

SEC Proposes to Exclude Certain Low-Revenue Issuers from Accelerated Filer Definitions

On May 9, 2019, the Securities and Exchange Commission (“SEC”) proposed amendments (the “proposed amendments”) to the accelerated filer and large accelerated filer definitions in Rule 12b-2 under the Securities Exchange Act of 1934 (“Exchange Act”).¹ If the proposed amendments are adopted, an issuer that qualifies as a Smaller Reporting Company (“SRC”) and had less than \$100 million revenues in the most recent fiscal year for which audited financial statements are available would be excluded from the definitions of accelerated filer and large accelerated filer.² As a result of this status change, these issuers would have more time to file their periodic reports and would no longer be required to obtain an attestation on their internal control over financial report (“ICFR”) from an independent outside auditor.³ The proposal also includes revisions to the transition thresholds for exiting accelerated filer and large accelerated filer status.⁴

I. The Existing Rules

Under the current reporting regime, there are three categories of issuers: non-accelerated filers, accelerated filers and large accelerated filers. An issuer is considered an accelerated filer if, as of the end of its fiscal year, (1) it has a public float⁵ of \$75 million or more but less than \$700 million, (2) it has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months and (3) it has filed at least one annual report pursuant to Exchange Act Section 13(a) or 15(d).⁶ A large accelerated filer is one that has a public float of \$700 million or more and satisfies the other two conditions applicable to accelerated filers.⁷ An issuer is considered as a non-accelerated filer if it does not meet either of the accelerated filer and large accelerated filer definitions.⁸

The category of an issuer determines the filing deadlines for its periodic reports. Accelerated filers must file their annual reports within 75 calendar days and quarterly reports within 40 calendar days after the end of the period.⁹ Large accelerated filers have a tighter deadline for filing annual reports—60 calendar days after the end of

¹ SEC Press Release, *SEC Proposes Amendments to More Appropriately Tailor the Accelerated and Large Accelerated Filer Definitions* (May 9, 2019), <https://www.sec.gov/news/press-release/2019-68>.

² *Amendments to the Accelerated Filer and Large Accelerated Filer Definitions*, Exchange Act Release No. 34-85814, File No. S7-06-19, available at <https://www.sec.gov/rules/proposed/2019/34-85814.pdf>.

³ *Id.*

⁴ *Id.*

⁵ Public float means aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates as of the last business day of the issuer’s most recently completed second fiscal quarter. *See* 17 CFR §240.12b-2.

⁶ 17 CFR §240.12b-2.

⁷ 17 CFR §240.12b-2.

⁸ SEC Release No. 34-85814, *supra* note 2, fn.2.

⁹ *See Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports*, Securities Act Release No. 33-8128, Exchange Act Release No. 34-46464, File No. S7-08-02 (Sept. 5, 2002) [FR-64], available at: <https://www.sec.gov/rules/final/33-8128.htm>. *See also* SEC, *Fast Answers: Form 10-K*, <https://www.sec.gov/fast-answers/answers-form10k.htm>.

the period—and the same 40-calendar-day-deadline for filing quarterly reports.¹⁰ Non-accelerated filers have 90 calendar days to file their annual reports and 45 calendar days to file their quarterly reports.¹¹ In addition to the differences in filing deadlines, accelerated filers and large accelerated filers are required to obtain an independent auditor attestation and report on the internal control assessment made by the management of the issuer.¹² Non-accelerated filers are exempt from such requirement.¹³

In June of 2018, the SEC adopted amendments to the definition of SRC to increase the number of issuers qualifying as SRCs and reduce compliance costs of these smaller issuers through scaled disclosure accommodations.¹⁴ However, at the same time, these amendments created overlaps between the SRC category and the categories of accelerated and large accelerated filer, disrupting the alignment between the reporting regimes for SRCs and non-accelerated filers.¹⁵ The chart below summarizes the existing relationship between SRCs and non-accelerated filers and accelerated filers.

Existing Relationship Between SRCs and Non-Accelerated Filers and Accelerated Filers¹⁶		
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

II. The Proposed Amendments

Under the proposed amendments, a new condition would be added to the definitions of accelerated filer and large accelerated filer, excluding an issuer eligible to be an SRC under the revenue test in the SRC definition.¹⁷ In

¹⁰ See *supra* note 7.

¹¹ See *supra* note 7.

¹² 15 U.S.C. §7262(b). Emerging growth companies are excluded from this subsection.

¹³ 15 U.S.C. §7262(c).

¹⁴ *Smaller Reporting Company Definition*, Securities Act Release No. 33-10513, Exchange Act Release No. 34-83550, File No. S7-12-16 (June 28, 2018) [83 FR 31992], available at <https://www.sec.gov/rules/final/2018/33-10513.pdf>.

