

Legal Update

SEC's Proposed Amendments to Accelerated and Large Accelerated Filer Definitions

On May 9, 2019, the US Securities and Exchange Commission (SEC) proposed revisions to the accelerated filer and large accelerated filer definitions in Rule 12b-2 under the Securities Exchange Act of 1934 (Rule 12b-2). These proposed changes would reduce the number of issuers that qualify as accelerated filers and reduce compliance costs for smaller reporting companies.

If the proposal is adopted, certain low-revenue issuers would not be subject to the Sarbanes-Oxley Act (SOX) Section 404(b) auditor attestation requirements regarding internal control over financial reporting (ICFR). In addition, these low-revenue issuers would not need to comply with the shorter SEC reporting deadlines that apply to accelerated and large accelerated filers. Among the most important proposed changes would be:

- excluding from the accelerated and large accelerated filer definitions any issuer that qualifies as a smaller reporting company (SRC) under the SRC revenue test (i.e., no revenues or annual revenues of less than \$100 million in the most recent fiscal year for which audited financial statements are available);

- revising the transition thresholds for accelerated and large accelerated filers becoming non-accelerated filers and for exiting large accelerated filer status; and
- adding a revenue test to the transition thresholds for exiting both accelerated and large accelerated filer status.

The SEC's proposed approach of adding a revenue test is consistent with legislation that has been proposed in various recent sessions of Congress.

Background

An important distinction between accelerated and large accelerated filers and non-accelerated filers (such as SRCs) is the requirement that an accelerated or large accelerated filer's independent auditor must attest to, and report on, management's assessment of the effectiveness of the issuer's ICFR. The attestation requirement results in certain costs and burdens for issuers. SOX Section 404(c) exempts those issuers that are neither accelerated nor large accelerated filers from the attestation requirement.

In addition, accelerated and large accelerated filers are subject to shorter filing deadlines for quarterly and annual reports than non-accelerated filers. Accelerated and large accelerated filers are also subject to certain additional disclosure requirements.

Issuers subject to the Securities Exchange Act of 1934 (Exchange Act) reporting requirements are categorized as non-accelerated, accelerated and large accelerated filers. Currently, an issuer is categorized as an accelerated filer if, at the end of its fiscal year,

- i. the issuer had an aggregate market value of the common equity held by its non-affiliates of \$75 million or more, but less than \$700 million, as of the last business day of its most recently completed second fiscal quarter,
- ii. the issuer had been subject to the requirements of section 13(a) or 15(d) of the Exchange Act for a period of twelve calendar months, and
- iii. the issuer had filed at least one annual report pursuant to section 13(a) or 15(d) of the Exchange Act.

To be a large accelerated filer, an issuer must meet the second and third conditions but have an aggregate market value of common equity held by its non-affiliates of \$700 million or more.

In addition to the accelerated and large accelerated filer definitions, Rule 12b-2 currently defines an SRC as an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a non-SRC parent that

- i. has a public float of less than \$250 million or
- ii. has annual revenues of less than \$100 million and either no public float or a public float of less than \$700 million.

If an issuer qualifies as an SRC, it may choose to prepare disclosure relying on scaled disclosure requirements.¹

In June 2018, the SEC adopted amendments to the SRC definition. Following the adoption of the amendments, some issuers became categorized as both SRCs and accelerated or large accelerated filers. Such issuers have some benefits of scaled regulation but are still required to comply with earlier filing deadlines and the ICFR auditor attestation requirement.

Proposed Amendments

Exclusion of Low-Revenue SRCs from Accelerated and Large Accelerated Filer Definitions

The SEC proposes to add a new condition to the definitions of accelerated and large accelerated filer that would exclude from those definitions an issuer eligible to be an SRC under the SRC revenue test. Under the proposed amendments, issuers that are eligible to be SRCs that have a public float between \$75 million and \$250 million would not be considered accelerated filers if their annual revenues were \$100 million or less. Therefore, they would be exempt from the requirements applicable to accelerated filers.

The SEC expects that the proposed amendments would increase the number of non-accelerated filers, and thus, increase the number of issuers that are exempt from the ICFR auditor attestation requirement. These issuers would be relieved of the costs associated with the attestation requirement, including those related to audit fees. According to the SEC, these compliance costs may be disproportionately burdensome for issuers that are SRCs under the SRC revenue test, thereby diverting funds otherwise available for reinvestment due to diminished access to internally-generated capital. The SEC expects that the proposed

amendments would eliminate these costs for SRCs. These changes could be especially helpful to companies in the biopharmaceutical and technology industries.

