

November 1, 2005

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE.
Washington, D.C. 20549-6561

File No.: S7-08-05
Proposed Rule: Revisions to Accelerated Filer Definition
and Accelerated Deadlines for Filing Periodic Reports
Release Nos. 33-8617; 34-52491

Dear Mr. Katz:

The Center for Public Company Audit Firms (the “Center”) of the American Institute of Certified Public Accountants (“AICPA”) respectfully submits the following written comments on the Securities and Exchange Commission’s (the “SEC” or the “Commission”) proposal, *Revisions to Accelerated Filer Definition and Accelerated Deadlines for Filing Periodic Reports* (the “Proposing Release” or “Proposal”).

The Center was established by the AICPA to, among other things, provide a focal point of commitment to the quality of public company audits and provide the SEC and the Public Company Accounting Oversight Board (PCAOB), when appropriate, with comments on their proposals on behalf of Center members. There are approximately 900 Center member firms that collectively audit 97% of all SEC registrants (and 91% of the non-accelerated filers are audited by Center member firms). All of the Center’s member firms are U.S. domiciled accounting firms. The AICPA is the largest professional association of certified public accountants in the United States, with more than 340,000 members in business, industry, public practice, government, and education.

SUMMARY COMMENTS

We applaud the Commission’s efforts to reconsider the final phase-in of the accelerated filing deadlines for periodic reports scheduled to occur in 2006. We support the approach of the Proposal to

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limit further acceleration of current filing deadlines for Form 10-K, to retain the current 10-Q deadlines, and to ease exiting from accelerated filer status. However, for the reasons noted in this letter, we recommend that the Commission indefinitely delay any additional acceleration of the current periodic report filing deadlines. Furthermore, rather than create a new, third category of issuer, we believe that the Commission's important objective of striking a balance between the needs of investors for timely high-quality information and the needs of issuers for cost-effectively generating that information would be better achieved by retaining a two-tiered structure.

Specifically, consistent with our comments on the Commission's *Securities Offering Reform* proposal and our comments to the Advisory Committee on Smaller Public Companies, we suggest the Commission revise the definition of an accelerated filer to include only those issuers with public float of \$700 million or more. According to the information compiled by the Commission's Office of Economic Analysis (OEA), this threshold would result in accelerated filings by issuers comprising approximately 95% of total U.S. equity market capitalization. We urge the Commission to adopt this approach. We believe that this structure for distinguishing between accelerated and non-accelerated filers appropriately balances investor needs for timely information against the costs of providing that information and is preferable to creating a third category of filer.

Further, we suggest that the Commission indefinitely delay any further acceleration of the existing report filing deadlines for accelerated filers as defined above (i.e., those with public float of \$700 million or more). We believe those deadlines should remain at 75 days and 40 days for Forms 10-K and 10-Q, respectively. Accordingly, we support retaining the Form 10-Q deadline at 40 days for all accelerated filers, as the Commission has proposed. Moreover, we do not believe the benefits that investors may derive from shortening the annual reporting deadlines to 60 days, respectively, are sufficient to outweigh the costs of achieving that deadline.

The Proposing Release also would revise the criteria governing an accelerated filer's exit from accelerated filer status. We support the Commission's reassessment of those criteria but we suggest that the Commission adopt alternative criteria for determining when issuers can exit accelerated filer status. Our specific comments present an alternative approach to this determination.

The Proposal raises a number of questions. Our letter comments on those issues that affect financial reporting and the involvement of independent auditors in the filing of periodic reports. Our specific comments are organized into the following sections:

- Creation and Definition of Large Accelerated Filer
- Proposed Amendments to Accelerated Filing Deadlines
- Determination Date for Accelerated Filer Status
- Exiting Accelerated Filer Categories
- Other

SPECIFIC COMMENTS

CREATION AND DEFINITION OF LARGE ACCELERATED FILER

Currently, accelerated filers are defined as issuers with public float of \$75 million or more. Accelerated filers file their quarterly and annual reports on Forms 10-Q and 10-K more quickly than non-accelerated filers. The Commission's proposal would stratify accelerated filers by creating a separate category for larger companies. As proposed, a "large accelerated filer" would be an issuer whose registered common equity securities have a worldwide public float of \$700 million or more. The definition of a large accelerated filer, as proposed, would differ from the definition of a "well-known seasoned issuer" in certain respects. For example, debt-only issuers that qualify as well-known seasoned issuers would continue to be exempt from all accelerated filing deadlines. The Commission seeks comment on the creation and definition of "large accelerated filer." The Commission also asks whether the resulting three tiers of filing status provide appropriate balance and structure within the periodic reporting system and whether that structure may cause confusion among investors.

