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SEC/CORPORATE

SEC Proposes Amendments to Update the Accelerated and Large Accelerated Filer Definitions

On May 9, the Securities and Exchange Commission proposed amendments to the accelerated filer and large accelerated filer definitions in Securities Exchange Act of 1934 Rule 12b-2. The proposed amendments would exclude certain lower-revenues companies from being classified as accelerated or large accelerated filers, which would reduce costs for those companies.

Background

Reporting companies are classified into three categories: large accelerated filers, accelerated filers and non-accelerated filers. The independent auditors of large accelerated and non-accelerated filers, but not of non-accelerated filers, must attest to, and report on, management's assessment of the effectiveness of their internal control over financing reporting (ICFR). This attestation requirement results in increased costs for accelerated and large accelerated filers and in shorter 10-K and 10-Q filing deadlines for quarterly and annual reports that do not apply to non-accelerated filers.

Currently, a company is classified as an accelerated filer if, at the end of its fiscal year:

1. the company had an aggregate market value of the common equity held by its non-affiliates of $75 million or more, but less than $700 million, as of the last business day of its most recent second fiscal quarter;
2. the company had been subject to the requirements of Section 13(a) or Section 15(d) of the Securities Exchange Act for a period of at least 12 calendar months; and
3. the company had filed at least one annual report pursuant to Section 13(a) or Section 15(d) of the Securities Exchange Act.

In addition to satisfying the second and third conditions stated above, a large accelerated filer also must have an aggregate market value of common equity held by its non-affiliates of $700 million or more.

Rule 12b-2 currently defines a smaller reporting company (SRC) as a company that is not an investment company, an asset-backed company or a majority-owned subsidiary of a non-SRC parent that:

1. has a public float of less than $250 million; or
2. has annual revenues of less than $100 million and either no public float or a public float of less than $700 million.

Some companies may be classified as both SRCs and accelerated or large accelerated filers, thus having to satisfy the IFRC auditor attestation requirement discussed above. The following are highlights of the amendments the SEC has proposed to remedy this issue.

Proposed Amendments

Exclusion of Low-Revenue SRCs from Accelerated and Large Accelerated Filer Definitions

The SEC has proposed adding a new condition to the definitions of accelerated and large accelerated filers in order to exclude those companies that are eligible to be an SRC under the SRC revenue test. As a result, a company that has a public float of between $75 million and $250 million as of its most recently completed second fiscal quarter would not be classified as an accelerated filer if its annual revenues in the most recent fiscal year for which audited financials are available is less than $100 million. This proposed amendment should significantly decrease the number of companies that are subject to the ICFR auditor attestation requirement.

Transition Thresholds for Exiting Accelerated and Large Accelerated Filer Status

The SEC also has proposed an amendment to Rule 12b-2 that would increase the public float thresholds for accelerated and large accelerated filers becoming non-accelerated filers from $50 million to $60 million, and for exiting large accelerated filer status from $500 million to $560 million. In addition, the SEC has proposed adding the SRC revenue test to determine whether a company should still be classified as an accelerated or large accelerated filer. A company whose public float fell below $60 million, or whose annual revenues fell below the SRC revenue test, would no longer be classified as an accelerated filer and, accordingly, would no longer be subject to the ICFR auditor attestation requirement.

Conclusion

The SEC is accepting comments on these proposed amendments. The SEC's proposed amendments are available here.

BROKER-DEALER

FINRA Launches Initiative to Simplify Firms' Digital Experience With FINRA, Facilitating More Efficient and Effective Compliance Programs

On May 14, the Financial Industry Regulatory Authority (FINRA) announced that it is launching an initiative designed to transform the digital platform used by firms to engage with FINRA across a variety of programs. The Digital Experience Transformation (the "Initiative") is an effort to integrate and simplify the digital interactions between brokerage firms and FINRA. The Initiative aims to facilitate efficiency and effectiveness of compliance programs.

In connection with the Initiative, FINRA has solicited and incorporated feedback from the industry through a series of focus groups with firms, as well as a survey of more than 50 firms. These firms provided insights into how the industry interacts with FINRA for compliance information and management, and how the processes can be improved.

