

SEC proposes major reforms impacting US domestic reporting issuers

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On May 19, the Securities and Exchange Commission (SEC) proposed significant amendments to its rules that would greatly expand the number of US domestic reporting companies eligible for securities law accommodations, including exemptions for auditor attestation reports under Sarbanes-Oxley (SOX) and an increased ability to file short-form shelf registration statements on Form S-3. The proposed rules, however, would largely leave intact the existing SOX and registration statement requirements for foreign private issuers (FPIs), including those reporting under the multijurisdictional disclosure system (MJDS).

What you need to know

- Further to the stated goals of the SEC to facilitate capital formation in US public securities markets, the SEC has proposed significant amendments to its rules that would greatly expand the number of US domestic reporting companies eligible for securities law accommodations. These amendments include: (i) exemptions for auditor attestation reports under Section 404(b) of SOX; and (ii) an increased ability to file short-form shelf registration statements on Form S-3, including as automatic shelf registrations that are immediately effective upon filing without SEC review.
- Specifically, the SEC proposes to amend the definition of “large accelerated filer” so that it applies to all issuers with a public float of at least US\$2 billion (an increase from US\$700M under the existing rules)¹, and eliminate the definition of “accelerated filer” so that an estimated 80% of SEC reporting companies will be exempt from the auditor attestation requirements of SOX 404(b).
- Additionally, the SEC is proposing to amend Form S-3 (the US domestic form for shelf offerings) to eliminate the 12-month reporting history requirement and the minimum US\$75 million public float threshold, making it generally available to nearly all US domestic reporting companies. The SEC also proposes to allow all US domestic issuers listed on a US national securities exchange to file an automatically effective Form S-3 once they have been SEC reporting for at least 12 months.
- The proposed rules are designed primarily to benefit US domestic reporting companies. Canadian issuers that file annual reports on Form 40-F under the MJDS would continue to be required to file SOX 404(b) auditor attestation reports, unless exempt as an “emerging growth company” (EGC), and the SEC has not proposed similar amendments to Forms F-3 or F-10 pending completion of its review of the FPI rules pursuant to its previously announced concept release, which [we discussed in a recent bulletin](#).
- The proposed rules are subject to a 60-day public comment period and the issuance of final rules by the SEC.

SEC proposal to expand SOX and reporting accommodations

Under the proposed rules, the existing framework of filer statuses for US domestic reporting companies is being simplified such that the substantial majority of issuers will qualify as a “non-accelerated filer” (NAF), a status which extends the deadlines for filing annual and quarterly reports, provides reduced disclosure and proxy requirements and, perhaps most importantly, eliminates the requirement to obtain an auditor attestation report under SOX 404(b).

Specifically, the SEC is proposing to:

- limit the definition of “large accelerated filer” (LAF) to issuers with a public float of at least US\$2 billion (an increase from US\$700 million under the existing rules); and
- eliminate the definition of “accelerated filer” (AF), which is currently applicable to issuers with a public float of US\$75 million to US\$700 million.

Under the proposed rules, LAF status would be determined annually based on the issuer’s average stock price over the last 10 trading days of its second fiscal quarter (rather than the last business day of the second fiscal quarter under the current rules). Entry into and exit from LAF status would require the issuer to exceed the public float threshold for two consecutive years (instead of being triggered based on meeting the threshold in just one year). These changes were designed to avoid inadvertently capturing issuers that might have briefly crossed the LAF threshold on a single day in one year.

As a result of the foregoing proposed changes, all US domestic reporting issuers that have a public float of less than US\$2 billion would be deemed NAFs and would be able to take advantage of the following accommodations:

- Exemption from SOX 404(b) auditor attestation.
- Longer deadlines to file Form 10-K and Form 10-Q²:
 - 90 days post-fiscal year-end for Form 10-K (compared to 60 days for LAFs and 75 days for AFs under the current rules); and
 - 45 days post-fiscal quarter-end for Form 10-Q (compared to 40 days for AFs under the current rules).
- Exemption from “say-on-pay” proxy requirements as well as “pay-vs-performance” and pay ratio disclosure requirements in connection with the annual proxy statement.
- Deferred compliance with new or revised financial accounting standards applicable to public companies.
- All disclosure accommodations currently available to issuers that qualify as a “smaller reporting company” (SRC)³ and/or EGC (for example, only requiring two years of financial statements and MD&A instead of three, and scaled executive compensation disclosure)⁴.