When the Commission proposed accelerating the filing dates for annual and quarterly reports in 2002, it was constrained by a lack of information on the costs and process changes issuers would need to implement in order to achieve those deadlines. Appropriately, the Commission's final rules provided for phased-in acceleration. Over the past few years, we have learned much more about the costs and abilities of issuers to accelerate the reporting process while maintaining (if not improving) the quality of reported information. Further, thanks to the OEA, we also have a much better understanding of the size and following of issuers in our capital markets. We applaud the Commission's efforts to reconsider the final phase-in of the accelerated filing deadlines scheduled to occur in 2006 in light of this additional information.

As stated above, we believe that the Commission's important objective of striking a balance between the needs of investors for timely high-quality information and the needs of issuers for cost-effectively generating that information would be better achieved by retaining a two-tiered structure. Specifically, we propose that the Commission define accelerated filers as those with a public float of \$700 million or more.

When the Commission issued its accelerated filing rules in 2002, it stated that the "the public float and reporting history requirements are designed to include the companies that are least likely to find such a change overly burdensome and where investor interest in accelerated filing is likely to be highest..... [The Commission] believe[s] it is more important that companies of the same relative size, including the most actively followed companies, are subject to shortened deadlines."¹ Our recommendation to increase the public float threshold for an accelerated filer is consistent with those objectives.

According to the information compiled by the OEA, a \$700 million threshold would result in accelerated filings by issuers comprising approximately 95% of total U.S. equity market capitalization and 90% of total capital raised in the U.S.² In addition to comprising the vast majority

¹ See *Acceleration of Periodic Report Filing Dates*, Release No. 33-8128, § II. B. 1 and § II. B. 3.

² According to *Securities Offering Reform*, Release No. 33-8591, § II. A. 1. and § II. A. 1. a. ('Definition of Well-Known Seasoned Issuer' and 'Market Capitalization Threshold'), issuers with \$700 million or more of

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of equity market capital, these issuers are widely followed.³ Conversely, issuers with public float between \$75 million and \$700 million account for only 4.3% of total U.S. equity market capitalization, represent 23% of public companies on the exchanges,⁴ and generally are followed by few, if any analysts.⁵ These smaller public companies tend to have fewer resources and thus face incremental challenges in meeting accelerated filing dates. Accordingly, we believe that the \$700 million threshold for an accelerated filer achieves the Commission's objective of providing investors with more timely filings by "the most actively followed companies" for whom "investor interest in accelerated filings is likely to be highest" and limits the cost of complying with these accelerated deadlines to those issuers who are least likely to find the change "overly burdensome."⁶

We recognize that issuers whose public float is currently between \$75 million and \$700 million have already been subject to accelerated reporting for the past two years. Some might argue that the costs and process improvements necessary to comply with those deadlines are therefore "behind them" and that there is no incremental burden to retaining the current deadlines. However, we would observe that there are on-going costs to maintaining these accelerated processes. Further, there will be incremental costs to maintain this accelerated reporting timeframe as rule changes occur. Those costs likely will be burdensome to these smaller companies. For example, the adoption of new accounting standards or the implementation of new or expanded financial and non-financial disclosure requirements will need to be accomplished in the accelerated timeframe. Again, given the relatively small market presence of these companies in terms of both dollars of capital and analyst following, providing these smaller issuers with an extra 15/5 days to file their annual/quarterly reports (compared to their current filing deadlines) seems appropriate on a cost-benefit basis.

An incremental benefit of maintaining a two-tiered structure is its relative simplicity. Over the past two decades, the Commission's efforts to streamline the rules and regulations governing our capital markets have benefited investors and issuers. The creation of a third tier of filer appears to run

public float accounted for about 95% of U.S. equity market capitalization in 2004 and approximately 90% of total capital raised (based on debt and equity offering proceeds) in the U. S. between 1997 and 2004.

³ These issuers are followed by an average of 12 analysts. See *Securities Offering Reform*, Release No. 33-8591, § II. A. 1. a (Market Capitalization Threshold).

⁴ According to the data in § V. B. ('Costs') of the Proposing Release, 2,307 of the companies listed on NYSE, Amex, NASDAQ, OTCBB or the Pink Sheets have a public float of between \$75 million and \$700 million. These companies represent 23% of the total number of companies on those exchanges and 4.3% of the public float.

