

August 9, 2018

SEC Amends Definition of Smaller Reporting Company

Advisory

By Joel Greenberg, Sara Adler

The SEC has amended the definition of a “smaller reporting company” (SRC) by increasing the thresholds at which issuers fail to qualify, thus expanding the number of registrants that qualify as SRCs and benefit from scaled disclosure requirements. On June 28, 2018, the SEC adopted [amendments](#) to the definition of SRCs to generally include registrants with a public float of less than \$250 million, as well as registrants with annual revenues of less than \$100 million for the previous year and either no public float or a public float of less than \$700 million.¹ The following chart summarizes the amendments to the SRC definition for a registrant making an initial determination² or a current SRC seeking to continue to qualify.

| Criteria | Current Definition | Revised Definition |
|--------------|---|---|
| Public Float | Public float of less than \$75 million | Public float of less than \$250 million |
| 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"> • no public float, or • public float of less than \$700 million |

A registrant that determines that it does not qualify as an SRC under the initial qualification thresholds will remain unqualified unless and until it determines that it meets one or more lower qualification thresholds. The subsequent qualification thresholds, set forth in the table below, are set at 80 percent of the initial qualification thresholds.

¹ A company with no public trading market for its equity securities has no public float and does not satisfy the tests requiring that public float be less than a specified amount.

² For purposes of the first fiscal year ending after effectiveness of the amendments, a registrant will qualify as an SRC if it meets one of the initial qualification thresholds in the revised definition as of the date it is required to measure its public float or revenues, even if such registrant previously did not qualify as a SRC. For example, a registrant with a September 30 fiscal year end that previously was not a SRC and that had a public float of \$220 million as of March 30, 2018 (the last business day of its most recently completed second quarter) will qualify as a SRC for the fiscal year ending September 30, 2018.

| Criteria ³ | Current Definition | Revised Definition |
|-----------------------|---|---|
| Public Float | Public float of less than \$50 million | Public float of less than \$200 million, if it previously had \$250 million or more of public float |
| Revenues | Less than \$40 million of annual revenues and no public float | Less than \$80 million of annual revenues, if it previously had \$100 million or more of annual revenues; and Less than \$560 million of public float, if it previously had \$700 million or more of public float. |

With respect to the revenue test, a registrant with no public float that subsequently qualifies under the \$80 million revenue threshold remains qualified until its revenue exceeds \$100 million, and a registrant that subsequently qualifies under the \$560 million public float threshold or \$80 million revenue threshold remains qualified until its public float exceeds \$700 million or its revenue exceeds \$100 million. A registrant that exceeded both the public float threshold and the revenue threshold, however, would not qualify unless and until it met both lower thresholds in order to avoid situations in which registrants enter and exit SRC status due to small fluctuations in either their revenues or public float.

Once an issuer determines that it does not qualify for SRC status because it exceeded one or more of the current thresholds, it will remain unqualified unless when making its annual determination either: it determines that its public float was less than \$200 million; or it determines that its public float and its annual revenues meet the requirements for subsequent qualification included in the chart below:

| | Prior Public Float | |
|-------------------------|---|--|
| | None or less than \$700 million | \$700 million or more |
| Prior Annual Revenues | | |
| Less than \$100 million | | 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 Less than \$560 million; and Revenues Less than \$80 million. |

For issuers that are required to file reports under section 13(a) or 15(d) of the Exchange Act: public float is measured as of the last business day of the issuer's most recently completed second fiscal quarter; annual

³ A registrant that does not qualify as an SRC may subsequently seek to qualify under either test.

revenues are as of the most recently completed fiscal year for which audited financial statements are available; and an issuer must reflect the determination of whether it came within the SRC definition in its quarterly report on Form 10-Q for the first fiscal quarter of the next year, indicating on the cover page of that filing, and in subsequent filings for that fiscal year, whether it is an SRC, except that, if a determination based on public float indicates that the issuer is newly eligible to be an SRC, the issuer may choose to reflect this determination beginning with its first quarterly report on Form 10-Q following the determination, rather than waiting until the first fiscal quarter of the next year.

For determinations based on an initial registration statement under the Securities Act or Exchange Act for shares of common equity: public float is measured as of a date within 30 days of the date of the filing of the registration statement; annual revenues are as of the most recently completed fiscal year for which audited financial statements are available; and the issuer must reflect the determination of whether it came within the SRC definition in the registration statement and must appropriately indicate on the cover page of the filing, and subsequent filings for the fiscal year in which the filing is made, whether it is an SRC. The issuer must re-determine its status at the end of its second fiscal quarter and then reflect any change in status as provided above. In the case of a determination based on an initial Securities Act registration statement, an issuer that was not determined to be an SRC may re-determine its status at the conclusion of the offering covered by the registration statement based on the actual offering price and number of shares sold.

The SEC also amended the definitions of “accelerated filer” and “large accelerated filer” to remove the automatic exclusion from these definitions of any registrant that qualifies as an SRC, in order to preserve the existing thresholds in those definitions (and maintain SOX Section 404(b) internal control audit requirements for issuers with public floats between \$75 million and \$250 million). Qualifying as an SRC will no longer automatically make a registrant a non-accelerated filer.⁴

The SEC did not amend any of the scaled disclosure accommodations available to SRCs in Regulation S-K and Regulation S-X. SRCs may continue to comply with the scaled disclosure requirements available to them on an item-by-item basis. Consistent with the current definition, the new SRC definition continues to exclude investment companies, asset-backed issuers and majority-owned subsidiaries of a parent that is not an SRC.

The amendments also revise Rule 3-05 of Regulation S-X, which provides the requirements for financial statements of businesses acquired or to be acquired in certain registration statements and current reports. Current paragraph (b)(2)(iv) of the rule allows certain registrants to omit such financial statements for the earliest of the three fiscal years required if the net revenues of the business to be acquired are less than \$50 million (based on the revenue threshold in the prior SRC definition). Rule 3-05 has been amended to increase the net revenue threshold in the rule to \$100 million, in light of the new SRC definition.

Cover pages to various SEC forms (including Forms 10-Q and 10-K), have been amended to remove the following phrase: “do not check if a smaller reporting company” following the “Non-accelerated filer” box.

The amendments are effective 60 days after publication in the *Federal Register*.

⁴ The SEC staff, however, has been directed to formulate recommendations to the SEC for possible additional changes to the “accelerated filer” definition that, if adopted, would have the effect of reducing the number of registrants that so qualify.

Joel I. Greenberg

Partner



joel.greenberg@arnoldporter.com

+1 212.836.8201

Sara Adler

Counsel



sara.adler@arnoldporter.com

+1 212.836.8224

© Arnold & Porter Kaye Scholer LLP 2018 All Rights Reserved. This Advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with counsel to determine applicable legal requirements in a specific fact situation.