

APPLICATION OF THE SARBANES-OXLEY ACT TO VOLUNTARY FILERS OF PERIODIC REPORTS WITH THE SEC¹

SIMPSON THACHER & BARTLETT LLP

JUNE 23, 2003

The Securities and Exchange Commission, through its rules and informal statements posted on its website, has begun to clarify the application of the Sarbanes-Oxley Act of 2002 (the "Act") to so-called "voluntary filers." "Voluntary filers" are companies that file periodic reports with the SEC solely to comply with covenants under debt instruments, to facilitate sales of securities under Rule 144² or for other corporate purposes rather than pursuant to statutory or regulatory requirements to make such filings. On the basis of a Frequently Asked Questions (the "FAQ") posted by the SEC on its website, it is clear that voluntary filers generally will not be required to comply with most of the corporate governance provisions in the Act, including Section 402, which contains a prohibition on loans to executive officers and directors. Nevertheless, such companies may wish to consider complying with certain of the Act's corporate governance requirements voluntarily as "best practices."

This memorandum briefly explains the SEC's position regarding voluntary filers, as set forth in the FAQ, and then provides, in Annex A, a chart detailing which provisions of the Act are applicable to voluntary filers based on the Act and adopted rules. For a more detailed analysis of any provision of the Act, please see our related memoranda, accessible on our website at www.simpsonthacher.com, or contact your relationship partner at the firm.

¹ This memorandum updates and supersedes our similarly titled memorandum dated January 10, 2003.

² The typical "voluntary filer" has issued notes pursuant to Rule 144A, followed by a registered "back-end" exchange offer of the Rule 144A notes for registered notes. For a period of time after the exchange, the issuer of the notes is required to file periodic reports with the SEC and is an "issuer" rather than a "voluntary filer." The obligation to file reports, however, is automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement becomes effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than 300 persons. After this automatic suspension, the company becomes a "voluntary filer."

“ISSUERS” AND “VOLUNTARY FILERS”

Pursuant to Section 2(a)(7) of the Act, a company that satisfies any of the following criteria is an “issuer” and is required to comply with most of the Act’s operative provisions:

- it has issued securities registered under Section 12 of the Securities Exchange Act of 1934, as amended;³
- it is required to file reports under Section 15(d) of the Exchange Act;⁴ or
- it files or has filed a registration statement that has not yet become effective (and which has not been withdrawn) under the Securities Act of 1933, as amended.

A strict reading of the definition of “issuer” indicates that a voluntary filer would not constitute an “issuer.” This is because a voluntary filer does not satisfy the criteria set forth in the first and third bullets set forth above and is not “required to file reports” under Section 15(d) of the Exchange Act. Notwithstanding this literal reading, many of the policies underlying the Act apply equally to both statutory “issuers” and voluntary filers. In addition, Congress drafted certain provisions of the Act (including the CEO and CFO periodic report certification requirements in Section 302) in a manner that evidenced an intent that such provisions apply to all companies that file periodic reports, not just statutory “issuers.” As a result, many practitioners and commentators advised preliminarily that voluntary filers should assume that most of the Act’s provisions apply, or after SEC rulemaking would apply, to voluntary filers.

In the FAQ, the SEC indicated that companies filing periodic reports pursuant to indenture obligations, but not otherwise “required” to file reports⁵, are not “issuers” for

³ Section 12 of the Exchange Act generally relates to companies that have securities registered for trading on a national securities exchange or that have equity securities (other than exempt securities) held of record by 500 or more persons and total assets exceeding \$1 million.

⁴ Section 15(d) of the Exchange Act generally requires a company that has filed a registration statement under the Securities Act of 1933, as amended, that has become effective, to file periodic reports with the SEC for the fiscal year in which the registration statement became effective, and thereafter if 300 or more persons hold of record the class of registered securities (as of the beginning of each succeeding fiscal year). Section 15(d) provides that the duty to file periodic reports is automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement becomes effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than 300 persons.

