



# Smaller Reporting Companies

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Fenwick  
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# Form 10-K Annual Reports by Type of Filer

FY 2010 (10/1/2009-9/30/2010)

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Smaller Reporting Companies	4,353	48%
Non-Accelerated Filers	1,184	13%
Accelerated Filers	1,800	20%
Large Accelerated Filers	1,479	17%
Other	<u>98</u>	1%
Total*	8,914	100%

\*Excludes foreign private issuers, registered investment companies, registered employee benefit plans and ABS issuers. Source: Gerry LaPorte, Chief of SEC Office of Small Business Policy, 11/19/10.

# Smaller Reporting Company Rules – History and Purpose

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- Proposed and adopted in 2007
- Objectives:
  - Broader coverage (up to \$75 million public float)
  - Consolidate small business issuers with non-accelerated filers
  - Regulatory simplification (eliminate Reg. S-B)
  - Reduce compliance costs
  - Introduce concept of scaled disclosure

# Smaller Reporting Company Definition

- **How small?** (Rule 12b-2 and Reg. S-K, Item 10(f))
  - For reporting company, less than \$75 million in public float, or
  - For IPO, as of a date within 30 days of the registration statement filing date:
    - (shares held by nonaffiliates + shares being offered) x estimated IPO price < \$75 million
  - If no public float, then less than \$50 million in annual revenues in most recent audited financials
- **Any other requirements?**
  - Not an investment company
  - Not an asset-backed issuer
  - Not a majority-owned subsidiary of a company that is not a smaller reporting company

## Entering and Exiting

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- Measure public float annually, on the last trading day of the second fiscal quarter
- Eligible to use smaller reporting company disclosure rules for the next fiscal year (starting with the Form 10-Q for the first quarter of the next fiscal year)
- Check the “smaller reporting company” box on the cover of the Form 10-Q for the first quarter of the next fiscal year, or “early adopt” – start using the smaller reporting company rules in the next Form 10-Q – for the second quarter of the year.
- Check the “smaller reporting company” box on the cover of that Form 10-Q

## Entering and Exiting (*cont'd*)

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- Once company has reported as a smaller reporting company, **if it disqualifies** based on the test at the end of Q2, it can wait until Q1 of the next fiscal year to switch to regular reporting.
- If company is a smaller reporting company once, then disqualifies, **how does it become one again?**
  - More stringent tests for returning:
    - Must have a public float of < \$50 million, or
    - If no public float, then revenues of <\$40 million

# Benefits of Smaller Reporting Company Status

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- **Less detailed disclosure requirements**
  - Some S-K items have less onerous disclosure requirements for smaller reporting companies
  - Some S-K items do not apply to smaller reporting companies
  - See chart in Reg. S-K, Item 10(f) – next slide
  - Form 10-K, Item 1A. “Risk Factors” not required
- **Is it all or none?**
  - No; “a la carte”
- **Non-accelerated filers exempted from SOX Section 404(b) by Dodd-Frank Act**

**Index of Scaled Disclosure Available to Smaller Reporting Companies**

<b>Item 101</b>	<b>Description of business</b>
<b>Item 201</b>	<b>Market price of and dividends on registrant's common equity and related stockholder matters</b>
<b>Item 301</b>	<b>Selected financial data</b>
<b>Item 302</b>	<b>Supplementary financial information</b>
<b>Item 303</b>	<b>Management's discussion and analysis of financial conditions and results of operations</b>
<b>Item 305</b>	<b>Quantitative and qualitative disclosures about market risk</b>
<b>Item 402</b>	<b>Executive compensation</b>
<b>Item 404</b>	<b>Transactions with related persons, promoters and certain control persons</b>
<b>Item 407</b>	<b>Corporate governance</b>
<b>Item 503</b>	<b>Prospectus summary, risk factors, and ratio of earnings to fixed charges</b>
<b>Item 504</b>	<b>Use of proceeds</b>
<b>Item 601</b>	<b>Exhibits</b>



