AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Feature

By Chad Husnick, Tony Simion, Drew Maliniak and Mason Zurek[1]

Securities Exchange Commission Reporting and Chapter 11: Part I

Chad Husnick
Kirkland & Ellis LLP
Chicago

Tony Simion
Alvarez & Marsal
Detroit

Chad Husnick is a partner in Kirkland & Ellis LLP's Restructuring Practice Group in Chicago. Drew Maliniak and Mason Zurek are associates in the firm's New York and Chicago offices, respectively. Tony Simion is a managing director within Alvarez & Marsal's North American Commercial Restructuring division in Detroit.

Editor's Note: *This is the first part of a two-part series.*

Restructuring professionals must guide management and act quickly on their feet in stressful situations with imperfect information. One area where this is especially acute is advising management of public reporting companies (*i.e.*, companies with securities publicly trading on a U.S. national securities exchange, such as the New York Stock Exchange (NYSE) or Nasdaq) on their public disclosure obligations under the Securities Exchange Act of 1934 (hereinafter, the "Exchange Act") before and during chapter 11.

This article provides guidance to general counsels, chief financial officers, chief accounting officers and other members of management that may handle Securities Exchange Commission (SEC) reporting. It discusses SEC-related disclosure and reporting considerations chronologically during the life cycle of a restructuring under chapter 11. This article is comprised of two parts. Part I will discuss reporting obligations before any bankruptcy petition is filed, then focus on the petition date and explain options available during the chapter 11 case. Part II, to be published in a later issue, will cover emergence planning and the routes available post-bankruptcy.

Most public reporting companies in chapter 11 will continue filing and complying with Exchange Act requirements. In rare situations, public reporting companies may seek relief from the SEC to comply with "modified reporting" in lieu of the regular Exchange Act requirements. As discussed herein, because companies can rarely satisfy the SEC's criteria for relief, continued reporting following the standard Exchange Act requirements is our "Base Case." In most circumstances, it is easier to continue reporting versus stopping and starting back up after a period of time.

Brief Overview of SEC Forms

Public-reporting companies must file certain reports with the SEC to comply with Exchange Act requirements, several of which are important in a restructuring. The annual report on Form 10-K provides an overview of the company's business and financial conditions, including audited financial statements.[2] The quarterly report on Form 10-Q updates the company's positions throughout its fiscal year and includes unaudited financial statements.[3] Current reports on Form 8-K announce certain material events.[4]

Disclosure Considerations During the Life Cycle of a Restructuring

Before Filing the Bankruptcy Petition

Before filing the bankruptcy petition, reporting obligations remain ongoing, including the obligation to file a Form 10-K or 10-Q and current reports on Form 8-K. However, updates may be required due to changing financial or business conditions in advance of a potential restructuring. Pre-petition events where a current report on Form 8-K may be required (or expected) include (1) withholding a principal or interest payment (Item 7.01 or 8.01); (2) entering into, extending, amending or terminating any forbearance agreements (Item 1.01); (3) material impairments (Item 2.06); (4) notice of failure to satisfy a con-

1 The authors thank Lanchi D. Huynh of Kirkland & Ellis LLP.

2 *See* "Form 10-K," U.S. Sec. & Exch. Comm'n, *available at* sec.gov/files/form10-k.pdf (unless otherwise specified, all links in this article were last visited on Sept. 8, 2022).
3 *See* "Form 10-Q," U.S. Sec. & Exch. Comm'n, *available at* sec.gov/files/form10-q.pdf.
4 *See* "Form 8-K," U.S. Sec. & Exch. Comm'n, *available at* sec.gov/files/form8-k.pdf.

tinued listing rule (Item 3.01); (4) entering into or amending a key employee incentive program (KEIP) or a key employee retention program (KERP) (Item 5.02); (5) temporary suspension of trading under employee benefit plans (Item 5.04); and (6) contractually cleansing debt-holders and/or securityholders under a nondisclosure agreement (NDA) (Item 7.01 or 8.01).

If disclosure is required under an item in Form 8-K, the deadline is four business days after the date of the stated event, while a "voluntary" Form 8-K is not subject to the four-business-day deadline. As the rules regarding selectively disclosing material nonpublic information (MNPI) with certain market participants, which includes the company's securityholders who may be reasonably anticipated to trade, under Regulation FD[5] apply to public reporting companies, Form 8-K may be used to ensure MNPI is widely disseminated before then or simultaneous with disclosure to any party not under a nondisclosure agreement.

A Form 10-K and 10-Q (or Form 20-F if a foreign private issuer) should be thoughtfully reviewed. Before (and during) a restructuring, there can be significant revisions to the business section, management's discussion and analysis of financial condition and results of operations (the "MD&A"), the special note regarding forward-looking statements (which should also be revised in press releases and other communications), risk factors (*e.g.*, a separate section on restructuring and liquidity issues), and the notes to the financial statements (*i.e.*, going-concern language).

When a filing appears imminent, it is important to confidentially — but candidly — communicate with the securities exchange (*i.e.*, Nasdaq or NYSE). A company should aim to align on the potential timing to suspend trading and any delisting of the securities, which may occur due to the bankruptcy filing. To maintain orderly trading, a company should preview any Form 8-K filing (particularly those related to forbearance or a bankruptcy petition) with the securities exchange at least 10 minutes before filing with the SEC.