⁵ For example, because they do not have 300 securities holders of record of the class of securities pursuant to which their reporting obligations arose.

purposes of the Act.⁶ This means, absent SEC rulemaking to the contrary, the Act's provisions applicable to "issuers" are not applicable to voluntary filers. We note, however, that some of the SEC's rules and forms implementing the Act require disclosure in periodic reports filed with the SEC. These disclosure obligations *will* apply to voluntary filers by virtue of the fact that voluntary filers are contractually required to file periodic reports in the form prescribed by the rules and regulations of the SEC. In the chart in Annex A, we have used the phrase "All filers of Exchange Act reports" to include all companies that file periodic reports with the SEC, whether by statute or pursuant to contractual obligations.

The SEC appears to be making a distinction in its rules between governance requirements under the Act (which tend to apply only to statutory "issuers") and disclosure requirements (which tend to apply to all companies filing reports under the Exchange Act). For example, all companies that file quarterly and annual reports are required to provide and disclose officer certifications under Section 302. In addition, voluntary filers are required to comply with the SEC's disclosure rules regarding independent financial experts (Section 407), codes of ethics (Section 406) and internal control reports (Section 404). While the corresponding provisions of the Act do not necessarily expressly apply to voluntary filers, the SEC, in adopting rules to implement the applicable provisions of the Act, has amended its existing rules, regulations and forms in a manner that has the effect of extending portions of the Act to all filers of Exchange Act reports. On the other hand, statutory provisions banning personal loans to directors and executive officers (Section 402), mandating fully independent audit committees (Section 301) and requiring disgorgement of profits following an accounting restatement (Section 304) appear to apply only to statutory "issuers" (or, in the case of the audit committee requirements, only those statutory "issuers" with listed securities).

**"BEST PRACTICES"
AND PRE-IPO COMPANIES**

Although many of the corporate governance provisions in the Act will not apply to voluntary filers and other privately held companies, it is nonetheless important for voluntary filers and other pre-IPO companies to be aware of these provisions. We expect that many voluntary filers will emulate the corporate governance practices and audit procedures of public companies. In addition, because Section 402's prohibition on loans to directors and executive officers will apply to a company immediately after it files a registration statement for SEC review, pre-IPO companies should consider whether the benefits of making loans to insiders

⁶ *Question 1*, SEC's Division of Corporation Finance: Sarbanes-Oxley Act of 2002 – Frequently Asked Questions, posted November 8, 2002 (revised November 14, 2002) at www.sec.gov/divisions/corpfin/faqs/soxact2002.htm.

outweigh the burdens of repaying or forgiving these loans immediately prior to filing a registration statement.⁷

The chart in Annex A identifies the types of reporting companies (e.g., listed companies, statutory issuers, all filers) that will be subject to each of the operative provisions of the Act (or to related rules and forms). As discussed above, in some cases, the SEC's rules and forms have a broader reach than the Act. Please note that, while we view the chart as a useful general guide for assessing the scope of certain provisions, the SEC's rules and forms are not always definitive on some of these issues and the SEC's interpretations could change with respect to unique situations.

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This memorandum is for general informational purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate governance developments, can be obtained from our website, www.simpsonthacher.com.

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⁷ Section 402 of the Act contains a "grandfathering" provision for loans outstanding on July 30, 2002. The Act, however, does not include similar protection for loans made after that date by a company that is not a statutory "issuer" at the time of making the loan. As a result, companies with outstanding insider loans may need to extinguish loans made or modified after July 30, 2002 before filing a registration statement with the SEC.

