

SEC Amendments Exempt More Smaller Reporting Companies from SOX 404(b) and Accelerated Filing Deadlines

By John O. Newell and Daniel P. Adams

The Securities and Exchange Commission (SEC) has [adopted amendments](#) to the definitions of accelerated filer and large accelerated filer to exclude companies that had annual revenues of less than \$100 million in their most recent fiscal year and are eligible to be a smaller reporting company (SRC) under SEC rules. The amendments also revise the transition thresholds to make it slightly easier for companies to exit accelerated filer and large accelerated filer status based on their public float. The result will be an increase in the number of companies that are non-accelerated filers, which are not required (1) to have the company's independent auditor attest to and report on management's assessment of the effectiveness of the company's internal control over financial reporting (ICFR) or (2) to file periodic SEC reports within the accelerated deadlines that apply to accelerated filers. The SEC adopted its [May 2019 proposals](#) as proposed, with two additions. One clarifies the limitations on the eligibility of a foreign private issuer (FPI) to report under SRC rules. The second addition adds a checkbox on the cover of Form 10-K to indicate whether the company has filed a report on and attestation to management's assessment of the company's ICFR with the Form 10-K. The amendments will be effective 30 days after publication in the *Federal Register*.

Impact of the Amendments

The amendments will result in many more companies that currently qualify as SRCs and are accelerated filers qualifying as non-accelerated filers. As a result, these companies will no longer be required:

- to comply with the accelerated filing deadlines for periodic SEC reports that apply to accelerated filers; and
- to obtain an attestation report from their independent auditor on the effectiveness of the company's ICFR.

In addition to the benefits of the amendments for companies that are currently both an SRC and an accelerated filer, some companies that qualify as an emerging growth company (EGC) that have exited or will be exiting EGC status – for example, due to “aging out” under the five-year sunset for EGC status – may qualify as a non-accelerated filer under the amendments and therefore avoid the expense of an independent auditor ICFR attestation.

The SEC states in the adopting release that it estimates that the amendments would result in 527 additional companies being classified as non-accelerated filers, of which an estimated 492 companies are currently accelerated filers or large accelerated filers that have annual revenues of less than \$100 million. Affected companies are concentrated in a small number of industries. Companies in the pharmaceutical products and medical equipment industries represent 29.1% and 4.4% of affected companies, respectively, and companies in the banking and financial trading industries represent 22.4% and 16.0% of affected companies, respectively.

Effective Date and Transition Guidance

The final amendments will be effective 30 days after publication in the *Federal Register*. The final amendments will apply to an annual report filing due on or after the effective date, rather than filings for periods ending on or after the effective date. As a result, a company will not be required to obtain an auditor attestation on ICFR for an annual report that is due on or after the effective date of the amended rules if the company meets the amended test for exclusion from accelerated filer or large accelerated filer status,

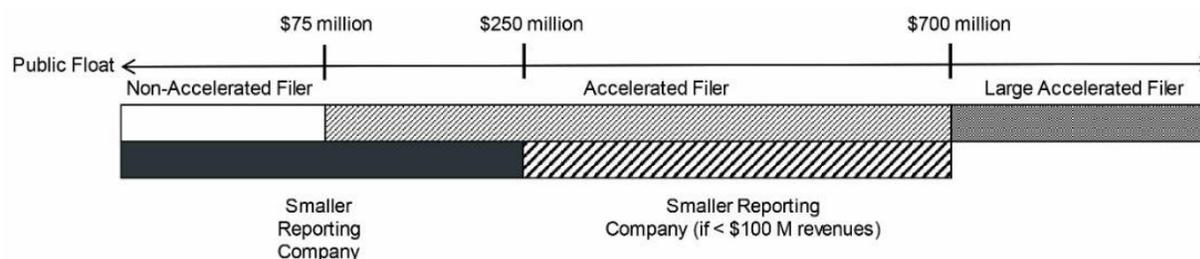
The SEC release provide the following guidance on the transition to the new definitions:

Even if [the company's] annual report is for a fiscal year ending before the effective date, the company 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.

