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SEC Proposes to Amend Definitions of “Accelerated Filer” and “Large Accelerated Filer”

In May 2019, the SEC announced a proposal (available [here](#)) to amend the definitions of “accelerated filer” and “large accelerated filer” under Rule 12b-2 of the Exchange Act, in an ongoing effort to reduce costs and reporting requirements for registrants. The proposed rule changes would:

- exclude from “accelerated filer” and “large accelerated filer” status a registrant that is eligible to be treated as a “smaller reporting company” (an “SRC”) and that had annual revenues of less than \$100 million in the most recent fiscal year for which audited financial statements are available;
- increase the transition thresholds for accelerated and large accelerated filers becoming non-accelerated filers from \$50 million to \$60 million and for exiting large accelerated filer status from \$500 million to \$560 million; and
- add a revenue test to the transition thresholds for exiting both accelerated and large accelerated filer status.

As a result of the proposed rule changes, certain low-revenue registrants would not be required to have their assessment of the effectiveness of internal control over financial reporting (“ICFR”) attested to, and reported on, by an independent auditor, although they would continue to be required to make such assessments and to establish and maintain the effectiveness of their ICFR.

Background

In 2002, the SEC established the regime categorizing registrants as non-accelerated, accelerated and large accelerated filers. Registrants with a public float of \$75 million or more are treated as accelerated filers, while registrants with a public float of \$700 million or more are treated as large accelerated filers. Accelerated and large accelerated filers are subject to shorter filing deadlines for quarterly and annual reports and are subject to some disclosure and other requirements that do not apply to non-accelerated filers. In particular, accelerated and large accelerated filers (but not non-accelerated filers) are subject to the requirement that their independent auditors must attest to, and report on, management’s assessment of the effectiveness of internal control over financial reporting (“ICFR”). Most registrants, including SRCs, must establish and maintain ICFR and have their management assess the effectiveness of their ICFR.

Initially, the categories of registrants under the accelerated and large accelerated filer reporting regime existed separately from categories that the SEC created to provide regulatory relief to smaller registrants.

However, in 2007, when the SEC combined its separate disclosure regime for small business issuers with the regime for larger issuers, it attempted to align the SRC and non-accelerated filer categories, to the extent feasible, to avoid unnecessary complexity. As a result, an SRC generally was not an accelerated or large accelerated filer and did not have to comply with the accelerated or large accelerated filing deadlines or the ICFR auditor attestation requirement.

In 2018, this alignment changed. The revised SRC definition allowed registrants to use either a public float test or a revenue test to determine SRC status. At the same time, the SEC increased the threshold in the public float test for a registrant to initially qualify as an SRC from less than \$75 million to less than \$250 million and expanded the revenue test to include a registrant with annual revenues of less than \$100 million if it has no public float or a public float of less than \$700 million. However, the SEC also revised the accelerated filer and large accelerated filer definitions to remove the condition that, for a registrant to be an accelerated filer or a large accelerated filer, it must not be eligible to use the SRC accommodations. Some registrants, as a consequence, became both SRCs and accelerated or large accelerated filers and have some, but not all, of the benefits of scaled regulation. These registrants are required to comply with earlier filing deadlines for annual and quarterly reports and the ICFR auditor attestation requirement.

Relief for Certain SRCs. Under the proposed rule changes, registrants that are eligible to be SRCs and had annual revenues of less than \$100 million in the most recent fiscal year for which audited financial statements are available would no longer be treated as accelerated or large accelerated filers. Registrants that qualify as SRCs under this revenue test would no longer be subject to accelerated filing deadlines for Exchange Act reports and would not be required to obtain an attestation report of management's assessment of the effectiveness of their ICFR by their independent auditor. However, they would still be required to make such assessments and establish and maintain the effectiveness of their internal control over financial reporting. Registrants that are eligible to be SRCs but not under the revenue test (*i.e.*, companies that are not excluded from the accelerated or large accelerated filer definition) would still need to satisfy all of the requirements applicable to accelerated or large accelerated filers, including the ICFR attestation requirement.

Transition Thresholds. Under the proposed rule changes, the transition threshold for exiting and re-entering accelerated filer status would be increased from \$50 million to \$60 million, and the threshold for losing large accelerated filing status would be increased from \$500 million to \$560 million. In addition, the proposed rule changes would include a revenue test for losing both accelerated and large accelerated filer status.

Under the proposed rule changes, a registrant would lose accelerated filer status (and be treated as a non-accelerated filer) if either:

- it determines at the end of a fiscal year that its public float had fallen below \$60 million on the last business day of its most recently completed second fiscal quarter; or
- it is able to qualify (or requalify) as an SRC under the revenue test.

A registrant would lose large accelerated filer status if either:

- it determines at the end of a fiscal year that its public float had fallen below \$560 million as of the last business day of its most recently completed second fiscal quarter; or
- it is able to qualify (or requalify) as an SRC under the revenue test.

If the registrant's public float drops below \$560 million but equals or exceeds \$60 million and it is not able to qualify as an SRC under the revenue test, it would become an accelerated filer. If, however, the registrant's public float drops below \$60 million or it is able to qualify as an SRC under the revenue test, it would become a non-accelerated filer.

