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Dear Mr. Katz:

I am submitting this letter in response to the Commission's request for public comment on the implementation of Section 404 of the Sarbanes-Oxley Act of 2002. Section 404 has been rightly identified as among the most challenging and demanding of the reforms enacted by Sarbanes-Oxley, and I am certain the Commission will receive many letters commenting on the general costs and burdens, as well as the benefits, of complying with Section 404. I will leave those broader issues to other commenters, however, as I write today solely to urge the Commission to consider the impact of Section 404 on, and to provide corresponding relief for, a relatively small subset of affected issuers. I am speaking of newly public companies—specifically, those companies that undertake initial public offerings after this year.

Recognizing the staggering challenges imposed by compliance with Section 404, the Commission and its staff have rightly shown a sensitivity in implementing Section 404 that has led to several delays in applicable compliance dates and various other forms of relief for differently situated issuers. Most recently, the Commission deferred compliance with Section 404 for non-accelerated filers and foreign private issuers until their first fiscal years ending on or after July 15, 2006.[1] This relief covers companies that become public in 2005. Earlier relief covered companies that became public in 2004. This letter is to urge similar relief for companies that become public in 2006 and thereafter.

As discussed in more detail below, companies that enter the public markets during 2006 and later will be confronted with Section 404 compliance very shortly thereafter. Because of the lengthy period required to actually comply with

[1] Release No. 33-8545, March 2, 2005.

Section 404—a period of a year, or more, in most cases—for companies going public in 2006 and thereafter, it will often be necessary to begin the Section 404 process well before preparation of disclosure documents and SEC-compliant financial statements for their IPO has begun. This will substantially increase the lead time for companies planning to access the public markets. They will be forced to commit significant internal resources and incur substantial costs while they are still private companies (and before they can realistically assess whether the markets will be receptive to their going public) in an effort that I believe was intended to apply only to public companies. In addition, they will face the burden of preparing disclosure documents and SEC-compliant financial statements while at the same time engaging in the demanding planning, documentation and testing required by Section 404. As expanded upon below, this in many cases may result in more costly but less effective Section 404 implementation and compliance, disrupt access to the capital markets, and inappropriately impose Section 404 efforts on private companies that may never make it to the public markets. Accordingly, I believe the Commission should take action to provide these companies with a full year after they become public companies to prepare for their first required management and auditor reports under Section 404.

*Section 404 and Its Impact on Initial Public Offerings: Proposed Relief*

Once Section 404 is fully implemented for non-accelerated filers and foreign private issuers, it will be fully in effect for all issuers, domestic and foreign. This will include all companies that complete their initial public offerings in the preceding year—whether by a "traditional" IPO of equity securities or by registering an exchange offer for debt securities that were initially issued in a Rule 144A or other unregistered transaction. Any foreign private issuer listing its securities in the U.S. markets for the first time will also be required to comply immediately with Section 404. Perhaps most critically, these companies will have to include management assessment and auditor attestation reports on internal control over financial reporting (collectively, "Section 404 reports") with their first 10-K and 20-F filings. This is in stark contrast to the Commission's very measured implementation of Section 404 so far—to date, all public companies, large and small, domestic and foreign, young and old, have been given at least a year to comply with Section 404 after they became public companies. Unlike the experience of current public companies, there will be no phase-in period for IPO issuers in 2006 and thereafter.

Because no company is an "accelerated filer" with respect to its first required annual report on Form 10-K, the Commission's release on March 2, 2005, had the effect of relieving companies, domestic or foreign, of any size, with an IPO or initial registration in 2005 from having to include Section 404 reports with their Form 10-K's or 20-F's due in 2006. A company that goes public in 2006, however, will enjoy no such dispensation and will be required to include those reports in its first annual filing with the SEC. I believe there are sound policy reasons why this should not be the case, and I urge the Commission to take the necessary action to afford newly public companies, in any year, some sensible relief. Specifically, I would propose that Section 404 reports not be required until an issuer has, as of the end of its fiscal year, been subject to the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") for a period of at least twelve calendar months and has been required to file at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act. I briefly discuss below the most critical reasons why this relief is needed and why the Commission should provide it.

*Need for time to comply with Section 404*

In order to be effective and meaningful, compliance with Section 404 requires a company to invest substantial time, over an extended period of time, in the effort. Just as a rough rule of thumb, many auditors and consultants have been advising that most companies need a full twelve months of preparation time before their first Section 404 reports are due. The required evaluations, although they are "as of" year-end, require testing and other work for a period of multiple months prior to that assessment date. Accelerated filers—who included their Section 404 reports for the first time with their 10-K's filed this month—were already actively and intensely involved with Section 404 planning and documentation during the spring and summer of 2004.

