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PUBLIC COMPANIES

Late SEC Filings Guide – 2024

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Under the U.S. federal securities laws and regulations of the Securities and Exchange Commission, U.S. public companies and foreign private issuers are subject to substantial disclosure requirements in their periodic reports required to be filed with the SEC. These reports have strict filing deadlines and the consequences for missing a deadline could have a wide range of impacts on a company, including with respect to its continued listing on a stock exchange, its ability to conduct securities offerings and its compliance with covenants under debt indentures or credit agreements, in addition to potential damage to its reputation in the market. Companies may find themselves facing an actual or potential late SEC filing for a wide variety of reasons, including restatements of financial statements, delays with obtaining requisite disclosure or accounting information from subsidiaries (particularly newly acquired entities), insufficient internal resources to prepare and file the requisite reports, or other extraordinary and unanticipated events. Some of these reasons are arguably within the company's control, but many are not and may occur with little or no advance warning. Accordingly, the legal and finance departments of a public company should be prepared to address the potential consequences of missing an SEC filing deadline in a very short timeframe, and the following is a checklist of the important issues that should be considered before a late SEC filing situation arises.

NOTIFICATION TO SEC OF INABILITY TO FILE ON TIME

If an annual report on Form 10-K or Form 20-F or a quarterly report on Form 10-Q is not filed within the required time period, the issuer must file with the SEC within one business day of the due date for the report a Form 12b-25 (designated as an "NT 10-K", "NT 20-F" or "NT 10-Q", respectively, in the EDGAR filing system) disclosing its inability to file the report timely and the reason for the delay. If a Form 10-K, Form 20-F or Form 10-Q cannot be filed timely "without unreasonable effort or expense", the report will be deemed to have been filed as of the original filing due date if the company files a Form 12b-25 in a timely manner, and then files the required report not later than the 15th calendar day (for a Form 10-K or 20-F) or fifth calendar day (for a Form 10-Q) following the original due date for the report. However, if a company fails to file the required report within the extended time period, no further extensions will be available and the SEC will consider the company to be delinquent as of the original due date of such report. For instance, if a company misses the extended deadline for a Form 10-K by a day, the SEC will consider the company to be delinquent for 16 days, not just one day. Even if the company does not expect to be able to file the required SEC report within the extended Rule 12b-25 time period, it should file the Form 12b-25 and provide the disclosures required under that form.

Note that Rule 12b-25 filing extensions are not available for Form 8-K filings.

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VIOLATION OF THE SECURITIES EXCHANGE ACT OF 1934 AND SEC ENFORCEMENT

The failure to file a required SEC report on time constitutes a violation of Section 13(a) of the Exchange Act and the SEC could suspend trading in the company's securities for up to 10 trading days or institute an administrative proceeding against the late filer, among other things, seeking revocation of the company's registration under the Exchange Act. These proceedings by the SEC are uncommon and are typically aimed at companies with recurring and egregious violations.

DISCLOSURE ISSUES AND INSIDER TRADING CONCERNS

Companies listed on the NYSE or NASDAQ are required by applicable stock exchange rules to issue a press release announcing the failure to file timely a periodic report with the SEC. Late filers typically file a Form 8-K under Item 8.01 (Other Events) or a Form 6-K reporting the late filing by attaching a copy of the press release. In addition, companies that receive a notice of delisting or failure to satisfy a continued listing rule or standard of a stock exchange must report receipt of the notice on Form 8-K under Item 3.01. As discussed below, the NYSE also strongly encourages companies to provide ongoing disclosure on the status of a delinquent annual or quarterly filing to the market through additional press releases.

Companies that have previously relied on Form S-3 or Form F-3 for shelf registrations and that have become ineligible to utilize Form S-3 or Form F-3 or to take down from an existing effective shelf registration on Form S-3 or Form F-3 should consider whether disclosure of this change in Form S-3 or F-3 eligibility and ability to use an existing shelf registration should be included in future periodic reports (e.g., in the Liquidity and Capital Resources section of Management's Discussion & Analysis).

Of course, material information concerning the underlying reasons for a delinquent periodic report may raise disclosure issues under Rule 10b-5, the SEC rule that prohibits a person in possession of material nonpublic information about a company (including the company itself) from purchasing or selling that company's securities. If material nonpublic information concerning the reasons for a late SEC report is in the possession of the company or its officers and directors, company share repurchases and trading by officers and directors should be halted.

