

## SEC Postpones Internal Control Compliance Deadline For Smaller Public Companies and Proposes Large Accelerated Filer Category

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### INTERNAL CONTROL COMPLIANCE EXTENSION

On September 22, 2005, the Securities and Exchange Commission issued a final rule<sup>1</sup> giving companies with a public float of less than \$75 million an extension of an additional year before they must comply with the internal control reporting requirements under Section 404 of the Sarbanes-Oxley Act. As a result of this rule change, a company that is not an accelerated filer will not need to comply with the internal control reporting requirements until its first fiscal year ending on or after July 15, 2007.

Section 404 requires that a company's annual report include (1) a report by management regarding the effectiveness of the company's internal control over financial reporting and (2) a corresponding auditor's report. The Advisory Committee on Smaller Public Companies, formed by the SEC to assess the impact of Sarbanes-Oxley regulations on smaller companies, considered the burden of Section 404 compliance on small companies and recommended that the internal control compliance deadline for non-accelerated filers be delayed for an additional year.<sup>2</sup> In light of the issues raised by the Advisory Committee and other groups and commentators, the SEC has determined to extend further the deadline for Section 404 compliance for non-accelerated filers. As a result of the SEC's action, any company, including a foreign private issuer, with a public float of less than \$75 million will first be required to comply with the Section 404 requirements in the company's annual report for the first fiscal year ending on or after July 15, 2007. A foreign private issuer with a public float equal to or exceeding \$75 million will still be required to comply with the Section 404 requirements in its annual report for the first fiscal year ending on or after July 15, 2006.

### NEW ACCELERATED FILER CATEGORY

Also on September 22, 2005, the SEC released a proposed rule<sup>3</sup> that would create a new category of accelerated filers. The definition of accelerated filer currently encompasses any issuer meeting the following conditions as of the end of its fiscal year: (i) the aggregate market value of the voting and non-voting common equity held by non-affiliates of the issuer is \$75 million or more; (ii) the issuer

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<sup>1</sup> See [SEC Release Nos. 33-8618; 34-52492](#) (September 22, 2005).

<sup>2</sup> In March 2005, the SEC granted another one-year delay in the Section 404 compliance dates for non-accelerated filers and foreign private issuers. See [SEC Release No. 33-8545](#) (March 2, 2005).

<sup>3</sup> See [SEC Release Nos. 33-8617; 34-52491](#) (September 22, 2005).

has been subject to reporting requirements under the Securities Exchange Act of 1934 for at least 12 calendar months; (iii) the issuer has filed at least one annual report under the Exchange Act; and (iv) the issuer is not eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports.

Under current regulations, all accelerated filers would be required to file annual reports for fiscal years ending on or after December 15, 2005 within 60 days after year-end and quarterly reports for subsequent periods within 35 days after quarter-end.

Under the proposed rule, reporting companies would be divided into three separate categories:

- filers with a public float of less than \$75 million would be classified as non-accelerated filers;
- filers with a public float of at least \$75 million but less than \$700 million would be classified as accelerated filers; and
- filers that meet the accelerated filer conditions and have a public float of at least \$700 million as of the last business day of the filer's most recently completed second fiscal quarter would be classified as "large accelerated filers."

The proposals would require only large accelerated filers to comply with further accelerated annual report filing deadlines. Large accelerated filers would be subject to 60-day Form 10-K filing deadlines for annual reports filed for fiscal years ending on or after December 15, 2005 and 40-day deadlines for subsequently filed quarterly reports on Form 10-Q. Accelerated filers would continue to be subject to the current 75-day Form 10-K filing deadlines and 40-day Form 10-Q deadlines, and non-accelerated filers would continue to be subject to the current 90-day Form 10-K filing deadlines and 45-day Form 10-Q deadlines applicable to their filings.

The proposals would also make it easier for large accelerated filers and accelerated filers to exit accelerated filing status. A large accelerated filer could file as an accelerated filer in the year its public float dropped below \$75 million, and an accelerated filer could file as a non-accelerated filer in the year its public float dropped below \$25 million.

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