Background

From 2007 to 2018, most companies that qualified as an SRC would not be an accelerated filer. In 2018, the SEC [amended the definition of an SRC](#) to expand the number of companies eligible for the SRC scaled disclosure accommodations. The 2018 amendments, discussed in an [earlier Goodwin alert](#), expanded the SRC eligibility requirements to include (1) companies with less than \$250 million of public float (increased from \$75 million) as of the last business day of the company's most recently completed second fiscal quarter and (2) companies with less than \$700 million of public float and less than \$100 million in annual revenues during the prior year. The 2018 amendments also eliminated the provisions of the accelerated filer and large accelerated filer definitions that excluded any company that qualified as an SRC from being an accelerated filer or large accelerated filer.

As a result, many companies that became newly eligible for SRC status were also accelerated filers and were required (1) to comply with the accelerated filing deadlines for periodic SEC reports that apply to accelerated filers and (2) to obtain an attestation report from their independent auditor on the effectiveness of the company's ICFR. The following illustration shows the overlap between SRC status and accelerated filer status created by the 2018 amendments.



Companies should note that a company is not an accelerated filer or a large accelerated filer until it has been subject to the reporting requirements of Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 for at least 12 calendar months and has filed at least one Form 10-K annual report.

When the SEC adopted the 2018 amendments, the SEC Chair directed the SEC staff to consider the historical and then-current relationships between the definitions of SRC and accelerated filer, among other things, and to make recommendations for potential future amendments that would reduce the number of companies that qualified as accelerated filers. The SEC has now adopted amendments that achieve that goal. For convenient reference, Annex A to this alert shows the text of the accelerated filer and large accelerated filer definitions in Rule 12b-2 under the Securities Exchange Act of 1934, marked to show the effects of the amendments.

Final Amendments

Application of SRC Revenue Test to Accelerated Filer and Large Accelerated Filer Definitions.

The amended definitions of accelerated filer and large accelerated filer in Rule 12b-2 exclude any company that is eligible to be an SRC under the SRC revenue test. Currently, companies with a public float of \$75 million or more do not qualify as non-accelerated filers regardless of their annual revenues. Under the amendments, any SRC that had less than \$100 million of annual revenues would be a non-accelerated filer, even if the company's public float exceeds \$75 million. Business development companies will be non-accelerated filers if they have a public float of \$75 million but less than \$700 million and investment income of less than \$100 million.

Companies with a public float between \$75 million and \$250 million that currently qualify as SRCs but have annual revenues of \$100 million or more will continue to be accelerated filers. These companies will therefore be required to satisfy all of the requirements applicable to accelerated filers, including accelerated filing deadlines and the ICFR auditor attestation requirement.

The table below summarizes the current and as-amended relationship between SRC status and accelerated filer status. The changes are shown with existing provisions that will be deleted in red strike-through text and provisions that will be added by the amendments in blue underscored text.

Relationship between SRC, Non-Accelerated Filer and Accelerated Filer Status under the Final Amendments		
Status	Public Float	Annual Revenues
SRC and Non-Accelerated Filer	Less than \$75 million	Not applicable
	<u>\$75 million to less than \$700 million</u>	<u>Less than \$100 million</u>
SRC and Accelerated Filer	\$75 million to less than \$250 million	Not applicable
	\$250 million to less than \$700 million	<u>\$100 million or more</u> Less than \$100 million
Accelerated Filer that is not eligible for SRC status	\$250 million to less than \$700 million	\$100 million or more

Public Float Transition Thresholds. Second, the amendments revise the public float transition provisions that apply to companies for exiting accelerated filer and large accelerated filer status. Under current SEC rules, a company that becomes an accelerated filer or large accelerated filer will not become a non-accelerated filer or accelerated filer until its public float falls below a specified threshold that is lower than the public float threshold that applied to the company when it became an accelerated filer or large accelerated filer. The amendments increase the public float transition thresholds that apply (1) to accelerated filers and large accelerated filers becoming non-accelerated filers from \$50 million to \$60 million and (2) to large accelerated filers exiting large accelerated filer status from \$500 million to \$560 million.

The table below summarizes the existing and as-amended transition thresholds and the impact of public float determinations on a company's filer status, assuming the company is not a non-accelerated filer due to its annual revenues as discussed in further detail below. The changes are shown with existing provisions that will be deleted in red strike-through text and provisions that will be added by the amendments in blue underscored text.

