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SEC AMENDS DEFINITION OF SMALLER REPORTING COMPANY AND EXPANDS SCALED DISCLOSURE ELIGIBILITY

The Securities and Exchange Commission (“SEC”) recently voted to amend the definition of a smaller reporting company (“SRC”). These amendments will expand the number of companies that are eligible to provide scaled disclosure in their filings with the SEC by nearly 1,000.

Background

In 2008, the SEC created the SRC category to reduce the regulatory burden and costs of compliance on smaller companies while promoting capital formation. Companies that qualify as SRCs may provide scaled disclosure, which is less burdensome than disclosure requirements for larger companies. For example, SRCs can include two years of annual audited financial statements instead of three years in their registration statements and periodic reports and may omit more detailed tables describing executive compensation. The amendments will become effective on September 10, 2018.

Smaller Reporting Company Amendments

The primary purpose of these amendments is to increase the number of companies that can take advantage of the reduced disclosure obligations applicable to SRCs. Under the previous definition, companies qualified as SRCs if they had either less than \$75 million in public float, or no public float and less than \$50 million in annual revenue. On September 10, 2018, the definition of SRC will include companies with a public float of less than \$250 million and companies with less than \$100 million in annual revenue and either no public float or public float of less than \$700 million. In addition, the thresholds for requalifying as a SRC after a company loses the SRC status were also proportionately increased.

The amendments also allow reporting companies to omit the financial statements of businesses acquired, or to be acquired, if the net revenue of the acquired business is less than \$100 million. Under the existing rule, this net revenue threshold was \$50 million. The increase in this threshold corresponds to the increase in the annual revenue threshold for determining if a company is a SRC, maintaining the connection between the SRC definition and this financial reporting rule.

Despite these amendments, the SEC has not yet modified the thresholds for the “accelerated filer” and “large accelerated filer” classifications. Consequently, a company may now qualify as both a SRC and as an accelerated filer and, in that case, will still need to comply with the accelerated filer deadlines, as opposed to the longer filing deadlines applicable to a non-accelerated filer.

These amendments also include technical amendments to the cover pages of Form 10, registration statements on Forms S-1, S-3, S-4, S-8, and S-11 and periodic reports on Forms 10-K and 10-Q to remove the “(Do not check if smaller reporting company)” notation next to the non-accelerated filer check box. The SEC now instructs registrants to check all boxes applicable to them.

What to Do Now

All reporting companies should be mindful of the date they should reevaluate filer status to determine if they now qualify as SRCs through either the increased public float cap or the new revenue test. This reevaluation is required annually. The SEC has instructed that, even if a company previously did not qualify as a SRC, if it meets one of the initial qualification tests in the amendments on its measurement date, the company will qualify as a SRC.

Although these particular amendments do not impact the thresholds for qualifying as an accelerated or large accelerated filer, SEC Chairman Jay Clayton has requested that the SEC Staff review potential amendments to these definitions. Although it is difficult to predict what these changes may be, any further changes advocated by Chairman Clayton may follow his stated goal of promoting capital formation in the public capital markets while maintaining the SEC's approach to investor protection.

If you would like more information regarding these amendments and how they may impact your company, please contact a member of Harter Secrest & Emery LLP's Securities and Capital Markets Group. For more information, visit www.hselaw.com.

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