

# SEC UPDATE



## Extensions In Respect of Section 404 Requirements for Foreign Private Issuers that Are Not Large Accelerated Filers

On August 9, 2006, the SEC issued two releases (one setting forth a proposed rule and one setting forth a final rule) in respect of compliance dates for requirements relating to internal control over financial reporting. These releases provide, or propose, relief for foreign private issuers other than large accelerated filers. The final rule will become effective upon official publication, and the proposed rule is subject to a 30-day comment period.

The impact of the initiatives varies depending on a foreign private issuer's filing status – large accelerated filer, accelerated filer or non-accelerated filer. In brief, there is no relief for large accelerated filers. **Large accelerated filers** generally include issuers (i) with an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of US\$700 million or more and (ii) that have been subject to SEC reporting requirements for a period of at least twelve months. **Accelerated filers** generally include issuers (i) with an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of US\$75 million or more, but less than US\$700 million, and (ii) that have been subject to SEC reporting requirements for a period of at least twelve months.

**Final Rule:** As a result of the final rule, foreign private issuers (other than those that qualify as large accelerated filers) will not be required to include an auditor's attestation report on internal control over financial reporting until their annual reports on 20-F or 40-F for the first fiscal year ending on or after July 15, 2007 (instead of July 15, 2006). Under the final rule (which may be modified by the proposed rule discussed below), such issuers will need to include a management's report on the effectiveness of internal control over financial reporting in their annual reports on 20-F or 40-F for the first fiscal year ending on or after July 15, 2006.

**Proposed Rule:** Under the proposed rule, non-accelerated filers (including foreign private issuers that are non-accelerated filers) would not be required to provide (i) a management's report on the effectiveness of internal control over financial reporting until the annual report for the first fiscal year ending on or after December 15, 2007 (instead of July 15, 2007) or (ii) an auditor's attestation report on internal control over financial reporting until the annual report for the first fiscal year ending on or after December 15, 2008 (instead of July 15, 2007).

Non-accelerated filers (including foreign private issuers that are non-accelerated filers) would have to complete only the management's portion of the internal control requirements in their first year of compliance with the requirements, and the management report would be deemed "furnished" rather than "filed" for that first year. This same relief on "furnishing" versus "filing" is proposed to be available to accelerated filers as well.

The proposed rule and final rule, however, do not affect the date by which foreign private issuers that are large accelerated filers must comply with all of the requirements related to internal control over financial reporting. Foreign private issuers that are large accelerated filers must include both a report the management's report on the effectiveness of internal control over financial reporting and the auditor's attestation report on internal control over financial reporting in the annual report for the first fiscal year ending on or after July 15, 2006.

The compliance dates applicable to foreign private issuers for Section 404 of the Sarbanes-Oxley Act can be summarized as follows (U= unchanged; NR=new rule; PR=proposed rule):

	<u>Large Accelerated Filer</u>	<u>Accelerated Filer</u>	<u>Non-Accelerated Filer</u>
<i>Worldwide market value (held by non-affiliates)</i>	<i>US\$700 million or more</i>	<i>US\$75 million or more, but less than US\$700 million</i>	<i>Less than \$75 million</i>
Section 404(a) <i>Management report</i>	First fiscal year ending on or after July 15, 2006 (U)	First fiscal year ending on or after July 15, 2006 (U)	First fiscal year ending on or after July 15, 2007 (PR)
Section 404(b) <i>Auditor's attestation report</i>	First fiscal year ending on or after July 15, 2006 (U)	First fiscal year ending on or after July 15, 2007 (NR)	First fiscal year ending on or after December 15, 2008 (PR)

**Proposed Relief for Newly Public Companies.** In addition, the SEC is proposing a transition period to alleviate reporting burdens imposed on newly public companies. Under the proposed rule, a newly public company would not need to comply with the requirements relating to internal control over financial reporting in its first annual report on Form 10-K, 20-F or 40-F. Rather, the company would begin to comply with these requirements in the second annual report that it files with the SEC. By reducing the burden of complying with the requirements relating to internal control over financial reporting in the first annual report, the proposed transition period would allow, among other things: (i) a company to complete its initial public offering in close proximity to its fiscal year-end, and (ii) a foreign private issuer to complete an SEC-registered exchange offer or business combination transaction and then subsequently deregister after filing just one annual report (assuming the issuer is then eligible for deregistration).

This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to any member of the Paul, Weiss Securities Group, including:

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