

SEC Staff Issues Clarifying Interpretations Regarding Recent Filing Deadline Extensions Related to COVID-19 (UPDATE)

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 our March 30, 2020 memorandum, available [here](#). On March 31, 2020, the staff of the SEC’s Division of Corporation Finance (the “Staff”) published two compliance and disclosure interpretations (“C&DIs”) regarding the Order and its relationship to Rule 12b-25 under the Securities Exchange Act of 1934, as amended.² On April 6, 2020, the Staff published an additional C&DI regarding the Order and the instructions to Form 10-K that permit certain information to be incorporated by reference from a company’s proxy statement.³

II. New Compliance and Disclosure Interpretations

The new C&DIs clarify (1) two separate points regarding the interplay between the Order and Rule 12b-25, both of which apply to Form 10-K and 10-Q filings, and (2) the relationship between the Order and the instructions to Form 10-K concerning the incorporation by reference of certain information from the company’s proxy or information statement:

- **First**, C&DI 135.12 states that, if a company believes that it will be unable to file its Form 10-K or 10-Q on a timely basis due to the COVID-19 crisis and is not sure whether it will be able to file within the Rule 12b-25 timeframes, it should furnish the Form 8-K or 6-K, as applicable, required by the Order by the later of either: March 16, 2020 or the original due date of the report, in order to avail itself of the 45 day period provided for in the Order. A company may not rely on the Order if it has only filed a Form 12b-25 by such time because it will not have met the conditions specified in the Order.
- **Second**, C&DI 135.13 clarifies that, even if a company has previously filed a Form 12b-25 it cannot subsequently rely on the time extensions under the Order unless it has already furnished the required Form 8-K or Form 6-K in a timely manner as provided in the Order. If the company properly furnishes a Form 8-K or 6-K in accordance with the Order and still cannot file the report on or before the extended deadline, it can subsequently rely on Rule 12b-25 and file a Form 12b-25.

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 Question 135.12 and Question 135.13, available at <https://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps.htm>. A proper Form 12b-25 filing provides companies with an additional 15 days to file a Form 10-K and an additional five days to file a Form 10-Q where the reasons for the delay cannot “be eliminated without unreasonable effort or expense.”

³ Question 104.18, available at <https://www.sec.gov/divisions/corpfin/guidance/exchangeactforms-interps.htm#104.18>. Form 10-K allows for certain information to be incorporated by reference from a company’s proxy or information statement (or, in certain cases, an amendment to its Form 10-K), provided such information is filed within 120 days of the end of the relevant fiscal year.

- **Third**, C&DI 104.18 states that if a company has timely filed its Form 10-K (excluding the information responsive to Part III of Form 10-K (the “Part III Information”)) without relying on the Order, it may still file a Form 8-K in accordance with the Order and thereby extend the 120-day deadline to file its Part III Information by 45 days (provided the deadline falls within the period of relief set forth in the Order). If a company has not yet filed its Form 10-K, it can rely upon the Order for both the Form 10-K and its Part III Information by filing a single Form 8-K containing the disclosure required by the Order, which must indicate that the Part III Information will be incorporated by reference and provide an estimated date of filing for the Part III Information. The 120-day deadline to file the Part III Information would then be extended by 45 days. Lastly, if a company has already filed a Form 8-K indicating its reliance on the Order solely with respect to its Form 10-K, then the company must either include the Part III Information in its Form 10-K or timely file a second Form 8-K in order to avail itself of the Order’s extended 45-day filing period with respect to the Part III information.

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