

SEC Releases FAQs Relating to Use of Form S-3 Registration Statement in Light of COVID-19 Order

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On May 4, 2020, the SEC issued three FAQs relating to the unique circumstances arising from COVID-19 and the use of Form S-3 registration statement. The SEC's Division of Corporation Finance is not including them within their Compliance and Disclosure Interpretations since these responses relate to unique circumstances arising from COVID-19. The staff may supplement or amend these responses.

The FAQs should provide clarity to registrants who would like to conduct takedowns off of an existing shelf registration statement or would like to file a new registration statement on Form S-3 but have relied on or are planning to rely on the SEC's COVID-19 Order (Release No. 34-88465 (March 25, 2020) (the "COVID-19 Order")), which subject to certain conditions, extends the filing deadline for public company reports in recognition of disruptions caused by COVID-19.

The responses to the three Form S-3 FAQs clarify the requirements and circumstances whereby registrants:

- - can conduct takedowns using an already-effective registration statement while relying on the COVID-19 Order for a delayed periodic report;
 - must reassess Form S-3 eligibility when they file the Form 10-K that serves as a Section 10(a)(3) update, even if they have relied on the COVID-19 Order to delay filing a Form 10-K (or a Form 40-F or a Form 20-F annual report, as applicable); and
 - would be eligible to file a new Form S-3 registration statement between the original due date of a filing and the due date as extended under the COVID-19 Order (with the staff noting that there would, however, be no acceleration of registration statements that do not contain all required information).

In the first FAQ response, the staff affirm that registrants may continue to conduct takedowns using an already-effective Form S-3 shelf registration statement while relying on the COVID-19 Order to delay the filing of a periodic report, including a Form 10-K (or a Form 40-F or a Form 20-F annual report, as applicable), provided that the registrant

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determines that the prospectus used complies with Section 10(a) of the Securities Act. The staff highlight that while the COVID-19 Order grants registrants additional time to file the required periodic reports under the Exchange Act, it does not delay or exempt compliance with requirements for Securities Act registration statements. In other words, compliance with all the requirements under Section 10(a) is still expected, with the relevant aspect here being compliance with Section 10(a)(3). Section 10(a)(3) 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 sixteen 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. In addition, shelf offerings pursuant to Rule 415 under the Securities Act require an undertaking to reflect in the prospectus any facts or events arising after the effective date of the registration statement which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Therefore, although Section 10(a)(3) may permit registrants relying on the COVID-19 Order to conduct a takedown using a prospectus that contains information older than sixteen months, in the event that updated information cannot be furnished without unreasonable effort or expense, the staff note that registrants and their legal advisers will need to determine whether the older disclosure is accurate and complete and when it is appropriate to update the prospectus.

In the second FAQ response, the staff clarify that the Form 10-K (or the Form 40-F or Form 20-F annual report, as applicable) that is filed late will be considered timely, for the purposes of reassessing S-3 eligibility, if all the conditions of the COVID-19 Order are met with respect to the filing. The staff (i) advise that for a registrant that properly relies on the COVID-19 Order, the due date for filing the Form 10-K (or the Form 40-F or Form 20-F annual report, as applicable) is extended and the registrant must reassess its eligibility when it files the Form 10-K (or the Form 40-F or Form 20-F annual report, as applicable), and (ii) note that a registrant is required to reassess its Form S-3 eligibility when it files the Form 10-K (or the Form 40-F or Form 20-F annual report, as applicable) that serves as a Section 10(a)(3) update. This FAQ is responsive to the requirement that, in order to remain on Form S-3, the registrant must continue to meet all of the requirements of Form S-3, including that the registrant has filed all the material required to be filed pursuant to Section 13, 14 or 15(d) for a period of at least twelve calendar months immediately preceding the Section 10(a)(3) update. Under Securities Act Rule 401(b), if an amendment to a registration statement and prospectus is filed for the purpose of meeting the requirements of Section 10(a)(3) of the Securities Act, the form and contents of such an amendment must conform to the applicable rules and forms as in effect on the filing date of such amendment. Based on this response, registrants can be assured their late filing (in accordance with the COVID-19 Order) will not by itself disqualify them from using their shelf for a takedown.

In the third FAQ response, the staff clarify that a registrant may file a new Form S-3 registration statement even if the registrant has not filed the required periodic report prior to the filing of the registration statement, provided that the registrant has properly furnished a Form 8-K (or a Form 6-K, as applicable) disclosing reliance on the COVID-19

Order. Understandably enough, the staff also note that the registrant will no longer be considered current and timely, and will lose eligibility to file new registration statements on Form S-3, if it fails to file the required report by the due date as extended by the COVID-19 Order. Registrants with compelling and well-documented facts may contact the staff to discuss their specific capital raising needs. The staff note, however, that the effective date of a Form S-3 is not likely to be accelerated for registrants relying on the COVID-19 Order until such time as any information required to be included in the Form S-3 is filed.