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SEC PROPOSES TO FURTHER EXTEND COMPLIANCE DATES FOR INTERNAL CONTROL REPORTS FOR NON-ACCELERATED FILERS AND FOR NEW PUBLIC COMPANIES

By *Dionne M. Rousseau* and *Allison C. Bell*

On August 9, 2006, the Securities and Exchange Commission (“SEC”) issued proposed rules to further extend the dates for compliance by “non-accelerated” filers with the internal control requirements mandated by Section 404 of the Sarbanes-Oxley Act of 2002, and to provide a transition period for new public companies to comply with the Section 404 internal control requirements. ([Click here](#) to link to the SEC’s release regarding the proposed rules.)

Non-Accelerated Filers—Under the proposed rules, a non-accelerated filer is not required to provide a management report on internal control over financial reporting until it files an annual report for the fiscal year ending on or after December 15, 2007. Additionally, a non-accelerated filer is not required to provide the auditor’s attestation report on internal control over financial reporting until it files an annual report for the fiscal year ending on or after December 15, 2008.

If adopted, the proposed compliance date extension for non-accelerated filers would be the fourth such extension granted by the SEC. Most recently, in September 2005, the SEC approved an extension of the Section 404 compliance dates for non-accelerated filers to the fiscal year ending on or after July 15, 2007, for both the management report and the auditor’s attestation report.

In its release, the SEC explained that in light of the challenges smaller companies will face in complying with the internal control over financial reporting and related requirements, it is necessary to continue to examine ways to make the reporting process more efficient and effective. This delay will allow time for the SEC to review reports and other guidance recently issued on the subject by the Committee of Sponsoring Organization (“COSO”), the SEC Advisory Committee on Smaller Public Companies, and the U.S. Government Accountability Office, among other organizations. The SEC also stated in its release that if it has not issued additional guidance to management on how to complete its assessment of internal controls over financial reporting in time to be of assistance in connection with annual reports filed for fiscal years ending on or after December 15, 2007, the compliance deadline could be further postponed.

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With respect to the auditor's attestation report, the SEC recognized in its release that because a company will likely only file a management report during its first year of compliance, without an accompanying auditor's attestation report, management's assessment may be called into question if the company's auditor comes to a contrary conclusion in its report filed in the subsequent year. To address this concern, the SEC proposes to deem the management report included in the company's annual report filed during the first year of compliance to be "furnished" rather than "filed"—thus avoiding potential liabilities under Section 18 of the Exchange Act and incorporation by reference into Securities Act Registration Statements.

New Public Companies—Finally, the proposed rules, if adopted, would also provide a transition period for new public companies before becoming subject to the internal control over financial reporting requirements. Currently, once non-accelerated filers are required to comply fully with the internal control reporting provisions, new public companies would be required to comply fully with the internal control reporting requirements as of the end of the fiscal year in which they becomes a public company. Under the proposal, a new public company would begin to comply with the Section 404 internal control reporting requirements in the second annual report that it files with the SEC.

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