



October 31, 2005

Mr. Jonathan G. Katz, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9303

Re: File No. S7-08-05
Release No. 33-8617
Revisions to Accelerated Filer Definition and Accelerated Deadlines for Filing
Periodic Reports

Dear Mr. Katz:

This letter is the response of BDO Seidman, LLP to your request for comments regarding the proposal listed above (which we refer to below as the “proposing release”).

The Commission’s proposal takes action to address many of the concerns that we have expressed in prior letters,¹ and we believe it is a much better approach than leaving the rules unchanged. Therefore, we support it. However, we believe the Commission should go further to achieve the right balance of providing timely information to investors without jeopardizing the reliability of that information or unduly burdening registrants.

The Commission’s objectives as it has reconsidered the due dates for periodic reports have been to (1) accelerate the time by which information is provided when the level of investor interest warrants it, (2) avoid inflicting the burden of accelerated reporting on companies when the level of investor interest does not warrant it, and (3) not jeopardize the reliability of information companies report. We agree with those objectives. However, to best achieve these objectives, we believe the Commission should:

1. Retain the approach of having two categories of issuers and raise the public float threshold that triggers accelerated reporting to \$700 million;
2. Not require periodic reports to be filed as quickly as proposed (the Commission should require filers with a public float of \$75 - \$700 million to file annual and quarterly reports

¹ See our comment letter on Release No. 33-8477 dated September 28, 2004 (in Commission File No. S7-32-04), our comment letter on Release No. 33-8501 dated January 31, 2005 (in Commission File No. S7-38-04), and our comment letter on Release No. 33-8571 dated May 31, 2005 (in Commission File No. 265-23).

within 90 and 45 days and filers with a public float of over \$700 million to file such reports within 75 and 40 days); and

3. Modify the rules for entering and exiting accelerated filer categories so that (a) companies enter a category only when they demonstrate a sustained change to a higher level of market following and (b) companies can more readily exit a category when an exit is warranted.

Our more specific comments and recommendations are set forth below.

Public Float Threshold

We believe the Commission should retain the approach of having two categories of issuers and raise the public float threshold that triggers accelerated reporting to \$700 million.

The Commission has indicated that it believes that investor interest in accelerated filing is likely to be highest for companies followed by analysts and institutional investors.² We think this is a reasonable belief. The Commission's staff has performed work that indicates that the market capitalization level at which issuers become widely followed is \$700 million.³ As a result, the Commission stated in the proposing release its belief "that Exchange Act reporting companies with a public float of \$700 million or more are more closely followed by the markets and securities analysts than other issuers." The Commission also noted "that there is a significant difference between companies with a public float of \$700 million or more and other public companies"⁴ and that these companies "accounted for approximately 95% of U.S. equity market capitalization in 2004."

Therefore, we strongly believe that the Commission's work clearly demonstrates the need to change the \$75 million market capitalization threshold that triggers accelerated filing to \$700 million and that the Commission should do so. Issuers below that threshold are not widely followed, and the cost to them of meeting the accelerated filing deadlines is overly burdensome and exceeds the benefit to investors. They should not be required to file on an accelerated basis.

We also note that this approach would allow the Commission to avoid needing to increase the number of categories of issuers from two to three. Although we believe this is a less important

² Release No. 33-8128, *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports*.

³ See Release No. 33-8501, *Securities Offering Reform*, and the report of the Size Subcommittee of the Advisory Committee on Smaller Public Companies (at <http://www.sec.gov/rules/other/265-23/adavernslides081005.pdf>), whose work was supported by the SEC staff.

⁴ As indicated in footnote 43 to the proposing release, "According to the Office of Economic Analysis, in the period from 1997 to 2004, issuers with a market capitalization in excess of \$700 million that conducted offerings typically had an average of 12 analysts following them prior to the offering and issuers with a market capitalization of between \$75 million and \$200 million, in most cases, have between zero to five analysts following them with approximately 50% having zero to two analysts following them. Further analysis showed that issuers with a market capitalization in excess of \$700 million had significantly higher average daily trading volumes. In addition, the data shows that issuers with a market capitalization in excess of \$700 million accounted for over 90% of the proceeds from securities offerings over that period."

factor, it seems clear that the comparative simplicity that would result from this approach would be desirable.

Due Dates for Accelerated Filings

We believe the Commission should not require periodic reports to be filed as quickly as proposed. Instead, we believe the Commission should require filers with a public float of \$75 - \$700 million to file annual and quarterly reports within 90 and 45 days and filers with a public float of over \$700 million to file such reports within 75 and 40 days.

