

Topic: Determining when a large accelerated filer must file the financial statements of a 50 percent or less owned person under Regulation S-X Rule 3-09(b)(1)

Background:

In the SEC's final rule, Revisions to Accelerated Filer Definition and Accelerated Deadlines for Filing Periodic Reports (Release No. 33-8644, 34-52989), the SEC generally made conforming changes to the guidance in S-X Rule 3-09(b) related to the due dates for separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons ("the other entity"). Specifically, the SEC amended S-X Rule 3-09(b)(3) and (4) to conform the due dates when the other entity has a fiscal year end after the fiscal year end of the registrant. In those circumstances, the due date of the financial statements of the other entity depends on whether it is a large accelerated filer, an accelerated filer, or a non-accelerated filer (i.e., "all other registrants").

The adopting release for the final rule indicated that S-X Rule 3-09 would be amended in a manner similar to the amendments made to Rule 3-09 when the accelerated filing deadlines were first adopted in 2002. Section III. C. included the following statement:

In the proposing release, we proposed to make the same types of conforming changes to Rules 3-01, 3-09 and 3-12 of Regulation S-X that we made when we first adopted the accelerated filing deadlines in 2002.

The adopting release for the adoption of original rule on accelerated filing deadlines (Release No. 33-8128; 34-46464) included the following as it relates to filing deadlines for S-X Rule 3-09 financial statements:

As part of our conforming amendments, we are amending Rule 3-09 of Regulation S-X to address these concerns. Separate financial statements of subsidiaries not consolidated and 50% or less owned persons required by Rule 3-09 of Regulation S-X will not be accelerated for inclusion in a company's annual report on Form 10-K if the subsidiary or 50% or less owned person is not an accelerated filer. In that instance, the financial statements of the subsidiary or 50% or less owned person can be filed by amendment within the existing time periods. In addition, we are making conforming amendments to still provide companies with additional time to file the required financial statements if the fiscal years of the investor registrant and the subsidiary or 50% or less owned person differ.

However, S-X Rule 3-09 (b)(1) was not conformed to address the due date when the other entity has a fiscal year that ends on or before the fiscal year end of the registrant. As it reads currently, S-X Rule 3-09 (b)(1) states:

If the registrant is an *accelerated filer* (as defined in §240.12b-2 of this chapter) but the 50 percent or less owned person is not an *accelerated filer*, the required financial

statements may be filed as an amendment to the report within 90 days, or within six months if the 50 percent or less owned person is a foreign business, after the end of the registrant's fiscal year. [emphasis added]

Exchange Act Rule 12b-2 contains separate definitions of “accelerated filer” and “large accelerated filer.” As defined, large accelerated filers are not simply a subset of accelerated filers.

S-X Rule 3-09 (b)(1) does not address all of the potential combinations of the filing statuses of registrants and other entities, as illustrated in the table below:

Registrant: Other Entity:	Large Accelerated	Accelerated	Non-Accelerated
Large Accelerated	No accommodation necessary	No accommodation necessary	No accommodation necessary
Accelerated	?	No accommodation necessary	No accommodation necessary
Non-Accelerated	?	Accommodation provided in S-X Rule 3-09 (b)(1)	No accommodation necessary

When the due date of the other entity coincides or precedes the due date of the registrant, no accommodation is needed under S-X Rule 3-09. In those circumstances, the financial statements required under S-X Rule 3-09 can be filed with, or incorporated by reference into, the annual report of the registrant as of its original due date.

However, S-X Rule 3-09(b)(1) does not specifically address any accommodation when the registrant is a large accelerated filer but the other entity is either an accelerated filer or a non-accelerated filer. Based on the accommodations adopted in S-X Rule 3-09(b)(3) and (4), it would appear that a similar accommodation should be available for large accelerated filers under S-X Rule 3-09(b)(1). This accommodation might call for a supplemental sentence in S-X Rule 3-09(b)(1), similar to the following:

If the registrant is a large accelerated filer (as defined in §240.12b-2 of this chapter) but the 50 percent or less owned person is not a large accelerated filer, the required financial statements may be filed as an amendment to the report within 75 days if the 50 percent or less owned person is an accelerated filer (as defined in §240.12b-2 of this chapter), within 90 days if the 50 percent or less owned person is neither a large accelerated filer nor an accelerated filer, or within six months if the 50 percent or less owned person is a foreign business, after the end of the registrant's fiscal year.