⁵ According to footnote 53 in *Securities Offering Reform*, Release No. 33-8591, issuers with a market capitalization of between \$75 and \$200 million, in most cases, have between zero to five analysts following them, with approximately 50% having zero to two analysts following them. Data from "Background Statistics: Market Capitalization of Public Companies" prepared by OEA and included in the report by the SEC's Small Business Advisory Committee indicate that even companies with market capitalization of between \$200 million and \$700 million are followed by only two to five analysts. (Refer to <http://www.sec.gov/rules/other/265-23/adavernslides081005.pdf>)

⁶ We do not believe that increasing the accelerated filer threshold to \$700 million should affect the internal control reporting requirements for companies with public float between \$75 million and \$700 million that have already implemented Item 308 of Regulation S-K (also referred to as "Section 404 reporting" in the context of the Sarbanes-Oxley Act of 2002). As noted in our comment letter on File No. S7-06-03, *Request for Public Input by SEC on Internal Control Reporting Requirements*, these companies and their auditors are already fully engaged in this process with the most labor intensive year behind them. In addition, there is a great deal to be learned from "year two" experiences with regard to the costs and benefits of internal control reporting, for which data should be accumulated for as many companies as possible. Lastly, it is in the public interest to continue the internal control reporting for as many companies as possible.

contrary to these simplification efforts. As the Commission notes in its Proposing Release, three sets of filing deadlines and definitional differences between “large accelerated filers” and “well known seasoned issuers” may confuse investors. The existence of three tiers also adds complexity to other rules and regulations (e.g., rules on entering and exiting filer categories). Further, as the Commission revises or creates other rules, it will need to address the question of three-tiered applicability and implementation of those rules. We acknowledge that the proposed three-tiered structure is a reasonable approach to balancing investor needs with issuer costs in certain respects. However, because an appropriate balance can also be achieved via a two-tiered structure, as we suggest, we question whether the incremental complexity of a three-tiered structure is warranted.

We also ask that the Commission reconsider whether it would be appropriate for certain debt-only issuers to accelerate the filing of their periodic reports. Consistent with our comments related to the *Securities Offering Reform* proposal, we believe debt-only issuers that meet the definition of a well-known seasoned issuer should be required to file on an accelerated basis in order to take advantage of automatic shelf registration. We believe our recommendation is consistent with one of the underlying premises of *Securities Offering Reform*, specifically, that regulatory actions have “improved the delivery of timely, high-quality information to the securities markets.”⁷ Under our proposal, such debt-only issuers would have the option to file periodic reports in accordance with the non-accelerated timetable if they are willing to forgo the benefit of automatic shelf registration that is available to well-known seasoned issuers.

PROPOSED AMENDMENTS TO ACCELERATED FILING DEADLINES

In 2002, the Commission adopted rules to phase-in accelerated filing deadlines for the annual reports (Form 10-K) and quarterly reports (Form 10-Q) for certain issuers. The phase-in schedule was amended in 2004. Based on the current stage of the phase-in, the due dates for all accelerated filers are 75 days for an annual report on Form 10-K and 40 days for quarterly reports on Form 10-Q. Absent any change in the existing rules, in 2006 the final phase of acceleration will require an accelerated filer with a December year end to file its 2005 Form 10-K within 60 days and its subsequent Form 10-Qs within 35 days. Non-accelerated filers remain at 90 days for Form 10-K and 45 days for Form 10-Q. Under the Commission’s proposal to create a third category of filer, the 60 day deadline for annual reports on Form 10-K would be required only for large accelerated filers, i.e., issuers with worldwide public float of common equity of \$700 million or more. The existing 75 day deadline for Form 10-K would continue to apply to accelerated filers. No further acceleration of quarterly reports on Form 10-Q would be required for any issuer. The Commission seeks comment on its proposed revisions to the filing deadlines. In particular, the Commission asks whether (a) it is necessary to distinguish larger accelerated filers from smaller ones if the only difference is the due date for the annual report, (b) further acceleration of the due date for Form 10-Q should be required of large accelerated filers and (c) the current 75- and 40-day filing deadlines for smaller accelerated filers should be retained.

⁷ See *Securities Offering Reform*, Release No. 33-8591, § I. B. 2 (Background – Exchange Act Reporting Standards)

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We recommend that the Commission indefinitely delay any additional acceleration of the current periodic report filing deadlines for accelerated filers. Our experiences with the costs and efforts to accelerate the filing of Form 10-K by 15 days (from 90 days to 75 days) indicate that an additional 15 day acceleration (from 75 days to 60 days) would be a significant burden, particularly for smaller public companies. We note that, in this context, 15 days represents a 20% reduction in filing time. That is very significant, particularly given the quality controls, disclosure reviews and audit requirements that need to be met for both the financial statements and internal controls. From a cost-benefit perspective, we do not believe that the cost of achieving this final 15 day acceleration is warranted. In addition, shortening the deadline will place additional pressure on public company management, legal counsel, audit committees, and financial reporting staff in addition to time constraints placed on the independent auditor. We believe that quality financial reporting is important and should not be compromised for accelerated timing.

