



## **Review Smaller Reporting Company Status in Light of New “Smaller Reporting Company” Definition and Updated SEC Staff C&DIs**

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A company newly qualifying as an SRC under the amended definition on or after September 10, 2018, regardless of whether it qualified under the previous definition, has the option to use the SRC scaled disclosure accommodations in (i) its next periodic or current report due on or after September 10, 2018, or (ii) transactional filings without a due date, in filings or amended filings made on or after September 10, 2018.

### **Updated and Withdrawn C&DIs**

The SEC Staff updated three Regulation S-K C&DIs and one Exchange Act Form C&DI relating to Form 10-K to reflect the amended SRC definition. The SEC Staff also withdrew four Exchange Act C&DIs addressing transition issues for SRCs and two obsolete Regulation S-K C&DIs relating to rescinded Regulation S-B and the correction of a misstatement on financial expert disclosure in the original SRC adopting release.

### **Updated Regulation S-K C&DIs**

Depending upon its public float, a company may be an accelerated filer and qualify as an SRC (C&DI 102.01)

According to C&DI 102.01, a company can be both an accelerated filer and an SRC. To use the illustration provided by C&DI 102.01, a company with a fiscal year ended December 31, 2018 that had a public float of \$80 million on the last business day of its second fiscal quarter would qualify as an SRC for filings due in 2019. This is because the company's public float as of the last business day of its second fiscal quarter was less than \$250 million (the new threshold

under the recent amendment to the definition of SRC). At the same time, the company is unable to exit its accelerated filer status for filings due in 2019 because this would require the company to have less than \$50 million in public float on the last business day of its second fiscal quarter in 2018 (see paragraph (3)(ii) of the definition of "accelerated filer" in Rule 12b-2). Because the company had a public float of \$80 million on the last business day of its second fiscal quarter of 2018, it will remain an accelerated filer for filings made in 2019 despite qualifying as an SRC. C&DI 102.01 points out that the company may use the scaled disclosure rules for SRCs in its annual report on Form 10-K, but the Form 10-K will be due 75 days after the end of its fiscal year and must include the auditor attestation reported described in Item 308(b) of Regulation S-K and required by Section 404 of Sarbanes-Oxley Act of 2002.

If an initial determination is made that a company does not qualify as an SRC, subsequent assessments for SRC status use a public float threshold that is 80% of initial threshold (C&DI 102.02)

According to C&DI 102.02, once a reporting company determines that it does not qualify as an SRC, it will remain unqualified unless, when making a subsequent determination, (a) it determines that its public float is less than \$200 million or (b) it determines that (i) for any threshold it previously exceeded, it is below the subsequent annual determination threshold (i.e., public float of less than \$560 million and annual revenues of less than \$80 million) and (ii) for any threshold that it previously met, it remains below the initial determination threshold (i.e., public float of less than \$700 million or no public float and annual revenues of less than \$100 million). As illustrated by C&DI 102.02, a company having a December 31 fiscal year would not qualify as an SRC if its public float as of June 28, 2019 was \$710 million and its annual revenues for the fiscal year ended December 31, 2018 were \$90 million. At the next determination date (June 30, 2020), it will remain unqualified as an SRC unless it determines that its public float as of June 30, 2020 was less than \$560 million and its annual revenues for the fiscal year ended December 31, 2019 remained less than \$100 million.

Consolidated annual revenues should be used for determination of SRC status (C&DI 202.01)

C&DI 202.01 clarifies that an issuer should include "all annual revenues on a consolidated basis" when calculating an issuer's annual revenues to determine whether the issuer qualifies as an SRC. Accordingly, a holding company with no public float as of the last business day of its second fiscal quarter would not qualify as an SRC unless "it had less than \$100 million in consolidated annual revenues in the most recently completed fiscal year for which audited

financial statements are available (i.e., as of the fiscal year end preceding that second fiscal quarter).”

## Updated Exchange Act Form C&DI

A company that no longer qualifies as an SRC may still use SRC scaled disclosure in a proxy statement for a section that it is incorporating into a prior year’s Form 10-K, if it qualified as an SRC in such prior year ([C&DI 104.13](#))

In C&DI 104.13, the SEC Staff provides an illustration of a company that files its Form 10-K for the fiscal year ended December 31, 2019 (the “**2019 Form 10-K**”) using disclosure permitted for SRCs under Regulation S-K. The cover page of the Form 10-K indicates that the company has its public float exceeding \$250 million at the end of its second fiscal quarter in 2019. At the same time, the company proposes to rely on General Instruction G(3) of Form 10-K to incorporate by reference executive compensation and other disclosure required by Part III of Form 10-K into the 2019 Form 10-K from the company’s definitive proxy statement to be filed not later than 120 days after its 2019 fiscal year end. In C&DI 104.13, the SEC Staff confirms that the company may use the scaled SRC disclosure in the proxy statement even though it does not qualify to use SRC disclosure for the fiscal year beginning January 1, 2020. According to the SEC Staff, this is because the company could have used SRC disclosure for Part III of its 2019 Form 10-K if it had not used General Instruction G(3) to incorporate that information by reference from the definitive proxy statement.

## Categories

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