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Proposed and Final Rules to Postpone Section 404 Internal-Control Reporting for Selected Filers

A new SEC rule proposal would postpone the Section 404 requirement for non-accelerated filers to report on management's assessment of internal control over financial reporting and would postpone the related audit requirement even further.¹ The proposal would also change the date by which newly public companies would be required to comply with Section 404. A simultaneously issued final rule defers the requirement to provide an audit report on internal control over financial reporting for certain foreign private issuers.²

Compliance Dates for Non-Accelerated Filers

The proposed rule would extend the effective date for compliance with Section 404(a)'s management-assessment requirement by non-accelerated filers, including foreign private issuers that are non-accelerated filers, to the first fiscal year ending on or after December 15, 2007. The current effective date for non-accelerated filers is the first fiscal year ending on or after July 15, 2007. The proposed rule would also extend the effective date for compliance with Section 404(b)'s requirement to provide an auditors' report on internal control over financial reporting to the first fiscal year ending on or after December 15, 2008.

The SEC's postponements are intended to help non-accelerated filers and their auditors prepare to apply the SEC's coming guidance for management on assessing internal control over financial reporting and the PCAOB's coming amendments to its requirements on auditing internal control over financial reporting. The SEC announced in May its plan to provide guidance for issuers and followed the announcement with a Concept Release in July that requests comments on the issues that might be covered by the guidance.³ The PCAOB announced, also in May, its intent to amend the requirements for the related audits in order to improve their efficiency.⁴

¹ SEC Release 33-8731, Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies, August 9, 2006, available at www.sec.gov.

² SEC Release 33-8730, Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Foreign Private Issuers That Are Accelerated Filers, August 9, 2006, available at www.sec.gov.

³ SEC Release 34-54122, Concept Release, Concerning Management's Reports on Internal Control Over Financial Reporting, July 11, 2006, available at www.sec.gov.

⁴ PCAOB, Auditing Standard No. 2, An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements, 2004.



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PHOTO: GettyImages/Photographer's Choice/Peter Dazeley 200022964-001



This is a publication of KPMG's
Department of Professional
Practice—Audit
212-909-5600

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Earlier editions are available at:
www.aro.kpmg.com

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New and Proposed Section 404 Compliance Dates

(Proposed requirements are shaded. Final requirements are not.)

Filer Status	404(a) – Management's Assessment	404(b) – Auditor Attestation
Non-accelerated filer (domestic and foreign)	Fiscal year ending on or after December 15, 2007 (proposed)	Fiscal year ending on or after December 15, 2008 (proposed)
Foreign accelerated filer	Fiscal year ending on or after July 15, 2006	Fiscal year ending on or after July 15, 2007
Foreign large accelerated filer	Fiscal year ending on or after July 15, 2006	Fiscal year ending on or after July 15, 2006

The SEC points out in the proposing release that the new compliance dates could be postponed again if its guidance on assessing internal control and the PCAOB's amendments to the related auditing standard are not issued in time to be of assistance to management and auditors.

Transition Relief for Newly Public Companies

The proposed rule would postpone the requirements for newly public companies to file management assessments and related auditors' reports to periods after a newly public company filed one annual report with the SEC. This transition relief would apply to any company that becomes public through an initial public offering or a registered exchange offer or that otherwise becomes subject to the Exchange Act reporting requirements, including foreign private issuers that list on a U.S. exchange for the first time.

The SEC is proposing this relief because of the time and resources involved in preparing a newly public company's first annual report, particularly one that quickly follows an initial public offering or initial listing.

Comments on the SEC's proposed rule on compliance dates for non-accelerated filers and transition for newly public companies should be submitted within 30 days after the date the proposal is published in the Federal Register.

Rule Deferring Section 404(b) for Certain Foreign Private Issuers

The new rule adopted by the SEC extends by one year the effective date for foreign private issuers that are accelerated filers (but not large accelerated filers) and file their annual reports on Form 20-F or 40-F to comply with the Section 404(b) requirement to file an auditors' report on internal control over financial reporting.⁵ The effective date for providing an auditors' report is for fiscal years ending on or after July 15, 2007 for these foreign private issuers.

Foreign private issuers that meet the criteria are still required to comply with Section 404(a)'s requirement to include management's report in a Form 20-F or 40-F for the first fiscal year ending on or after July 15, 2006. And the new rule does not affect the requirements for foreign private issuers that are large accelerated filers to comply with Section 404(a) and (b) for the first fiscal year ending on or after July 15, 2006.

The final rule will be effective on the date it is published in the Federal Register. Publication is expected shortly.

Registrants should not treat the descriptive and summary statements above about the rule or proposed rule as a substitute for what might be adopted or for any other SEC requirements. They should refer to the texts of the SEC requirements, consider their particular circumstances, and consult their accounting and legal advisors.

⁵ "Large accelerated filer" includes issuers with an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates ("public float") of \$700 million or more as of the last business day of the issuer's most recently completed second fiscal quarter. See Exchange Act Rule 12b-2 for the definition of "large accelerated filer."