

SECURITIES ALERT

SEC POSTPONES INTERNAL CONTROL REPORT COMPLIANCE DATE FOR NON-ACCELERATED FILERS AND PROPOSES AMENDMENTS TO ACCELERATED FILER DEFINITION AND PERIODIC REPORTING DEADLINES



On September 21, 2005, the Securities and Exchange Commission (the SEC) voted to postpone for one additional year the compliance date for filing internal control reports by companies that are not accelerated filers, including foreign private issuers that are not accelerated filers. The SEC also proposed amendments to the accelerated filer definition and periodic reporting deadlines. The proposed rules are subject to a 30-day public comment period. The SEC is also soliciting public comment on several questions concerning the manner in which internal control requirements should apply to smaller public companies.

POSTPONED INTERNAL CONTROL REPORT COMPLIANCE DATE FOR NON-ACCELERATED FILERS

The SEC rules implementing Section 404 of the Sarbanes-Oxley Act of 2002 require, among other things, that a reporting company include in its annual report a report of management and an accompanying auditor's report on the effectiveness of the company's internal controls. Since adoption, the SEC has previously acted twice to provide companies with additional time to comply with the Section 404 requirements. In February 2004 the SEC granted a short extension of compliance dates for both accelerated and non-accelerated filers. In March 2005 the SEC approved a one-year extension for non-accelerated filers and foreign private issuers that file annual reports on Form 20-F or 40-F.

Once again, the SEC is deferring the compliance date for non-accelerated filers. Under the SEC's new compliance schedule, a company that is not an accelerated filer, including a foreign private issuer that is not an accelerated filer, must begin to comply with the Section 404 requirements for its first fiscal year ending on or after July 15, 2007.

Prior to the SEC's September 21 deferral, the concept of accelerated filer had limited application to foreign private issuers. With the SEC's September 21 action, the definition of

accelerated filer has become relevant for foreign private issuers for purposes of the deferral. There is no deferral in the internal control report requirement for a foreign private issuer that meets the definition of an accelerated filer and that files an annual report on Form 20-F or Form 40-F — such a foreign private issuer must begin to comply with the internal control report and related requirements in the annual report for its first fiscal year ending on or after July 15, 2006. A foreign private issuer that is not an accelerated filer must begin to comply with the internal control reporting rules in its annual report for its first fiscal year ending on or after July 15, 2007.

The SEC's reasons for the deferral include ongoing efforts by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) to develop an enhanced COSO Internal Control Framework for smaller public companies, and the continuing evaluation of the impact of the internal control over financial reporting requirements on smaller public companies by the SEC Advisory Committee on Smaller Public Companies (the Advisory Committee). The SEC staff indicated that the extension is consistent with a recent Advisory Committee recommendation.

The SEC also is soliciting public comment on several questions about the application of the internal control reporting requirements to smaller public companies, including questions regarding the amount of time and expense that companies that are not accelerated filers have incurred to date to prepare for compliance with the internal control reporting requirements. Comments on the questions posed by the SEC should be received by the SEC within 30 days of their publication in the *Federal Register*.

PROPOSED AMENDMENTS TO ACCELERATED FILER DEFINITION AND PERIODIC REPORTING DEADLINES

The SEC voted to propose amendments to the periodic report filing deadlines and the definition of an “accelerated filer” in Rule 12b-2 under the Securities Exchange Act of 1934. The proposals would:

- create a new category of companies called “large accelerated filers” to refer to companies that have an aggregate worldwide public float of \$700 million or more and otherwise meet the conditions that apply to accelerated filers. The \$700 million threshold that would distinguish large public filers from other public filers is consistent with the public float threshold used in the SEC's recently adopted definition of a well-known seasoned issuer for purposes of the Securities Act of 1933.
- redefine “accelerated filers” as companies that have at least \$75 million but less than \$700 million in aggregate worldwide public float.
- cause large accelerated filers to become subject to a 60-day Form 10-K annual report deadline and a 40-day Form 10-Q quarterly report deadline next year and in subsequent years.
- maintain indefinitely the current 75-day Form 10-K annual report deadline and 40-day Form 10-Q quarterly report deadline for accelerated filers, as redefined.

- amend the definition of accelerated filer to ease restrictions on the process for exiting accelerated filer status. The SEC's proposed amendments would permit an accelerated filer whose public float has dropped below \$25 million as of the last business day of the company's most recently completed second fiscal quarter to file an annual report on a non-accelerated basis for the same fiscal year that the determination of public float is made. The proposed amendments similarly would permit a large accelerated filer with less than \$75 million in public float as of the last business day of the company's most recently completed second fiscal quarter to exit large accelerated filer status for the same fiscal year that the determination of public float is made.

The SEC's proposed amendments do not affect non-accelerated filers. These companies would continue to file Form 10-K annual reports on a 90-day basis and Form 10-Q quarterly reports on a 45-day basis. The SEC's proposed amendments also do not affect the filing deadlines for foreign private issuers of Forms 20-F or 40-F. Comments on the proposed amendments should be received by the SEC within 30 days of their publication in the *Federal Register*.

CONTACT INFORMATION

If you have any questions or would like to learn more about this topic, please contact the partner who represents you, or:

Ambika Kuckreja
akuckreja@akingump.com
1.866.AKIN LAW

Austin	Brussels	Dallas	Houston	London	Los Angeles	Moscow
New York	Philadelphia	Riyadh (Affiliate)	San Antonio	San Francisco	Silicon Valley	Washington, D.C.