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SEC Adopts Amendments to the 'Accelerated Filer' and 'Large Accelerated Filer' Definitions

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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On March 12, 2020, the U.S. Securities and Exchange Commission (SEC) adopted amendments to the accelerated filer and large accelerated filer definitions under Rule 12b-2 of the Exchange Act to reduce burdens and compliance costs for certain smaller registrants. Under the new rules, certain low-revenue registrants no longer are required to have their assessment of the effectiveness of internal control over financial reporting (ICFR) attested to, and reported on, by their independent auditors.

The final amendments, which are summarized below, become effective on April 27, 2020, and apply to any annual report filing due on or after the effective date.

Background

In 2018, the SEC revised the definition of a “smaller reporting company” to expand the number of registrants that can utilize the scaled-down disclosure requirements that are available to smaller reporting companies. Following these amendments, however, some registrants were categorized as both smaller reporting companies and accelerated or large accelerated filers, resulting in a requirement for these registrants to obtain an auditor attestation of their ICFR. The final rules are intended to appropriately narrow the types of registrants that are included in the accelerated and large accelerated filer definitions.

Amendments to Exclude Low-Revenue Smaller Reporting Companies

The new rules revise the accelerated and large accelerated filer definitions to exclude from those definitions registrants that are eligible to be treated as a smaller reporting company (SRC) and that had annual revenues of less than \$100 million in the most recent fiscal year for which audited financial statements are available. The amendments provide that business development companies (BDCs) can also qualify for this low-revenue exclusion using their annual investment income as a measure of annual revenue, although BDCs would continue to be ineligible to be smaller reporting companies. See Table 1, “Accelerated Filer and Large Accelerated Filer Conditions Under the Final Rules” and Table 2, “Relationships Between Smaller Reporting Companies and Non-Accelerated, Accelerated, and Large Accelerated Filers Under the Final Amendments.”

The amendments further provide that a foreign private issuer (FPI) is excluded from the accelerated and large accelerated filer definitions if it qualifies, and elects to be treated, as a smaller reporting company based on the low-revenue test described immediately above. As was the case before the amendments, however, an FPI that does not elect to

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be treated as a smaller reporting company (*e.g.*, it does not use the forms and rules designated for domestic issuers and does not provide financial statements in accordance with U.S. Generally Accepted Accounting Principles) will not be excluded from the accelerated and large accelerated filer definitions based on the low-revenue test.

While registrants that are eligible to be treated as a smaller reporting company based on the low-revenue test are not subject to the requirement to obtain an auditor attestation of their ICFR, they generally remain subject to the requirements of Section 404(a) of the Sarbanes-Oxley Act and related rules that require (except in the case of newly public companies) a management report on ICFR in annual reports filed with the SEC. Further, the final amendments do not change an auditor's role in the financial statement audit.

Check Box on Annual Report Cover Pages

The amendments add a check box to the cover pages of annual reports on Forms 10-K, 20-F and 40-F to indicate whether an ICFR auditor attestation is included in the filing.

Amendments to Transition Provisions

The new rules increase the transition thresholds for accelerated and large accelerated filers to become non-accelerated filers from \$50 million to \$60 million and increase the threshold for exiting large accelerated filer status from \$500 million to \$560 million. See Table 3, "Subsequent Determination of Filer Status Based on Public Float Under the Final Amendments." The SEC increased the public float transition thresholds so that they are 80% of the initial thresholds, which is consistent with the percentage used in the transition thresholds for smaller reporting company eligibility. The amendments also add a revenue test to the transition thresholds for exiting both accelerated and large accelerated filer status.

Table 1. Accelerated Filer and Large Accelerated Filer Conditions Under the Final Rules

Final Accelerated Filer Conditions	Final Large Accelerated Filer Conditions
The issuer has a public float 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.	The issuer has a public float of \$700 million or more as of the last business day of the issuer's most recently completed second fiscal quarter.
The issuer has been subject to the requirements of Exchange Act Section 13(a) or 15(d) for a period of at least 12 calendar months.	Same.
The issuer has filed at least one annual report pursuant Exchange Act Section 13(a) or 15(d).	Same.
The issuer is not eligible to use the requirements for SRCs under the revenue test in paragraph (2) or (3)(iii)(B), as applicable, of the "smaller reporting company" definition in Rule 12b-2 or, in the case of a BDC, does not meet the requirements of the revenue test in those paragraphs using annual investment income as the measure of its annual revenues.	Same.

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Table 2. Relationships Between Smaller Reporting Companies and Non-Accelerated, Accelerated and Large Accelerated Filers Under the Final Rules

Status	Public Float	Annual Revenues
SRC and Non-Accelerated Filer	Less than \$75 million	N/A
	\$75 million to less than \$700 million	Less than \$100 million
SRC and Accelerated Filer	\$75 million to less than \$250 million	\$100 million or more
Accelerated Filer (not SRC)	\$250 million to less than \$700 million	\$100 million or more
Large Accelerated Filer (not SRC)	\$700 million or more	N/A

Table 3. Subsequent Determination of Filer Status Based on Public Float Under the Final Rules

Final Amendments to the 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 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

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