the issuer to also disclose the material weakness in the issuer’s proxy materials that are mailed to shareholders, something which would happen as a matter of course if the issuer mails a copy of its Annual Report on Form 10-K in satisfaction of the requirement to send an annual report to shareholders, but which would otherwise require some special adjustments to the issuer’s proxy materials.

## Endnotes

1. See SEC Release No. 34-50754, available at <http://www.sec.gov/rules/exorders/34-50754.htm>.
2. The SEC defines an “accelerated filer” as a company that: (i) has a public float of at least \$75 million; (ii) has been subject to the SEC’s periodic reporting requirements for at least 12 months and has filed at least one annual report with the SEC; and (iii) is not eligible to file annual reports on Form 10-KSB or quarterly reports on Form 10-QSB.
3. See PCAOB Release No. 2004-014, available at [http://www.pcaobus.org/Rules\\_of\\_the\\_Board/Documents/Docket\\_016/Release2004-014.pdf](http://www.pcaobus.org/Rules_of_the_Board/Documents/Docket_016/Release2004-014.pdf).
4. See <http://www.sec.gov/info/accountants/controlfaq1004.htm>.

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This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your LeBoeuf relationship partner.

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