Senior management and investor relations departments are likely to face ongoing questions regarding the issues underlying a delinquent periodic report, as well as the company's timing for resolving those issues. It would be worth reminding those company personnel responding to such questions of the company's obligations under Regulation FD, which prohibits selective disclosure of material nonpublic information.

NYSE AND NASDAQ LISTING REQUIREMENTS

Companies listed on the NYSE or NASDAQ face possible delisting if they are delinquent in their SEC filings.

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NYSE. Applicable NYSE rules require companies to file annual reports on Form 10-K or Form 20-F and quarterly reports on Form 10-Q with the SEC in a timely manner or face possible delisting. In addition, under NYSE rules foreign private issuers are required to file a Form 6-K with semi-annual financial information as of and for the first six months of the fiscal year in English within six months after the end of the second fiscal quarter.

Under the NYSE's procedures for companies that fail to file timely their SEC reports, the NYSE will notify a late filer of its delinquent status, and within five days of receiving the notice, the company must contact the NYSE to discuss the status of the SEC report and issue a press release disclosing the status of the filing. If the company does not issue a press release, the NYSE itself will do so. The NYSE will also attach an ".LF" indicator to the company's ticker symbol to identify the delinquency and include the company on the late filer list posted on the NYSE website.

During the six-month period after the missed filing due date, the NYSE will monitor the company and the status of the delinquent filing, including through ongoing contact with the company, until the delinquent report is filed. If the company fails to file the delinquent report within six months after the filing due date, the NYSE may, in its sole discretion, allow the company's securities to be traded for up to an additional six-month period, depending on the company's specific circumstances. If the NYSE determines that an additional trading period of up to six months is not appropriate, it will commence suspension and delisting procedures.

In determining whether an additional trading period of up to six months is appropriate, the NYSE will consider the likelihood that the overdue filing can be made during the additional period, as well as the company's general financial status, based on information from a variety of sources, including the company, its audit committee, its outside auditors, the staff of the SEC and any other relevant regulatory body. The NYSE strongly encourages companies to provide ongoing disclosure to the market on the status of the annual report filing through press releases, and will also take the frequency and detail of such information into account in determining whether an additional six-month trading period is appropriate.

NYSE rules also provide that the failure of a company to make timely, adequate and accurate disclosures of information, including failure to file timely quarterly reports on Form 10-Q, may also result in similar delisting procedures. Note also that trading in any security can be suspended immediately, and application can be made to the SEC to delist the security, if the NYSE deems it necessary or appropriate in the public interest or for the protection of investors.

NASDAQ. Under applicable NASDAQ rules, listed companies must comply with SEC filing requirements. NASDAQ-listed companies face delisting for missed annual Form 10-K and Form 20-F filings as well as for missed quarterly Form 10-Q filings. Under NASDAQ rules, a foreign private issuer must also file a Form 6-K containing its interim balance sheet and income statement as of the end of its second fiscal quarter in English, no later than six months following the end of its second fiscal quarter. Failure to file this Form 6-K on time could also result in delisting.

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NASDAQ's policy is to send a notification of deficiency and grant a delinquent filer the opportunity to submit a plan of compliance within 60 calendar days, although the time period may be shortened at the NASDAQ staff's discretion. NASDAQ staff may defer commencing delisting procedures for up to 180 calendar days from the due date of the periodic report for the company to evidence compliance. If the company fails to regain compliance by filing the missing report prior to the expiration of the grace period or if NASDAQ does not accept the plan of compliance, then NASDAQ will issue a staff determination letter that indicates that the company is subject to delisting. The delinquent filer may then request a hearing before a NASDAQ Hearings Panel within seven calendar days of receipt of the staff determination letter. If a company requests a hearing before the NASDAQ Hearings Panel, the delisting action will be automatically stayed for 15 calendar days starting from the end of the seven calendar day period. To obtain a longer stay period, the company must make a specific request to the NASDAQ Hearings Panel for the extension and explain why such a stay would be appropriate in the company's request for a hearing. The NASDAQ Hearings Panel may permit the company to remain listed for up to 360 calendar days from the due date of the company's first late filing. A company may appeal a NASDAQ Hearings Panel decision to the NASDAQ Listing and Hearing Review Counsel. However, an appeal does not stay the NASDAQ Hearings Panel's decision to delist the company's securities.

