

Goodwin Alerts

May 05, 2020

SEC Publishes COVID-19 FAQs

by John O. Newell

The staff (“Staff”) of the Division of Corporation Finance of the Securities and Exchange Commission (“SEC”) has published [interpretive responses](#) to four questions (“FAQs”) related to compliance with the SEC’s [COVID-19 Order](#) (“COVID-19 Order”), discussed in an earlier [Goodwin client alert](#). One of the FAQs addresses what a company must do to comply with the conditions of the COVID-19 Order in order to extend the due date for its Form 10-K report or other reports required by the Securities Exchange Act of 1934 (“Exchange Act”). The other three FAQs address the effect of reliance on the COVID-19 Order to extend the due date of a Form 10-K report on a company’s eligibility to use an existing Form S-3 registration statement and to file a new Form S-3. The FAQs are similar to the Staff’s Compliance and Disclosure Interpretations in format, but have been published separately because of the “unique circumstances arising from COVID-19.”

Compliance with the COVID-19 Order. The first FAQ addresses the question “what disclosure is required under the COVID-19 Order?” The Staff response reiterates the Form 8-K disclosures that are required to satisfy the conditions of the COVID-19 Order, and concludes by stating that “[a]ll of these disclosures are necessary to appropriately rely on the COVID-19 Order.”

Form S-3 – Takedowns on Effective Form S-3 Registration Statement. The second FAQ addresses the question whether a company can “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?”

The Staff response makes two points. First, reliance on the COVID-19 Order extends the due date for a Form 10-K or other report, so as a technical matter a company may continue to use a prospectus containing information older than the 16-month limit of Section 10(a)(3) of the Securities Act of 1933 (“Securities Act”).

Second, although Section 10(a)(3) will not prevent a company from using a prospectus containing information more than 16 months old if the company is properly relying on the COVID-19 Order, the COVID-19 Order does not exempt a company from the other disclosure requirements of Section 10(a) and other sections of the Securities Act. As a result, a company that properly relies on the COVID-19 Order to offer and sell securities between the original due date for a Form 10-K report and the extended due date under the COVID-19 Order will need to review the prospectus and update the disclosure in the prospectus if necessary to comply with the disclosure requirements of the federal securities laws and the related SEC rules and regulations.

Form S-3 – Form S-3 Eligibility. The third FAQ addresses the question when must a company “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” to an effective Form S-3 registration statement?

The Staff response states that a company must reassess its Form S-3 eligibility, as required by Securities Act Rule 401, when it files its Form 10-K report that serves as a Section 10(a)(3) amendment to the Form S-3. Because the COVID-19 Order extends the due date for the Form 10-K report if the company complies with its conditions, the proper date for the company to reassess its eligibility to use Form S-3 is the date on which it files its Form 10-K report.

Form S-3 – Filing of New Form S-3 Registration Statements and Acceleration of Effectiveness. The fourth FAQ address two related questions: is a company that is relying on the COVID-19 Order to delay a the

filing of its Form 10-K report (or another required filing) eligible to file a new Form S-3 registration statement between the original due date of the report and the extended due date under the COVID-19 Order, and will the Staff accelerate the effectiveness of registration statements that do not contain all of the information required in the registration statement?

The Staff response states that if the company has properly furnished the Form 8-K containing the disclosure required by the COVID-19 Order, the Staff will consider the company both timely and current in its reporting under the Exchange Act, and therefore eligible to file a new Form S-3, as long as the company files the periodic report by the due date as extended by the COVID-19 Order. If the company does not file the report by the extended due date, it will no longer be considered timely and current, and will no longer be eligible to file a Form S-3 registration statement.

However, the Staff also indicates that although a company may be eligible to file a Form S-3 registration statement between the original due date for the Form 10-K or other required report and the due date as extended by the COVID-19 Order, 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,” presumably due to concerns about the adequacy of the disclosure contained in the prospectus or incorporated by reference from the company’s Exchange Act reports. The FAQ also indicates that companies with “compelling and well-documented facts” can contact the Staff to discuss the company’s specific capital-raising needs.

Visit Goodwin’s [Coronavirus Knowledge Center](#), where firm lawyers from across the globe are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

CONTACTS:

John O. Newell

Counsel

+1 617 570 1475

jnewell@goodwinlaw.com

© 2020 Goodwin Procter LLP. All rights reserved. This informational piece, which may be considered advertising under the ethical rules of certain jurisdictions, is provided with the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter LLP, Goodwin Procter (UK) LLP or their attorneys. Prior results do not guarantee similar outcome.

Goodwin Procter LLP is a limited liability partnership which operates in the United States and has a principal law office located at 100 Northern Avenue, Boston, MA 02210. Goodwin Procter (UK) LLP is a separate limited liability partnership registered in England and Wales with registered number OC362294. Its registered office is at 100 Cheapside, London EC2V 6DY. A list of the names of the members of Goodwin Procter (UK) LLP is available for inspection at the registered office. Goodwin Procter (UK) LLP is authorized and regulated by the Solicitors Regulation Authority.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this informational piece (including any attachments) is not intended or written to be used, and may not be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.