ANNEX A
APPLICATION OF SPECIFIC PROVISIONS

Sarbanes-Oxley Act Operative Provision (and Section Number)	Applicability
Company's Auditor Cannot Provide Audit Services Unless Registered with Public Company Accounting Oversight Board (Sarbanes §102)	"Issuers" only, although it may be "best practice" for all Exchange Act filers
Company's Auditor Cannot Provide Specified Non-Audit Services (Sarbanes §201)	"Issuers" and other "audit clients" ¹
Audit Committee Must "Pre-Approve" Audit and Non-Audit Services Provided by Auditors (Sarbanes §202)	"Issuers" only
Company Must Disclose Pre-Approval Policies and Procedures (Sarbanes §202)	All filers of Exchange Act reports (including "voluntary filers")
Company's Auditor Must Rotate Lead, Concurring, Reviewing and Other Significant Partners (Sarbanes §203)	"Issuers" and other "audit clients"
Audit Partner May Not Receive Compensation for Selling Non-Audit Services (S-X Rule 2-01(c)(8))	"Issuers" and other "audit clients"
Company's Auditors Must Provide Audit Committee with Timely Reports Regarding Critical Accounting Policies, Alternative Treatments and Other Material Communications (Sarbanes §204)	"Issuers" only, but industry professional rules require similar communications in connection with audits of financial statements under the federal securities laws
Company Should Not Employ Recent Outside Audit Engagement Team Members in a "Financial Reporting Oversight Role" (Sarbanes §206)	"Issuers" only
Company Must Disclose Fees Paid to Principal Accountants and Nature of Non-Audit Services (SEC Release 33-8183)	All filers of Exchange Act reports (including "voluntary filers"), except asset-backed issuers
All Audit Committee Members Must be Independent (Sarbanes §301)	Companies with exchange-listed securities

¹ The term "audit clients" includes various affiliates of an issuer.

In addition, "voluntary filers" and other pre-IPO companies also should consider complying with the various auditor independence rules because the use of a non-independent auditor may taint an auditor's ability in the future (after an IPO or other registered offering, for example) to attest to financial statements in respect of the pre-IPO period

Sarbanes-Oxley Act Operative Provision (and Section Number)	Applicability
Board Must Grant Sarbanes-Specified Authority to Audit Committee (Sarbanes §301)	Companies with exchange-listed securities
Audit Committee Must Establish Whistleblower Procedures (Sarbanes §301)	Companies with exchange-listed securities
CEO and CFO Must Certify Annual/Quarterly Reports, “Disclosure Controls and Procedures” and “Internal Controls” (Sarbanes §302)	All filers of Exchange Act reports (including “voluntary filers”)
Company Must Establish and Maintain Disclosure Controls and Procedures, Review such Controls and Procedures Quarterly and Disclose Conclusions from such Review (Sarbanes §302)	All filers of Exchange Act reports (including “voluntary filers”)
Directors and Officers May Not Exert an Improper Influence over the Audit Process (Sarbanes §303)	<p>It is not clear whether this rule applies to all filers of Exchange Act reports (including “voluntary filers”) or just those companies with financial statements “that are required to be filed with the SEC” under the Exchange Act rules</p> <p>Nonetheless, we would advise all companies to avoid any conduct that could be deemed to violate this provision</p>
Disgorgement of Profits and Bonuses Following a Restatement (Sarbanes §304)	“Issuers” only
Directors and Executive Officers May Not Make Equity Trades During Retirement Plan Blackout Periods (Sarbanes §306(a))	“Issuers” of equity securities only
Company Must Notify Directors and Executive Officers of Retirement Plan Blackout Periods (Sarbanes §306(a))	“Issuers” of equity securities only
Company’s Plan Administrator Must Provide Notice to Retirement Plan Participants and the Company of Retirement Plan Blackout Periods (Sarbanes §306(b))	Administrators of retirement plans
Attorneys Must Comply with SEC Reporting Requirements (Sarbanes §307)	Attorneys appearing and practicing before the SEC
Company Must Disclose Material Correcting Adjustments (Sarbanes §401)	All filers of Exchange Act reports (including “voluntary filers”)
Company Must Describe All Material Off-Balance Sheet Transactions (Sarbanes §401)	All filers of Exchange Act reports (including “voluntary filers”) and companies filing registration statements

