

Practice Update

The Gray Area: Navigating Requirements for Issuers Sharing Smaller Reporting Company and Accelerated Filer Status

December 3, 2019

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When the Securities and Exchange Commission (the “Commission”) adopted amendments to raise the thresholds in the smaller reporting company definition last year, the Commission did not make the corresponding amendments to the definitions of “accelerated filer” and “large accelerated filer.” As a result, issuers with a public float of \$75 million or more (but less than \$700 million) continued to be considered accelerated filers even if they qualify as smaller reporting companies, and would be required to comply with certain of the requirements applicable to accelerated filers. The Commission confirmed the reality of this newly created ‘dual status’ in the Final Rule and the Division of Corporation Finance’s Compliance & Disclosure Interpretations for Regulation S-K, Question 102.01. Earlier this year, the Commission proposed rules to amend the definitions of accelerated filer and large accelerated filer to fix this conundrum but the comment period has expired, and to date, the definitions remain unchanged. Below is a graphic illustration of how an issuer can have a dual status. Note, this illustration assumes the issuer has annual revenue in excess of \$100 million.

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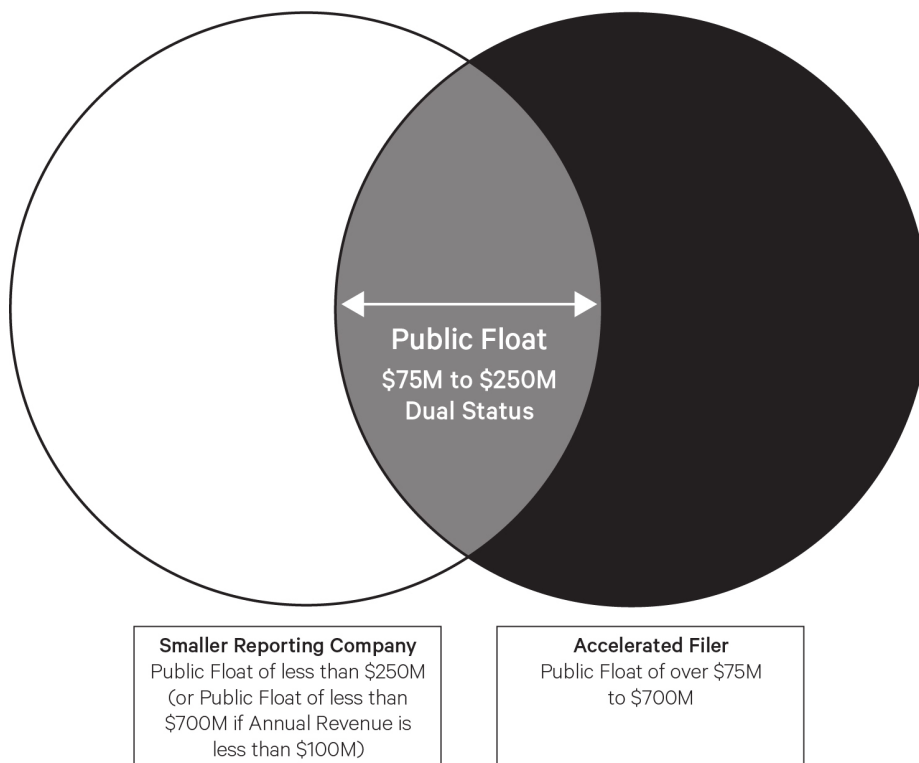
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This change creates some confusion for issuers and adds complexity that extends far beyond checking an additional box on the cover page of Securities Act and Exchange Act forms. One important fact to note is that the filing deadlines for annual and quarterly reports differ for smaller reporting companies and accelerated filers:

- For smaller reporting companies (non-accelerated filers), the annual report on Form 10-K is due **90 days** after the end of the fiscal year and quarterly reports on Form 10-Q are due **45 days** after the end of the fiscal quarter.
- For accelerated filer (non-smaller reporting companies), the annual report on Form 10-K is due **75 days** after the end of the fiscal year and quarterly reports on Form 10-Q are due **40 days** after the end of the fiscal quarter.
- Issuers holding dual status as a smaller reporting company and accelerated filer are required to follow the deadlines for accelerated filers.

