

SEC/SRO UPDATE:

SEC AMENDS DEFINITION OF “SMALLER REPORTING COMPANY”; COMMISSIONER PIOWAR STEPS DOWN; SEC ADOPTS INLINE XBRL FOR TAGGED DATA; SEC PROPOSES WHISTLEBLOWER RULE AMENDMENTS

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SEC AMENDS DEFINITION OF “SMALLER REPORTING COMPANY”

On June 28, the Securities and Exchange Commission (SEC) approved amendments to the definition of “smaller reporting company” (SRC) to increase the number of companies that qualify for certain “scaled” disclosure accommodations under the federal securities laws.¹

The SEC also approved amendments to the definitions of “accelerated filer” and “large accelerated filer” so that newly SRC-eligible accelerated filers could continue to be subject to accelerated filing requirements.

Changes to the “Smaller Reporting Company” Definition

Under the revised definition, SRCs generally are public companies with:

- a public float of less than \$250 million as of the last business day of its most recently completed second fiscal quarter; or

- annual revenue of less than \$100 million during its most recently completed fiscal year for which audited financials are available; and either:

no public float; or

a public float of less than \$700 million.

This table summarizes the revisions to the SRC definition:

Criteria	Previous SRC Definition	Revised SRC 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

Under the amended revenue threshold test of the SRC definition, public companies with a large public float (equal to or more than \$250 million but less than \$700 million) but with little to no revenue (less than \$100 million in annual revenue) are eligible for SRC status.

Consistent with the previous definition, under the amendments, once a registrant determines that it does not qualify as an SRC under the qualification thresholds noted above, it will remain unqualified unless and until it meets one or more lower qualification thresholds, which are set at 80% of the initial qualification thresholds. Under the amendments, a registrant that did not initially qualify as an SRC because its public float was \$250 million or more would subsequently qualify if its public float dropped below \$200 million, regardless of revenue. In addition, a registrant that did not initially qualify as an SRC because it

exceeded either or both of the \$100 million annual revenue and \$700 million public float thresholds would subsequently qualify if its annual revenue dropped below \$80 million and its public float dropped below \$560 million.

The initial and lower qualification thresholds are shown in this table:

Criteria	Previous SRC Definition	Revised SRC 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.

The amendments become effective September 10, 2018. For the first fiscal year ending after such effectiveness, 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 the registrant previously did not qualify as an SRC. For example, as illustrated in the final rule, a registrant with a September 30 fiscal year-end that previously was not an 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 an SRC for the fiscal year ending September 30, 2018.

Changes to “Accelerated Filer” and “Large Accelerated Filer” Definitions

Prior to the amendments, the definitions of “accelerated filer” and “large accelerated filer” in

Exchange Act Rule 12b-2 excluded companies that qualified as SRCs. To preserve the existing thresholds for accelerated filers, the amendments allow some SRCs to also qualify as an accelerated filer.

These companies will be eligible for scaled disclosure but will still be required to comply with the accelerated filing requirements and the auditor internal control attestation requirements of Section 404(b) of the Sarbanes-Oxley Act of 2002. As part of the rule changes, the SEC staff has been directed to formulate a recommendation about future changes to the “accelerated filer” definition that would cause fewer companies fall within that definition.

Changes to Rule 3-05 of S-X

In addition to the amendments to the definitions above, the SEC also made conforming changes to Rule 3-05 of Regulation S-X. Current Rule 3-05 states that a business that is acquired or is to be acquired is significant to the acquiror at the 50% level, the acquiror is generally required to file three years of historical financial statements of such business. Current Rule 3-05 will allow acquirors to omit financial statements for the earliest of the three years if the net revenues of the business are less than \$50 million. The new rule will allow omissions if the net revenues are less than \$100 million.

COMMISSIONER PIWOWAR STEPS DOWN

On July 9, Michael Piwowar resigned as a Commissioner at the SEC after announcing his resignation in May.² Mr. Piwowar served on the Commission for nearly five years. His resignation reduced the number of Commissioners from

the full complement of five to four, with three of them serving current terms. Commissioner Kara M. Stein is serving a “holdover” term that will expire in December 2018.

