



Client Alert

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SECTION 404 TRAP FOR THE UNWARY CAUSING DELINQUENCY AMONG MANY SMALL REPORTING COMPANIES

We are sending this memo to smaller reporting companies to caution them that inadvertently (or intentionally) omitting the management assessment from this year's 10-K or 10KSB will make them delinquent. It may also threaten listing on NASDAQ. For most non-accelerated filers, the management assessments required under the internal control reporting requirements of Section 404 of the Sarbanes-Oxley Act became due for the first time this year, with annual reports covering fiscal year 2007. However, a survey of the annual reports filed so far this year by many smaller reporting companies reveals that many of these companies have left out this critical piece of their required disclosures.

Section 404 of the Sarbanes Oxley Act ("SOX404") requires each reporting company to provide a report on management's assessment of the effectiveness of the company's internal control over financial reporting ("ICFR"). This ICFR report must be filed each year with the company's annual report on Form 10-K or Form 10KSB. SOX404 also requires the company's independent auditor to provide an audit report on ICFR.

Most reporting companies had to begin providing the ICFR report beginning in 2003. However, the SEC implemented a series of delays for smaller reporting companies that qualify as "non-accelerated filers" (generally companies with a market "float" of its common stock that is valued at less than \$75 million). Under the delaying amendments, the non-accelerated filers are required to file their managements' ICFR report for the first fiscal year ending after 12/15/07. For calendar year end companies, this would require the first report with the 12/31/07 Form 10-K or Form 10KSB. (The delaying amendments allow the non-accelerated filers to wait until 2009 to provide the separate auditor's opinion on ICFR.)

In the same annual report that the smaller reporting company is first required to provide the ICFR report, it also must first include in its Sarbanes-Oxley Section 302 management certification a new paragraph, to certify to management's responsibility to design and evaluate the company's ICFR.

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After the filing of that annual report, all of the company's annual and quarterly reports must include this new certification paragraph.

The SEC has stated that annual reports that do not include the required ICFR report and certification will be considered delinquent.

If we can be of any assistance to you in this or any other matter, please feel free to contact any member of the securities team at Arnall Golden Gregory LLP.

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