

24 October 2005

Jonathan G. Katz  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-3628

**SEC Release Nos. 33-8618; 34-52492; File nos. S7-40-02; S7-06-03**

Dear Mr. Katz,

We respectfully submit the following comments to the Commission regarding SEC Release Nos. 33-8618 and 34-52492 (the "Release"), which, among other consequences, extends by one year the compliance date for certain amendments to Rules 13a-15 and 15d-15 under the Securities Exchange Act of 1934 for companies that are not accelerated filers. Pursuant to the Release, a company that is not an accelerated filer must begin to comply with the requirements set forth under the amendments to these rules for its first fiscal year ending on or after July 15, 2007.

In the text of the Release, the Commission stated that "it is critical to make the extension effective as soon as possible so that they [non-accelerated filers] have the *certainty of knowing that they can rely on it.*" (emphasis added) We respectfully point out to the Commission that the Release fails to achieve, for us and for many other smaller public companies, the certainty and reliability which the new deadline was meant to provide.

Based on informal conversations with members of the SEC staff, we understand that in the event a company which is not currently an accelerated filer becomes an accelerated filer for 2006, it will lose the benefit of the one-year extension provided in the Release. Because a company which is not currently an accelerated filer (e.g., for fiscal year ending on December 31, 2005) cannot know whether or not it will be an accelerated filer in the coming year, the issuer cannot and will not know, possibly until June 30, 2006, when it will be required to comply with the amendments to Rules 13a-15 and 15d-15. The Release has thus created substantial *uncertainty* for smaller public companies rather than certainty.

Numerous factors can cause a company to cross the public float threshold and pass from "non-accelerated" to "accelerated" filer status:

- (i) an increase in the market price for its shares;
- (ii) a capital increase through a public offering;
- (iii) a secondary sale of shares to the public by one or more large shareholders;
- (iv) a corporate acquisition or merger realized through a public offering of shares; or
- (v) the conversion into equity securities of publicly held debt obligations.

Only some of the factors above are under the control of the company, and any one or more of them may cause an issuer to transition from non-accelerated to accelerated filer status. If such a transition occurs prior to the end of the issuer's second quarter in 2006, its deadline for compliance with the amendments to Rules 13a-15 and 15d-15 will be reduced by one year. In addition, compliance may be required for a period of the year which has already gone by.

# HEAD N.V.

This uncertainty as to the applicable deadline for compliance is likely to bring about the following unintended, and undesirable, consequences:

- (i) *inadequate preparation for compliance:* Company A is currently a non-accelerated filer, and it reasonably believes that it will not become an accelerated filer in 2006. It therefore expects to be required to comply for its first fiscal year ending on or after July 15, 2007. However, due to any of the factors described above (e.g., a rise in its stock price, an unanticipated acquisition opportunity), Company A may pass the threshold on June 30, 2006, and become an accelerated filer subject to a deadline of July 15, 2006. It must therefore prepare for compliance on a greatly reduced timeframe and beginning for a year which has already half gone by.

As a result, Company A's ability to achieve adequate preparation will have been significantly reduced.

- (ii) *unnecessary and inefficient use of corporate resources:* Company B is currently a non-accelerated filer. However, its stock price has been moving steadily up, prompting some affiliated shareholders to consider selling off and its Board of Directors to raise the possibility of a capital increase. Company B's management is therefore uncertain as to whether Company B will become an accelerated filer in 2006. To avoid being caught unprepared, Company B's management decides in the last quarter of 2005 to undertake compliance beginning for the year 2006, with resultant significant expenditures in management and financial resources. In the end, however, Company B does not become an accelerated filer in 2006.

As a result, not only did Company B incur substantial costs, to the detriment of its shareholders, one year prior to compliance becoming necessary, but management's decision to begin preparing for compliance one year earlier than necessary caused Company B to fail to benefit from one of the Commission's stated purposes in providing the extension: to enable smaller public companies "to benefit from the experiences of accelerated filers in the second year of compliance with the internal control reporting requirements as best practices emerge and increased efficiencies are realized." (citation from the Release)

While we agree with the stated purpose of the Release, we suspect that the uncertainty it creates as to what deadline will apply for compliance will unfortunately cause many smaller public companies to make, in good faith, one or the other of the errors described above.

To resolve the uncertainty created by the Release and avoid the types of problems described above, we respectfully request the Commission to clarify that the one-year extension granted by the Release may be relied upon by all companies that were non-accelerated filers at the time the Release became effective, and that the deadline to which such issuers are subject will not be shortened by one year in the event such issuers transition to accelerated filer status during the year 2006. Only by clarifying the stability of the deadline provided for in the Release will the Commission enable smaller public companies to "have the certainty of knowing that they can rely on it."

We note also that, in the event the Commission adopts different requirements for internal control over financial reporting for smaller public companies, a similar uncertainty will exist. In a given

# HEAD N.V.

fiscal year, a non-accelerated filer will not know whether it will become an accelerated filer during the subsequent year, and hence it will not know what standards will be applied for its internal control over financial reporting for the coming year. To avoid the risks of a lack of readiness or a waste of corporate resources which may result from this uncertainty, non-accelerated filers should be given an adequate period of time to prepare for and adapt to the requirements applicable to accelerated filers following their transition into such status.

In closing, we would like to reiterate that for us, and for many other smaller public companies, the Release has created *uncertainty* about the deadline to which we will be subject for compliance with the amendments to Rules 13a-15 and 15d-15, despite the Commission's stated objective to create certainty in that regard. We therefore request and look forward to the Commission's establishing the *reliability* of the one-year extension for smaller public companies in the manner suggested above.

Please feel free to contact Ralf Bernhart or Gefion Hauer at ++43-1-701 79 222 or [r.bernhart@head.com](mailto:r.bernhart@head.com) or [g.hauer@head.com](mailto:g.hauer@head.com) in the event you wish further information regarding any of the matters raised above.

Sincerely yours,



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