Companies that receive a notification of deficiency from NASDAQ are required to issue a press release announcing the receipt of NASDAQ's notification of deficiency and its basis. Failure to issue the press release within four business days of receipt of NASDAQ's notification of deficiency will result in the implementation of a trading halt.

NASDAQ will also append an additional character, "E", to the company's trading symbol to identify the filing delinquency until the company has fulfilled its filing obligations.

Companies facing delisting as a result of delinquent SEC filings are generally expected to provide to the NASDAQ Hearings Panel an estimated date by which they will become current with all their SEC filing obligations, together with a schedule of actions to be completed by the company and its auditors. The company should describe any expected adjustments or restatements relating to the financial statements contained in prior filings. The company should also provide copies of all public disclosures pertinent to the filing delinquency or the expected adjustments or restatements.

FORM S-3, FORM F-3 AND "WKSI" ELIGIBILITY

Form S-3 and Form F-3 are short-form registration statements that permit issuers to incorporate by reference to Exchange Act reports much of the information that would otherwise be required to be set forth in a long-form registration statement on Form S-1 or Form F-1. Form S-3 and Form F-3 are commonly used by seasoned issuers to put in place debt, equity or universal "shelf registrations" under which future securities offerings can be accomplished through "takedowns" from the shelf with relative speed. Among other eligibility requirements, in order to utilize Form S-3 or Form F-3, issuers must have timely filed all required reports (including annual reports on Forms 10-K and 20-F, quarterly reports on Form 10-Q and certain current reports on Form 8-K) under the Exchange Act during the twelve calendar months and any portion of a month immediately before the filing of the registration statement.

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Thus, a Form S-3 or Form F-3 cannot be filed during the Rule 12b-25 grace period and if a company has missed a filing date for a Form 10-K, Form 20-F or Form 10-Q (and has not filed the report within the permitted Rule 12b-25 grace period), absent a waiver from the SEC, it will not be eligible to file a Form S-3 or Form F-3 registration statement for at least twelve full calendar months from the original filing due date. In addition, issuers that qualified as Well Known Seasoned Issuers (WKSIs) would lose their WKSI status, which depends in part on meeting the Form S-3 or F-3 eligibility requirements, including the 12-month SEC filing timeliness requirement. For example, if a company missed its filing that was due on March 16 but filed all subsequent periodic reports on time, it will be eligible to use a Form S-3 or Form F-3 starting from April 1 of the following year because of the requirement to have timely filed all reports for the twelve calendar months and any portion of a month preceding the use of Form S-3 or Form F-3. Note that the original date when the filing was due rather than the date on which the filing was actually made is used for calculating the return to Form S-3 or F-3 eligibility, even if the company never files the missing report. However, it is recommended that companies file all reports even if significantly late in order to stay current with their periodic reporting obligations, as this affects their Form S-8 eligibility and the availability of Rule 144 for resales and mitigates their violation of Section 13(a) of the Exchange Act.

Recognizing the hardship that could result from Form S-3 ineligibility caused by a missed Form 8-K filing, the SEC provided in Form S-3 that failure to file timely Form 8-K reports with respect to the following disclosure items will not result in losing Form S-3 eligibility:

- Item 1.01 (entry into a material definitive agreement);
- Item 1.02 (termination of a material definitive agreement);
- Item 1.04 (mine safety – reporting of shutdowns and patterns of violations);
- Item 2.03 (creation of a direct financial obligation or an obligation under an off-balance sheet arrangement of a registrant);
- Item 2.04 (triggering events that accelerate or increase a direct financial obligation under an off- balance sheet arrangement);
- Item 2.05 (costs associated with exit or disposal activities);
- Item 2.06 (material impairments);
- Item 4.02(a) (non-reliance on previously issued financial statements or a restated audit report or completed interim review); and
- Item 5.02(e) (adoption or commencement of material compensatory plan, contract or arrangement for principal executive officer, principal financial officer, or a named executive officer).