Further, the SEC is proposing to confer NAF status (and the above-mentioned accommodations that go along with it) on all newly public US domestic reporting companies for their first 60 months (five years) as an SEC reporting company. Currently, new issuers that qualify as an EGC likewise have a five-year onramp for such accommodations, but if they qualify as an LAF or are otherwise disqualified from EGC status during that five-year period, they would lose the accommodations. The proposed rules would ensure that all newly public US domestic reporting companies would benefit from this onramp for the first five years, potentially greatly reducing compliance costs in the initial years after going public.

In addition, the SEC is proposing to eliminate “smaller reporting company” status, as this intermediate status will become unnecessary under the proposed rules. No changes are proposed to the status of “emerging growth company”, which remains a separate status in order to permit certain IPO-related accommodations under the JOBS Act.

Finally, the SEC is proposing an NAF sub-category with even longer deadlines for Form 10-K and Form 10-Q filings, for NAFs with total assets of US\$35 million or less for the two most recent fiscal years.

SEC proposal to reform shelf offering procedures for US domestic reporting companies

In a companion rule proposal, the SEC has also put forward several amendments to its rules and forms for securities offerings by US domestic reporting companies. The most significant of these proposed changes is to amend Form S-3 to eliminate many of the prerequisites for use of that form, which is used for short-form shelf and other offerings by US domestic reporting companies such as delayed primary or secondary offerings or at-the-market (ATM) offerings.

Specifically, the proposed amendments to Form S-3 and related SEC rules include the following:

- Elimination of the eligibility requirement that the issuer has been an SEC reporting company for at least 12 calendar months, meaning that Form S-3 will become available to issuers immediately after going public.
- Elimination of the eligibility requirement that the issuer has a public float of at least US\$75 million, as well as other transaction-based eligibility requirements (other than those related to asset-backed securities).
- Permitting S-3 filers that have a class of common equity securities listed on a US national securities exchange (i.e., “eligible listed issuers”, or ELIs) to take advantage of most of the accommodations currently only available to “well-known seasoned issuers” (WKSIs), including simplified disclosures in shelf registration statements and the ability to pay SEC filing fees on a “pay-as-you-go” basis in connection with shelf takedowns (rather than needing to register a specific dollar amount or number of securities at the time of filing the registration statement).
- Permitting ELIs that have an SEC reporting history of at least 12 complete calendar months (i.e., “seasoned eligible listed issuers”, or SELIs) to file an automatically effective Form S-3 (an S-3ASR)—that is, without requiring an SEC review or waiting period.

As explained in the rule proposal, the above-mentioned reforms are intended to maximize issuer access to the shelf and other short-form offerings on Form S-3 while retaining the criteria that the issuer has (1) a class of securities that have been registered with the SEC⁵; and (2) current information that is publicly available on EDGAR (thus issuers would still lose S-3 eligibility if they are not timely in their SEC reporting⁶). In addition, the SEC is proposing to amend Form S-3 to make it explicitly unavailable to FPIs as well as foreign governments, asset-based issuers, and investment companies, as well as to certain other types of issuers due to heightened risk of securities law violations by such issuers⁷. Finally, we note that as a result of the introduction of the “ELI” and “SELI” categories, the term “WKSI” would be eliminated for US domestic reporting companies under the proposed rules (although WKSI-eligibility would still be relevant for FPIs, as discussed below).

The proposed changes to Form S-3 would greatly facilitate the ability of newly public US domestic companies to raise capital in the first year following their initial SEC registration, because under the current regime, such issuers would be required to register securities offerings on Form S-1, which cannot be used for primary shelf offerings. In addition, all US domestic reporting issuers that have US-listed common equity securities will be able to benefit from the automatically effective S-3ASR regime after 12 months as a US public company.

Finally, the SEC is proposing other changes to its Securities Act forms, including its current long-form registration statement on Form S-1 (to permit both backward and forward incorporation by reference⁸, thereby allowing issuers to achieve cost savings associated with more streamlined prospectuses). It is also proposing to preempt US state securities laws (or “blue sky” laws) in connection with all SEC-registered securities offerings, not just those involving issuers with US-listed securities.