We also fully support the Commission's proposal to eliminate any further acceleration of filing dates for quarterly reports on Form 10-Q. While the information and experiences we have gathered during the initial phase-in of accelerated deadlines are more anecdotal than scientific, it seems clear to us that both larger and smaller accelerated filers already face significant challenges in consistently preparing high-quality interim financial statements, footnotes and Management's Discussion and Analysis within the existing reporting deadlines.

As noted above, we encourage the Commission to revise the definition of an accelerated filer to include only issuers with public float of \$700 million or more. Under this revised approach, the annual and quarterly reports of issuers with a public float of less than \$700 million would be 90 days and 45 days after period end.

DETERMINATION DATE FOR ACCELERATED FILER STATUS

Currently, an issuer determines whether it must enter accelerated filer status based on public float as of the last business day of the issuer's most recently completed second fiscal quarter. The Commission's proposal would retain this determination date and apply it to the assessment of filer status for both accelerated and large accelerated filers. Respondents to the proposal are asked to comment on whether (a) the second fiscal quarter is the appropriate date for such determination; and (b) the determination should be made over a longer period of time.

The current requirement to determine accelerated filer status at a single point in time has presented one significant challenge to smaller issuers that we suggest the Commission address in finalizing its Proposal. Specifically, during this period of transition to internal control reporting under Section 404 of the Sarbanes-Oxley Act of 2002 ("SOX 404"), when an issuer first becomes an accelerated filer, it must accelerate the completion of its annual report on Form 10-K *and* implement the SOX 404 internal control reporting requirements, both for the first time. We have observed that this is a very significant challenge for many smaller issuers.

In some cases, market conditions might enable an issuer to anticipate meeting the \$75 million threshold at the end of its second quarter. In those circumstances, the issuer can get a "head start" on implementing SOX 404. However, in other cases there may be a rapid or unexpected change in stock price at quarter end that makes the achievement of accelerated filer status a surprise. Further, there is no "grace period" for an issuer whose stock price momentarily "blips" onto the accelerated filer radar

screen at the end of its second fiscal quarter, only to fall below \$75 million shortly thereafter. Accordingly, a small issuer may face significant challenges and costs to implement all the requirements of an accelerated filer by virtue of what may boil down to a minimal change in stock price on just one day.

If the Commission finalizes the Proposal as drafted, we strongly encourage the Commission to consider providing a first-time accelerated filer with some relief during this period of transition to SOX 404 internal control reporting. Accordingly, until such time that SOX 404 applies universally to all issuers, we recommend that the SEC modify its existing transition provisions such that a non-accelerated filer must first comply with SOX 404 in its second annual report after becoming an accelerated filer. Such modification would provide non-accelerated filers with a more reasonable period of time to prepare to report under SOX 404 in an orderly and cost-effective manner.

EXITING ACCELERATED FILER CATEGORIES

An accelerated filer is permitted to file as a non-accelerated filer (i.e., exit accelerated filer status) under the current rules only if and when the issuer becomes eligible to use Forms 10-KSB and 10-QSB. Eligibility for these forms requires meeting the definition of a small business issuer (less than \$25 million in revenues *and* less than \$25 million in public float) at the end of two consecutive years. The Commission proposes to permit an accelerated filer to exit accelerated filer status if its public float falls below \$25 million at the end of the issuer's second fiscal quarter. A large accelerated filer would exit the large accelerated filer category and become an accelerated filer if its public float dropped below \$75 million at the end of its second fiscal quarter. Under the proposal, the exit date would be effective (in both cases) at the end of the issuer's fiscal year. The Commission seeks comment on whether these exit thresholds and timelines are appropriate.

We support the Commission's efforts to reassess the current framework for exiting accelerated filer status by seeking a more timely determination of circumstances that no longer warrant accelerated reporting. We agree that the current exit requirements can lead to inequitable results. In particular, we note that although the Commission's objective in establishing the accelerated filer rules was to have similar sized issuers reporting in a similar fashion,⁸ the disparity in thresholds for entering and exiting accelerated filer status could lead similar sized companies to have dissimilar reporting requirements. For example, an accelerated filer that once had \$750 million in public float whose public float drops to below \$250 million would continue to report on a more accelerated basis than a company that has \$675 million in public float whose public float had never exceeded \$700 million. We see no logic, equity or benefit to that result.

