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SEC EXTENDS COMPLIANCE DATE FOR INTERNAL CONTROL RULES

Yesterday evening, the SEC announced that the compliance date for its so-called "Section 404" rules would be delayed from June 15, 2004 to November 15, 2004. (http://www.sec.gov/news/press/2004-21.htm) Section 404 under the Sarbanes-Oxley Act requires companies to certify annually the effectiveness of their internal financial controls, and for their auditors to attest to management's certification. To do so, companies have embarked upon an extensive review and revision of their internal controls to permit them to make this certification.

Several companies, and the new accounting regulatory agency, PCAOB, asked for an extension of time to properly implement the new procedures and to finalize the standards under which auditors will test the controls.

Under the SEC extension, large companies (i.e., market cap of $75 million or more) will not have to comply until their first fiscal year ending after November 15, 2004 (rather than June 15, 2004). Smaller companies must comply for their first fiscal year ending after July 15, 2005 (rather than after April 15, 2005).

This SEC change will not have any effect on the implementation time table for large companies with a December 31, 2004 year-end.

For those companies conducting these reviews with the assistance of a "404 consultant," some have asked their securities counsel to retain such consultants so that problems discovered during the review can be addressed within the context of the attorney-client privilege.

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- IRS Tax Shelter Regulations Can Affect Existing Tax Strategies
- NYSE Clarifies Three Year "Look-back"

If you would like more information on these topics or have any questions, please e-mail us at CorporateNotes@KutakRock.com.

■ NO CHANGE-IN-CONTROL BENEFITS DESPITE MERGER

As executives of recent merger targets such as AT&T Wireless reportedly prepare to enjoy benefits as a result of certain "change-in-control" arrangements, executives in other companies should determine whether their own "change-in-control" plans will always protect their interests. In one recent case, they did not. (http://www.ca3.uscourts.gov/opinarch/031950u.pdf)

In a federal appeals court decision issued early last month, five employees of a subsidiary who were demoted following a merger found out that their parent company's change-in-control plan did not protect them. This was because the plan only applied if a change in control occurred at the holding company level. Here, the employees were in a subsidiary company that was subsequently taken over by another subsidiary that had been recently acquired by the parent company. The court found that the acquisition by the parent company did not affect the control of the parent company but rather that of the acquired company.

ATLANTA
CHICAGO
DENVER
DES MOINES
FAYETTEVILLE
IRVINE
KANSAS CITY
LITTLE ROCK
NEW YORK
OKLAHOMA CITY
OMAHA
PASADENA
RICHMOND
SCOTTSDALE
WASHINGTON
WICHITA

Because effective "change-in-control" provisions can convince key employees to stay on board during difficult merger transition periods, companies should ensure their change-in-control plans cover the desired employees.

■ IRS TAX SHELTER REGULATIONS CAN AFFECT EXISTING TAX STRATEGIES

Christopher May of our Fayetteville, Arkansas office writes:

In the wake of reported abuses of tax-savings strategies by companies and high net-worth individuals, the IRS has announced aggressive disclosure rules that are intended to compel taxpayers, and their tax advisors, to admit participation in, and perhaps draw more intense IRS scrutiny to, certain "reportable transactions." (Treasury Regulations §§ 1.6011-4, and 301.6112-4)

IRS regulations require taxpayers to describe in their tax returns:

- Any transaction designated as a "tax avoidance transaction" by the IRS;
- Any transaction in which the taxpayer is required to keep the transaction or its tax effects confidential;
- Certain transactions resulting in a significant loss;
- Any transaction that creates a significant book/tax difference; and
- A transaction in which an asset is only held briefly.

Even if the participants in such a transaction do not make the required disclosures, the tax advisors to such transaction are required to keep detailed records for seven years and provide them to the IRS upon request.

The reportable transaction rules are a "trap for the unwary," and you should consult an experienced tax advisor if you intend to participate in such a transaction.

■ NYSE CLARIFIES THREE-YEAR "LOOK-BACK"

In its January 29 interpretations regarding its corporate governance standards, the NYSE originally provided an example of how its three-year "look-back" period worked in applying the direct compensation test for independent directors. Based on the example, it appeared that the "look-back" could actually extend to a four-year period. After numerous companies questioned this view, the NYSE issued a clarifying interpretation on February 13, 2004 that only a three-year "look-back" period would apply, and withdrew its original interpretation. (http://www.nyse.com/pdfs/section 303Afaqs.com)

The three-year testing period, which goes into effect after the one-year transition period that ends on November 3, 2004, affects the determination of whether a director received more than $100,000 from the company in compensation (not director fees) during any twelve-month period.

Kutak Rock LLP is a national law firm with 325 attorneys located in 16 offices throughout the United States. Our practice includes corporate, banking and securities law, mergers and acquisitions, bankruptcy, employee benefits, and complex commercial litigation.

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