
COVID-19 Related FAQs

Division of Corporation Finance

Because these responses relate to unique circumstances arising from COVID-19, the staff is not including them within our Compliance and Disclosure Interpretations. The staff may supplement or amend these responses.^[1]

Covid-19 Order Questions

1. Question: What disclosure is required under the COVID-19 Order (Release No. 34-88465 (March 25, 2020) (“COVID-19 Order”))?

Answer: To take advantage of an extended filing deadline under the COVID-19 Order, a registrant must make certain prescribed disclosures in the Form 8-K (or Form 6-K, if applicable) and in the report, schedule or form that is filed on a delayed basis.

In the Form 8-K (or Form 6-K), the registrant must disclose (1) that it is relying on the COVID-19 Order; (2) a brief description of the reasons why the registrant could not file the subject report, schedule or form on a timely basis; (3) the estimated date by which the report, schedule or form is expected to be filed; and (4) a company-specific risk factor or factors explaining the impact, if material, of COVID-19 on the registrant’s business. If the reason the subject report cannot be filed timely relates to the inability of any person, other than the registrant, to furnish any required opinion, report or certification, the registrant must also attach, as an exhibit to the Form 8-K or Form 6-K, 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.

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

All of these disclosures are necessary to appropriately rely on the COVID-19 Order. [May 4, 2020]

Form S-3 Questions

1. Question: May a registrant continue to conduct takedowns using an already-effective registration statement while relying on the COVID-19 Order for a periodic report, including a Form 10-K?

Answer: Yes, if the registrant determines that the prospectus used complies with Section 10(a) of the Securities Act of 1933. Registrants that fully comply with the conditions of the COVID-19 Order may delay the filing of periodic reports required under the Exchange Act; however, the COVID-19 Order does not delay or exempt compliance with requirements for Securities Act registration statements. Section 10(a)(3) requires that when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense. In addition, shelf offerings pursuant to Rule 415 require an undertaking 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, registrants and their legal advisers will need to determine when it is appropriate to update the prospectus. Registrants are responsible for the accuracy and completeness of their disclosure. [May 4, 2020]

2. Question: With respect to an effective Form S-3, when must a registrant reassess its eligibility to remain on the form if it has relied on the COVID-19 Order to delay filing a Form 10-K that will serve as a Section 10(a)(3) update?

Answer: Under Securities Act Rule 401(b), if an amendment to a registration statement and prospectus is filed for the purpose of meeting the requirements of Section 10(a)(3) of the Act, the form and contents of such an amendment must conform to the applicable rules and forms as in effect on the filing date of such amendment. A registrant is therefore required to reassess its Form S-3 eligibility when it files the Form 10-K that serves as a Section 10(a)(3) update. When a registrant properly relies on the COVID-19 Order, the due date for filing the Form 10-K is extended and the registrant must reassess its eligibility when it files the Form 10-K. At the time of filing the Form 10-K, the registrant must meet all of the requirements of Form S-3, including that the registrant 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, to remain on Form S-3. The Form 10-K will be considered timely if all the conditions of the COVID-19 Order are met with respect to the filing. Refer to the Commission's Press Release, available at: <https://www.sec.gov/news/press-release/2020-73>. [May 4, 2020]

3. Question: Is a registrant relying on the COVID-19 Order to delay a required filing eligible to file a new Form S-3 registration statement between the original due date of a filing and the extended due date, and will the staff accelerate the effectiveness of registration statements that do not contain all required information?

Answer: Between the original due date of a required filing and the due date as extended by the COVID-19 Order, a registrant may file a new Form S-3 registration statement even if the registrant has not filed the required periodic report prior to the filing of the registration statement. The staff will consider the registrant to be current and timely in its Exchange Act reporting if the Form 8-K disclosing reliance on the COVID-19 Order is properly furnished. The registrant will no longer be considered current and timely, and will lose eligibility to file new registration statements on Form S-3, if it fails to file the required report by the due date as extended by the COVID-19 Order. Registrants with compelling and well-documented facts may contact the staff to discuss their specific capital raising needs. However, registrants 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. [May 4, 2020]

[1] This statement represents the views of the staff of the Division of Corporation Finance. It is not a rule, regulation, or statement of the Securities and Exchange Commission ("Commission"). The Commission has neither approved nor disapproved its content. This statement, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

Modified: May 4, 2020