Existing and Amended Public Float Thresholds for Exiting Accelerated Filer and Large Accelerated Filer Status			
Initial Public Float Determination	Resulting Filer Status	Subsequent Public Float Determination	Resulting Filer Status
\$700 million or more	Large Accelerated Filer	\$500 <u>\$560</u> million or more	Large Accelerated Filer
		Less than \$500 <u>\$560</u> million but \$50 <u>\$60</u> million or more	Accelerated Filer
		Less than \$50 <u>\$60</u> million	Non-Accelerated Filer
Less than \$700 million but \$75 million or more	Accelerated Filer	Less than \$700 million but \$50 <u>\$60</u> million or more	Accelerated Filer
		Less than \$50 <u>\$60</u> million	Non-Accelerated Filer

Application of SRC Revenue Test to Accelerated Filer and Large Accelerated Filer Transitions. The amendments exclude a company from being an accelerated filer or a large accelerated filer if the company is eligible for SRC status under the applicable SRC revenue test. The SRC revenue test that applies to exclude a company from being large accelerated filer or accelerated filer will depend on the company's prior status as follows:

- If the company previously was an SRC (e.g., the company had a public float of less than \$250 million) or the company had not previously determined that it was not qualified as an SRC (e.g., it was the company's initial SRC determination), its public float must be less than \$700 million and its revenues must be less than \$100 million for the prior year.
- If the company previously did not qualify as an SRC because it had a public float of \$700 million or more, but its annual revenues had been less than \$100 million, its public float must be less than \$560 million and its revenues must be less than \$100 million for the prior year.
- If the company did not qualify as an SRC because it had annual revenues of \$100 million or more, but its public float had been less than \$700 million, its revenues must be less than \$80 million for the prior year and its public float must be less than \$700 million.
- If the company previously did not qualify as an SRC because it both had public float of \$700 million or more and had revenues of \$100 million or more, its public float must be less than \$560 million and its revenues must be less than \$80 million for the prior year.

The following table illustrates how a company's prior status will impact the SRC revenue test (which has both a public float and a revenue component) that will apply to that company:

SRC Revenue Test Applicable for Determining Non-Accelerated Filer Status		
Prior Annual Revenues	Prior Public Float	
	None or less than \$700 million	\$700 million more
Less than \$100 million	Neither threshold exceeded Note: This category applies to all companies that were not previously disqualified as an SRC regardless of prior public float or revenues	Public float – Less than \$560 million; and Revenues – less than \$100 million
\$100 million or more	Public float – None or less than \$700 million; and Revenues – Less than \$80 million	Public float – None or less than \$700 million; and Revenues – Less than \$80 million

Any company meeting the applicable SRC revenue test set forth above will be excluded from being an accelerated filer or a large accelerated filer and, accordingly, will be a non-accelerated filer.

Form 10-K Cover Page

The final amendments add two changes that were not part of the proposed amendments. The first of these changes adds a check box to the cover page of Form 10-K to indicate whether the company has filed the Section 404(b) report on and attestation to management's assessment of the

effectiveness of the company's ICFR. The amendments make similar changes to Form 20-F and Form 40-F.

Limitation on Foreign Private Issuers Qualifying as SRCs

The other change from the proposed amendments is a new instruction to the definition of SRC in Rule 12b-2. The instruction provides that “[a] foreign private issuer is not eligible to use the requirements for smaller reporting companies unless it uses the forms and rules designated for domestic issuers and provides financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles.”

Annex A

Rule 12b-2 – Accelerated Filer and Large Accelerated Filer Definitions Final Amendments (Release No. 34-88365)

~~Deletions shown in red strikethrough text~~

Insertions shown in blue underscored text

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 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) of the "smaller reporting company" definition in this section, as applicable.

(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) of the "smaller reporting company" definition in this section, as applicable.

(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 \$~~50~~60 million, as of the last business day of the issuer's most recently completed second fiscal quarter. ~~An issuer making this determination becomes a non-accelerated~~; 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) of the "smaller reporting company" definition in this section, as applicable. An issuer that makes either of these determinations becomes a nonaccelerated 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) of the "smaller reporting company" definition in this section, as applicable. 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) of the "smaller reporting company" definition in this section, as applicable, 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.

(4) For purposes of paragraph (1), (2), and (3) only, a business development company is considered to be 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, provided that the business development company meets the requirements of the test using annual investment income under Rule 6-07.1 of Regulation S-X (17 CFR 210.6-07.1) as the measure of its "annual revenues" for purposes of the test.

Note to paragraphs (1), (2) and (3): The aggregate worldwide market value of the issuer's outstanding voting and non-voting common equity shall be computed by use of the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity.

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