

SEC Issues FAQs Relating to COVID-19 Reporting Relief

May 6, 2020

On Monday, the SEC staff issued four [Frequently Asked Questions](#) (“FAQs”) relating to its March 25th [order](#) (the “COVID-19 Order”) which extended filing deadlines for companies who require additional time to comply with such deadlines as a result of COVID-19 (as discussed in our previous [memo](#).) The FAQs reiterate the disclosures required for relief pursuant to the March 25th order and also clarify the effect of the extended filing deadlines on the use of Form S-3.

The following is a summary of the FAQs:

- *Required Disclosure for Relief:* In order to take advantage of an extended filing under the COVID-19 Order, a company must disclose in its Form 8-K (or Form 6-K):
 - that it is relying on the COVID-19 Order;
 - a brief description of the reasons why the company could not file the subject report, schedule or form on a timely basis;
 - the estimated date by which the report, schedule or form is expected to be filed; and
 - a company-specific risk factor or factors explaining the impact, if material, of COVID-19 on its business.

If the company cannot file the report in a timely manner because a person, other than the company, is unable to furnish a required opinion, report or certification, the company must also attach a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the original due date of such report as an exhibit to the Form 8-K or Form 6-K.

In the report, schedule or form filed on a delayed basis pursuant to the COVID-19 Order, the company must disclose that it is relying on the order and state the reasons why it could not file such report, schedule or form on a timely basis.

- *Takedowns from Effective Registration Statement:* A company may continue to conduct takedowns from an already effective shelf registration statement when it has not filed its Form 10-K (or other periodic report) in reliance on the COVID-19 Order as long as the company continues to comply with Section 10(a) of the Securities Act. Section 10(a)(3) requires that a prospectus used more than nine months after the effective date of the registration statement contain information as of a date no more than 16 months prior to use, so far as such information is known or can be furnished by the company without unreasonable effort or expense. In addition, Rule 415 requires an issuer to reflect in the prospectus 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 set forth in the registration statement. Although Section 10(a)(3) may permit registrants relying on the COVID-19 Order to conduct a takedown using a prospectus that contains information older than sixteen months in the event that updated information cannot be furnished “without unreasonable effort or expense,” the COVID-19 Order does not provide relief from the requirements of Section 10(a)(3) and the SEC staff cautioned that companies and their legal advisers will need to determine when it is appropriate to update the prospectus. We expect that companies and their legal and investment banking advisers will carefully consider what information is available and whether there is sufficient information about the company’s current performance and the impact of COVID-19 on its performance and liquidity.

- *Reassessing Form S-3 Eligibility:* After the initial filing, a company's eligibility to use Form S-3 is reassessed at the time the company files its Form 10-K, which serves as a Section 10(a)(3) update. Pursuant to the FAQs, when a company properly relies on the COVID-19 Order, the due date for filing the Form 10-K is extended and the company will reassess its eligibility when it files its Form 10-K at a later date. At the time it files the Form 10-K, the company must meet all of eligibility requirements of Form S-3, including the requirement that the company has made all filings required under Section 13, 14 or 15(d) for at least 12 calendar months immediately preceding the Section 10(a)(3) update. The Form 10-K will be considered timely if all the conditions of the COVID-19 Order are met with respect to the filing.
- *Filing a New Form S-3:* A company may file a new Form S-3 even if it has not filed a required periodic report pursuant to relief granted under the COVID-19 Order. As long as the Form 8-K disclosing reliance on the order is properly furnished, the staff will consider the company to be current and timely in its reporting. The company will no longer be considered current and timely, however, if it fails to file the required report by the due date as extended by the COVID-19 Order. However, companies relying on the COVID-19 Order should note that the staff will be unlikely to accelerate the effective date of a Form S-3 until such time as any information required to be included in the Form S-3 is filed.

Although it is not specifically referenced in the FAQs, we believe the same principles would apply to Form F-3 as well.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

Maurice Blanco	212 450 4086	maurice.blanco@davispolk.com
Joseph A. Hall	212 450 4565	joseph.hall@davispolk.com
Michael Kaplan	212 450 4111	michael.kaplan@davispolk.com
Nicholas A. Kronfeld	212 450 4950	nicholas.kronfeld@davispolk.com
James C. Lin	+ 852 2533 3368	james.lin@davispolk.com
Byron Rooney	212 450 4658	byron.rooney@davispolk.com
Sarah Solum	650 752 2011	sarah.solum@davispolk.com
Richard D. Truesdell, Jr.	212 450 4674	richard.truesdell@davispolk.com
Elizabeth S. Weinstein	212 450 3889	elizabeth.weinstein@davispolk.com

© 2020 Davis Polk & Wardwell LLP | 450 Lexington Avenue | New York, NY 10017

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's [privacy notice](#) for further details.