



Corporate and Securities Law Alert

Determining Filing Deadlines for Periodic Reports

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In December 2005, the SEC adopted new filing deadlines for Forms 10-K and 10-Q, creating three tiers of filing deadlines based upon the filing company’s market capitalization – “large accelerated filer,” “accelerated filer” or “non-accelerated filer” – and rules for when a company transitions from one category to another. The full text of the SEC’s adopting release is available at: <http://www.sec.gov/rules/final/33-8644.pdf>. Highlights of the rule changes are summarized below.

How do we determine what type of filer our company is?

A public company determines whether it is a “large accelerated filer,” “accelerated filer” or “non-accelerated filer” by examining, at the end of its fiscal year:

- the aggregate worldwide market value of voting and non-voting common equity held by non-affiliates (“non-affiliate float”) as of the last business day of its most recent second fiscal quarter; and
- whether the company
 - has been subject to the periodic reporting requirements of the Exchange Act for at least twelve months,
 - has filed at least one annual report (e.g., Form 10-K) under the Exchange Act, and
 - is not eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports.

Generally, the company will be an **accelerated filer** or a **large accelerated filer** if its non-affiliate float is in the ranges for those categories of issuers set forth in the table below, and the answers to the three Exchange Act questions above are “yes”.

A company that is not currently an accelerated filer or a large accelerated filer will be a **non-accelerated filer** if its non-affiliate float is less than \$75 million or the answer to any of the three Exchange Act questions above is “no”. Small companies and companies that recently completed their

initial public offerings will be non-accelerated filers, and will re-assess their status at the end of each fiscal year.

What are the filing deadlines for Forms 10-K and 10-Q going forward?

The periodic report filing deadlines, which are different for the different categories of issuers, are:

Aggregate Market Value Held by Non-affiliates (as of last day of second fiscal quarter)	Category of Issuer	Form 10-K Deadline – Fiscal Years Ending Before 12/15/2006	Form 10-K Deadline – Fiscal Years Ending on or after 12/15/2006	Form 10-Q Deadline
At least \$700 million	Large Accelerated Filer	75 days after f.y.e.	60 days after f.y.e.	40 days after quarter end
At least \$75 million but less than \$700 million	Accelerated Filer	75 days after f.y.e.	75 days after f.y.e.	40 days after quarter end
Less than \$75 million	Non-Accelerated Filer	90 days after f.y.e.	90 days after f.y.e.	45 days after quarter end

Large accelerated filers will accelerate to a 60-day deadline for their Form 10-K filings, beginning with the annual report filed for the first fiscal year ending on or after December 15, 2006. Other accelerated filers will continue to file Forms 10-K under the current 75-day deadline. Non-accelerated filers will continue to have 90 days to file the Form 10-K.

Both accelerated filers and large accelerated filers will continue to file Forms 10-Q under a 40-day deadline. Non-accelerated filers will continue to have 45 days to file the Form 10-Q.

How does a company transition between different filer categories as its market capitalization changes?

Once a company becomes an accelerated filer or a large accelerated filer, separate thresholds will apply in order for it to reclassify to a category that has a lower non-affiliate float

requirement. An accelerated filer can reclassify as a non-accelerated filer, and a large accelerated filer can reclassify as an accelerated filer or non-accelerated filer, only if it meets these criteria.

An accelerated filer becomes a non-accelerated filer if it determines at the end of a fiscal year that it had non-affiliate float of less than \$50 million as of the last business day of its most recently completed second fiscal quarter.

A large accelerated filer becomes an accelerated filer if it had non-affiliate float of \$50 - \$500 million; it becomes a non-accelerated filer if its non-affiliate float was less than \$50 million.

These reclassification criteria represent a change to the rules for exiting from accelerated filer status. Previously, in order to transition from accelerated filer to non-accelerated filer, a company must have been eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports, which required that the company satisfy the definition of “small business issuer” at the end of two consecutive years. Now, a company that satisfies the market capitalization thresholds for transitioning to another category can make the transition immediately at the end of that fiscal year.

The filer category into which the company falls at the end of its fiscal year governs the deadlines for the annual report to be filed for that fiscal year, the quarterly and annual reports to be filed for the subsequent fiscal year and all annual and quarterly reports to be filed thereafter (until the next change of category).

Why were these changes to the filing deadlines and categories of filers made?

The SEC made the changes, in part, out of concern that smaller public companies needed relief from further acceleration of the filing deadlines, due to the costs that these smaller companies would likely incur if they were required to comply with the more accelerated filing deadlines.

What other changes to the federal securities laws are being made for smaller public companies?

In September 2005, the SEC extended the deadline for non-accelerated filers to comply with internal control over financial reporting requirements. The Form 10-K management report and auditor’s attestation on internal controls is now scheduled to apply to non-accelerated filers commencing with the annual report for the fiscal years ending on or after July 15, 2007.

In addition, the SEC’s Advisory Committee on Smaller Public Companies is wrapping up its assessment of the current regulatory system for smaller public companies under the federal securities laws, including the impact of Sarbanes-Oxley. The Advisory Committee has issued a draft report and is due to issue its final recommendations to the SEC in April 2006. The Advisory Committee is assessing a number of areas, including internal controls, corporate governance and disclosure, accounting standards, and capital formation.

After considering the recommendations of the Advisory Committee, the SEC may propose additional changes to existing rules in order to provide further regulatory relief to smaller public companies in some of these areas. However, given the rule making process, it is likely to take several months (or longer) for any changes that are in fact proposed to be adopted and become effective.

If you would like further information about these changes, please contact any member of your Fenwick & West team, or Horace Nash (650.335.7934 – hnash@fenwick.com), or Eileen Duffy Robinett (650.335.7271 – erobinett@fenwick.com).

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