While the Proposing Release would ease exiting accelerated filer status slightly, we encourage the Commission to consider other alternatives that would more timely address a significant or persistent decline in public float. For example, we see no reason to have the determination and effective dates for exiting accelerated filer status parallel the entry date. The purpose of the second quarter determination date and year end effective date for becoming an accelerated filer is to provide adequate lead time to meet accelerated deadlines. That rationale does not exist when an issuer switches to non-accelerated status.

⁸ "We believe it is more important that companies of the same relative size, including the most actively followed companies, are subject to shortened deadlines." See *Acceleration of Periodic Report Filing Dates*, Release No. 33-8128, § II. B. 3.

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Using the current threshold of \$75 million for accelerated filer status, we recommend the Commission permit an accelerated filer to file as a non-accelerated filer at the earlier of (a) less than \$75 million of public float for three consecutive quarter ends or (b) less than \$25 million of public float at one quarter end. Exit from accelerated filer status would be effective immediately and would be reported on Form 8-K in order to promptly notify investors. An issuer whose market capitalization falls below \$75 million for three consecutive quarter ends, or that has had a substantial (i.e., 66%) drop in public float to \$25 million, has likely suffered a market decline that is persistent and thus should be able to report on the same timeline as similar sized issuers.

For issuers that are large accelerated filers, we would recommend a similar approach for exiting the large accelerated filer status: the earlier of (a) less than \$700 million of public float for three consecutive quarter ends, or (b) less than \$250 million⁹ of public float at one quarter end. Exit from large accelerated filer status also should be effective immediately and should be promptly reported on Form 8-K.

OTHER COMMENTS

In June 2004, members of the AICPA SEC Regulations Committee and the Commission's staff discussed how the existing accelerated filer rules would apply to an issuer of both public debt and equity securities that files a Form 15 to deregister its equity securities but whose debt securities continued to be registered.¹⁰ At the time, it was unclear to the Committee whether an issuer could exit the accelerated filer rules if it deregistered its equity securities. Because exiting required meeting the small business issuer rules (including the \$25 million revenue threshold), it seemed unlikely that most issuers of public debt would be able to exit the accelerated filer rules even though they no longer had any public equity securities. We note that Proposing Release addresses and resolves this issue and we support the Commission's revisions to the existing rules. Our proposed alternative framework for exiting accelerated filer status would also resolve this issue and provide for timely relief when an issuer no longer has public equity float.

In April 2004, members of the AICPA SEC Regulations Committee and the Commission's staff discussed how an issuer would determine accelerated filer status upon a change in year end.¹¹ Specifically, the Committee was unclear as to whether the determination date would change upon an issuer's change in fiscal year such that a retrospective assessment would be required as of the date that would have been the end of the second fiscal quarter related to the new fiscal year end (i.e., six months prior to the end of the transition period). The Commission staff's view was that a reassessment was required. Accordingly, an issuer that was otherwise not an accelerated filer could become one by virtue of a change in fiscal year-end. We note that the Proposing Release does not

⁹ We believe \$250 million is a reasonable threshold for this purpose because it represents a substantial (64%) drop from the "large accelerated filer" public float threshold of \$700 million. A \$250 million threshold is proportional to the drop from \$75 million to \$25 million of public float that would trigger an exit from the "accelerated filer" category.

¹⁰ Refer to Discussion Document E, *Accelerated Filer Status After Filing Form 15*, in the minutes of the June 15, 2004 meeting. These minutes are publicly available on the AICPA's website at www.aicpa.org.

¹¹ Refer to Discussion Document D, *Determining Accelerated Filer Status When a Registrant Changes its Fiscal Year-End*, in the minutes of the April 8, 2004 meeting. These minutes are publicly available on the AICPA's website at www.aicpa.org.

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address this issue. We recommend that the final rules specifically address whether and how an issuer should assess its accelerated filer (or large accelerated filer) status when it changes its fiscal year end.

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The AICPA appreciates the opportunity to comment on the Release. We would be pleased to discuss these comments with you at your convenience.

Sincerely,



Robert J. Kueppers
Chair
Center for Public Company Audit Firms



Jay P. Hartig
Chair
SEC Regulations Committee

cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A Glassman
Commissioner Annette L. Nazareth
Mr. Alan L. Beller
Mr. Donald T. Nicolaisen