
LEGAL UPDATES AND NEWS

SEC Adopts Changes to Definitions of Accelerated and Large Accelerated Filers

The Securities and Exchange Commission (the “SEC”) has adopted amendments to its definitions of “accelerated filer” and “large accelerated filer” that will exclude any issuer that qualifies as a “smaller reporting company” (“SRC”) under the SRC revenue test adopted by the SEC in 2018. The amendments will also increase the public float thresholds at which accelerated and large accelerated filers will be able to become non-accelerated filers or non-accelerated filers, and will add the SRC revenue test as a second transition threshold.

The SEC’s stated purpose in adopting the new changes is to promote capital formation by excluding certain smaller companies from the costs associated with being an accelerated or larger accelerated filer. These include allowing companies that qualify as an SRC under the revenue test to be exempt from the requirement to have their independent auditors attest to the effectiveness of their internal controls over financial reporting (“ICFR”) and, in certain cases, reducing the disclosure requirements and extending the timeline for SEC filings. The amendments will become effective April 27, 2020 and will apply to annual reports due on or after that date (even if the annual report is for a fiscal year ending before April 27, 2020).

Background

In 2018, the SEC amended its definition of an SRC by increasing the permissible public float of an SRC from less than \$75 million to less than \$250 million. The SEC also expanded its use of the SRC revenue test so that issuers with annual revenues of less than \$100 million are considered SRCs if they have a public float of less than \$700 million. However, corresponding changes to the definitions of accelerated and large accelerated filer were not adopted at that time, which led to an overlap between the filer categories, with some companies being concurrently considered SRCs and accelerated filers. At the time, the SEC noted it would review its definitions of accelerated and large accelerated filer and evaluate whether changes should be made. The changes the SEC is now adopting are a result of those efforts.

Accelerated and Large Accelerated Filer Definitions

The new definitions of accelerated and large accelerated filer exclude issuers that had annual revenues of less than \$100 million for the previous year and a public float of less than \$700 million at the end of their previous second quarter. The practical effect of this change is that issuers that qualify as an SRC under the revenue test will be exempt from the ICFR auditor attestation requirement (though such issuers will still be required to establish, maintain and internally assess the effectiveness of their ICFR) and will be allowed to file their periodic reports using the more relaxed time schedule afforded to SRCs. However, the changes will not affect the status of SRCs that qualify as such only under the public float test (issuers that have less than \$250 million in public float but \$100 million or more in annual revenues). Such SRCs, while being eligible for the relaxed disclosure requirements available to SRCs, will continue to be considered accelerated filers and thus required to provide the ICFR auditor attestation and file their periodic reports under the time schedule for accelerated filers.

Financial institutions should note that the changes to these SEC definitions do not alter the Federal Deposit Insurance Corporation Improvement Act requirement that institutions with \$1 billion or more in assets obtain an ICFR auditor attestation for purposes of their annual reporting requirements with the applicable federal banking agencies (though such attestation need not be included in any filing with the SEC if the financial institution is exempt from the SEC’s auditor attestation requirement).

Transition Thresholds

As adopted by the SEC, the amendments also change the public float thresholds used for exiting filing status (e.g., moving from an accelerated filer to a non-accelerated filer) and add the SRC revenue test as a second threshold by which issuers can become non-accelerated filers. These changes will allow companies with a declining public float and/or annual revenues to more readily transition to a filer status that is in line with their current situation, with an accompanying easing of the timing for filing periodic reports and, in the case of a transition to non-accelerated status, relief from certain disclosure requirements for SEC filings.

Public Float

The amendments increase the public float thresholds for issuers exiting accelerated or large accelerated filer status. The public float threshold for stepping down from large accelerated filer to accelerated filer is being increased from \$500 million to \$560 million (a large accelerated filer that exceeds the SRC revenue test discussed below and has a public float that decreases to less than \$250 million but is still greater than \$60 million would become a concurrent SRC/accelerated filer). The public float threshold for stepping down from large accelerated filer or accelerated filer to non-accelerated filer is being increased from \$50 million to \$60 million.

The table below summarizes the amended public float thresholds for moving to a lower filer status. The thresholds applicable before April 27, 2020 are noted in bold for comparison.

