

SEC Proposes to Amend Filer Definitions to Exempt More Issuers From Sarbanes-Oxley 404(b) Auditor Attestation Requirement

May 14, 2019

On May 9, 2019, the Securities and Exchange Commission (SEC), by a vote of 3-1, proposed [amendments](#) to the definitions of “accelerated filer” and “large accelerated filer” in Exchange Act Rule 12b-2. The proposed amendments are summarized below and set forth in detail in Appendix A. The key effect of the amendments would be to exempt a greater number of smaller issuers from the requirement to provide an auditor’s attestation of management’s assessment of internal control over financial reporting (ICFR) under Section 404(b) of the Sarbanes-Oxley Act (SOX 404(b)). The SEC’s stated goal is to promote capital formation by reducing compliance costs (which may disproportionately burden smaller issuers) while maintaining appropriate investor protections.

Background on the Proposal

Under the current definitions of accelerated filer and large accelerated filer, an issuer must have had a public float of \$75 million or more but less than \$700 million to be an accelerated filer, or \$700 million or more to be a large accelerated filer, in each case as of the last business day of the issuer’s most recently completed second fiscal quarter. Accelerated filers and large accelerated filers are subject to accelerated reporting deadlines and the SOX 404(b) auditor attestation requirement.

In June 2018, the SEC adopted amendments to the definition of “smaller reporting company” (SRC) in Rule 12b-2 to expand the number of issuers eligible to qualify as an SRC and take advantage of the related scaled disclosure requirements. At the time, the SEC did not increase the threshold for accelerated filer status, which created overlap among the filer categories. Some issuers qualified as both SRCs and accelerated or large accelerated filers, meaning they enjoyed relief in the form of scaled disclosure but remained subject to the SOX 404(b) auditor attestation requirement. Acknowledging the complexity caused by the SRC amendments, SEC Chair Jay Clayton directed the Staff of the SEC’s Division of Corporation Finance to formulate recommendations for potential rule amendments to reduce the number of issuers that would qualify as accelerated filers.

Proposed Amendments

The proposed amendments would exclude from the accelerated filer and large accelerated filer definitions an issuer that is eligible to be a SRC and had annual revenues of less than \$100 million in the most recently completed fiscal year. Therefore, SRCs with less than \$100 million in revenues would be exempt from the accelerated reporting deadlines and SOX 404(b) auditor attestation requirement. They would still be required to comply with other SOX mandates, including audit committee independence requirements, CEO and CFO certifications, and the requirement to establish and maintain ICFR and have management assess its effectiveness. Appendix B includes tables excerpted from the proposing release that outline the current and proposed relationships among the filer categories.

The SEC also proposed to amend the transition thresholds for exiting accelerated or large accelerated filer status. Currently, an issuer will remain a large accelerated filer until its public float falls below \$500 million, at which time it will become an accelerated filer. The proposed amendments would adjust the transition threshold for exiting large accelerated filer status to \$560 million to align with the SRC transition threshold. Under the current rules, an issuer that is an accelerated or large accelerated filer will become a non-accelerated filer if its public float falls below \$50 million. The proposed amendments would adjust the transition threshold for becoming a non-accelerated filer to \$60 million. Appendix C includes tables excerpted from the proposing release that outline the proposed amendments to the public float transition thresholds. Finally, the proposed amendments would add the

revenue test of the SRC definition as another prong when determining whether an issuer is eligible to exit accelerated or large accelerated filer status.

The SEC Commissioners who supported the proposal believe it would enable smaller issuers to redirect the resources they would have spent on a SOX 404(b) auditor attestation toward investments in research and development, human capital and other growth initiatives. One SEC Commissioner, Robert Jackson, voted against the proposal, arguing that it was based on outdated evidence. He contends that current market data proves that the reduction in compliance costs does not justify the loss of investor protections.

The SEC will accept public comments on the proposal for 60 days following its publication in the *Federal Register*, with comments likely due in late July.

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APPENDIX A

Proposed Amendments to “Accelerated Filer” and “Large Accelerated Filer” Definitions in Exchange Act Rule 12b-2

Accelerated filer and large accelerated filer -

(1) *Accelerated filer.* The term *accelerated filer* means an issuer after it first meets the following conditions as of the end of its fiscal year:

(i) The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$75 million or more, but less than \$700 million, as of the last business day of the issuer’s most recently completed second fiscal quarter;

(ii) The issuer has been subject to the requirements of section 13(a) or 15(d) of the Act (15 U.S.C. 78m or 78o(d)) for a period of at least twelve calendar months; and

(iii) The issuer has filed at least one annual report pursuant to section 13(a) or 15(d) of the Act. and

(iv) The issuer is not eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the “smaller reporting company” definition in this section.

(2) *Large accelerated filer.* The term *large accelerated filer* means an issuer after it first meets the following conditions as of the end of its fiscal year:

(i) The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of the issuer’s most recently completed second fiscal quarter;

(ii) The issuer has been subject to the requirements of section 13(a) or 15(d) of the Act for a period of at least twelve calendar months; and

(iii) The issuer has filed at least one annual report pursuant to section 13(a) or 15(d) of the Act. and

(iv) The issuer is not eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the “smaller reporting company” definition in this section.

