Friday, May 8, 2020

On May 4, the Securities and Exchange Commission’s Division of Corporation Finance (the Division) issued four frequently asked questions (FAQs) related to the SEC’s conditional relief order (the Order) that was issued in the wake of the Coronavirus Disease 2019 (COVID-19). As detailed in the March 27, 2020 edition of the Corporate & Financial Weekly Digest, the Order gives publicly traded companies an additional 45 days to file certain reports, including most periodic or current reports, that would have been due during the period of March 1-July 1, if the company is unable to meet a filing deadline due to circumstances related to COVID-19. In order to take advantage of the relief, an issuer must, among other things, issue a current report on Form 8-K or Form 6-K, as applicable, with a summary of why the relief is necessary in the particular circumstances.

The FAQs address the following issues:

The first FAQ reiterates that a reporting company availing itself of the relief under the Order must issue a current report on Form 8-K or Form 6-K, as applicable, with (1) a statement that the filer is relying on the Order; (2) a brief description of why the relief is necessary in the particular circumstances; (3) the estimated date by
which the company expects to make the filing; (4) one or more company-specific risk factors explaining the impact, if material, of COVID-19 on its business; and (5) if the reason the filing cannot be timely made relates to the inability of any person, other than the registrant, to furnish a required opinion, report or certification, the Form 8-K or Form 6-K, as applicable, shall include as an exhibit 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 deadline for such report to be filed.

The remaining FAQs address the interplay between reliance on the Order and its impact on a company's ability to file and otherwise use a registration statement on Form S-3. Specifically, the first Form S-3-related FAQ clarifies that a registrant may conduct shelf takedowns using an already-effective registration statement on Form S-3, even if the registrant is relying on the Order with respect to the filing of periodic reports under the Securities Exchange Act of 1934 (the Exchange Act). However, such a registrant will need to determine that the prospectus complies with Section 10(a)(3) of the Securities Act of 1933 (the Securities Act), which requires that, when a prospectus is used more than nine months after the effective date of the registration statement, the information contained in the prospectus must be as of a date not more than 16 months prior to its use, if the information is known to the user of the prospectus or can be furnished by the user without unreasonable effort or expense. The FAQ reminds registrants that, even if a registrant is able to conduct a takedown using a prospectus that contains information older than 16 months, if such information cannot be furnished without reasonable effort or expense, the registrant will need to determine when it is necessary or appropriate to update the prospectus to ensure the accuracy and completeness of its disclosure.

The second Form S-3-related FAQ provides guidance as to when a registrant that has an effective Form S-3 must assess its Form S-3 eligibility, if that registrant relies on the Order. Rule 401(b) under the Securities Act provides that, if an amendment to a registration statement and prospectus is filed to meet the requirements of Section 10(a)(3) of the Securities Act, as described above, the form and contents of the amendment must meet the requirements under the applicable rules and forms as in effect on the date the amendment is filed. For that reason, a registrant that properly relies on the Order must reassess its Form S-3 eligibility on the date when it files the Form 10-K that updates the Form S-3 in order to comply with Section 10(a)(3) of the Securities Act, including to confirm that it has made all required filings pursuant to Section 13, 14 or 15(d) of the Exchange Act for at least 12 months immediately preceding the filing of the Form 10-K. The Form 10-K will be considered timely, if all of the conditions to rely upon the Order are met with respect to the filing.

The third Form S-3-related FAQ clarifies that even if a registrant is relying on the Order to delay a required filing, that registrant may still file a new registration statement on Form S-3 during the period between the original due date of the required filing and the due date as extended by the Order, even if the registrant has not filed the required report prior to filing the registration statement. The Division will consider the registrant to be current and timely in its Exchange Act reporting for purposes of the registrant’s eligibility to use Form S-3, so long as the registrant issues a Form 8-K or a Form 6-K, as applicable, that contains the disclosure required to rely upon the Order. However, a registrant will no longer be considered current and timely for Form S-3 eligibility purposes, if it fails to file the required report by
the extended due date for such filing. The FAQ reminds registrants relying on the Order that the staff of the Division will be unlikely to accelerate the effective date of a Form S-3, until any information required to be included in the Form S-3 is filed and encourages registrants with “compelling and well-documented facts” to contact the Division to discuss their specific capital raising needs.


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