Additionally, there are some other complexities that issuers holding dual status must consider when

drafting securities disclosures. The following table summarizes certain disclosure requirements under Regulation S-K, the scaled disclosure requirements available to smaller reporting companies, and clarifies whether issuers with dual status as a smaller reporting company and an accelerated filer are able to benefit from such scaled disclosures.

Regulation S-K	General Disclosure Requirements	Smaller Reporting Company Scaled Disclosure Requirements	Can Dual Status Issuers (Smaller Reporting Company and Accelerated Filer) Benefit from the Scaled Disclosure Requirements?
Description of Business (Item 101)	Description of the general developments of the business for the last five years .	Only required to provide a description for the last three years .	Yes. However, an accelerated filer must disclose whether it makes available free of charge on its website its annual, quarterly and current reports as soon as reasonably practicable after filed with or furnished to the SEC. See <i>S-K, Item 101 (e)(4)</i> .
Market price of and dividends on registrant's common equity and related stockholder matters (Item 202)	A performance graph comparing the yearly percentage change in the company's cumulative total shareholder return on common stock registered under Section 12 of the Securities Exchange Act of 1934.	Not required to provide stock performance graph under Item 202.	Yes.
Selected financial data (Item 301)	Selected financial data for the past five years.	Not required to provide information under Item 301.	Yes.
Supplementary financial information (Item 302)	Supplementary financial information, including certain quarterly financial data.	Not required to provide information under Item 302.	Yes.
Management's discussion and analysis (MD&A) of financial condition and results of operations (Item 303)	Three-year MD&A comparison and a five-year contractual obligations table.	Only required to provide a two-year MD&A comparison . Not required to provide the five-year contractual obligations table.	Yes.
Quantitative and qualitative disclosures about market risk (Item 305)	Certain quantitative and qualitative information about market risk.	Not required to provide information under Item 305.	Yes.
Internal control over financial reporting (Item 308)	Attestation report of the registered public accounting firm.	Not required to provide the registered public accounting firm's attestation report on the registrant's internal control over financial reporting in the registrant's annual report.	No . Accelerated filers must provide the registered public accounting firm's attestation report on the registrant's internal control over financial reporting in the registrant's annual report.
Executive compensation (Item 402)	Compensation discussion and analysis (CD&A). Summary compensation table must be provided for the last three years. All compensation tables required.	CD&A is not required. Summary compensation table must be provided for the last two years . Certain compensation tables are not required, including tables for Nonqualified Deferred Compensation, Grants	Yes.

	Disclosures of Pay Ratio and compensation policies and practices related to risk management is required.	Compensation, Grants of Plan-Based Awards, Option Exercises and Stock Vested and Pension Benefits. Disclosures of Pay Ratio and compensation policies and practices related to risk management not required.	
Transactions with related persons, promoters and certain control persons (Item 404)	Disclosure of related party transactions exceeding \$120,000 since the beginning of the registrant's last fiscal year. Disclosure of policies and procedures for the review, approval, or ratification of related party transactions is required.	Disclosure of related party transactions exceeding the lesser of \$120,000 or 1% of the company's total assets at year-end for the last two completed fiscal years. Note - This is an expanded disclosure requirement for smaller reporting companies. Not required to disclose policies and procedures for the review, approval, or ratification of related party transactions.	Yes. The expanded disclosure requirement for smaller reporting companies is required.
Corporate governance (Item 407)	Full compliance with the disclosure of corporate governance information.	Not required to provide Compensation Committee Reports or information regarding Compensation Committee Interlocks and Insider Participation. Not required to provide disclosure of hedging policies in proxy and information statements until fiscal years beginning on or after July 1, 2020.	Yes. However, an accelerated filer will need to disclose its hedging policies in its proxy and information statements for fiscal years beginning on or after July 1, 2019, a year earlier than smaller reporting companies.
Exhibits (Item 601)	All exhibits	Not required to provide Statement Regarding Computation of Ratios exhibit.	Yes.

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