The Commission's various actions to delay the implementation of Section 404 for different issuers have reflected this reality, and public companies have been given additional time, on several occasions, for their compliance efforts. Alan Beller, the Director of the Commission's Division of Corporation Finance, explained this at a Section 404 conference in January when he said that "because we believe these [Section 404] reforms to be so important, and because we are aware of the time and expense necessary to implement them, for more than two years now we have been encouraging companies and auditors to get an early start on planning, preparation and compliance."[2]

The "early start" to which Mr. Beller referred, however, will not be practicably available to companies going public after this year. Under the current rules, a company intending to go public in 2006 or later would face the stark and rather dire choice of having to begin preparations for Section 404, at considerable cost, prior to the time the company is public (or even has any assurance it will ever be public) or having to accept an almost certain inability to comply meaningfully with the requirements of Section 404. For example, a calendar-year company that completes its IPO in October 2006 will either need to have made substantial progress toward compliance with Section 404 before that time or will face severe and perhaps insurmountable difficulties in including the required Section 404 reports with its first 10-K filing that will be due in March 2007. Section 404 does not, and is not intended to, apply to private companies. Under the existing rules, however, private companies planning to become public companies would seem to be expected to bear considerable costs, both monetary and otherwise, due to Section 404.

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[2] "Investors, the Stock Market, and Sarbanes-Oxley's New Section 404 Requirements," Speech by Alan L. Beller, Director, Division of Corporation Finance, New York, New York, January 12, 2005 ("Beller Speech").

When analyzing the costs and benefits of its initial rulemaking under Section 404, the Commission noted that it was allowing an extended period of time for public companies to comply with the new rules. In that regard, it noted that

> A longer transition period will help to alleviate the immediate impact of any costs and burdens imposed on companies. A longer transition period may even help to reduce costs as companies will have additional time to develop best practices, long-term processes and efficiencies in preparing management reports. Also, a longer transition period will expand the period of availability of outside professionals that some companies may wish to retain as they prepare to comply with the new requirements.[3]

The Commission's analysis inheres all the more in the situation of a newly public company. Without an equitable transition period provided by the Commission, however, these companies will not enjoy any of these reduced costs and increased benefits that the Commission's initial rulemaking afforded other companies.

*Effect on quality of Section 404 compliance*

Mr. Beller has also stated that "we want to ensure that the rules encourage companies genuinely to improve their controls and processes to provide better reliability of financial statements and financial reporting. We are not seeking to encourage mere check-the-box compliance exercises."[4] I believe the Commission greatly increases the chances that newly public companies will be able to meet these standards if it affords them the time they will need to prepare for full compliance with Section 404.

As the Commission understands, the offering period for an IPO is necessarily a demanding time for companies, which may be relatively small and young and already strapped, at that time, for personnel and sometimes cash. It is not realistic to expect companies in this situation to be also putting in place the necessary systems and processes for full compliance with Section 404. It would be a far better system that allowed a company to put its best foot forward for its offering process and then turn, with its best foot again available, to the challenges of complying with Section 404.

There is a very real, and unfortunate, possibility that without some type of action by the Commission the result will be a lower quality of Section 404 compliance and the Commission will be stymied, with regard to this small subset of companies at least, in its admirable goal of providing better reliability of financial statements and financial reporting. Neither investors nor newly public companies want this result, and it is in the public interest generally for the Commission to take the reasonable steps that would help prevent it.

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[3] Release No. 33-8238, Section V.B.

[4] Beller Speech.

*Effect on timing of business and capital-raising decisions*

If the Commission does not offer some type of relief from Section 404 to companies that are contemplating an initial public offering (or otherwise entering the U.S. capital markets), we also face the very real prospect that there will be unintended, and significant, effects on the business and capital-raising decisions that companies must make. For example, those of us in the private bar who are active in representing underwriters and issuers during initial public offerings have already heard credible stories of issuers that have considered letting Section 404 dictate the timing of their offerings—for example, by delaying their IPO until after the end of their fiscal year in order to "buy" themselves an additional 12 months to comply with Section 404. Similarly, an exchange offer might be delayed following a Rule 144A debt offering in order to provide the issuer with more time to comply with Section 404 once it becomes a public company (as will happen when it exchanges the Rule 144A securities with registered ones).

Rather than being able to respond solely to the conditions of the market and their own business, these companies are finding their capital-raising decisions and timing to be driven by regulatory forces that seem almost capricious in this regard. I believe this consequence was unintended by Sarbanes-Oxley or the Commission, and I submit that it is unfortunate and should be avoided if possible. The Commission's release on March 2, 2005, removed this difficulty for companies that complete their IPO's in 2005 but it will remain an issue in all subsequent years unless the Commission takes further action to alleviate the problem.

In closing, let me state my appreciation and support for the Commission's efforts to implement Section 404 as sensibly as possible and to understand the consequences and ramifications of Section 404 for public companies, our capital markets and investors alike. I sincerely hope that in that spirit the Commission will provide some relief from the current system of rules under Section 404 for companies that complete their IPO's, or otherwise become public companies for the first time, after this year.

Very truly yours,

/s/ John W. White

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