(3) *Entering and exiting accelerated filer and large accelerated filer status.*

(i) The determination at the end of the issuer’s fiscal year for whether a non-accelerated filer becomes an accelerated filer, or whether a non-accelerated filer or accelerated filer becomes a large accelerated filer, governs the deadlines for the annual report to be filed for that fiscal year, the quarterly and annual reports to be filed for the subsequent fiscal year and all annual and quarterly reports to be filed thereafter while the issuer remains an accelerated filer or large accelerated filer.

(ii) Once an issuer becomes an accelerated filer, it will remain an accelerated filer unless: the issuer determines, at the end of a fiscal year, that the aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of the issuer was less than \$500 million, as of the last business day of the issuer’s most recently completed second fiscal quarter. An issuer making this determination; or it determines that it is eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the “smaller reporting company” definition in this section. An issuer that makes either of these determinations becomes a non-accelerated filer. The issuer will not become an accelerated filer

again unless it subsequently meets the conditions in paragraph (1) of this definition.

(iii) Once an issuer becomes a large accelerated filer, it will remain a large accelerated filer unless ~~the issuer; it~~ determines, at the end of a fiscal year, that the aggregate worldwide market value of the voting and non-voting common equity held by ~~its~~ non-affiliates ~~of the issuer~~ (“aggregate worldwide market value”) was less than \$~~500~~560 million, as of the last business day of the issuer’s most recently completed second fiscal quarter or it determines that it is eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the “smaller reporting company” definition in this section. If the issuer’s aggregate worldwide market value was \$~~50~~60 million or more, but less than \$~~500~~560 million, as of the last business day of the issuer’s most recently completed second fiscal quarter, ~~the issuer~~and it is not eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the “smaller reporting company” definition in this section, it becomes an accelerated filer. If the issuer’s aggregate worldwide market value was less than \$~~50~~60 million, as of the last business day of the issuer’s most recently completed second fiscal quarter, ~~the issuer~~or it is eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the “smaller reporting company” definition in this section, it becomes a non-accelerated filer. An issuer will not become a large accelerated filer again unless it subsequently meets the conditions in paragraph (2) of this definition.

(iv) The determination at the end of the issuer’s fiscal year for whether an accelerated filer becomes a non-accelerated filer, or a large accelerated filer becomes an accelerated filer or a non-accelerated filer, governs the deadlines for the annual report to be filed for that fiscal year, the quarterly and annual reports to be filed for the subsequent fiscal year and all annual and quarterly reports to be filed thereafter while the issuer remains an accelerated filer or non-accelerated filer.

APPENDIX B

Tables Excerpted from the Proposing Release Highlighting Current and Proposed Relationships Among the Filer Categories

Existing Relationships between SRCs and Non-Accelerated and Accelerated Filers		
Status	Public Float	Annual Revenues
SRC and Non-Accelerated Filer	Less than \$75 million	N/A
SRC and Accelerated Filer	\$75 million to less than \$250 million	N/A
	\$250 million to less than \$700 million	Less than \$100 million
Accelerated Filer (not SRC)	\$250 million to less than \$700 million	\$100 million or more

Proposed Relationships between SRCs and Non-Accelerated and Accelerated Filers		
Status	Public Float	Annual Revenues
SRC and Non-Accelerated Filer	Less than \$75 million	N/A
	\$75 million to less than \$700 million	Less than \$100 million
SRC and Accelerated Filer	\$75 million to less than \$250 million	\$100 million or more
Accelerated Filer (not SRC)	\$250 million to less than \$700 million	\$100 million or more

APPENDIX C

Tables Excerpted from the Proposing Release Highlighting Proposed Amendments to the Public Float Transition Thresholds

Existing Requirements			
Initial Public Float Determination	Resulting Filer Status	Subsequent Public Float Determination	Resulting Filer Status
\$700 million or more	Large Accelerated Filer	\$500 million or more	Large Accelerated Filer
		Less than \$500 million but \$50 million or more	Accelerated Filer
		Less than \$50 million	Non-Accelerated Filer
Less than \$700 million but \$75 million or more	Accelerated Filer	Less than \$700 million but \$50 million or more	Accelerated Filer
		Less than \$50 million	Non-Accelerated Filer

Proposed Amendments to the Public Float Thresholds			
Initial Public Float Determination	Resulting Filer Status	Subsequent Public Float Determination	Resulting Filer Status
\$700 million or more	Large Accelerated Filer	\$560 million or more	Large Accelerated Filer
		Less than \$560 million but \$60 million or more	Accelerated Filer
		Less than \$60 million	Non-Accelerated Filer
Less than \$700 million but \$75 million or more	Accelerated Filer	Less than \$700 million but \$60 million or more	Accelerated Filer
		Less than \$60 million	Non-Accelerated Filer