



Via Hand Delivery

October 9, 2009

Mary L. Schapiro
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: October 2, 2009 Press Release: Small Public Companies to Begin Providing Audited Assessment of Internal Controls over Financial Reporting in Nine Months

Dear Chair Schapiro:

I am writing on behalf of the Council of Institutional Investors (“Council”), an association of public, corporate, and union pension funds with combined assets of over \$3 trillion, in response to the U.S. Securities and Exchange Commission’s (“Commission”) above referenced October 2nd press release (“Release”).¹ The purpose of this letter is to communicate our disappointment with the Commission’s decision to provide many public companies a sixth deferral from the full requirements of Section 404 of the Sarbanes-Oxley Act (“SOX”).

As indicated in the Release and confirmed in the Commission’s recently published study, Section 404 is a “key provision” of SOX and plays a vital role in ensuring high quality financial reporting and enhancing investor confidence in the markets.² Consistent with the language and intent of Section 404 of SOX,³ we have long held the view that any company tapping the public markets to raise capital should be required to have appropriate internal controls in place that have been subject to a meaningful review and attestation by external independent auditors.⁴ The need for strong internal controls is particularly important for the generally riskier smaller public companies that have been the beneficiaries of the Commission’s deferrals.⁵

¹ Press Release, U.S. Securities and Exchange Commission, Small Public Companies to Begin Providing Audited Assessment of Internal Controls over Financial Reporting in Nine Months 1 (Oct. 2, 2009), <http://www.sec.gov/news/press/2009/2009-213.htm>.

² *Id.*; see Office of Economic Analysis, United States Securities and Exchange Commission, Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements 86-92 (Sept. 2009), http://www.sec.gov/news/studies/2009/sox-404_study.pdf (describing the many benefits realized by investors and other users of financial reports from compliance with the Section 404 requirements).

³ See, e.g., S. Rep. No. 107-205, at 54 (July 3, 2002), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_reports&docid=f:sr205.pdf (indicating that Congress intended that “[a]nnual reports filed with the SEC must” comply with all of the Section 404 requirements).

⁴ E.g., Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Nancy M. Morris, Secretary, Securities and Exchange Commission 1 (Sept. 14, 2006), <http://www.sec.gov/rules/proposed/s70603/s70603-58.pdf>.

⁵ See Carlo di Floria, COSO Study on Fraud in Financial Reporting 4 (Oct. 1999), http://9iacc.org/papers/day3/ws7/d3ws7_cdfloria.html (noting that most frauds in financial reporting are “committed by smaller corporations”); see also, Lord & Benoit White Paper, The Tipping Point: Collision of Relaxed Regulation, Small Business and the Economy 14 (Feb. 9, 2009), <http://www.section404.org/news.php?id=34&news=Lord-&Benoit-White-Paper:-The-Tipping-Point:-Collision-of-Relaxed-Regulation,-Small-Business-and-the-Economy> (“History and experience suggest that these smaller companies are particularly susceptible to fraud.”).



October 9, 2009

Page 2 of 2

The Release indicates that the Commission's basis for a sixth deferral is so that "small public companies and their auditors can better plan for the required auditor attestation."⁶ We find this basis even less convincing than the bases for many of the prior five deferrals.⁷

If, after more than seven years, a public company and its external auditors have not been able to properly plan for the auditor attestation of their internal controls, perhaps it is in the best interests of investors and all capital market participants that those companies and their external auditors be excluded from accessing the many benefits derived from participating in our public markets.

In any event, we are very grateful to the Commission for explicitly stating that there will not be "further Commission extensions."⁸ We look forward to 2011 when, after more than eight years after the enactment of Section 404, this critical investor protection will finally be fully implemented by all public companies.

Sincerely,

Jeff Mahoney
General Counsel

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⁶ Press Release, *supra* note 1, at 1.

⁷ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Nancy M. Morris, Secretary, Securities and Exchange Commission 2-5 (Mar. 10, 2008) (evaluating the bases for the fifth deferral); *see also* Floyd Norris, *Enforcing the Law, Eight Years Later*, N.Y. Times.com, Oct. 2, 2009, at 1, <http://norris.blogs.nytimes.com/2009/10/02/enforcing-the-law-eight-years-later/> (describing the bases for prior Commission deferrals as "excuses" for responding to the lobbying by legislators).

⁸ Press Release, *supra* note 1, at 2.