

SEC Staff Publishes COVID-19 Related FAQs

I. Background

On March 25, 2020, the Securities and Exchange Commission (the “SEC”) issued Order No. 34-88465 (the “Order”), which extended the deadlines for certain filings by reporting companies where the companies’ inability to timely file is due to circumstances related to the continuing COVID-19 pandemic.¹ We previously summarized the Order in a March 30, 2020 memorandum, available [here](#), as well as the subsequent compliance and disclosure interpretations regarding the Order, available [here](#). On May 4, 2020, the staff of the Division of Corporation Finance (the “Staff”) issued a series of frequently asked questions (“FAQs”) relating to the Order.²

II. COVID-19 Disclosure Questions

Regarding the disclosure required to take advantage of the extended filing deadlines under the Order, the first FAQ reiterates the requirements for the Form 8-K (or Form 6-K, as applicable) and the subsequent delayed filing itself. In the Form 8-K or Form 6-K, a registrant must disclose (1) that the registrant is relying on the Order, (2) its reasons for not being able to file timely, (3) the estimated date the report is expected to be filed, and (4) a company-specific risk factor describing the impact, if material, of COVID-19 on the registrant’s business. In the delayed filing itself, a registrant must disclose reliance on the Order and the reasons for the delay in filing.

III. Form S-3 Questions

A. Shelf Takedowns

According to the second FAQ, a registrant may continue to conduct shelf takedowns using an already-effective Form S-3 registration statement while relying on the Order to delay a filing deadline for a periodic report (including a Form 10-K), provided that the prospectus complies with the requirements of Section 10(a) of the Securities Act of 1933, as amended (the “Securities Act”). Pursuant to Section 10(a)(3) of the Securities Act, once a prospectus is more than nine months old (measured from the date of effectiveness of the registration statement), the information contained therein cannot be more than sixteen months out of date (provided that such information is known to the user of the prospectus or can be reasonably furnished by the user). Additionally, the undertakings required by Rule 415 under the Securities Act require that the prospectus must reflect any fundamental changes to the information set forth therein, which may require that the registrant update the prospectus. The FAQ also notes that the Order only applies to filings required by the Securities Exchange Act of 1934, as amended (the “Exchange Act”). Registrants cannot rely upon the Order to extend the deadlines of Securities Act filings.

B. Assessing Form S-3 Eligibility

In the third FAQ, the Staff notes that each time a Section 10(a)(3) update (such as a Form 10-K) to a registration statement is filed, a registrant must reassess its continuing eligibility under its currently filed Form S-3. Provided that a registrant properly relies upon the Order to extend its Form 10-K filing deadline, a registrant need not reassess its eligibility until the Form 10-K is actually filed. In order to remain eligible to use its current Form S-3, the registrant must have met the requirements under Form S-3 at the time of the Section 10(a)(3) filing,

¹ Order Under Section 36 of the Securities Exchange Act of 1934 Modifying Exemptions from the Reporting and Proxy Delivery Requirements for Public Companies, available at <https://www.sec.gov/rules/exorders/2020/34-88465.pdf>.

² COVID-19 Related FAQs, available at https://www.sec.gov/corpfin/covid-19-related-faqs#_edn1.

including that all material required to be filed under Sections 13, 14 or 15(d) of the Exchange Act has been filed for at least twelve months prior to the Section 10(a)(3) filing.

C. New Form S-3 and its Effectiveness

The last FAQ states that a registrant may file a new Form S-3 during the period between the original due date of a required filing and the extended deadline of that filing under the Order, even if the registrant has not yet submitted the delayed filing. The registrant will be considered current and timely in its reporting provided that the Form 8-K required by the Order is properly filed. However, if the registrant does not submit the required filing by its extended deadline, it will no longer be considered current and timely and will not be eligible to file any new registration statement on its Form S-3. The FAQ acknowledges that there may be extenuating circumstances that the registrant can bring to the Staff's attention, suggesting there may be some leeway on these points. As to whether the Staff will consider accelerating the effectiveness of registration statements that do not include all the information required under Section 10(a), the FAQ notes that the Staff is unlikely to do so until the required information is filed.

IV. Conclusion

The Staff continues to provide guidance regarding the effects of the COVID-19 pandemic on various filing requirements under the Securities Act and the Exchange Act. Although the latest FAQs are not binding, they provide helpful insight into the Staff's approach to these matters, particularly as to capital raising under Form S-3.

* * *

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Kimberly Petillo-Décosard at 212.701.3265 or kpetillo-decosard@cahill.com; or Emma O'Hara at 212.701.3150 or eohara@cahill.com or email publications@cahill.com.