

Smaller Issuer Relief in the Financial CHOICE Act

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by Kimberley R. Anderson

As noted in the earlier post, the House passed the Financial CHOICE Act yesterday. While the headline-grabbing aspects of the Financial CHOICE Act relate to a repeal of the Volcker Rule and reducing the authority of the Consumer Financial Protection Bureau, there are some other interesting tidbits relating to public company disclosure, including two that would provide significant relief for smaller issuers. However, the Financial CHOICE Act is unlikely to be adopted by the Senate, which is expected to draft its own measure to modify the Dodd-Frank Act. Hopefully these provisions will be considered for the Senate's bill.

Voluntary XBRL. Smaller issuers with total annual gross revenues of less than \$250 million as well as emerging growth companies would be exempt from the requirement to use XBRL for their financial statements or other periodic reporting. They could, however, elect to use XBRL voluntarily.

Expanded Exemption from Internal Control Attestation. Section 404(b) of Sarbanes-Oxley requires an issuer to file an attestation report from its independent registered public accounting firm on the issuer's internal control over financial reporting. The current requirement only applies to accelerated filers or large accelerated filers. The Financial CHOICE Act amends and expands the exemption to include any issuer that has total market capitalization of less than \$500 million and any issuer that qualifies for the new low-revenue issuer exemption.

The low-revenue issuer exemption is a temporary exemption which applies to an issuer that:

- ceased to be an emerging growth company on the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933;
- had average annual gross revenues of less than \$50 million as of its most recently completed fiscal year; and

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- is not a large accelerated filer.

These amendments are a dramatic expansion of the exemption and would provide significant relief to smaller issuers. They also stand in stark contrast to the position taken by the SEC back in 2011, when the SEC examined the impact of 404(b) on smaller issuers with a market capitalization between \$75 and \$250 million. Back in 2011, the SEC recommended against expanding the existing exemption.