See the effects of the proposed changes as set out in Annex I.

The proposal is subject to a 60-day comment period after publication in the *Federal Register*.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Mark S. Bergman
+44-20-7367-1601
mbergman@paulweiss.com

Christopher J. Cummings
+1-416-504-0522
ccummings@paulweiss.com

Gregory A. Ezring
+1-212-373-3458
gezring@paulweiss.com

Andrew J. Foley
+1-212-373-3078
afoley@paulweiss.com

Catherine L. Goodall
+1-212-373-3919
cgoodall@paulweiss.com

David S. Huntington
+1-212-373-3124
dhuntington@paulweiss.com

Brian M. Janson
+1-212-373-3588
bjanson@paulweiss.com

John C. Kennedy
+1-212-373-3025
jkennedy@paulweiss.com

Raphael M. Russo
+1-212-373-3309
rrusso@paulweiss.com

Monica K. Thurmond
+1-212-373-3055
mthurmond@paulweiss.com

Lawrence G. Wee
+1-212-373-3052
lwee@paulweiss.com

Tracey A. Zacccone
+1-212-373-3085
tzaccone@paulweiss.com

Hank Michael
+1-212-373-3892
hmichael@paulweiss.com

Annex I

Current Requirements			
Initial Public Float Determination	Resulting Filer Status	Subsequent Public Float Determination	Resulting Filer Status
\$700 million or more	Large Accelerated Filer	\$500 million or more	Large Accelerated Filer
		Less than \$500 million but \$50 million or more	Accelerated Filer
		Less than \$50 million	Non-Accelerated Filer
Less than \$700 million but \$75 million or more	Accelerated Filer	Less than \$700 million but \$50 million or more	Accelerated Filer
		Less than \$50 million	Non-Accelerated Filer

Proposed Requirements Based on Public Float (see below for revenue test)			
Initial Public Float Determination	Resulting Filer Status	Subsequent Public Float Determination	Resulting Filer Status
\$700 million or more	Large Accelerated Filer	\$560 million or more	Large Accelerated Filer
		Less than \$560 million but \$60 million or more	Accelerated Filer
		Less than \$60 million	Non-Accelerated Filer
Less than \$700 million but \$75 million or more	Accelerated Filer	Less than \$700 million but \$60 million or more	Accelerated Filer
		Less than \$60 million	Non-Accelerated Filer

Adding the revenue test, which provides:

Paragraph (2) of the SRC definition: a registrant qualifies as an SRC if its annual revenues are less than \$100 million and it has no public float or a public float of less than \$700 million.

Paragraph (3)(iii)(B) of the SRC definition: among other things, a registrant that initially determines it does not qualify as an SRC because its annual revenues are \$100 million or more cannot become an SRC until its annual revenues fall below \$80 million.

Accelerated Filers. An accelerated filer would remain one unless either its public float falls below \$60 million or it becomes eligible to use the SRC accommodations under the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the SRC definition. A registrant that is initially applying the SRC definition or previously qualified as an SRC would apply paragraph (2) of the SRC definition. Once a registrant determines that it does not qualify for SRC status, it would apply paragraph (3)(iii)(B) of the SRC definition at its next annual determination.

Therefore, an accelerated filer would remain an accelerated filer until its public float falls below \$60 million or its annual revenues fall below the applicable revenue threshold (\$80 million or \$100 million), at which point it would become a non-accelerated filer.

Large Accelerated Filers. To transition out of large accelerated filer status, a registrant would need to have a public float below \$560 million as of the last business day of its most recently completed second fiscal quarter or meet the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the SRC definition. A large accelerated filer would become an accelerated filer at the end of its fiscal year if its public float fell to \$60 million or more but less than \$560 million as of the last business day of its most recently completed second fiscal quarter and its annual revenues are not below the applicable revenue threshold (\$80 million or \$100 million). The large accelerated filer would become a non-accelerated filer if its public float fell below \$60 million or it meets the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the SRC definition.

For a large accelerated filer to meet the SRC revenue test, generally, its public float would need to fall below \$560 million as of the last business day of its most recently completed second fiscal quarter and its annual revenues would need to fall below the applicable revenue threshold (\$80 million or \$100 million). One exception to this requirement is that a registrant that was a large accelerated filer whose public float had fallen below \$700 million (but remained \$560 million or more) but became eligible to be an SRC under the SRC revenue test in the first year the SRC amendments became effective, would become a non-accelerated filer even though its public float remained at or above \$560 million.

If the SRC revenue test were not added to the accelerated filer and large accelerated filer transition provisions, a registrant's annual revenues would never factor into determining whether an accelerated filer could become a non-accelerated filer, or whether a large accelerated filer could become an accelerated or non-accelerated filer. For example, if the SRC revenue test is not added to the transition provisions, an accelerated filer with a public float that remains more than \$60 million but less than \$700 million and with annual revenues of \$100 million or more would not be able to become a non-accelerated filer even if its annual revenues subsequently fall below \$80 million.