

JULY 09, 2018

## SEC Expands Smaller Reporting Company Eligibility

by John O. Newell, Daniel P. Adams, Bradley C. Weber

### Speed Read

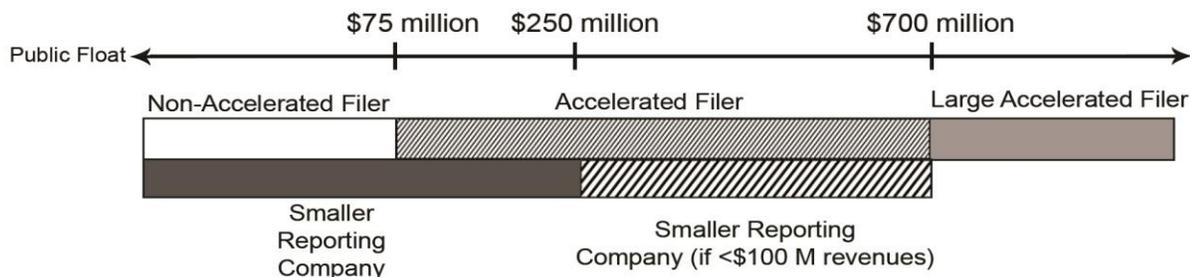
The Securities and Exchange Commission (SEC) has [adopted amendments](#) that will increase the number of companies eligible to take advantage of the SEC's reduced, or scaled, disclosure rules as a "smaller reporting company" or "SRC." The amendments increase the maximum public float for SRCs from less than \$75 million to less than \$250 million as of the last business day of the company's most recently completed second fiscal quarter. As an alternative to the public float test, the amended SRC definition will also expand SRC eligibility to companies that have less than \$100 million in annual revenues if they have either no public float or have a public float that is less than \$700 million.

### Impact of the SRC Amendments

The amendments will permit eligible companies to reduce or eliminate some disclosures in their Form 10-K reports, Form 10-Q reports and proxy statements. However, the amendments will not exclude companies that qualify as an SRC from the definition of "accelerated filer" under SEC rules, and do not change the current thresholds for "accelerated filer" or "large accelerated filer" definitions. As a result, companies with \$75 million or more of public float that qualify as SRCs under the amended definition will be subject to requirements that apply to accelerated filers, including:

- the filing deadlines for periodic reports under the Securities Exchange Act of 1934 (Exchange Act) and the related rules and forms, and
- the requirement that accelerated filers provide the auditor's attestation report on management's assessment of internal control over financial reporting (ICFR) required by Section 404(b) of the Sarbanes-Oxley Act of 2002.

The overlap between smaller reporting company status and accelerated filer status is shown in the following illustration.



## ***Discussion of the SRC Amendments***

The SEC originally [proposed to amend the definition of SRC](#) on June 27, 2016. Just over two years later, the SEC voted unanimously to adopt amendments that are largely similar to the proposed amendments. Companies that qualify as an SRC can elect to use the SEC's scaled disclosure requirements rather than complying with the full range of disclosure requirements that apply to other companies under SEC rules. This can eliminate some disclosure requirements and reduce others.

Use of the scaled disclosure requirements is optional, and SRCs may choose to report using (1) the standard disclosure requirements applicable to other companies, (2) the scaled disclosure requirements or (3) a mix of the two. For example, a company might choose to omit the Compensation Committee report, Compensation Disclosure and Analysis and CEO pay ratio disclosure in its proxy statement but retain all or most of the standard (non-scaled) disclosure in its Form 10-Q and Form 10-K reports. The table at the end of this alert summarizes the scaled disclosure requirements available to SRCs under SEC rules.

The amended rules potentially affect a large number of companies. The adopting release states that the SEC staff estimates that 966 additional companies will be eligible for SRC status in the first year after the amendments become effective. This includes 779 companies with a public float of \$75 million or more and less than \$250 million; 161 companies with a public float of \$250 million or more and less than \$700 million, and revenues of less than \$100 million; and 26 companies with no public float and revenues of \$50 million or more and less than \$100 million.

Although the amendments do not provide any relief from accelerated filer status (including the Section 404(b) ICFR attestation report requirement) for SRCs with a public float of \$75 million or more, the SEC Chair has directed the SEC staff to formulate recommendations for possible changes that the SEC could adopt in the future to reduce the number of companies that are accelerated filers under current SEC rules. If adopted, such amendments could exempt from these requirements some or all companies that qualify as SRCs but have a public float equal to or greater than \$75 million.