Implications for foreign private issuers and/or MJDS issuers

The SEC rule proposals are designed to benefit only US domestic reporting companies, and do not change the SEC reporting requirements or registration statement procedures for FPIs, including those reporting under the MJDS. As explained in the rule proposals, the SEC is not changing the existing framework for FPIs in light of the SEC's ongoing comprehensive review of the FPI framework. Accordingly, all FPIs—including Canadian issuers filing under the MJDS—that file annual reports on Forms 20-F and 40-F will need to continue to follow the existing rules and are not eligible to rely on any accommodations for NAFs as described above. They must continue to use Forms F-3 and F-10 for US securities offerings in accordance with existing practices.

Emphasizing its intent to keep the FPI rules the same, the SEC has proposed to amend Form 20-F to remove references to LAF and AF statuses and replace them with a hardwired requirement for a SOX 404(b) auditor attestation report for all issuers with a public float of US\$75 million or more (unless they qualify as an EGC). This preserves the status quo because currently FPIs that are under this public float threshold are NAFs and are thus currently exempt from SOX 404(b) auditor attestation.

No changes are being made to Form 40-F, which currently requires a SOX 404(b) auditor attestation report for all issuers other than EGCs; since Form 40-F is only available for issuers with a public float of US\$75 million or more, the SOX 404(b) requirement for MJDS issuers is effectively the same as it is for other FPIs filing on Form 20-F. Nevertheless, under the proposed rules, an FPI (including an MJDS issuer) that voluntarily reports on US domestic forms—which require US GAAP financial statements—would be exempt from SOX 404(b) auditor attestation and can rely on the other NAF accommodations described above under the proposed rules if it is under the US\$2 billion public float threshold and/or within the first five years of SEC reporting.

Likewise, in another effort to preserve the status quo for FPIs, the SEC rule proposals explicitly prohibit FPIs from using Forms S-1 and S-3 and retain the term “WKSI” only for FPIs. Accordingly, FPIs would continue to need to assess F-3 eligibility based on the current rules (including the existing 12-month seasoning period and US\$75 million public float requirement) and would need to qualify as a WKSI (which requires a US\$700 million public float) in order to file an automatically effective F-3 (i.e., an F-3ASR) that is not subject to SEC review.

Timing and next steps

The SEC proposals are each subject to a 60-day public comment period, commencing on the date the proposing releases are published in the Federal Register. Following conclusion of the public comment period, the SEC is expected to prepare and approve final rules (which may or may not include modifications from its initial rule proposals). As such, the exact timing and content of the final rules is uncertain; however, we expect that the SEC will move swiftly to enact final rules following expiration of the public comment period.

FOOTNOTES

- [1.](#) “Public float” refers to the aggregate worldwide market value of the voting and non-voting common equity held by the issuer’s non-affiliates.
- [2.](#) The SEC has proposed eliminating Form 10-Q and replacing it with Form 10-S, to be used for semi-annual reporting in lieu of quarterly reporting, [as we discussed in a previous bulletin](#).
- [3.](#) To qualify as an SRC, an issuer must have (1) a public float of less than US\$250 million; or (2) revenues of US\$100 million or less and either (A) no public float or (B) a public float of less than US\$700 million.

- [4.](#) To qualify as an EGC, an issuer must have annual revenues of US\$1.235 billion or less (subject to inflation adjustment); cannot have issued more than US\$1 billion of non-convertible debt in the prior three years; cannot have become a “large accelerated filer” and no more than five years can have elapsed since the first sale of common equity securities under an SEC registration statement.
- [5.](#) Usually this occurs when an issuer has a class of securities listed on a US national securities exchange (e.g., the New York Stock Exchange or Nasdaq); however, it is sufficient to have registered securities with the SEC, even without such an exchange listing, and thus Form S-3 may be available to issuers whose securities are only quoted on an OTC market.
- [6.](#) The proposed rules would also loosen the timeliness requirement somewhat by considering a filing to be untimely only if it is not made within seven days of the original due date and only mandating loss of S-3 eligibility if more than one untimely filing is made within a 12-month period.
- [7.](#) For example, (1) blank check companies, shell companies (other than former SPACs that are not FPIs) and penny stock issuers (i.e., BSP issuers); and (2) issuers or subsidiaries of an issuer convicted of a criminal securities law violation or the subject of a judicial or administrative decree relating to securities law violations.
- [8.](#) Incorporation by reference would not be available to BSP issuers (see footnote 7).

To discuss these issues, please contact the author(s).

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