

Discussion Document A

Topic: Section 404 Reporting by Non-Accelerated Filers After Exiting Accelerated Filing

Background:

Under the SEC's transition provisions for Section 404 compliance, the applicability of Section 404 depends on whether or not an issuer is an accelerated filer.

Accelerated Filing Exit Provisions: In December 2005, the SEC issued a final rule, *Revisions to Accelerated Filer Definition and Accelerated Deadlines for Filing Periodic Reports* (SEC Release No. 33-8644; 34-52989). Among other things, the final rule amended the provisions for exiting accelerated filer status. Under the amended exit provisions, a large accelerated filer or an accelerated filer whose public float falls below \$50 million as of the last business day of its second fiscal quarter would become a non-accelerated filer for that fiscal year. Further, an accelerated filer or large accelerated filer that ceases to have public equity float altogether (e.g., as a result of the company being acquired), would immediately become a non-accelerated filer. Previously, an accelerated filer had to continue reporting on an accelerated basis until it qualified to file as a small business issuer.

Section 404 Transition Provisions: The SEC has adopted several revisions to the transition provisions for beginning to comply with the internal control reporting requirements of Section 404 of the Sarbanes-Oxley Act of 2002. The current Section 404 reporting deadlines are as follows (based on SEC Release No. 33-8618; 34-52492 (dated September 22, 2005) for domestic filers and SEC Release No. 33-8730; 34-54294 (dated August 9, 2006) for foreign private issuers):

- Large accelerated filers and accelerated filers, other than foreign private issuers, were required to begin complying with Section 404 reporting for fiscal years ending on or after November 15, 2004.
- Foreign private issuers that meet the definition of a large accelerated filer are required to begin to comply with all aspects of Section 404 reporting for fiscal years ending on or after July 15, 2006.
- Foreign private issuers that meet the definition of an accelerated filer are required to begin to comply with Section 404(a), reporting on management's assessment, for fiscal years ending on or after July 15, 2006 and to comply with Section 404(b), the auditor attestation report, for fiscal years ending on or after July 15, 2007.
- Non-accelerated filers currently are required to begin complying with all aspects of Section 404 reporting for fiscal years ending on or after July 15, 2007. However, on August 9, 2006, the SEC proposed further revisions to the transition provisions for non-accelerated filers. As proposed, for non-accelerated filers (including foreign private issuers that qualify as non-accelerated filers), Section 404 reporting by management would be delayed to fiscal years ending on or after

December 15, 2007, and Section 404 attestation by the auditor would be delayed to fiscal years ending on or after December 15, 2008.

As a result of the relaxed provisions for exiting accelerated filer status, there are likely to be more instances in which an accelerated filer that had reported under Section 404 becomes a non-accelerated filer. Particularly given the SEC's pending proposal to further defer Section 404 reporting by non-accelerated filers, the Committee wishes to confirm with the SEC staff that the Section 404 transition provisions apply to all non-accelerated filers, including a former accelerated filer that met the applicable exit provisions. That is, a former accelerated filer that had reported under Section 404 can suspend Section 404 reporting while a non-accelerated filer, until either (a) it again becomes an accelerated filer, or (b) as a non-accelerated filer, it must begin to comply with Section 404 under the SEC's applicable transition provisions.

As an example, Company X is a calendar year-end SEC registrant. For its fiscal year ended December 31, 2005, Company X was an accelerated filer and complied with all applicable SEC filing and Section 404 reporting requirements and deadlines. For the fiscal year ending December 31, 2006, Company X will qualify as a non-accelerated filer by virtue of its public float dropping below \$50 million as of the last business day of its second fiscal quarter (June 30, 2006). As a non-accelerated filer, Company X is not required to comply with Section 404 in its 2006 Form 10-K.

The Committee understands that on several occasions, the Office of Chief Counsel in the Division of Corporation Finance has responded to registrants with similar fact patterns that they were not required to comply with Section 404 if they were filing as a non-accelerated filer. In addition, at the 2005 AICPA National Conference on Current SEC and PCAOB Developments, Carol Stacey expressed that same view in response to a question.

Issue/Question:

If an issuer previously met the definition of an accelerated filer or a large accelerated filer, but that issuer subsequently meets the exit provisions and becomes a non-accelerated filer, must the issuer comply with Section 404 in its SEC annual report?

Answer: Whether and how an issuer must comply with Section 404 is determined on an annual basis. Accordingly, an accelerated filer previously subject to Section 404 reporting should reassess its Section 404 reporting requirements if it becomes a non-accelerated filer.

Committee Recommendation: The Committee concurs with the answer.

SEC Staff Position: The SEC staff agrees with the answer.