## ***The Amended SRC Definition***

The amendments revise the definition of "smaller reporting company" in Rule 405 under the Securities Act of 1933 (Securities Act) and Rule 12b-2 under the Exchange Act. The SEC also adopted related amendments to Rule 3-05 of Regulation S-X and Item 10 of Regulation S-K, as well as changes to Forms S-1, S-3, S-4 and S-11 under the Securities Act and Forms 10, 10-K and 10-Q under the Exchange Act.

*Qualification as an SRC.* The table below summarizes the amendments to the SRC definition. Companies may qualify as an SRC based on *either* the public float test *or* the revenues test. A company that qualifies as an SRC under the public float test would qualify regardless of whether it satisfies the revenues test. In a change from the proposed amendments, the final amendments expand the SRC definition to include a company with a public float of less than \$700 million if the company also has annual revenues of less than \$100 million.

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Criteria	Current Definition	Revised Definition
Public Float	Public float of less than \$75 million (other than companies with no public float)	Public float of less than \$250 million
<i>or</i>		
Revenues	Less than \$50 million of annual revenues and no public float	Less than \$100 million of annual revenues and <ul style="list-style-type: none"> <li>• no public float, or</li> <li>• public float of less than \$700 million</li> </ul>

Companies must determine whether they qualify as an SRC on an annual basis. The date for this determination varies, depending on whether the company is a reporting company under the Exchange Act or is filing an initial registration statement under the Securities Act. For reporting companies under the Exchange Act, public float is measured as of the last business day of the company's most recently completed second fiscal quarter. Consistent with the prior SRC definition, a company cannot qualify as an SRC if it is an investment company, an asset-backed issuer or a majority-owned subsidiary of a parent that is not an SRC.

*Re-Qualification as an SRC.* Once a company determines that it does not qualify as an SRC because it exceeded one or more of the applicable thresholds, the company will remain unqualified unless, when making its annual determination, it determines that either:

- its public float was less than \$200 million; or
- its public float and its annual revenues meet the requirements for subsequent qualification shown in the table below:

Prior Annual Revenues	Prior Public Float	
	None or less than \$700 million	\$700 million or more
Less than \$100 million	Neither threshold exceeded	Public float: less than \$560 million; <i>and</i> Revenues: less than \$100 million
\$100 million or more	Public float: none or less than \$700 million; <i>and</i> Revenues: less than \$80 million	Public float: less than \$560 million; <i>and</i> Revenues: less than \$80 million

These lower thresholds only apply if a company previously determined that it did not qualify as an SRC under the new thresholds. For example, a company that previously did not qualify as an SRC because its public float was \$150 million would qualify under the new rules if its public float as of the last business day of its most recently completed second fiscal quarter was more than \$200 million but less than \$250 million. We believe that the same result should be reached even if the company's public float exceeded \$250 million as of the last

business day of its second quarter of 2017, but companies in this situation should consider seeking confirmation from the SEC if formal guidance is not published.

*Accelerated Filer and Large Accelerated Filer Definitions.* Currently, the accelerated filer and large accelerated filer definitions include a provision that specifically excludes companies that are eligible to use the SRC requirements. Under current law, status as an accelerated filer or a large accelerated filer also triggers the Section 404(b) requirement that the company's auditor provide an attestation report on ICFR.

In order to increase the public float cap for SRCs from \$75 million (which will continue to be the dividing line between non-accelerated filers and accelerated filers), the amendments eliminate the current provisions that exclude SRCs from the accelerated filer and large accelerated filer definitions. After the amendments become effective, some companies that are accelerated filers will be eligible to use the SRC scaled disclosure provisions, but will remain subject to other requirements applicable to accelerated filers, including filing deadlines and the Section 404(b) requirement. Companies that would have qualified as SRCs under existing rules as of the applicable determination date will continue to qualify as non-accelerated filers because the public float thresholds in the accelerated filer definition align with those in the existing SRC definition.