The failure to file timely under any other Form 8-K disclosure items will result in a loss of Form S-3 eligibility. Moreover, a company must be current in all of its Form 8-K filings, including those excepted from the timely filing requirement, at the time of a Form S-3 filing. Thus, a company must have provided the disclosure required by any of the excepted Form 8-K items on or before the date that it files a Form S-3 registration statement with the SEC.

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Note that because Forms 6-K are furnished and not filed and are only required to be furnished promptly, a foreign private issuer's failure to furnish timely a Form 6-K does not affect its Form F-3 eligibility.

WAIVER OF FORM S-3 OR FORM F-3 ELIGIBILITY REQUIREMENTS

If an issuer misses a filing deadline for a Form 10-K, Form 20-F, Form 10-Q or Form 8-K (including any extended deadline under Rule 12b-25) for reasons other than technical difficulties beyond the issuer's control (for which there is a separate filing date adjustment procedure as described below), it may preserve its ability to use Form S-3 or Form F-3 by seeking a waiver of the Form S-3 or Form F-3 eligibility requirements from the SEC. The waiver request must be in writing and addressed to the SEC's Office of the Chief Counsel and should generally include the following information:

- Description of the issuer, including whether it has an existing Form S-3 or Form F-3 or is planning to file one;
- Reasons for the waiver request;
- Description of the late filing and an explanation as to why the issuer failed to file on a timely basis;
- Whether the issuer otherwise meets the requirements to use a Form S-3 or Form F-3;
- Why the SEC should approve the waiver request;
- Whether the issuer has previously failed to timely file any required Exchange Act filing; and
- Description of the processes and procedures being implemented by the issuer to ensure future compliance.

The waiver request is submitted directly to the Office of the Chief Counsel and not through the SEC's EDGAR filing system. Issuers will be notified of the SEC's determination regarding the waiver by phone and neither the issuer's request nor the SEC's response will be posted on the EDGAR filing system.

Note that the SEC has indicated that Form S-3 or Form F-3 eligibility waivers are granted only under very limited circumstances. A waiver request will be more difficult to obtain if an issuer has a history of delinquent filings or the more days the filing is late. The SEC is less likely to grant a waiver of the Form S-3 or Form F-3 eligibility requirements where the filer fails to meet the extended deadline granted under Rule 12b-25 because the SEC considers the filing to be late as of the original filing due date, rather than from the extended due date.

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REQUEST FOR FILING DATE ADJUSTMENT

For SEC filings that are late due to technical difficulties with the SEC's EDGAR filing process outside of the filer's control on the original due date, the SEC staff will consider a request by the company (not a third party filing agent) to adjust the filing date of the filing to the time the company initially attempted to transmit the filing. The request must be made in writing, signed by the company or an authorized legal representative of the company and submitted via EDGAR as a CORRESP submission, addressed to the Chief, Office of Information Technology, Division of Corporation Finance. Companies should confirm the submission of the request with an e-mail to cfitedgar@sec.gov and are recommended to discuss the request with the SEC staff by telephone prior to formally submitting the request via EDGAR. The request should include, among other things, the following information:

- A concise, but detailed, description of the technical difficulties leading to the late filing, including the date and time of the initial attempted transmission or transmissions. (Note that the SEC does not generally consider technical issues with the filing agent's internet connection or heavy traffic on the EDGAR system due to a large volume of filings to be a valid technical difficulty for a filing date adjustment unless the technical issue is on the SEC side of the EDGAR system itself.)
- A statement of how the company will be harmed if the SEC staff does not grant the filing date adjustment request.
- An affirmative request for adjustment of the filing date from the specific filing date to the date of the initial attempted transmission.

In addition, copies of any e-mails sent by EDGAR for test filings and all filing attempts, including acceptance/suspense messages, which demonstrate the company's good faith effort to timely file, should be included. Filing date adjustment requests are generally processed within five to seven business days of receipt.

OPTIONS DURING FORM S-3 OR FORM F-3 INELIGIBILITY

A public company that is late in filing an SEC report may already have an effective Form S-3 or Form F-3 shelf registration statement on file with the SEC. A delinquent issuer faced with a year of Form S-3 or Form F-3 ineligibility has several different options with respect to an existing shelf registration statement.