## Modified Reg. S-K and S-X Items

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- **Executive compensation disclosures**  
(Reg. S-K, Item 402)
  - No CD&A is required
  - Fewer named executive officers
    - Only CEO and two next most highly compensated executive officers
    - Plus up to two former executive officers
  - Two years (instead of three) in summary compensation table
  - Abbreviated post-termination compensation information
    - No numerical amounts required
  - No disclosures re: compensation policies and practices as they relate to risk management (*Item 402(s)*)
  - Tables not required:
    - Grants of Plan-Based Awards
    - Option Exercises and Stock Vested
    - Pension Benefits
    - Nonqualified Deferred Compensation

## Modified Reg. S-K and S-X Items (*cont'd*)

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- **Financial Statements**
  - Not “regular” Reg. S-X; use Article 8 of Reg. S-X
  - Must still be U.S. GAAP
  - Time periods for audited financial statements
    - Two years income statement
    - Two years balance sheet
    - Two years cash flows
    - Two years changes in stockholders’ equity
- **MD&A** (*Reg. S-K, Item 303*)
  - Comparison of two years (not three)
  - No five-year contractual obligations table

## Modified Reg. S-K and S-X Items (*cont'd*)

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- **Item 404** – *Transactions with Related Persons, Promoters and Certain Control Persons*
  - Provide 404(a) information based on transaction threshold equal to the lesser of \$120,000 or 1% of the average total assets at fiscal yearend
  - No need to provide 404(b) disclosure about review, approval and ratification of related person transactions
  - Provide promoters and certain control persons disclosure under 404(c), and provide list of parents, basis of control, and percentage ownership
  - Provide related person transaction information for each of the last two fiscal years

## Modified Reg. S-K and S-X Items (*cont'd*)

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- **Other Modified S-K Items**
  - Item 101 – *Description of Business*
    - Three-year look back for description of business
  - Item 201 – *Market Price of and Dividends on the Registrants' Equity and Related Stockholder Matters*
    - No performance graph required
- **S-K Items not required at all for SRCs**
  - Item 301 – *Selected Financial Data* (5-year data)
  - Item 302 – *Supplementary Financial Data* (Quarterly data)
  - Item 305 – *Quantitative and Qualitative Disclosures about Market Risk* (Derivatives disclosures)
  - Item 407(e)(4) and (5) – Compensation Committee interlocks, Compensation Committee report

## Scaled Disclosures – an *a la carte* approach

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- May choose among the scaled disclosure for smaller reporting company and the larger company disclosure requirements on an item-by-item basis – essentially just voluntary reporting
- Must always comply with smaller reporting company item requirements if more rigorous
  - e.g., S-K Item 404
- No requirement to indicate whether complying with scaled disclosure requirements, requirements applicable to larger public companies, or a combination

## Scaled Disclosures – an *a la carte* approach (*cont'd*)

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- If company qualifies, it must check the box on the cover of its periodic reports indicating its status, whether or not it uses the scaled disclosure requirements
- Exchange Act Rule 12b-20 and anti-fraud considerations

# Expanded Form S-3 Eligibility

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- Form S-3 or Form F-3 is available for primary offerings of equity or debt securities, without regard to the size of the issuer's public float or the rating of the debt issued, *provided the issuer*:
  - meets the other registrant eligibility conditions for use of Form S-3 or F-3;
  - has a class of common equity securities listed and registered on a national securities exchange; and
  - sells no more than the equivalent of 1/3 of its public float in primary offerings over any 12 calendar month period

# Expanded Form S-3 Eligibility (*cont'd*)

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- Form S-3 not available for shell companies
- Public float =
  - (i) last sale price or average bid/ask, multiplied by
  - (ii) number of shares held by non-affiliates
- Sale amount can increase if public float increases or decreases if public float decreases