*Regulation S-X Amendment.* Rule 3-05 of Regulation S-X requires companies to include financial statements of businesses acquired or to be acquired in certain registration statements and current reports. The SEC has amended Rule 3-05 to increase the net revenue threshold in Rule 3-05(b)(2)(iv) from \$50 million to \$100 million, which in certain circumstances might allow a buyer to omit the oldest year of the target company's financial statements. This change will maintain alignment between the revenues test in the amended SRC definition and the financial statement requirements of Rule 3-05.

*Revisions to SEC Forms.* The SEC adopted changes to Forms S-1, S-3, S-4 and S-11 under the Securities Act and Forms 10, 10-K and 10-Q under the Exchange Act to eliminate the parenthetical instruction "(Do not check if a smaller reporting company)" after the check box for non-accelerated filer status on the facing (cover) page of these forms. Companies should be aware that the SEC also [adopted amendments to its XBRL rules](#) at the same meeting at which it adopted the amended SRC definition. The XBRL amendments also include changes to the facing page of certain SEC forms, including Forms 10-K and 10-Q, that will change the text as shown below. The XBRL amendments, including these changes, will be effective *30 days* (rather than 60 days for the amended SRC definition) after publication in the *Federal Register*.

Indicate by check mark whether the registrant has submitted electronically ~~and posted on its corporate Web site, if any,~~ every Interactive Data File required to be submitted ~~and posted~~ pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit ~~and post~~ such files).

All companies, whether qualifying as an SRC or not, filing one of these forms after the applicable effective date will need to reflect these changes in the text of the form that they file.

### **Effective Date**

The final rules will be effective 60 days after publication in the *Federal Register*. As a result, a company with a December 31 fiscal year end that previously was not an SRC and that had a public float of less than \$250 million as of June 29, 2018 (the last business day of its most recently completed second quarter), will qualify as an SRC for the fiscal year ending December 31, 2018.

**Summary of Scaled Disclosure Requirements for Smaller Reporting Companies**

from

*Amendments to Smaller Reporting Company Definition*

(Release No. 33-10513, June 28, 2018)

**Regulation S-K**

Item	Scaled Disclosure Accommodation
101 – Description of Business	<p>May satisfy disclosure obligations by describing the development of the registrant’s business during the last three years rather than five years.</p> <p>Business development description requirements are less detailed than disclosure requirements for non-SRCs.</p>
201 – Market Price of and Dividends on the Registrant’s Common Equity and Related Stockholder Matters	Stock performance graph not required.
301 – Selected Financial Data	Not required.
302 – Supplementary Financial Information	Not required.
303 – Management’s Discussion and Analysis of Financial Condition and Results of Operations (MD&A)	<p>Two-year MD&amp;A comparison rather than three-year comparison.</p> <p>Contractual obligations table not required.</p>
305 – Quantitative and Qualitative Disclosures About Market Risk	Not required.
402 – Executive Compensation	<p>Three named executive officers (CEO and the two most highly compensated executive officers other than the CEO) rather than five.</p> <p>Two years of summary compensation table information rather than three.</p> <p>Not required:</p> <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>• Nonqualified deferred compensation table.</li> <li>• Disclosure of compensation policies and practices related to risk management.</li> <li>• Pay ratio disclosure.</li> <li>• Quantification of termination/change of control benefits</li> </ul>
404 – 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.

407 – Corporate Governance	Audit committee financial expert disclosure not required in first annual report. Compensation committee interlocks and insider participation disclosure not required. Compensation committee report not required.
503 – Prospectus Summary, Risk Factors and Ratio of Earnings to Fixed Charges	No ratio of earnings to fixed charges disclosure required. No risk factors required in Exchange Act filings.
601 – Exhibits	Statements regarding computation of ratios not required.
<b>Regulation S-X</b>	
8-02 – Annual Financial Statements	Two years of income statements rather than three years. Two years of cash flow statements rather than three years. Two years of changes in stockholders' equity statements rather than three years.
8-03 – Interim Financial Statements	Permits certain historical financial data in lieu of separate historical financial statements of equity investees.
8-04 – Financial Statements of Businesses Acquired or to Be Acquired	Maximum of two years of acquiree financial statements rather than three years.
8-05 – Pro forma Financial Information	Fewer circumstances under which pro forma financial statements are required.
8-06 – Real Estate Operations Acquired or to Be Acquired	Maximum of two years of financial statements for acquisition of properties from related parties rather than three years.
8-08 – Age of Financial Statements	Less stringent age of financial statements requirements.

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