

SEC Adopts Amendments to Reduce Burdens on Smaller Issuers

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On March 12, 2020, the Securities and Exchange Commission (SEC) adopted amendments to the accelerated filer and large accelerated filer definitions in Exchange Act Rule 12b-2. The SEC believes that the amendments will more appropriately tailor the types of issuers that are included in the definitions, thereby reducing unnecessary burdens and compliance costs for certain smaller issuers while maintaining investor protections. Notably, certain smaller issuers will no longer be required to obtain a separate attestation of their internal control over financial reporting (ICFR) from an outside auditor as result of the amendments. In addition, these smaller issuers may now comply with the filing deadlines applicable to non-accelerated filers.

The amendments will:

- Exclude from the accelerated and large accelerated filer definitions an issuer that is eligible to be a smaller reporting company and had annual revenues of less than \$100 million in the most recent fiscal year for which audited financial statements are available. Business development companies will be excluded in analogous circumstances.
- Increase the transition thresholds for an accelerated and a large accelerated filer becoming a non-accelerated filer from \$50 million to \$60 million and for exiting large accelerated filer status from \$500 million to \$560 million;
- Add a revenue test to the transition thresholds for exiting both accelerated and large accelerated filer status; and
- 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.

When classified as an accelerated or large accelerated filer, an issuer is subject to, among other things, the requirement that its outside auditor attest to, and report on, management's assessment of the effectiveness of the issuer's ICFR. Such issuers must also comply with the filing deadlines for accelerated filers and large accelerated filer, as applicable. Prior amendments adopted by the SEC in 2018 resulted in some issuers meeting the definitions of both an accelerated filer and a smaller reporting company. Under those circumstances, such an issuer would benefit from scaled disclosure requirements applicable to smaller reporting companies, but would remain subject to the filing deadlines applicable to accelerated filers and to the requirement to obtain an attestation of its ICFR from its outside auditor. The amendments adopted by the SEC on March 12, 2020 eliminate this possibility.

In addition, the amendments address circumstances applicable to new public issuers. In the Jumpstart Our Business Startups (JOBS) Act of 2012, Congress exempted many new public issuers from the ICFR attestation requirement for up to five years after going public. The amendments will allow smaller issuers that have been public for more than five years, but have not yet reached \$100 million in revenues, to continue to benefit from the JOBS Act exemption as they build their businesses.

Following the adoption of the amendments, smaller reporting companies with less than \$100 million in revenues will continue to be required to establish and maintain effective ICFR. Their principal executive and financial officers must continue to certify that, among other things, they are responsible for establishing and maintaining ICFR and have evaluated and reported on the effectiveness of the company's disclosure controls and procedures. In addition, these smaller companies will continue to be subject to a financial statement audit by an independent auditor, who is required to consider ICFR in the performance of that audit. However, as a result of the amendments, unlike larger issuers, these smaller companies will no longer be required to obtain a separate attestation of their ICFR from an outside auditor. In addition, these smaller companies may comply with the filing deadlines applicable to non-accelerated filers.

Upon the adoption of the amendments, SEC Chairman Jay Clayton stated, “The amendments represent an incremental, but meaningful, change that builds on the benefits of the JOBS Act for smaller public companies. The JOBS Act provided a well-reasoned exemption from the ICFR attestation requirement for emerging growth companies during the first five years after an IPO. These amendments would allow smaller reporting companies that have made it to that five-year point, but have not yet reached \$100 million in revenues, to continue to benefit from that exemption as they build their businesses, while still subjecting those companies to important investor protection requirements.”

The amendments will become effective 30 days after publication in the Federal Register and will apply to annual report filings due on or after the effective date.

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