The SEC recognizes that the proposed amendments could result in investors receiving less or different disclosure about material weaknesses in ICFR at low-revenue SRCs than under the current rules. However, the SEC finds it unlikely there would be a significant effect on the ability of investors to make informed investment decisions based on the financial reporting of those issuers. At the open meeting on the proposed amendments, Chairman Jay Clayton noted that the proposed rules “are aimed at that subset of issuers where the added step of an ICFR auditor attestation is likely to add significant costs and is unlikely to enhance financial reporting or investor protection.”

The benefits of the attestation requirement may be smaller for issuers with low revenues for several reasons, including

- lower susceptibility to the risk of misstatements, including those related to revenue recognition,
- lower risk of failure to detect and disclose material weaknesses due to less complex financial systems and controls, and
- lesser importance of financial statements in assessing issuer valuation.

Additionally, a non-accelerated filer that meets the SRC revenue test would still be subject to many obligations with respect to the ICFR, including establishing, maintaining, and assessing the effectiveness of ICFR and for management to assess internal controls.

The SEC finds that this benefit to low-revenue SRCs is consistent with its historical practice of providing scaled disclosure and other

accommodations for smaller issuers. It is also consistent with recent actions by Congress to reduce burdens on new and smaller issuers, including Title I of the JOBS Act and Section 72002 of the Fixing America’s Surface Transportation Act of 2015.

Increase in Transition Thresholds for Becoming Non-Accelerated Filers and Exiting Large Accelerated Filer Status

The SEC proposes to amend Rule 12b-2 by revising the transition thresholds for issuers exiting accelerated and large accelerated filer status. Currently, once an issuer is an accelerated or a large accelerated filer, it cannot transition to non-accelerated filer status until its public float falls below a threshold that is lower than the public float threshold for initially becoming an accelerated or large accelerated filer. As discussed above, in order to be categorized as an accelerated filer, an issuer must have a public float of \$75 million or more, but less than \$700 million, as of the last business day of its most recently completed second fiscal quarter. A large accelerated filer must have a public float greater than \$700 million.

In order for an accelerated filer to become a non-accelerated filer, its public float as of the last business day of its most recently completed second fiscal quarter must fall below \$50 million, a determination made at the end of the fiscal year. Similarly, a large accelerated filer will become an accelerated filer if its public float falls below \$500 million as of the last business day of its most recently completed second fiscal quarter determined at the end of the fiscal year, or it will become a non-accelerated filer if its public float falls below \$50 million applying that same test.

The SEC proposes to

- revise the public float transition threshold for accelerated and large

accelerated filers to become a non-accelerated filer from \$50 million to \$60 million and

- revise the large accelerated filer public float transition provision from \$500 million to \$560 million.

The SEC expects that these increases in the transition thresholds would limit the number of cases in which an issuer would qualify as both an SRC and either an accelerated filer or large accelerated filer. Additionally, by increasing the transition thresholds, the public float transition thresholds would be 80% of the initial thresholds, which would be consistent with the recent amendments to the SRC transition thresholds. Thus, the transition thresholds across the SRC, accelerated filer, and large accelerated filer definitions would be in alignment.

Addition of Revenue Test to Transition Thresholds for Exiting Accelerated and Large Accelerated Filer Status

The SEC proposes to amend Rule 12b-2 by adding the SRC revenue test to the public float transition thresholds for accelerated and large accelerated filers. An issuer would exit large accelerated filer status and become an accelerated filer if its public float fell to less than \$560 million but more than \$60 million. It would become a non-accelerated filer if its public float fell below \$60 million or if its annual revenues fell below the applicable revenue threshold to become eligible to use the SRC accommodations.

Similarly, an issuer would exit accelerated filer status and become a non-accelerated filer if its public float fell below \$60 million or it met the revenue test of the SRC definition.

If the SRC revenue test were not added to the accelerated filer and large accelerated filer transition thresholds, then an issuer's revenues would not be considered in determining

- whether an accelerated filer could become a non-accelerated filer, or
- whether an issuer could exit its large accelerated filer status.

Conclusion

The SEC is seeking comments on its proposed revisions. The proposed revisions are open for public comment for a period of 60 days from the date of their publication in the Federal Register.

Additional Information

A copy of the proposing release is available at <http://bit.ly/2E5aXv6>.

Endnote

¹ See "SEC Expands Definition of Smaller Reporting Company," dated July 9, 2018, available at <http://bit.ly/2YoOOj5>.

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