¹⁵ SEC Release No. 34-85814, *supra* note 2, pp. 6-7, 10.

¹⁶ *Id.*, p.22 Table 2.

¹⁷ SEC Release No. 34-85814, *supra* note 2.

other words, SRCs with annual revenues of less than \$100 million¹⁸ would have the non-accelerated filer status. The chart below summarizes the proposed relationship between SRCs and non-accelerated and accelerated filers.

Proposed Relationship Between SRCs and Non-Accelerated Filers and Accelerated Filers¹⁹		
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

In addition, the SEC also proposes to revise the transition thresholds for issuers exiting accelerated and large accelerated filer status. Specifically, the proposed amendments would (1) increase the public float transition threshold for accelerated and large accelerated filers becoming non-accelerated filers from \$50 million to \$60 million,²⁰ (2) increase the public float transition threshold for large accelerated filers becoming accelerated filers from \$500 million to \$560 million²¹ and (3) allow accelerated and large accelerated filers to exit accelerated filer status and become non-accelerated filers if their annual revenues fall below the applicable revenue threshold—\$80 million (for issuers that did not qualify as SRCs)²² or \$100 million (for SRCs)²³. The SEC explained in the proposing release that the new transition thresholds (\$60 million and \$560 million) were selected to be consistent with the percentage used in the transition thresholds for SRC eligibility, which is 80% of the initial qualification thresholds.²⁴ The proposed addition of a revenue test for the transition thresholds also aligns the non-accelerated filer category with the SRC category.

The SEC estimates that 539 issuers would move from the accelerated or large accelerated filer categories to the non-accelerated filer category as a result of the proposed amendments, mostly as a result of the newly added

¹⁸ Note that the SRC also must not have a public float of \$700 million or more. 17 CFR §240.12b-2, definition of SRC, para.(2). However, it is rare for a SRC that has less than \$100 million annual revenues to have a public float of \$700 million or more. See SEC Release No. 34-85814, *supra* note 2, fn.25.

¹⁹ SEC Release No. 34-85814, *supra* note 2, p.22, Table 3.

²⁰ SEC Release No. 34-85814, *supra* note 2.

²¹ *Id.*

²² 17 CFR §240.12b-2, definition of SRC, para.(3)(iii)(B). Applies if the issuer initially determines it does not qualify as an SRC because its annual revenues are \$100 million or more. See SEC Release No. 34-85814, *supra* note 2, pp.31-32.

²³ 17 CFR §240.12b-2, definition of SRC, para.(2). Applies to an issuer initially applying the SRC definition or previously qualified as an SRC. See SEC Release No. 34-85814, *supra* note 2, pp.31-32.

²⁴ SEC Release No. 34-85814, *supra* note 2, p.30.

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revenue component.²⁵ These issuers, according to SEC’s analysis, are heavily concentrated in the following industries: pharmaceutical products (30.2%), banking (20.2%) and financial trading (10.2%).²⁶ Hence, the proposed amendments could lead to a “noticeable decrease in the presence of ‘Pharmaceutical Products’ and ‘Banking’ issuers in the pool of accelerated filers.”²⁷

The proposed amendments aim to reduce compliance costs for certain lower-revenue issuers, thereby allowing these issuers to redirect funds into business development while maintaining appropriate level of investor protections. The SEC has stated that the affected issuers may find the compliance costs “particularly burdensome,”²⁸ while “the benefits of having those issuers comply with the accelerated and large accelerated filer requirements may be more limited than for other issuers.”²⁹ Some underlying factors cited by the SEC include these issuers’ typically less complex financial and internal control systems and reduced willingness to expend resources on remediating ICFR issues, as well as the fact that investors tend to focus more on these issuers’ prospects than on their current financial performance.³⁰ Additionally, the SEC notes that the reduced burden on smaller issuers may make smaller companies more willing to register an offering or a class of their securities.³¹

The SEC is currently soliciting comments on the proposed amendments, issues and alternatives discussed in the proposing release as well as other matters that may be relevant.³² Comments are due 60 days after the release’s publication on the Federal Register.³³

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; or Yilin Zhu at 212.701.3384 or yzhu@cahill.com.

²⁵ *Id.*, pp.59-60.

²⁶ *Id.*, p.64.

²⁷ *Id.*

²⁸ *Id.*, p. 41.

²⁹ *Id.*, p.16.

³⁰ *See Id.*, pp.95-101.

³¹ *Id.*, pp.16, 81.

³² *See id.*, pp.34-39, 129-34.

³³ SEC Press Release, *supra* note 1.