

COVID-19: SEC ISSUES COVID-19 ORDER FAQs

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U.S. Capital Markets Alert

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On March 25, 2020, the Securities and Exchange Commission (“SEC”) issued an [order](#) (the “Order”) extending conditional relief to reporting companies affected by the novel coronavirus disease (“COVID-19”). The Order provides reporting companies with an additional 45 days to file certain disclosure reports, schedules, or forms that would otherwise have been due on or before July 1, 2020.

On May 4, 2020, the SEC issued four [FAQs](#) to provide reporting companies with additional guidance regarding the disclosures necessary to take advantage of the conditional relief provided by the Order and the implications of the use of the conditional relief by reporting companies on their ability to use existing and file new registrations statement on Form S-3. We previously analyzed the SEC's orders providing conditional relief to reporting companies affected by COVID-19 in the following client alerts available on the K&L Gates Hub: [COVID-19: SEC Announces Conditional Relief for Companies Affected by Coronavirus](#) and [COVID-19: SEC Extends Conditional Relief and Provides Disclosure Guidance](#).

DISCLOSURE REQUIRED BY COVID-19 ORDER

The SEC's first FAQ provides reporting companies further guidance regarding what disclosure is required by the Order to take advantage of the extended filing deadline. A reporting company taking advantage of the conditional relief must disclose on Form 8-K (or Form 6-K): (1) that it is relying on the Order; (2) a brief description of the reasons why the reporting company could not file the delayed 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 material impact of COVID-19 on its business.

If the applicable filing cannot be timely made due to the inability of any person, other than the reporting company, to furnish any required opinion, report, or certification, the reporting company 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 filing. Additionally, in the report, schedule, or form filed on a delayed basis pursuant to the Order, the reporting company must disclose that it is relying on the Order and state the reasons why it could not timely file such report, schedule, or form.

GUIDANCE REGARDING REGISTRATION STATEMENTS ON FORM S-3 Takedowns from an Already Effective Shelf Registration Statement

The SEC's second FAQ makes clear that reporting companies taking advantage of the conditional relief provided by the Order may continue to conduct takedowns using an already effective shelf registration statement so long as they fully comply with the Order. It is important to note that the Order does not delay or exempt compliance

with the Securities Act requirements for registration statements, including Section 10(a)(3), which 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 16 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.

Reassessing Form S-3 Eligibility

A reporting company must reassess its eligibility to use an effective Form S-3 each time it files a Form 10-K because such filing serves as a Section 10(a)(3) update of the registration statement. To remain eligible to use the Form S-3, a reporting company must meet all of the requirements of Form S-3 at the time it files its Form 10-K, including the requirement that it has filed all the material required to be filed pursuant to Section 13, 14, or 15(d) for a period of at least 12 calendar months immediately preceding the Section 10(a)(3) update. The SEC's third FAQ clarifies that a delayed Form 10-K filing will be considered timely and will not affect a reporting company's Form S-3 eligibility if all of the conditions of the Order are met with respect to such filing.

Eligibility to File a New Form S-3

The SEC's fourth FAQ provides that a reporting company taking advantage of the conditional relief provided by the Order may file a new registration statement on Form S-3 even if such company has not filed the required periodic report prior to the filing of the registration statement so long as such company has properly filed a Form 8-K disclosing reliance on the Order. A reporting company will lose its Form S-3 eligibility if it fails to file the required report by the due date as extended by the Order. The FAQ notes that reporting companies with compelling and well-documented facts may contact the staff to discuss their specific capital raising needs, but the staff is 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.

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