



[Client Alert] SEC Proposes Amendments to “Accelerated Filer” and “Large Accelerated Filer” Definitions

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On May 9, 2019, the SEC proposed amendments to the definitions of “accelerated filer” and “large accelerated filer” contained in Rule 12b-2 under the Securities Act of 1934. The effects of the proposed changes make it clear that issuers that meet the “smaller reporting company” definition are excluded from also being included in the “accelerated filer” and “large accelerated filer” definitions. This overlap was an unintended consequence of the Agency’s earlier amendment in June 2018 of the “smaller reporting company” definition. The SEC is now proposing to rectify that overlap.

By way of background, in June 2018, the SEC amended the definition of “smaller reporting company” to mean a company that (i) has public float of less than \$250 million or (ii) has annual revenue of less than \$100 million and either (a) no public float or (b) public float of less than \$700 million. However, the definitions of “accelerated filer” and “large accelerated filer” were not amended and therefore continue to include any issuer that has a public float of between \$75 million and \$700 million. You might recall that public float is the value of a company’s outstanding stock, excluding shares held by affiliates like officers, directors and 10+% stockholders. The relevant measurement date is the last day of the company’s second fiscal quarter; public float is calculated based on the closing price on that day or the immediately preceding trading day if the last day of that quarter is not a trading day.

Under the proposal, the definitions of “accelerated filer” and “large accelerated filer” would be amended to specifically exclude an issuer that (i) has annual revenue of less than \$100 million and (ii) has either no public float or public float of less than \$700 million.

In addition, the proposed amendment would provide a second threshold under which an issuer can transition out of “accelerated filer” and “large accelerated

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filer” status. The current rule provides that an issuer can transition to a smaller reporting company from accelerated or large accelerated filer status when it has public float of less than \$50 million and \$500 million, respectively. The proposed amendment raises those thresholds to \$60 million and \$560 million, respectively, and adds an additional threshold under which an accelerated or large accelerated filer can transition to a smaller reporting company when at the measurement date it meets the revenue test of (i) annual revenue of less than \$100 million and has (ii) either no public float or public float of less than \$700 million.

The proposed rule also settles the unintended potential inclusion of smaller reporting companies in the requirement of Item 308 of Regulation S-K. Item 308 requires an issuer’s independent registered public accounting firm to provide an attestation for inclusion in the issuer’s Form 10-K on its management’s annual assessment of the effectiveness of the issuer’s internal control over financial reporting. Only issuers that are accelerated filers or large accelerated filers would have to provide that attestation. If adopted, this will save qualifying smaller reporting companies much time, effort and money in the preparation of the Form 10-K and the related audit. However, issuers who currently expect to have to provide the attestation should continue their current efforts to do so in the event that the amendment as proposed is not adopted.

The comment period for the proposal will end on July 29, 2019.

The proposed amendments to Rule 12b-2 may be found at <https://www.sec.gov/rules/proposed/2019/34-85914.pdf>

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