Sarbanes-Oxley Act Operative Provision (and Section Number)	Applicability
Company Must Provide Tabular Disclosure of Contractual Obligations (Sarbanes §401)	All filers of Exchange Act reports (including “voluntary filers”) and companies filing registration statements (except, in each case, small business issuers)
Company Must Reconcile All <u>Publicly Disclosed</u> Non-GAAP Financial Measures (Sarbanes §401)	“Issuers” only, although it may be “best practice” for all Exchange Act filers
Company Must Reconcile All Non-GAAP Financial Measures <u>Used in SEC Filings</u> (Sarbanes §401)	All filers of Exchange Act reports (including “voluntary filers”)
Company Must Furnish Publicly Disclosed Earnings Releases to SEC on Form 8-K (Sarbanes §§401 and 409)	Companies subject to the filing requirements of Form 8-K
Company May Not Extend Credit to Directors and Executive Officers (Sarbanes §402)	“Issuers” only ²
Directors and Officers Must File Section 16 Reports within Two Business Days of Trade (Sarbanes §403)	Issuers of equity securities only
Company Must Provide Section 16 Reports on Website (Sarbanes §403)	Issuers of equity securities only
Company Must Prepare and Disclose Annual Report on Internal Controls (including a Management Evaluation and Auditor Attestation thereof) and Quarterly Evaluation of Internal Controls (Sarbanes §404)	All filers of Exchange Act reports (including “voluntary filers”)
Company Must Disclose Whether It Has Adopted a Code of Ethics for Senior Executive Officers and Senior Financial Officers (and Make the Code Publicly Available) (Sarbanes §406)	All filers of Exchange Act reports (including “voluntary filers”), except asset-backed issuers
Company Must Disclose Changes to, or Waivers from, its Code of Ethics (Sarbanes §406)	All filers of Exchange Act reports (including “voluntary filers”), except asset-backed issuers
Company Must Disclose Whether It Has an “Audit Committee Financial Expert” (Sarbanes §407)	All filers of Exchange Act reports (including “voluntary filers”), except asset-backed issuers
SEC to Review Company’s Annual Reports Regularly (Sarbanes §408)	“Issuers” only

² Pre-IPO companies with outstanding insider loans may need to extinguish loans made or modified after July 30, 2002 before filing a registration statement with the SEC (or otherwise becoming an “Issuer”).

Sarbanes-Oxley Act Operative Provision (and Section Number)	Applicability
Company Must Provide “Real-Time” Disclosure (Sarbanes §409)	“Issuers” only, but likely to apply to all filers of Exchange Act reports (including “voluntary filers”), except foreign private issuers
Company’s Accountants Must Maintain Audit or Review Records for Seven Years (Sarbanes §802)	Auditors of “issuers” (but likely to become “best practice” with respect to all Exchange Act filers)
No Person May Destroy, Alter or Falsify Records in Federal Investigations and Bankruptcy Cases (Sarbanes §802)	Any person
Debts Not Dischargeable in Bankruptcy if Incurred in Violation of Securities Fraud Laws (Sarbanes §803)	Any person and any violation of securities laws
Company May Not Terminate or Harass Whistleblowers (Sarbanes §806)	“Issuers” and their officers, employees, <i>contractors</i> , <i>subcontractors</i> and <i>agents</i>
No Person May Engage in Securities Fraud (Sarbanes §807)	Any person
CEO and CFO Must Certify Annual/Quarterly Reports (Sarbanes §906)	“Issuers” only
No Person May Tamper with a Record or Impede an Official Proceeding (Sarbanes §1102)	Any person
Freeze on Extraordinary Payments to Directors or Officers (Sarbanes §1103)	An issuer of publicly traded securities
No Person May Retaliate against a Whistleblower (Sarbanes §1107)	Any person

Additional Recently Enacted SEC Disclosure Requirements	Applicability
Company Must Disclose Equity Compensation Plan Information (Item 201(d) of Regulation S-K)	All filers of Exchange Act reports (including “voluntary filers”)
Company Must Comply with Accelerated 10-K and 10-Q Filing Deadlines (SEC Release 33-8128)	All filers of Exchange Act reports (including “voluntary filers”) that qualify as “accelerated filers”
Company must check a box on the cover of each Form 10-K and 10-Q indicating whether it is an accelerated filer (SEC Release 33-8128)	All filers of Exchange Act reports (including “voluntary filers”)
Company Must Disclose its Public Common Stock Float as of Second Quarter (SEC Release 33-8128)	All filers of Exchange Act reports (including “voluntary filers”)
Company Must Disclose Website Address in 10-K and Should Make Exchange Act Reports Available on Website (SEC Release 33-8128)	All filers of Exchange Act reports (including “voluntary filers”)

Additional Recently Enacted SEC Disclosure Requirements	Applicability
Company Must Disclose Fees Paid to Principal Accountants and Nature of Non-Audit Services (SEC Release 33-8183)	All filers of Exchange Act reports (including “voluntary filers”), except asset-backed issuers