Companies with a Public Float of \$75 - \$700 Million

We believe that accelerating the due dates for companies with a public float of \$75 - \$700 million from 90/45 days to 75/40 days has presented an undue burden on these companies that the Commission should address.

The complexity of today's accounting standards,⁵ the volume of disclosure requirements, and the requirement to report on internal control over financial reporting (for which the extra 45 days previously provided by the Commission's exemptive order⁶ is no longer available) create an immense amount of work for the staffs of smaller public companies. Completing all of this work within 75 days after year-end (often 120 days for internal control reports) and 40 days after quarter-end has been very difficult.⁷ Although the exercise of internal control reporting has generally caused companies to enhance their controls, our sense is that the contribution this has made to reliable reporting has been significantly diluted by the acceleration of due dates to 75/40 days. No matter how automated and well controlled a company's systems are, closing the books and thoughtfully preparing and reviewing financial reports are still people-dependent processes at many levels. The 75/40 days due dates put undue pressure on people and significantly increase the risk of error or, at the very least, make it extremely difficult to maintain quality.

Compressing this work into shorter periods has also increased costs to smaller public companies by (a) forcing them to increase their staffs and (b) severely limiting the time their financial management can devote to "running the business" during the periods before periodic reports are due.

⁵ The Commission's staff has acknowledged this complexity in its *Report and Recommendations Pursuant to Section 401(c) of the Sarbanes-Oxley Act of 2002 On Arrangements with Off-Balance Sheet Implications, Special Purpose Entities, and Transparency of Filings by Issuers*.

⁶ Release No. 34-50754, *Order Under Section 36 of the Securities Exchange Act of 1934 Granting an Exemption from Specified Provisions of Exchange Act Rules 13a-1 and 15d-1*.

⁷ This view is consistent with the increase in the number of late filing notifications that have been filed. As indicated in footnote 17 in Release No. 33-8618, *Management Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Companies that are not Accelerated Filers*, "During the first 11 months of the Commission's current fiscal year which ends on September 30, 2005, we received 2,320 notifications of late Form 10-K filings on Form 12b-25. This represented a 13% increase over the total number of similar notifications that we received during all of our 2004 fiscal year."

For these reasons, we believe the Commission should permit all filers with a public float of less than \$700 million to file annual and quarterly reports within 90/45 days.

Companies with a Public Float of Over \$700 Million

For the same reasons as discussed above, we believe the Commission should retain the current requirements for filers with a public float of over \$700 million to file annual and quarterly reports within 75/40 days.

We acknowledge that many issuers of this size file their annual reports in less than 75 days, and we believe the Commission should encourage this. However, our sense is that many of the companies in this category that file more than 60 days after year-end need the extra time and that a 20% reduction in the time available to complete their annual report will be a significant burden for them. If, notwithstanding investor pressure to provide more timely annual reports, these companies still feel they need the extra time, we believe the Commission should provide it to them.

We agree with the Commission that the due date for these companies' quarterly reports should remain at 40 days after quarter-end. Our experience has been that the acceleration of quarterly reports to 40 days has presented a significant challenge. The time needed (after the books have been closed) to review a filing internally, coordinate the auditors' review of a filing (which is difficult because so much of the auditors' work must be performed late in the process, requiring auditors to typically be involved in the reviews of several issuers' quarterly reports at the same time), resolve any issues, and finalize it has made it difficult for companies to significantly compress the quarterly closing process. This is particularly true in quarters when there are significant accounting or reporting issues that must be addressed. The current level of challenge in meeting the 40-day deadline tells us that companies are not ready to accelerate to 35 days.

Entering and Exiting Accelerated Filer Categories

We believe the Commission should modify the rules for entering and exiting accelerated filer categories so that (a) companies enter a category only when they demonstrate a sustained change to a higher level of market following and (b) companies can more readily exit a category when an exit is warranted.

We share the Commission's view that a company's accelerated filer category should not change frequently. However, entering a more accelerated filing category is a major burden for a company, so we believe a company should be made to assume this burden only when it has demonstrated a sustained change to a higher level of market following that warrants this burden. A company whose float temporarily exceeds a specified threshold due to temporary market conditions or temporary interest in the company should not have to move to a more accelerated filing category. Similarly, the conditions for moving to a less accelerated filing category should not be so severe that only a very few companies will ever meet them. (The commentary in the

proposing release indicates that that is the case.⁸) The criteria should instead be set at levels where companies that no longer meet the entry test and aren't expected to do so in the near future are relieved of the burden.