The Initiative, which will be implemented in stages over the course of the next few years, is focused on six areas:

- efficiency—centralized task management designed to help compliance professionals do their work faster and at lower cost;
- proactive compliance—actionable notifications for early warning of issues;
- simplified experience—customized and personalized user experience tailored to the role of the user;
- enhanced interaction—centralized workspace to facilitate interaction with FINRA staff;
- flexibility and automation—easier machine-to-machine integration with firm systems, plus enhanced access to FINRA compliance data; and
- self-service—access to online knowledge base and contextual support.

A full press release from FINRA in connection with this matter is available here.

DERIVATIVES

See "Joint Audit Committee Releases Two Regulatory Alerts" in the CFTC section.

CFTC

Joint Audit Committee Releases Two Regulatory Alerts

On May 14, the Joint Audit Committee (JAC), a representative committee of US futures exchanges and the National Futures Association (NFA), released two regulatory alerts of particular importance to futures commission merchants (FCMs) that clear for customers whose accounts are managed by third-party advisers. The regulatory alerts "reconfirm and reiterate" the JAC's view of existing law regarding guarantees against loss and margin in the context of multiple accounts of a single beneficial owner at an FCM, which accounts are managed by different advisers and/or traded pursuant to different programs of the same adviser.

JAC Regulatory Alert #19-02 instructs FCMs that all accounts of the same beneficial owner for the same account classification type (e.g., segregated, secured, cleared swaps) must be combined for margin purposes. This does not mean that accounts for the same beneficial owner must be margined as a single account on a daily basis. Separate accounts may be continue to be margined separately. However, the alert explains that, when an FCM considers whether it may release excess funds from one account of a beneficial owner, the alert advises the FCM that it must combine all accounts of the same regulatory classification—even those under different control—to assess what might be available to pay out.

JAC Regulatory Alert #19-03 begins by restating the provisions of Commodity Futures Trading Commission Rule 1.56, which provides that no FCM may: 1) directly or indirectly guarantee a client against loss; 2) limit the loss of a customer; or 3) agree not to call for margin as established by the rules of an exchange. The alert explains that, where a beneficial owner has multiple accounts with multiple advisers (e.g., 1, 2 and 3) at an FCM (or even multiple accounts with the same adviser traded pursuant to different programs—e.g., 1a, 1b and 1c), the FCM cannot agree that it will never look to recover losses in any one account from other accounts beneficially owned by the same owner—even where the other accounts are managed by another adviser, or subject to a different program of the same adviser. Further, under no circumstance may an FCM limit losses to funds on deposit.

Importantly, the alert instructs FCMs to comprehensively and thoroughly review existing customer (and noncustomer agreements) to ensure the agreements contain no non-compliant language.

JAC Regulatory Alert #19-02 is available here.

JAC Regulatory Alert #19-03 is available here.

EU DEVELOPMENTS

Council of the EU has Adopted CRR II Regulation and CRD V Directive at First Reading

On May 14, the Council of the European Union (Council of the EU) published a press release announcing that it had adopted the proposed revisions to the Capital Requirements Regulation (CRR II) and to the Capital Requirements Directive (CRD) IV, or CRD V, at first reading. This follows the preliminary political agreement reached by the Council of the EU and the European Parliament in December 2018 on proposed revisions to CRD IV and CRR (as reported in the December 7, 2018 edition of the *Corporate & Financial Weekly Digest*).

The legislation will be published in the *Official Journal of the European Union* in June 2019, going into effect 20 days thereafter. Most of the provisions in CRR II will start to apply from mid-2021. Member States will have to apply the majority of provisions implementing CRD V 18 months and one day after it goes into effect.

The Council of the EU's press release is available here, in which links to the text of CRR II and CRD V can be found.

Council of the EU has Adopted EMIR Refit Regulation at First Reading

On May 14, the Council of the European Union (Council of the EU) published a press release announcing that it had adopted at first reading the proposed Regulation to amend the European Markets Infrastructure Regulation (EMIR), or the EMIR Refit Regulation. This follows the preliminary political agreement the Council of the EU and the European Parliament reached in February 2019 on proposed amendments to be made to EMIR (as reported in the February 8, 2019 edition of the *Corporate & Financial Weekly Digest*).

The EMIR Refit Regulation will go into effect 20 days after it is published in the *Official Journal of the European Union*. The majority of provisions will apply from the date it goes into effect, which is expected to be by June 21.

The Council of the EU's press release is available here.

For more information, see Katten's advisory, "EMIR REFIT: What Non-EU Asset Managers Should be Doing Now."

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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* Click here to access the *Corporate & Financial Weekly Digest* archive.