

SEC Regulations Committee
April 17, 2007 - Joint Meeting with SEC Staff
SEC Offices – Washington DC

Discussion Document J

Topic: Application of Item 308T of Regulations S-K and S-B to a Non-Accelerated Filer That Early Adopts Internal Control Reporting by Management

Issue: That is, may a non-accelerated filer voluntarily “furnish” its management’s report on internal control over financial reporting in its Form 10-K or Form 10-KSB for a fiscal year ending before December 15, 2007 in reliance on Item 308T of Regulations S-K or S-B?

Background: In December 2006, the SEC issued a final rule, *Internal Control Over Financial Reporting in Exchange Act Periodic Filings of Non-Accelerated Filers and Newly Public Companies* (SEC Release Nos. 33-8760; 34-54942). As adopted, a non-accelerated filer must begin to provide management’s report on internal control over financial reporting, under Item 308(a) of Regulations S-K or S-B, in the annual report for its first fiscal year ending on or after December 15, 2007. A non-accelerated filer must begin to provide its auditor’s report on internal control over financial reporting, under Item 308(b) of Regulations S-K or S-B, in the annual report for its first fiscal year ending on or after December 15, 2008.

To implement this phase-in, the SEC adopted temporary provisions, Item 308T of Regulations S-K and S-B (“Item 308T”), which apply to a registrant that is a non-accelerated filer for a fiscal year ending on or after December 15, 2007 but before December 15, 2008. Under Item 308T, a non-accelerated filer is permitted to “furnish” management’s report on internal control over financial reporting in its annual report for its fiscal year ending on or after December 15, 2007. Item 308T also provides that such annual report is not required to include the auditor’s report on internal control over financial reporting. A registrant following Item 308T must provide a statement similar to the following in its SEC annual report:

“This annual report does not include an attestation report of the company’s registered public accounting firm regarding internal control over financial reporting. Management’s report was not subject to attestation by the company’s registered public accounting firm pursuant to temporary rules of the Securities and Exchange Commission that permit the company to provide only management’s report in this annual report.”

As adopted, the scope of Item 308T is limited to the SEC annual report of a non-accelerated filer for a fiscal year ending on or after December 15, 2007 but before December 15, 2008. However, a non-accelerated filer might wish to voluntarily provide its management’s report on internal control over financial reporting for a fiscal year ending before December 15, 2007.

Question: Is a non-accelerated filer permitted to follow Item 308T of Regulations S-K or S-B for a fiscal year ending before December 15, 2007?

View A: Yes. Notwithstanding the Note to Item 308T that limits its scope to “a fiscal year ending on or after December 15, 2007 but before December 15, 2008,” a non-accelerated filer may furnish its management report on internal control over financial reporting in its Form 10-K or Form 10-KSB for a fiscal year ending before December 15, 2007. Such voluntary compliance with Item 308(a) of Regulations S-K or S-B would not preclude the application of Item 308T in the fiscal year ending on or after December 15, 2007 but before December 15, 2008. That is, the non-accelerated filer could rely on Item 308T until its annual report for the fiscal year ending on or after December 15, 2008. Until that time, the non-accelerated filer could omit the auditor’s report on internal control over financial reporting otherwise required under Item 308(b) of Regulations S-K or S-B in reliance on Item 308T.

View B: No. The Note to Item 308T clearly limits its scope to “a fiscal year ending on or after December 15, 2007 but before December 15, 2008.” If a non-accelerated filer wishes to

voluntarily comply with Item 308 of Regulations S-K or S-B for a fiscal year ending before December 15, 2007, it must file, rather than furnish, both management's report on internal control over financial reporting, under Item 308(a) of Regulations S-K or S-B, and its auditor's report on internal control over financial reporting, under Item 308(b) of Regulations S-K or S-B.

Committee Recommendation: The Committee supports View A, which would further encourage non-accelerated filers to early adopt the internal control reporting provisions of Section 404(a) of the Sarbanes-Oxley Act of 2002 for the benefit of investors and the capital markets.

SEC Staff Response: The staff noted that Item 308T does not technically apply to a fiscal year ending before December 15, 2007, and would not be available if a non-accelerated filer wanted to early adopt Section 404 reporting on internal control over financial reporting for a fiscal year ending before December 15, 2007. However the staff expressed doubt that further action would be taken if a registrant "furnished" its report.