Entering a More Accelerated Filing Category

To ensure that a company moves to a more accelerated filing category only when it has demonstrated a sustained change to a higher level of market following, we believe the commission should change the market float test.

- A company should need to meet the specified level of market float for a sustained period of time – not just a single point in time (the end of its second quarter).
- We believe such a sustained period should be at least a year.

This could be accomplished in a number of ways, e.g., by (1) requiring a company to exceed the specified threshold as of two consecutive second quarter-end dates or (2) requiring a company to exceed the specified threshold for five consecutive quarter-end reporting dates (with adequate lead time from the fifth measurement date to the date of the first report that must be filed on an accelerated basis). We prefer the first alternative because it is simpler.

During this current period of transition to internal control reporting, we believe the Commission should structure its rules so that a company does not have to transition to both accelerated filing and internal control reporting concurrently. Accelerating due dates and first-time internal control reporting are major efforts, and completing both of them in the same year is a major challenge for a company. We suggest that the Commission address this by not requiring a new accelerated filer to report on internal control until the second annual report that it files on an accelerated basis. For example, a company that became an accelerated filer in 2005 could be required to file its 2005 annual report on an accelerated basis but not be required to report on internal control until 2006. Less desirably, the Commission could require this company to report on internal control in 2005 but permit it to file its 2005 annual report within 90 days and defer accelerated filing until 2006. We believe it is particularly important for the Commission to consider the concurrent transition issue if it retains the requirement for smaller companies (i.e., those with a public float of under \$700 million) to file on an accelerated basis. Concurrent transition is particularly difficult for smaller companies. Also, internal control reporting has a much higher relative cost for smaller companies (which many parties are working to address), so we believe there should not be a “rush” to make these companies report.⁹

⁸ The proposing release states, with respect to accelerated filers whose public float falls below \$25 million, “While the proposed amendments would permit additional companies to exit accelerated filer status, our research indicates that the proposed amendments would not significantly increase fluctuations out of accelerated filer status.” Footnote 50 states, “we estimate that only 25 companies had a public float of \$75 million in 2003, but less than \$25 million in 2004” (emphasis added).

⁹ As stated in our comment letter on Release No. 33-8618, *Management Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Companies that are not Accelerated*

Exiting a Filing Category

To ensure that a company that no longer meets an entry test and isn't expected to do so in the near future is allowed to move to a less accelerated filing category, we believe the Commission should change the proposed rules for exiting a category.

- The \$25/\$75 million thresholds for exiting a category are too low to permit a company that has experienced a sustained decline in its public float to exit a category. The levels should be set higher. Thresholds that are approximately two-thirds of the next entry level seem reasonable to us (e.g., \$50/\$500 million). Perhaps the Commission's Office of Economic Analysis could study volatility of issuers' stock prices and determine if some other thresholds would better accomplish this goal.
- To ensure that the decline in public float is a sustained decline, companies should be required to meet the thresholds referred to above for a period of time, rather than at a point in time. To minimize complexity, the Commission should select a measurement approach that is generally consistent with that used to trigger entry into a more accelerated filing category. However, the measurement approach for exiting accelerated filer status does not need to factor in lead time. Therefore, measurements should be made through the end of the year (vs. ignoring changes after the end of the second quarter).
- If a company has experienced a dramatic decline (e.g., to one-third of the entry threshold) in market float as of a single point in time (e.g., any quarter-end), it should be able to exit a category.
- When a company qualifies to exit a category, it should be able to do so immediately and not have to wait until the end of the year.

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We believe the Commission's rules and its proposal place excessive importance on timely filing and that this harms investors because it creates an excessive burden for the companies they own and it risks diminishing the quality of filings. We believe that modifying the Commission's rules in the manner outlined above will strike a more appropriate balance between the goals of timeliness, quality and cost reduction, and better serve the needs of investors.

We appreciate this opportunity to express our views to the Commission. We would be pleased to answer any questions the Commission or its staff might have about our comments. Please contact Wayne Kolins, National Director – Assurance Practice, at (212) 885-8595 or via electronic mail at wkolins@bdo.com, or Lee Graul, National Director – SEC Practice, at (312) 616-4667 or via electronic mail at lgraul@bdo.com.

Filers (in Commission File No. S7-06-03), we recommend an alternative approach for ensuring that smaller public companies maintain effective controls over financial reporting.



Very truly yours,

BDO Seidman, LLP