

SEC Relaxes Requirements for Smaller Reporting Companies by Amending Accelerated and Large Accelerated Filer Definitions

I. Overview

On March 12, 2020, the Securities and Exchange Commission (the “SEC”) adopted amendments (the “Final Rules”) to the definitions of “accelerated filer” and “large accelerated filer” in Rule 12b-2 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”).¹ Among other things, the Final Rules (1) exclude issuers eligible to be smaller reporting companies and have annual revenues of less than \$100 million in the most recent fiscal year for which audited financial statements are available (the “Revenue Test”) from the definitions of accelerated filer and large accelerated filer (and exclude business development companies from such definitions in similar circumstances), (2) increase the transition thresholds for becoming a non-accelerated filer and exiting accelerated or large accelerated filer status, (3) add the Revenue Test to the transition thresholds for exiting accelerated and large accelerated filer status, and (4) add a check box to the cover pages of annual reports regarding inclusion of an auditor attestation on internal control over financial reporting (“ICFR”). The SEC adopted the amendments largely in the form proposed on May 9, 2019.²

II. Background

Under Rule 12b-2, an issuer must satisfy the following conditions to be an accelerated filer or large accelerated filer: (1) the issuer had an aggregate public float of at least \$75 million but not more than \$700 million (or, in the case of a large accelerated filer, an aggregate public float of at least \$700 million), as of the last business day of such issuer’s most recently completed second fiscal quarter, (2) the issuer 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) the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act.³

Under Rule 12b-2, an issuer qualifies as a smaller reporting company (“SRC”) if it (1) has a public float of less than \$250 million or (2) meets the Revenue Test.⁴ Under the current rules, an issuer may sometimes be categorized as both an SRC and an accelerated or large accelerated filer, subjecting such issuer to both sets of rules. For example, as an accelerated or large accelerated filer, such issuer would be subject to the earlier annual and quarterly report filing deadlines and the requirement under Section 404(b) of the Sarbanes Oxley Act of 2002 that mandates the issuer’s independent auditor to attest to management’s assessment of the effectiveness of ICFR (“Auditor Attestation”).

¹ For full text of the Final Rules, see Securities and Exchange Commission, Amendments to the Accelerated Filer and Large Accelerated Filer Definitions, SEC Release No. 34-88365; File No. S7-06-19, available at <https://www.sec.gov/rules/final/2020/34-88365.pdf> (March 12, 2020) [hereinafter, the “Adopting Release”]. Unless otherwise specified, quoted statements in this memorandum are taken from the Final Rules.

² For full text of the Proposed Rules, see Securities and Exchange Commission, Amendments to the Accelerated and Large Accelerated Filer Definitions, Release No. 34-85814, available at <https://www.sec.gov/rules/proposed/2019/34-85814.pdf> (May 9, 2019).

³ 17 CFR 240.12b-2.

⁴ *Id.*

III. Amendments to Accelerated and Large Accelerated Filer Definitions

The Final Rules amend Rule 12b-2 to exclude from the definition of accelerated filer and large accelerated filer an issuer that (1) is eligible to be an SRC and (2) satisfies the Revenue Test. As a result, an issuer who meets these requirements will not be subject to the rules applicable to accelerated filers and large accelerated filers, such as the earlier annual and quarterly report filing deadlines and Auditor Attestation requirement.⁵

The Final Rules also apply to business development companies, but with an investment income test replacing the Revenue Test. Foreign private issuers that are SRCs by meeting the Revenue Test are also covered under the Final Rules, but they could only avail themselves of the benefits if they forego the reporting regime for foreign private issuers.

IV. New Transition Thresholds and Revenue Test

The existing thresholds for meeting the definitions of accelerated and large accelerated filer (described above) remain unchanged. Under the existing transition rules, a large accelerated filer will become an accelerated filer if its public float drops below \$500 million but is greater than or equal to \$50 million, and a large accelerated filer or an accelerated filer will become a non-accelerated filer if its public float falls below \$50 million.⁶

Under the Final Rules, a large accelerated filer will become an accelerated filer if its public float falls below \$560 million, and a large accelerated filer or an accelerated filer will become a non-accelerated filer if its public float falls below \$60 million. The Final Rules also add the Revenue Test to the transition thresholds, thus allowing accelerated and large accelerated filers to become non-accelerated filers by meeting the Revenue Test. The increase in the transition thresholds and the addition of the Revenue Test should bring more issuers into the non-accelerated filer category.

V. New Check Box Requirement

In the Adopting Release, the SEC agreed with commentators that “more prominent and easily accessible disclosure” regarding whether a report includes an Auditor Attestation “would be useful to investors and market participants while imposing only minimal burdens on issuers.” As a result, under the Final Rules, issuers must include a check box on the cover page of any annual report on Form 10-K, 20-F, or 40-F filed with the SEC, indicating whether an Auditor Attestation is included in the report. If an issuer is required to tag the cover page data using Inline eXtensible Business Reporting Language (“Inline XBRL”), such issuer will also be required to tag the check box with Inline XBRL. The new requirement applies to all annual reports filed on or after April 27, 2020 (regardless of the accelerated filer status).

VI. Conclusion

With the adoption of the Final Rules, the SEC intends to “reduce unnecessary burdens on new and smaller issuers.” SEC Chairman, Jay Clayton, expressed that the Final Rules “would allow smaller reporting companies that have made it to that five-year point, but have not yet reached \$100 million in revenues, to continue to benefit from that exemption as they build their businesses, while still subjecting those companies to important investor

⁵ In the *Adopting Release*, the SEC estimated that the exclusion from the Auditor Attestation requirement alone would save issuers approximately \$210,000 per year in compliance costs.

⁶ 17 CFR 240.12b-2.

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protection requirements.”⁷ The Final Rules will become effective on April 27, 2020. Given the potential benefits to issuers, companies should reconsider which of the revised definitions they now meet and revise their next annual report to include the required check box.

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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 e-mail authors Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Kimberly C. Petillo-Décossard at 212.701.3265 or kpetillo-decossard@cahill.com; or Joseph E. Cho at 212.701.3589 or jcho@cahill.com; or email publications@cahill.com.

⁷ Securities and Exchange Commission, Press Release, “SEC Adopts Amendments to Reduce Unnecessary Burdens on Smaller Issuers by More Appropriately Tailoring the Accelerated and Large Accelerated Filer Definitions” (March 12, 2020), available at <https://www.sec.gov/news/press-release/2020-58>.

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