A. UTILIZING AN EXISTING FORM S-3 OR FORM F-3 SHELF REGISTRATION

The SEC staff has indicated that an issuer that becomes ineligible to use Form S-3 or Form F-3 could decide to continue to use an existing effective Form S-3 or Form F-3 if the issuer and its counsel determine that the prospectus complies with the requirements of the Securities Act of 1933, including whether the prospectus is a valid Section 10(a) prospectus and complies with Rule 408 (which requires disclosure of material information as may be necessary to make the information in the prospectus not materially misleading). As a practical matter, it will be difficult for an issuer that is late with an annual report on Form 10-K or 20-F to be able to use an existing shelf registration on Form S-3 or F-3 due to the updating requirements of Section 10(a)(3) (described below) and the materiality of the information typically included in an annual report. This option is more relevant in the context of a late quarterly report on Form 10-Q or current report on Form 8-K of an issuer that is not a foreign private issuer.

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Under applicable SEC rules, issuers are required to update an effective Form S-3 or Form F-3, among other things, for purposes of Section 10(a)(3) of the Securities Act (which requires periodic updating of information in a prospectus) or to reflect "fundamental changes". Section 10(a)(3) provides that the information (including the audited financial statements) in a prospectus forming part of a registration statement that is used more than nine months after the effective date of the registration statement cannot be more than 16 months old. For companies with calendar fiscal years, the 16-month period generally ends on April 30 of the second year following the date of the audited financial statements. The prospectus and registration statement are considered to be "stale" after such period for Section 10(a)(3) purposes. Updating for Section 10(a)(3) purposes is usually done through the filing of an annual report on Form 10-K or Form 20-F containing updated audited financial statements, which is incorporated by reference into the Form S-3 or Form F-3. As a practical matter, because the Form 20-F filing deadline is four months after the fiscal year end and coincides with the Section 10(a)(3) updating deadline and a late Form 20-F is the only Exchange Act filing that could cause a foreign private issuer to lose its Form F-3 eligibility, for foreign private issuers, any existing effective Form F-3 may not be used once the Form 20-F filing due date is missed until the issuer regains Form F-3 eligibility or the registration statement is converted to Form F-1

For purposes of determining whether an existing shelf registration can be used by a delinquent Exchange Act filer prior to the Section 10(a)(3) deadline, a key question is whether information in a missed SEC report constitutes a "fundamental change". Missing information that would have been contained in a delinquent Form 10-K or Form 20-F (including audited financials for the latest fiscal year) would clearly seem to constitute a "fundamental change", and information that would have been included in a missed Form 10-Q filing could constitute a "fundamental change". Thus, if the missing information is indeed a "fundamental change", then a delinquent filer would not be able to use the existing shelf registration on Form S-3 or Form F-3 at least until the missing "fundamental change" information is provided.

For Form S-3 or F-3 eligible issuers, updating for these purposes may be accomplished by post-effective amendment, incorporation by reference to the issuer's Exchange Act reports, or by means of a prospectus supplement. However, in the case of a delinquent annual report on Form 10-K, if the updating is done by filing the delinquent Form 10-K, the existing Form S-3 may no longer be used without further amendment, even if prior to the Section 10(a)(3) updating deadline. This is because the filing of the Form 10-K is considered the equivalent of a post-effective amendment to the registration statement and requires an evaluation of the issuer's eligibility to use the Form S-3. Due to the delinquency of the Form 10-K, the issuer would not meet the timeliness requirement for its Exchange Act filings during the prior 12 months and would not be eligible to use the short-form Form S-3 registration statement. As a result, the Form S-3 may not be used until the issuer regains Form S-3 eligibility or the registration statement is converted to Form S-1.

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The SEC staff has recognized the possibility that Form 10-Q information may not amount to a "fundamental change" by noting in its guidance that the quarterly results set forth in Form 10 Q could be included in the registration statement by sticker rather than post-effective amendment, so long as such information does not constitute a fundamental change in the information set forth or included in the registration statement. Thus, an issuer that has been late in filing a Form 10-Q could take the position that it may continue to use an existing effective Form S-3 shelf registration statement on the grounds that information in the late Form 10-Q did not constitute a "fundamental change". However, even if an issuer concludes that information in the Form 10-Q does not constitute a "fundamental change", underwriters in a shelf takedown may be uncomfortable with that conclusion and could resist proceeding with an offering until the delinquent report is filed and the issuer again becomes Form S-3 eligible (or utilizes Form S-1).