New 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 (\$500) million or more	Large Accelerated Filer
		Less than \$560 (\$500) million but \$250 million or more	Accelerated Filer
		Less than \$250 million but \$60 (\$50) million or more	SRC/Accelerated Filer (<i>if the company does not qualify as a non-accelerated filer under the applicable SRC revenue test</i>)
		Less than \$60 (\$50) million	Non-Accelerated Filer
Less than \$700 million but \$75 million or more	Accelerated Filer	Less than \$700 million but \$250 million or more	Accelerated Filer
		Less than \$250 million but \$60 (\$50) million or more	SRC/Accelerated Filer (<i>if the company does not qualify as a non-accelerated filer under the applicable SRC revenue test</i>)
		Less than \$60 (\$50) million	Non-Accelerated Filer

SRC Revenue Test

The amendments also institute the SRC revenue test as a second threshold by which issuers can become non-accelerated filers. An issuer that previously qualified as an SRC (e.g., a concurrent SRC/accelerated filer) can transition to non-accelerated filer status if its annual revenues have decreased to less than \$100 million (in the case of a large accelerated filer, only if its public float has also fallen below \$560 million). In all other circumstances, an accelerated filer or a large accelerated filer with a public float below \$560 million can transition to non-accelerated filer status if its annual revenues fall below \$80 million.

The table below summarizes the circumstances under which the use of the SRC revenue test will lead to the issuer transitioning to non-accelerated filer status.

SRC Revenue Test as a Transition Threshold			
Initial Filer Status	Subsequent Determination Using the SRC Revenue Test		Resulting Filer Status
Large Accelerated Filer	Public float less than \$560 million	Annual revenue below \$80 million	Non-Accelerated Filer
		Annual revenue below \$100 million (<i>only if the company has previously qualified as an SRC</i>)	
Accelerated Filer	Annual revenue below \$80 million		Non-Accelerated Filer
	Annual revenue below \$100 million (<i>only if the company has previously qualified as an SRC</i>)		
SRC/Accelerated Filer	Annual revenue below \$100 million		Non-Accelerated Filer

For example, an issuer with a December 31 fiscal year end that did not exceed the public float threshold in the prior year and that has a public float, as of June 30, 2020, of \$230 million and annual revenues for the fiscal year ended December 31, 2019 of \$101 million will be eligible to be an SRC under the public float test; however, because the issuer would not be eligible to be an SRC under the SRC revenue test, it will be an accelerated filer (assuming the other conditions are also met). At the next determination date (June 30, 2021), if its public float, as of June 30, 2021, remains at \$230 million and its annual revenues for the fiscal year ended December 31, 2020 are less than \$100 million, the issuer will be eligible to be an SRC under the SRC revenue test (in addition to the public float test) and thus it will become a non-accelerated filer.

On the other hand, an issuer with a December 31 fiscal year end that has a public float, as of June 30, 2020, of \$400 million and annual revenues for the fiscal year ended December 31, 2019 of \$101 million will not be eligible to be an SRC under either the public float test or the SRC revenue test and will be an accelerated filer (assuming the other conditions are also met). At the next determination date (June 30, 2021), if its public float, as of June 30, 2021, remains at \$400 million, that issuer will not be eligible to be an SRC under the SRC revenue test unless its annual revenues for the fiscal year ended December 31, 2020 are less than \$80 million, at which point it will be eligible to be an SRC under the SRC revenue test and to become a non-accelerated filer.

The final amendments will become effective April 27, 2020 (30 days after they are published in the Federal Register). The final amendments will apply to an annual report filing due on or after the effective date. Even if that annual report is for a fiscal year ending before the effective date, the issuer may apply the final amendments to determine its status as a non-accelerated, accelerated, or large accelerated filer. For example, an issuer that has a March 31, 2020 fiscal year end and that is due to file its annual report after

the effective date of the amendments may apply the final amendments to determine its filing status even though its fiscal year end date precedes the effective date. An issuer that determines it is eligible to be a non-accelerated filer under the final amendments will not be subject to the ICFR auditor attestation requirement for its annual report due and submitted after the effective date of the amendments and may comply with the filing deadlines that apply, and other accommodations available, to non-accelerated filers.

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