

**LEGAL UPDATES AND NEWS**

**SEC Finalizes Rule on Smaller Reporting Company Definition**

The Securities and Exchange Commission (the “SEC”) recently finalized a rule, effective September 10, 2018, that expands the definition of “smaller reporting company” (“SRC”) to include registrants with (i) a public float of less than \$250 million, or (ii) annual revenues of less than \$100 million for the previous year and either no public float or a public float of less than \$700 million. (The method of calculating “public float” is set forth in the final rule.) The previous definition of an SRC only included registrants that had a public float of less than \$75 million, or less than \$50 million of annual revenues and no public float. The advantage of qualifying as an SRC is reduced disclosure requirements, as noted in the following table.

**Reduced Disclosure Examples**

<b>Rule</b>	<b>Reduced Disclosure Compared to Non-SRCs</b>
Item 101 of Regulation S-K – Description of Business	Describe registrant’s business during the last 3 years rather than 5 years. Business description requirements are less detailed than disclosure requirements for non-SRCs
Item 201 of Regulation S-K – Market Price/Dividends on Registrant’s Common Equity & Related Stockholder Matters	Stock performance graph not required
Item 301 of Regulation S-K – Selected Financial Data	Not required
Item 302 of Regulation S-K – Supplementary Financial Data	Not required
Item 303 of Regulation S-K – Management’s Discussion and Analysis of Financial Condition and Results of Operations	2-year MD&A comparison rather than 3-year comparison Tabular disclosure of contractual obligations not required
Item 305 of Regulation S-K – Quantitative and Qualitative Disclosures About Market Risk	Not required
Item 402 of Regulation S-K – Executive Compensation	3 named executive officers rather than 5 in Summary Compensation table  2-year summary comp. table information rather than 3 years  Not required: <ul style="list-style-type: none"> <li>• Compensation discussion and analysis</li> <li>• Grants of plan-based awards table</li> <li>• Option exercises and stock vested table</li> <li>• Pension benefits table</li> <li>• Non-qualified deferred compensation table</li> <li>• Disclosure of compensation policies and practices related to risk management</li> <li>• Pay ratio disclosure</li> </ul>
Item 404 of Regulation S-K – Transactions With Related Persons, Promoters and Certain Control Persons	Description of policies/procedures for the review, approval or ratification of related party transactions not required
Item 407 of Regulation S-K – Corporate Governance	Compensation committee interlocks and insider participation disclosure not required Compensation committee report not required
Item 503 of Regulation S-K – Prospectus Summary, Risk Factors and Ratio of Earnings to Fixed Charges	No ratio of earnings to fixed charges disclosure required. No disclosure of risk factors required in Exchange Act filings
Item 601 of Regulation S-K – Exhibits	Statements regarding computation of ratios not required
Regulation S-X – Financial Statements	2 years (rather than 3) of statements of income, cash flows and changes in stockholders’ equity 2 years (rather than 3) of acquiree financial statements

## **Updated Definition and Subsequent Tests**

The final rule now defines an “SRC” as an issuer that is not: an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not an SRC, and meets one of the two initial threshold tests outlined below:

<b>Criteria (Two Options)</b>	<b>Previous SRC Definition</b>	<b>Revised SRC Definition</b>
Public Float Test	Public float < \$75 million	Public float < \$250 million
Revenues Test	Annual revenues < \$50 million and no public float	Annual revenues < \$100 million and either: <ul style="list-style-type: none"><li>• No public float, or</li><li>• Public float &lt; \$700 million</li></ul>

Additionally, a registrant that does not initially qualify as an SRC because its public float is \$250 million or more, can subsequently qualify as an SRC if its public float declines to less than \$200 million, regardless of its revenues. A registrant that subsequently qualifies as an SRC under the \$200 million public float threshold would remain qualified until its public float exceeds \$250 million.

## **Application of New Threshold**

The final rule is effective September 10, 2018. Companies still are required to measure their (i) public float as of the last business day of their most recent second fiscal quarter, and (ii) revenue as of the most recently completed fiscal year for which audited financial statements are available. However, a company’s status does not change until the end of its fiscal year. Such determination must be reflected on the cover page of the company’s quarterly report on Form 10-Q filed for the first fiscal quarter of the next year.

For the first fiscal year ending after September 10, 2018, a company will qualify as an SRC if it meets one of the initial qualification thresholds of an SRC, i.e., its (i) public float is less than \$250 million, or (ii) annual revenues are less than \$100 million for the previous year and it does not have a public float or its public float is less than \$700 million.

For example, a company with a fiscal year ending on December 31, 2018 will measure its public float as of the last business day of the quarter ended June 30, 2018. If such company’s public float is less than \$250 million, it will be subject to the reduced disclosure regimen applicable to an SRC with respect to periodic reports filed with the SEC after December 31, 2018 (including its Form 10-K for the year ended December 31, 2018).

A company filing an initial registration statement with the SEC to become a public company must choose a date within 30 days of the filing to determine SRC eligibility. The initial qualification thresholds of an SRC would apply to such company.

## **Accelerated Filers and Auditor’s Attestation**

Companies with \$75 million or more of public float that qualify as SRCs under the new rule will nevertheless remain subject to certain accelerated filer requirements, including the timing of the filing of periodic reports and the requirement that accelerated filers provide an auditor’s attestation of management’s assessment of internal control over financial reporting required by Section 404(b) of the Sarbanes-Oxley Act. However, the SEC has stated that it is reviewing these definitions and additional rule changes may occur.

Luse Gorman, PC is a Washington, D.C based law firm specializing in the representation of financial institutions. We advise clients located throughout the nation, ranging in size from small community-based financial institutions to multinational banks. Please contact any of our attorneys below if you have any questions regarding the information contained in this newsletter.

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