

U.S. SEC STAFF ISSUES FAQs RELATING TO EXTENSION OF FILING DEADLINES DUE TO COVID-19

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Late Monday, the SEC Staff published FAQs addressing several questions relating to the SEC's March 25th Order extending filing relief for public companies unable to meet a filing deadline because of circumstances related to COVID-19.

- *Disclosure Required to Utilize Filing Extension (FAQ 1).* To utilize the filing extension, a reporting company must disclose in the Form 8-K (or 6-K):
 - that it is relying on the Order;
 - a brief description of the reasons why the company could not make the filing on a timely basis;
 - the estimated filing date;
 - a company-specific risk factor or factors explaining the impact, if material, of COVID-19 on its business; and
 - if the reason the report cannot be timely filed relates to the inability of a third party to provide any required opinion, report or certification, the filing should include as an exhibit a statement signed by the third party specifying the reasons they were unable to provide the document by the original due date.

When the delayed report is eventually filed, the company must disclose that it is relying on the Order and state the reasons why it could not file the report on a timely basis.

- *Shelf-Takedowns Permitted If Required Information Included in Prospectus (FAQ 2).* A company that has utilized the Order to delay filing current or periodic reports can continue to complete shelf-takedowns from an effective shelf registration statement if it determines the prospectus complies with Section 10(a) of the Securities Act (i.e., the prospectus contains all required information). In particular:

- Section 10(a)(3) requires that a prospectus used more than nine months after the effective date of the registration statement must include information as of a date not more than sixteen months prior to such use – to the extent known or obtainable without unreasonable effort or expense; and
- Pursuant to the undertakings, any facts or events arising after the effective date of the registration statement which, individually or in the aggregate, represent a fundamental change in the information in the registration statement, must be included (or incorporated by reference) in the prospectus.

The staff notes that companies and their advisors are responsible for the accuracy and completeness of shelf prospectuses and that they should consider when it is appropriate to update them in light of these requirements.

- *Time for Reassessing S-3 Eligibility (FAQ 3).* A company must reassess its Form S-3 eligibility when it files the Form 10-K that serves as a Section 10(a)(3) update. If properly relying on the Order, the due date for filing the Form 10-K is extended and the company must reassess its eligibility when it files the Form 10-K – including that the company has filed all the material required to be filed pursuant to Section 13, 14 or 15(d) for a period of at least twelve calendar months immediately preceding the Section 10(a)(3) update. The Form 10-K will be considered timely if all the conditions of the Order were met.
- *Eligibility to File New Registration Statement (FAQ 3).* If a company is properly relying on the Order, it remains eligible to file a new Form S-3 even if the delayed report has not yet been filed. The company will no longer be considered current and timely, and will lose S-3 eligibility, if it fails to file the required report by the extended due date.

The SEC staff invites companies “with compelling and well-documented facts” to contact them to discuss their specific capital raising needs. However, they note that they will be unlikely to accelerate the effective date of a Form S-3 until any information required to be included is filed.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

MEET THE TEAM



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