

SEC Proposed Changes to Accelerated and Large Accelerated Filer Definitions: First Analysis

A Lexis Practice Advisor® Practice Note by Anna Pinedo and Ryan Eickel, Mayer Brown LLP



Anna Pinedo
Mayer Brown LLP

Introduction

This article discusses the proposed amendments issued by the U.S. Securities and Exchange Commission (the SEC) on May 9, 2019 to the accelerated filer and large accelerated filer definitions in Rule 12b-2 (Rule 12b-2) (17 C.F.R. § 240.12b-2) under the Securities Exchange Act of 1934, as amended (the Exchange Act). The proposed amendments: (i) exclude 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); (ii) revise the transition thresholds for accelerated and large accelerated filers becoming non-accelerated filers and for exiting large accelerated filer status; and (iii) add a revenue test to the transition thresholds for exiting both accelerated and large accelerated filer status.

These proposed revisions, if adopted, would reduce the number of issuers that are considered accelerated filers and reduce compliance costs for SRCs. 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. For more information on SEC reporting deadlines for various types of companies, see [2019 SEC Filing Deadlines \(Accelerated Filers\)](#), [2019 SEC Filing Deadlines \(Large Accelerated Filers\)](#) and [2019 SEC Filing Deadlines \(Non-Accelerated Filers\)](#).

For comprehensive list of Lexis Practice Advisor resources on the topics covered in this article, see [Periodic and Current Reporting Resource Kit](#) and [Financial Statements and Reporting Resource Kit](#).

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 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:

- 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

- 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-
- 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 has:

- Public float of less than \$250 million-or-
- 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.

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 disclosures but are still required to comply with shorter filing deadlines and the ICFR auditor attestation requirement.

Initial Guidance

Below is a summary of the SEC's proposed revisions to the Rule 12b-2 definitions of accelerated filer and large accelerated filer.

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, if adopted,

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. 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 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-
- An issuer could exit its large accelerated filer status

Looking Ahead

The SEC has issued a proposing release, which is available at <https://www.sec.gov/rules/proposed/2019/34-85814.pdf>. 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.

Anna Pinedo, partner, Mayer Brown

Anna Pinedo is a partner in Mayer Brown's New York office and a member of the Corporate & Securities practice. She concentrates her practice on securities and derivatives. Anna represents issuers, investment banks/financial intermediaries and investors in financing transactions, including public offerings and private placements of equity and debt securities, as well as structured notes and other hybrid and structured products.

She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including technology, telecommunications, healthcare, financial institutions, REITs and consumer finance. Anna has worked closely with foreign private issuers in their securities offerings in the United States and in the Euro markets. She also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.

In the derivatives area, Anna counsels a number of major financial institutions acting as dealers and participants in the commodities and derivatives markets. She advises on structuring issues as well as on regulatory issues, including those arising under the Dodd-Frank Act. Her work focuses on foreign exchange, equity and credit derivatives products, and structured derivatives transactions. Anna has experience with a wide range of transactions and structures, including collars, swaps, forward and accelerated repurchases, forward sales, hybrid preferred stock and off-balance sheet structures. She also has advised derivatives dealers regarding their Internet sites and other Internet and electronic signature/delivery issues, as well as on compliance matters.

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