Under that interpretation, the accommodations under S-X Rule 3-09(b)(1) would be as follows¹:

Registrant: Other Entity:	Large Accelerated	Accelerated	Non-Accelerated
Large Accelerated	No accommodation necessary	No accommodation necessary	No accommodation necessary
Accelerated	Filed within 75 days	No accommodation necessary	No accommodation necessary
Non-Accelerated	Filed within 90 days	Filed within 90 days	No accommodation necessary

Issue/Question:

Do large accelerated filers receive any accommodation under S-X Rule 3-09(b)(1) where the other entity is either an accelerated filer or a non-accelerated filer?

View A:

As indicated in the final rule's adopting release, the SEC intended to provide an accommodation to all situations where the registrant is subject to shorter filing deadlines than the other entity. Under S-X Rule 3-09(b)(1), the reference to the registrant as an

¹ With respect to foreign businesses, S-X Rule 3-09(b)(1) would require the financial statements to be filed within 6 months after the end of the registrant's fiscal year.

“accelerated filer” should be interpreted to include both accelerated filers and large accelerated filers. Further, the reference to the other as “not an accelerated filer” should be interpreted to include other entities that are accelerated filers when the registrant is a large accelerated filer. Under the accommodation of S-X Rule 3-09(b)(1), the due date of the financial statements of the other entity depends on whether the other entity is an accelerated filer (75 days), neither a large accelerated filer nor an accelerated filer (90 days), or a foreign business (six months).

View B:

S-X Rule 3-09(b)(1) should be read literally. Accordingly, no accommodation is afforded to large accelerated filers. Large accelerated filers must ensure that the financial statements of the other entity are available timely for their purposes.

Committee Recommendation:

The Committee recommends View A, and suggests that the SEC make conforming changes to S-X Rule 3-09(b)(1).

Staff Response:

The staff agrees with View A and noted that technical corrections are in the process of being made to the final rules.

Excerpt from 210.3-09 Separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons. (as amended)

(a) If any of the conditions set forth in §210.1-02(w), substituting 20 percent for 10 percent in the tests used therein to determine a significant subsidiary, are met for a majority-owned subsidiary not consolidated by the registrant or by a subsidiary of the registrant, separate financial statements of such subsidiary shall be filed. Similarly, if either the first or third condition set forth in §210.1-02(w), substituting 20 percent for 10 percent, is met by a 50 percent or less owned person accounted for by the equity method either by the registrant or a subsidiary of the registrant, separate financial statements of such 50 percent or less owned person shall be filed.

(b) Insofar as practicable, the separate financial statements required by this section shall be as of the same dates and for the same periods as the audited consolidated financial statements required by §§210.3-01 and 3-02. However, these separate financial statements are required to be audited only for those fiscal years in which either the first or third condition set forth in §210.1-02(w), substituting 20 percent for 10 percent, is met. For purposes of a filing on Form 10-K (§249.310 of this chapter):

(1) If the registrant is an accelerated filer (as defined in §240.12b-2 of this chapter) but the 50 percent or less owned person is not an accelerated filer, the required financial statements may be filed as an amendment to the report within 90 days, or within six months if the 50 percent or less owned person is a foreign business, after the end of the registrant's fiscal year.

(2) If the fiscal year of any 50 percent or less owned person ends within the registrant's number of filing days before the date of the filing, or if the fiscal year ends after the date of the filing, the required financial statements may be filed as an amendment to the report within the subsidiary's number of filing days, or within six months if the 50 percent or less owned person is a foreign business, after the end of such subsidiary's or person's fiscal year.

(3) The term registrant's number of filing days means:

- (i) 60 days (75 days for fiscal years ending before December 15, 2006) if the registrant is a large accelerated filer;
- (ii) 75 days if the registrant is an accelerated filer; and
- (iii) 90 days for all other registrants.

(4) The term subsidiary's number of filing days means:

- (i) 60 days (75 days for fiscal years ending before December 15, 2006) if the 50 percent or less owned person is a large accelerated filer;
- (ii) 75 days if the 50 percent or less owned person is an accelerated filer; and
- (iii) 90 days for all other 50 percent or less owned persons.

