



Smaller Reporting Company¹ Compliance and Disclosure Interpretations

1. Do all current reporting companies have an opportunity to determine if they qualify for treatment as a smaller reporting company applying the \$75 million public float test as of the end of the second quarter in the fiscal year next ending after December 15, 2007, or the alternative \$50 million annual revenue test for companies that cannot calculate their public float?

Yes. All reporting companies as of the effective date of the new rules can determine if they qualify for smaller reporting company status based on the \$75 million in public float or \$50 million in annual revenue test in paragraphs (i) and (iii) of new Item 10(f)(1) of Regulation S-K. The language in paragraph (iii) of new Item 10(f)(2) of Regulation S-K, requiring companies to have a public float below \$50 million or revenues below \$40 million to qualify for smaller reporting company status "[o]nce an issuer fails to qualify" for that status, will not apply in determining smaller reporting company status in the first year after the effective date of the new rules, because this is the initial determination as to smaller reporting company status for all current reporting companies. No issuer previously will have failed to qualify for smaller reporting company status within the meaning of paragraph (iii) of Item 10(f)(2).

2. Could a company with a fiscal year ended December 31, 2007 be both a smaller reporting company and an accelerated filer for 2008 if it was an accelerated filer with respect to filings due in 2007 and had a public float of \$60 million on the last business day of its second fiscal quarter of 2007?

Yes. A company must look to the definitions of "smaller reporting company" and "accelerated filer" in Rule 12b-2 under the Exchange Act to determine if it qualifies as a smaller reporting company and non-accelerated filer for each year. This company will qualify as a smaller reporting company for filings in 2008, because fiscal year 2007 is the initial determination year for the company to qualify for smaller reporting company status, and it had less than \$75 million in public float on the last business day of its second fiscal quarter.² Since the company first determined it was an accelerated filer in an earlier year, however, it is required to have less than \$50 million in public float on the last business day of its second fiscal quarter in 2007 to exit accelerated filer status in 2008, as provided in paragraph (3)(ii) of the definition of "accelerated filer" in Rule 12b-2. This company had a public float of \$60 million on the last business day of its second fiscal quarter of 2007, and therefore is unable to transition to non-accelerated filer status. As this example illustrates, due to the application of the transition rules for accelerated filers, a company can be both an accelerated filer and a smaller reporting company simultaneously. Such a company may use the scaled disclosure rules for smaller reporting companies in its annual report on Form 10-K, but the report is due 75 days after the end of the its fiscal year and must include the Sarbanes-Oxley Section 404 auditor

attestation report described in Item 308(b) of Regulation S-K.

3. Will a company that does not qualify as a smaller reporting company this year be able to qualify as a smaller reporting company if its public float falls below \$75 million at the end of its second fiscal quarter in a future fiscal year?

Any reporting company that can calculate its public float and did not qualify as a smaller reporting company previously will not qualify as a smaller reporting company in the future unless its public float falls below \$50 million as of the last business day of its second fiscal quarter. This is provided for in Item 10(f)(2)(iii) of Regulation S-K and follows the rule for exiting accelerated filer status. Companies that cannot calculate their public float would need to fall below \$40 million in annual revenue to qualify as smaller reporting companies in the future.

4. The version of the adopting release on smaller reporting company regulatory relief and simplification currently posted on the Commission's Web site states on page 24 that the Commission added Item 407(g) to Regulation S-K to provide that smaller reporting companies are not "required to provide an Audit Committee [Financial Expert]* Report until the first annual report after their initial registration statement is filed with the Commission and becomes effective." An asterisked footnote indicates that the bracketed language was inadvertently omitted from the release when initially published. The initial version of the release indicated that smaller reporting companies are not required to provide an audit committee report under the circumstances described. Are smaller reporting companies required to provide an audit committee report?

Yes. All smaller reporting companies are required to provide the audit committee report required by Item 407(d)(3) of Regulation S-K. The text of Item 407(g) referred to in the release does not discuss the audit committee report. It states, among other things, that smaller reporting companies are not required to provide the audit committee financial expert disclosure required in paragraph (d)(5) of Item 407 until their first annual report after their initial registration statement under the Securities Act or Exchange Act becomes effective. The omission of the words "Financial Expert" from the original version of the release was inadvertent.

5. Do the new disclosure requirements available to smaller reporting companies apply to the Schedule 14A disclosure requirements that refer registrants to specific paragraphs of items in Regulation S-K?

Yes. Where any schedule or form, including Schedule 14A, refers a registrant to a disclosure item or a specific paragraph of a disclosure item found in Regulation S-K (17 CFR §§ 229.10-229.1123) and the registrant meets the definition of "smaller reporting company" under Rule 405 of the Securities Act or Rule 12b-2 of the Exchange Act, whichever is applicable to the filing, the registrant may use the disclosure requirements available to smaller reporting companies under that item. These requirements usually may be found in a separate paragraph of the Regulation S-K item entitled "Smaller reporting companies." If the requirements for smaller reporting companies in an item specify that smaller reporting companies *must* comply with the smaller reporting company requirements, the smaller reporting company must comply. For example, a registrant that is a smaller reporting company must furnish the disclosure required by Item 404(d)(1) of Regulation S-K, rather than merely the disclosure required by Item 404

(a), even though Item 7(b) of Schedule 14A refers to Item 404(a) only. Item 404(d)(1) specifies that smaller reporting companies must provide certain information in order to comply with Item 404(a).

6. Is a smaller reporting company required to describe its policies and procedures for review, approval or ratification of transactions with related persons as specified by Item 404(b) of Regulation S-K if a schedule or form being used for a filing requires the company to furnish the information required by Item 404(b)?

No. Smaller reporting companies are not required to furnish Item 404(b) disclosure in these circumstances. Smaller reporting companies comply with the requirements of Item 404 by furnishing the information called for by Item 404(d) of Regulation S-K, the paragraph of Item 404 labeled "Smaller reporting companies," which does not require Item 404(b) disclosure.

¹ The SEC adopted its smaller reporting company rules in [Release 33-8876 \(Dec. 19, 2007\) \[73 FR 934\]](#).

² This assumes that the company was not an investment company, asset-backed issuer, or majority-owned subsidiary of a parent that is not a smaller reporting company, none of which are eligible to be a smaller reporting company.

<http://www.sec.gov/info/smallbus/src-cdinterps.htm>

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