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Securities Alert

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SEC Expands Number of Companies that Qualify as "Smaller Reporting Companies"

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On June 28, 2018, the SEC adopted amendments to the definition of "smaller reporting company" that are "intended to reduce compliance costs for these registrants and promote capital formation, while maintaining appropriate investor protections." Specifically, a company now can claim to be a "smaller reporting company" if the company:

- has a "public float" of less than $250 million (an increase from $75 million), calculated as of the last day of its most recently completed second fiscal quarter; or
- has less than $100 million in annual revenue (an increase from $50 million) and either has no public float or a public float of less than $700 million.

"Public float" is calculated by multiplying the number of the company's common shares held by non-affiliates by the market price and, in the case of an IPO, adding to that number the product obtained by multiplying the common shares covered by the registration statement by their estimated public offering price.

A smaller reporting company enjoys significant benefits under the U.S. federal securities laws, including:

- "scaled" disclosure under Regulation S-K, which can result in less extensive narrative disclosure than required of other reporting companies, particularly in the description of executive compensation in its proxy statement;
- a requirement to provide audited financial statements for two fiscal years, in contrast to other reporting companies, which generally must provide audited financial statements for three fiscal years; and
- the ability to use "forward" incorporation by reference in an S-1 registration statement, greatly simplifying implementation of an "evergreen" shelf registration statement.

The amendments also provide how companies can phase in and out of smaller reporting company status upon falling below one or both of the thresholds described above. Specifically, a company exits smaller reporting company status because it either has revenues greater than $250 million or public float/revenues greater than $700 million/$100 million. Once the company loses smaller reporting company status, it can re-enter smaller reporting company status if its revenues fall below $200 million or its float/revenues fall below $560 million/$80 million.

The amendments did not change the current thresholds contained in the definitions of "accelerated filer" and "large accelerated filer" in Exchange Act Rule 12b-2. Accordingly, companies with $75 million or more of public float that qualify as smaller reporting companies under the new rules will remain subject to the requirements that apply to accelerated filers. These requirements include (a) accelerated timing of filing periodic reports under the Exchange Act and (b) the obligation to provide the auditor's attestation of management's assessment of internal control over financial reporting required by Section 404(b) of the Sarbanes-Oxley Act of 2002. During the Commission meeting at which the new rules were adopted, however, Commission Chairman Jay Clayton directed the staff of the Commission to recommend possible additional changes to the "accelerated filer" definition that, if adopted, would reduce the number of companies that qualify as accelerated filers.

The SEC's Adopting Release is available at: https://www.sec.gov/rules/final/2018/33-10513.pdf

If you would like to discuss the implications of the SEC's action regarding "smaller reporting companies" and how it affects your company, please call any of the lawyers listed below or your regular Nelson Mullins contact:

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