For any delinquencies with Exchange Act filings, any existing effective Form S-3 or Form F-3 may no longer be used after the Section 10(a)(3) updating deadline (generally April 30) has passed.

In addition, issuers that are eligible and elect to continue to use their existing Form S-3 or Form F-3 following a filing delinquency must consider whether there are any Section 12(a)(2) or Rule 10b-5 anti-fraud concerns and should discuss with their auditors the auditor's ability to deliver any comfort letter that may be required in connection with a shelf offering.

B. CONVERSION TO FORM S-1 OR FORM F-1

An issuer that intends to conduct registered shelf offerings during Form S-3 or Form F-3 ineligibility and is not comfortable with continuing to use the prospectus included in an existing shelf registration statement on Form S-3 or Form F-3 because of concerns regarding disclosures of "fundamental changes" could file a post-effective amendment to convert the Form S-3 or Form F-3 shelf registration to Form S-1 or Form F-1 and include the "fundamental change" information, provided that it is current in its other Exchange Act reports. However, Form S-1 or Form F-1 shelf registrations are limited by the fact that such forms are subject to SEC review and cannot incorporate by reference future Exchange Act reports filed after the Form S-1 or Form F-1 is declared effective. As a result, the post-effective amendment will require additional time and effort to prepare and have declared effective.

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C. LEAVING DORMANT AND REVIVING WHEN FORM S-3 OR F-3 ELIGIBLE AGAIN

An issuer that decides to wait until it recovers its Form S-3 or F-3 eligibility could allow the effective Form S-3 or Form F-3 to remain dormant until it is once again eligible to use it and resume its use. There would be no duty to update the dormant Form S-3 or F-3 so long as it is not being used. Although Exchange Act reports are automatically incorporated by reference into the Form S-3 or Form F-3 and update the registration statements during the dormant period, once the issuer regains Form S-3 or F-3 eligibility, a post-effective amendment or Exchange Act report incorporated by reference into the registration statement may be required to include any necessary auditor consents to the incorporation of their audit reports into the Form S-3 or Form F 3 (if not previously filed with the most recent Form 10-K or Form 20-F incorporated by reference)[1] or to update the registration statement for any additional material information not already reflected in the previously incorporated Exchange Act filings. As a practical matter, filing an Exchange Act report which is incorporated by reference into the registration statement, would be more efficient than a post-effective amendment.

D. WITHDRAW AND RE-FILE

In the alternative, an issuer could decide to withdraw the existing Form S-3 or Form F-3 and file a new Form S-3 or Form F-3 once it regains Form S-3 or Form F-3 eligibility, especially if the amount of securities remaining unsold as of the date the issuer lost eligibility is relatively small or if the issuer expects to regain WKSI status. Under such circumstances, the issuer will be credited with any unused registration fees under the withdrawn Form S-3 or Form F-3, which could be used to pay the filing fee for the new registration statement pursuant to Rule 457(p) of the Securities Act.

FORM S-8

Form S-8 is the short-form registration statement used by public companies (including foreign private issuers) to register securities offered to employees under company employee benefit plans. In order to use Form S-8, an issuer must have filed all reports with the SEC required to be filed during the preceding 12 months. Unlike Form S-3 and Form F-3, there is no requirement that reports have been timely filed for the prior 12 months. Thus, if a company has missed a Form 10-K, Form 20-F, Form 10-Q or Form 8-K filing deadline, the company may not register securities to be issued under a benefit plan on a Form S-8 until the missed report is filed. Once the missed report is filed, the company will once again be eligible to use Form S-8.

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[1] We understand that certain audit firms may not be willing to provide a consent to the incorporation by reference of their audit reports into an existing Form S-3 or F-3 registration statement at a time when the issuer is not eligible to use the Form S-3 or F-3. However, once the issuer regains Form S-3 or F-3 eligibility, a consent would be provided. Issuers should consult their auditors with respect to their specific audit firm's policy on providing consents in these circumstances.