In June, Pres. Donald Trump nominated Elad Roisman, a Republican and government lawyer, to fill the vacancy left by Piwowar’s departure on the Commission. Roisman currently serves as chief counsel to the Senate Banking Committee, which recently held a hearing on Roisman’s nomination and is expected to set a date for a full confirmation vote within the coming weeks.

SEC ADOPTS INLINE XBRL FOR TAGGED DATA

On June 28, the SEC adopted amendments to the eXtensible Business Reporting Language (XBRL) requirements for the submission of operating company financial statement information and fund risk/return summary information.³ The primary change is the adoption of “Inline” XBRL, which will embed XBRL data directly into the filing so that disclosure documents are both human-readable and machine-readable. Currently, issuers subject to XBRL must make two filings.

While the amendments modify existing XBRL requirements, they do not change the categories of filers or scope of disclosures subject to XBRL requirements.

Phase-in for operating companies

Type of Company	Compliance Date
Large accelerated filers that use U.S. GAAP	Beginning with fiscal periods ending on or after June 15, 2019
Accelerated filers that use U.S. GAAP	Beginning with fiscal periods ending on or after June 15, 2020

Type of Company	Compliance Date
All other filers	Beginning with fiscal periods ending on or after June 15, 2021

Filers will be required to comply beginning with their first Form 10-Q filed for a fiscal period ending on or after the applicable compliance date.

Phase-in for funds

Type of Company	Compliance Date
Large fund groups (net assets of \$1 billion or more as of the end of their most recent fiscal year)	Two years after the effective date of the amendments
All other funds	Three years after the effective date of the amendments

In addition, several requirements will be eliminated. For example, the requirement for operating companies and funds to post XBRL data on their websites will be eliminated upon the effective date of the amendments.

SEC PROPOSES WHISTLEBLOWER RULE AMENDMENTS

Also on June 28, the SEC proposed amendments to the rules governing its whistleblower program.⁴ Section 21F of the Securities Exchange Act of 1934 (the “Exchange Act”) establishes the Commission’s whistleblower program. Among other things, Section 21F authorizes the SEC to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful SEC enforcement actions resulting in monetary sanctions of more than \$1 million and successful related actions.

Awards must be made in an amount equal to 10% to 30% of the monetary sanctions collected. Congress established a separate fund at the Trea-

sury Department, called the Investor Protection Fund (IPF), from which whistleblower awards are paid.

According to the press release, the Commission has ordered more than \$266 million in 50 awards to 55 whistleblowers, including individuals filing jointly, whose information and cooperation assisted the Commission in bringing successful enforcement actions.

The proposed whistleblower rule amendments would make certain modifications and clarifications to the existing rules, as well as several technical amendments.

The proposed rules would, among other things:

- provide the Commission with additional tools in making whistleblower awards to seek to ensure that whistleblowers are appropriately rewarded for their efforts;
- increase efficiencies in the whistleblower claims review process;
- clarify the requirements for anti-retaliation protection under the whistleblower statute; and
- implement other technical amendments.

The public comment period will remain open for 60 days following publication of the proposing release in the Federal Register.

ENDNOTES:

¹See SEC Rel. No. 2018-116 (June 28, 2018), available at <https://www.sec.gov/news/press-release/2018-116>. See also SEC, Final Rule: Smaller Reporting Company Definition, Release Nos. 33-10513; 34-83550; File No. S7-12-16, 17 C.F.R.

Pts. 210, 229, 230, 239, 240, and 249, available at <https://www.sec.gov/rules/final/2018/33-10513.pdf>.

²See Peter Feltman, *SEC Commissioner Michael Piwowar leaves agency*, CQ Roll Call (July 9, 2018), 2018 WL 3342915.

³See SEC Rel. No. 2018-117 (June 28, 2018), available at <https://www.sec.gov/news/press-release/2018-117>.

⁴See SEC Rel. No. 2018-120 (June 28, 2018), available at <https://www.sec.gov/news/press-release/2018-120>.