

[Latham & Watkins Capital Markets Practice](#)

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FAQs: SEC Filing Deadline Relief for COVID-19

The May 5 Update includes Questions 14-17, which relate to [FAQs](#) released by the SEC Division of Corporation Finance on May 5 (Corp Fin FAQs).

The April 9 Update includes Question 13, which relates to SEC Guidance issued on April 8.

On March 25, 2020, the Securities and Exchange Commission (SEC) issued an order (the March 25 Order) that [extended](#) its prior [order](#) granting relief from SEC key filing deadlines.

The March 25 Order now covers filings due on or before July 1, 2020, and supersedes the prior order.

In addition, the SEC announced [interpretive positions](#) that the Staff will take regarding certain Securities Act and Exchange Act obligations.

1. What filings are covered?

All Exchange Act periodic and current reports (e.g., Forms 10-K, 10-Q, 8-K, 20-F, 40-F, and 6-K) and all proxy and information statements.

2. What filings are not covered?

- Schedule 13Ds and amendments
- Tender offer filings under Regulation 14D
- Section 16 filings
- Any Securities Act filing

3. What is the time period covered?

Filings due on or before July 1, 2020.

4. How long can I delay my filing?

Filings must be made not later than 45 days from the original due date.

5. What conditions must be satisfied to delay a required filing?

If an issuer (or other person) is unable to meet a filing deadline due to circumstances related to the COVID-19 outbreak, it must:

- Provide a Form 8-K or Form 6-K report by the original filing deadline of the report that discloses:
 - That it is relying on the March 25 Order
 - A brief description of why it could not file the report on a timely basis
 - The estimated date by which the report is expected to be filed
 - If appropriate, risk factors explaining any material impact of COVID-19 on its business
 - If the reason the report cannot be filed relates to the inability of a third party (e.g., an independent audit firm) to furnish an opinion or report, the Form 8-K or 6-K must include as an exhibit a statement from the third party why they are unable to furnish the opinion or report
- Disclose, when it ultimately makes the required filing, that it relied on the March 25 Order and the reasons it could not make the original filing when due.

6. Is one Form 8-K/6-K enough to cover all my late filings?

No. A new Form 8-K/6-K must be made for each late filing.

7. Does an issuer need to file a Form 12b-25 Notification of Late Filing?

No, so long as the delayed filing is made within the required 45-day time period.

8. Can I still file a Form 12b-25 if I cannot make the 45-day extended deadline?

Yes. A company can rely on Rule 12b-25 to obtain a further extension if it is unable to file the delayed report by the 45-day deadline ([C&DI 135.12](#)).

9. What about the reverse? If I file a Form 12b-25 based on the original deadline, can I use the relief to add 45 days to the Rule 12b-25 extension period?

No. The SEC Staff has informed us that, unlike the answer to FAQ 8, a company that initially relies on Rule 12b-25 cannot use the 45-day relief to obtain a further extension if it is unable to file within the Rule 12b-25 extension period ([C&DI 135.13](#)).

10. Form S-3/F-3 and WKSJ status require, among other things, a company to be current and timely in certain Exchange Act filings. Will I lose Form S-3/F-3 eligibility or WKSJ status if I rely on the March 25 Order?

No, if you (a) had met the required Exchange Act filing obligations as of March 1, 2020 and (b) file any Exchange Act report due during the period March 1-July 1, 2020 within the 45-day extended filing deadline for that report.

11. Form S-8 and Rule 144(c) similarly require a company to be current in certain Exchange Act filings. Will I lose Form S-8 eligibility or be deemed not to be meet Rule 144(c) if I rely on the March 25 Order?

Same answer as FAQ 10.

12. What if mail delivery of proxy/soliciting materials is not possible?

An issuer (or other person) does not need to furnish proxy statements, annual reports and other soliciting materials, or information statements and annual reports, to any security holder if both:

- That security holder has a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended the delivery service customarily used to make the solicitation.
- The issuer (or other person) has made a good-faith effort to furnish the materials to the security holder in accordance with the SEC's rules relating to furnishing and delivery.

13. What about Part III information in a Form 10-K?

The March 25 Order is available with respect to Part III information, which generally must be filed in a proxy statement or an amendment to the Form 10-K not later than 120 days after fiscal year-end ([C&DI 104.18](#)). The procedure to be followed depends on a company's circumstances with respect to the Part III information:

- If the Form 10-K was timely without relying on the Order, the company should furnish a Form 8-K by the 120-day deadline and provide the Part III information within 45 days of the 120-day deadline.
- If COVID-19 circumstances cause a delay for the Form 10-K itself, the company can furnish by the original Form 10-K deadline a single Form 8-K that addresses both the Form 10-K and Part III information specifically. In this case, the Form 10-K is due within 45 days after the original deadline and the Part III information is due within 165 days (120 days plus 45 days) after fiscal year end.
- If COVID-19 circumstances cause a delay for the Form 10-K itself and the Form 8-K does not specifically address a delay in Part III information, the company may either (1) include the Part III information in its Form 10-K filed within 45 days of the original Form 10-K deadline or (2) furnish a second Form 8-K by the original 120-day deadline and then file the Part III information no later than 45 days after the 120-day deadline.

In each case, Part III information may be included in a definitive proxy or information statement or an amendment to the Form 10-K.

14. Can I still do shelf takedowns despite a delayed Form 10-K filing?

In theory, a company that is taking advantage of the March 25 Order to delay filling its Form 10-K can take down from an effective shelf, even though its financials are technically stale. Two caveats apply:

- The difficulties of obtaining comfort from auditors after the 135-day cut-off are likely to limit the usefulness of this as a practical matter.
- The prospectus must generally comply with the requirements of Securities Act Section 10(a), which include that the information cannot be more than 16 months old.

([Corp Fin FAQs](#), Form S-3 Questions, No. 1)

15. How should I test my eligibility for Form S-3 when I file my delayed Form 10-K?

A company should look to the 12-month period (plus any portion of a month) prior to filing the delayed Form 10-K to determine if all required Exchange Act filings have been timely made. The delayed Form 10-K itself, of course, would be considered timely filed, assuming the conditions of the March 25 Order have been met. The 60-day look-back period for purposes of assessing continued eligibility under the public float requirement under Form S-3 is likewise based on the actual date of filing the Form 10-K. Needless to say, if you do not file the delayed Form 10-K by the extended filing date, it would not be current and timely. ([Corp Fin FAQs](#), Form S-3 Questions, No. 2).

16. Will the Staff declare a new shelf registration statement effective despite a delayed Form 10-K filing?

Unlikely. Although the filing of the Form 10-K itself will be excused because of the March 25 Order, the Staff is unlikely to excuse the absence of required disclosure such as updated financial statements. Corp Fin invites issuers with “compelling and well-documented facts” to contact the Staff to “discuss their specific capital raising needs,” but cautions that it 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.” The FAQs do not address WKSIs specifically, but similar considerations would presumably apply. ([Corp Fin FAQs](#), Form S-3 Questions, No. 3)

17. How do the Corp Fin FAQs apply to Foreign Private Issuers?

The FAQs do not specifically address Form F-3 and Form 20-F filings, but the same principles should apply equally to FPIs.

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If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Alexander F. Cohen

alexander.cohen@lw.com
+1.202.637.2284
Washington, D.C.

Paul M. Dudek

paul.dudek@lw.com
+1.202.637.2377
Washington, D.C.

Joel H. Trotter

joel.trotter@lw.com
+1.202.637.2165
Washington, D.C.

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