

Capital Markets and Securities

A bulletin prepared by the Capital Markets Group at Vedder Price designed to keep corporate executives and investment banking professionals informed of major developments in the securities industry.

December 2004

SEC POSTPONES INTERNAL CONTROL REPORT FILING DATE FOR CERTAIN "SMALLER" ACCELERATED FILERS

On November 30, 2004, the SEC issued an exemptive order granting certain "smaller" accelerated filers a 45 day extension for filing management's report on internal control over financial reporting and the related auditors' attestation report. These internal control reports are required under Section 404 of the Sarbanes-Oxley Act and Items 308(a) and (b) of Regulation S-K, and would otherwise have been required to be filed with annual reports on Form 10-K for fiscal years ending on or after November 15, 2004 within 75 days after fiscal year end. It is important to note that if applicable, the order only extends the timeline for filing the internal control reports, and does not delay the date for management's assessment of internal controls, which still must be made as of the end of the most recent fiscal year.

The extension applies to what the SEC characterized as "smaller accelerated filers" – issuers with a public common equity float of less than \$700 million at the end of its second fiscal quarter in 2004 – who have a fiscal year ending between and including November 15, 2004 and February 28, 2005 and who satisfy the following conditions:

- all other information required to be included in the Form 10-K is filed within 75 days of fiscal year end (or within 90 days if the company satisfies the conditions of Exchange Act Rule 12b-25) and the company identifies in the Form 10-K that it has not included the internal control reports as permitted by the exemptive order;
- any material weaknesses in the company's internal control over financial reporting (either identified by management or the auditors prior to filing the Form 10-K) are disclosed in the Form 10-K;
- the Form 10-K must be completed by amendment to include the internal control reports no later than 45 days following the end of the 75 day filing period (even if the company relied on Rule 12b-25 for an extension) and no additional extensions for the Form 10-K amendment are permitted; and
- until the Form 10-K is amended, the company will not meet Form S-2 and Form S-3 eligibility requirements. The SEC staff has apparently taken the position that use of a currently effective shelf registration statement must be suspended until the Form 10-K amendment is filed, although the use of Rule 144 and Form S-8 is not impaired by reliance on the exemptive order.

A copy of the exemptive order is available on the SEC's website at <http://www.sec.gov/rules/exorders/34-50754.htm>.

Capital Markets and Securities bulletin is published by the law firm of Vedder, Price, Kaufman & Kammholz, P.C. It is intended to keep our clients and other interested parties informed of developments in corporate finance and securities matters. It is not a substitute for professional advice.

© 2004 Vedder, Price, Kaufman & Kammholz, P.C. Reproduction of this bulletin is permitted only with credit to Vedder, Price, Kaufman & Kammholz, P.C. For an electronic copy of this newsletter, please contact us at info@vedderprice.com.

If you have any questions regarding material in this issue of *Capital Markets and Securities*, or suggestions for a specific topic you would like addressed in a future issue, please contact any member of the Capital Markets Group.

Contributing Author: Robyn B. Goldman.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with more than 210 attorneys in Chicago, New York City and Roseland, New Jersey. The attorneys in the firm's Capital Markets Group regularly represent corporations and investment bankers, both foreign and domestic, in a wide variety of matters, including:

- debt and equity offerings, including initial public offerings, structured debt financings, aircraft securitizations, dual-class equity structures, and sophisticated preferred stock instruments;
- capital formation for initial capitalization, financing ongoing operations, and acquisitions;
- corporate disclosure, periodic reporting, proxy solicitations, and insider trading and beneficial ownership compliance matters;
- private placement of securities, including Rule 144A and Regulation S transactions;
- tender offers, mergers and acquisitions, and recapitalizations and restructurings;
- international offerings of securities and compliance by foreign issuers with U.S. securities laws;
- litigation and administrative and arbitration proceedings involving various securities fraud claims, disclosure issues, and regulatory enforcement matters; and
- municipal bond financings.

Chicago

222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Fax: 312/609-5005
Contact: Robert J. Stucker

New York

805 Third Avenue
New York, New York 10022
212/407-7700
Fax: 212/407-7799
Contact: Neal I. Korval

New Jersey

Five Becker Farm Road
Roseland, New Jersey 07068-1023
973/597-1100
Fax: 973/597-9607
Contact: John E. Bradley

Members of the Capital Markets Group:

Thomas P. Desmond (<i>co-chair</i>)	312/609-7647
John T. Blatchford (<i>co-chair</i>)	312/609-7605
Christopher G. Barrett	312/609-7557
Steven R. Berger (<i>New York</i>)	212/407-7714
Robyn B. Goldman	312/609-7662
Jennifer Durham King	312/609-7835
James W. Morrissey	312/609-7717
Meeghan O'Donnell	312/609-7529
Stewart Reifler (<i>New York</i>)	212/407-7742
Ernest W. Torain, Jr.	312/609-7558
Richard L. Williams III	312/609-7588
Jason K. Zachary	312/609-7757
Dana S. Armagno	312/609-7543
James A. Arpaia	312/609-7618
William J. Bettman	312/609-7776
David C. Blum	312/609-7811
Deborah B. Eades	312/609-7661
Karin Jagel Flynn	312/609-7805
Dean N. Gerber	312/609-7638
Dan L. Goldwasser (<i>New York</i>)	212/407-7710
Douglas M. Hambleton	312/609-7684
Paul R. Hoffman	312/609-7733
John T. McEnroe	312/609-7885
Daniel C. McKay II	312/609-7762
Maureen A. Miller	312/609-7699
Robert J. Moran	312/609-7517
Lane R. Moyer	312/609-7586
Michael A. Nemeroff	312/609-7858
Timothy W. O'Donnell	312/609-7683
Cathy G. O'Kelly	312/609-7657
Daniel O'Rourke	312/609-7669
John R. Obiala	312/609-7522
Ronald Scheinberg (<i>New York</i>)	212/407-7730
Thomas E. Schnur	312/609-7715
Daniel T. Sherlock	312/609-7551
Guy E. Snyder	312/609-7656
Robert J. Stucker	312/609-7606
David A. Sturms	312/609-7589
Dalius F. Vasys	312/609-7623
Donald A. Wassall (<i>New York</i>)	212/407-7707
Issa O. Yesufu	312/609-7591