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As is the case with Form S-3 and Form F-3, applicable SEC rules require companies to update an effective Form S-8 for Section 10(a)(3) purposes and to reflect "fundamental changes". Any updating for these purposes is accomplished by incorporation by reference to the issuer's Exchange Act reports. If a Form 10-K, Form 20-F or Form 10-Q filing is missed, and the incorporation by reference of the missed report would have otherwise been needed to satisfy a requirement to update the Form S-8 for Section 10(a)(3) purposes or to reflect a "fundamental change", use of the existing Form S-8 should be suspended until the missed SEC report is filed.

FORM S-4 OR FORM F-4

Form S-4 and Form F-4 are the forms used by issuers to register securities issued in an exchange offer or as consideration in an acquisition. Form S-4 and Form F-4 permit information with respect to the issuer to be incorporated by reference to the issuer's Exchange Act reports if the issuer meets the eligibility requirements for use of Form S-3 or Form F-3, respectively. Otherwise, the required information regarding the issuer must be set out in the prospectus included in the Form S-4 or Form F-4 registration statement.

If a late SEC filing results in Form S-3 or F-3 ineligibility, another consequence will be the inability to incorporate Exchange Act reports into a Form S-4 or Form F-4 registration statement until the issuer is again Form S-3 or F-3 eligible, as applicable.

RESALES OF RESTRICTED OR CONTROL SECURITIES UNDER RULE 144 SAFE HARBOR

Rule 144 under the Securities Act provides a means for directors and officers of public companies and others to make unregistered public sales of restricted or control securities of the company without being deemed underwriters. Rule 144 eligibility is conditioned on satisfying several requirements including the availability of current public information about the company. Specifically, a company subject to SEC reporting must have filed all reports required to be filed during the twelve months prior to the sale, other than Form 8-K reports, in order for the sellers to sell after a six month holding period.

A failure to file a required Form 10-K, Form 20-F or Form 10-Q will result in the failure to satisfy the "current public information" requirement of Rule 144 and the inability of directors, officers and others to rely on the Rule 144 safe harbor until the late filing is actually made (at which time Rule 144 will become available immediately).

INDENTURE AND CREDIT AGREEMENT COVENANTS

Public company indentures and credit agreements often include an affirmative covenant to file SEC reports and/or to deliver copies of those reports to security holders and lenders or to an agent or trustee on their behalf. To the extent that such covenants impose a timeliness requirement for such filings, there is a potential risk that a noteholder or lender could deliver a notice of default as a result of a breach of a covenant to file SEC reports on a timely basis.

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Many indenture reporting covenants are modeled on Section 314(a) of the Trust Indenture Act of 1939 and there has been litigation over whether Section 314(a) and corresponding indenture reporting covenants impose a timeliness requirement for filing SEC reports. While one New York State trial court ruled in an unpublished decision that a timeliness requirement should be read into Section 314(a) and a corresponding indenture reporting covenant, at least five federal district courts (including the Southern District of New York) and the Eighth and Fifth Circuit Courts of Appeals have subsequently rejected that view and ruled that no such timeliness requirement would be read into Section 314(a) and the corresponding indenture reporting covenant. As a result, to the extent that noteholders or creditors want a timeliness requirement, that should be expressly provided in the indenture or credit agreement reporting covenant.

Delinquent filers should review outstanding indentures and credit agreements to evaluate the risk of potential defaults. With regard to outstanding public debt, it may be useful to determine if a substantial portion of the securities are held by a hedge fund or similar institution that might be more likely to call a technical default in an attempt to recover repayment at a premium over the price paid for the debt in the public marketplace. In addition, to the extent issuers are negotiating new indentures or credit agreements or amending existing ones, they may want to use a version of the affirmative covenant which requires delivery of copies of SEC reports to security holders, lenders, agents or trustees only when actually filed with the SEC, regardless of whether or not the reports are filed timely.

TAKEAWAY

If a company is facing a late SEC filing situation, there are most likely other issues for the company underlying the late filing and the company and its legal and finance teams will be under pressure to address those issues as a priority. While the late SEC filing may be unavoidable, considering and understanding the potential consequences and being prepared with the company's proposed responses in advance of any late filing event may take some of the pressure off of what will be an already stressful period for the company.

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