Lender NDAs and "Blow Out" Objectives

During negotiations with third-party debt-holders on a possible restructuring, the company and its attorneys will negotiate NDAs with holders of substantial indebtedness. Restructuring NDAs will require the creditor to acknowledge that they may receive the MNPI and restrict the buying and selling of the company's securities while in possession of the MNPI.

Creditors are not willing to accept an indefinite trading restriction and therefore contractually require that the company "cleanse" or "blow out" all MNPIs shared with them during the negotiations by publicly releasing the information via a Form 8-K or press release. This cleansing obligation is typically tied to a certain date. It is important to identify in the NDA what specific information will be required to be blown out to avoid future disputes over what constitutes the MNPI. The authors suggest attaching an appendix to the NDA that precisely lays out the materials to be blown out and identifies what materials should be reviewed by legal and financial advisors and are therefore not required to be cleansed.

The NDA is a critical agreement. It allows a company to share highly sensitive forward-looking information that is necessary for creditors to come to the table, but it also sets a timer for coming to a deal, since creditors will not accept lengthy trading restrictions. While it is possible that a cleansing obligation can be pushed back through negotiation and parties may continue negotiating after the MNPI has been blown out, the cleansing date puts pressure on the parties to come to terms.

Upon Filing the Bankruptcy Petition

The filing of a chapter 11 petition may feel like highly orchestrated chaos. The SEC reporting is one of many elements and should be timed and considered part of an overall communications strategy with all of the stakeholders, including employees, pre-petition investors, suppliers and regulators.

Typically, a company will issue a press release and the required Form 8-K (see Items 1.03 and 2.04) upon the filing of the bankruptcy petition to announce that the company will pursue a restructuring through an in-court bankruptcy proceeding.

The Form 8-K should be prepared in advance so that it can be filed as quickly as possible after the petition has been filed. If the bankruptcy petition is made after 5:30 p.m. EDT, expect the Form 8-K to be filed once the SEC's filing system opens the next business day at 6 a.m. EDT.[6] The Form 8-K should disclose the type of restructuring, meaning whether it is pre-packaged, pre-arranged or a traditional proceeding. The Form 8-K also may serve to cleanse the MNPI that had been shared with creditors ahead of the filing. After the Form 8-K, the securities exchange may immediately suspend trading in the company's securities. It is important to communicate with the exchange at this juncture. There are three possible outcomes depending on the facts of the restructuring.

Prompt delisting: Shortly after the Form 8-K, a securities exchange may file a Form 25 to delist the company's equity securities if the company has publicly announced through a Form 8-K or otherwise that (1) there is no expected recovery to the equity securities or that the listed securities are likely to be canceled through the restructuring, and (2) the exchange has determined that the company is not expected to meet the exchange's continued listing standards (*e.g.*, that the common stock is expected to trade below $1 for 30 trading days).[7]

Delayed delisting: If the restructuring outcome for the exchange-listed securities is unclear, the securities exchange may file the form 25 weeks or months later once the outcome has crystallized. If delayed, and the company and its creditors want the company to exit the restructuring as a private company without SEC reporting obligations, then the company might need to voluntarily seek a delisting to eliminate its Exchange Act § 12(b) reporting obligations.[8]

No delisting: If a recovery for the exchange-listed securities is expected from the outset and likely to be confirmed through the reorganization plan, then the securities exchange

5 17 C.F.R. § 243.

6 *See* "EDGAR Calendar," U.S. Sec. & Exch. Comm'n, *available at* sec.gov/edgar/filer-information/calendar.
7 17 C.F.R. § 240.12d2-2(b).
8 *Id.* at (c).

would likely not delist the securities. This would be a relatively rare occurrence.

If the exchange files a Form 25, trading in the company's common stock will be immediately suspended and the delisting will be effective 10 days following the filing of the Form 25.[9] Deregistration under § 12(b) of the Exchange Act will occur 90 days following the filing of the Form 25,[10] although the company will remain a public-reporting company under §§ 12(g)[11] and 15(d).[12]

Upon the delisting of the securities, trading should be expected to resume on the over-the-counter (OTC) market (such trading is known to occur colloquially on "the pink sheets"). Without any other steps needed from the company, brokers should begin OTC trading by filing a FINRA Form 211, which is designed to help comply with SEC Rule 15c2-11 and requires certain information to be published before broker-dealers may quote securities OTC.[13] Generally, OTC markets, the usual U.S. OTC exchange administrator, should add a "Q" as a suffix to the company's current ticker symbol,[14] and companies will often update their investor-relations sites to reflect the company's new status.

During the Chapter 11 Proceedings

To repeat the Base Case, during a chapter 11 proceeding it is expected that most public reporting companies will continue their SEC reporting uninterrupted. The SEC's staff has expressed their view on this topic in Staff Legal Bulletin (SLB) No. 2, dated April 15, 1997: "Companies in bankruptcy are not relieved of their reporting obligations." This includes "filing the current reports required by Form 8-K and satisfying the proxy, issuer tender offer and going-private provisions."[15]

Although most companies continue their SEC reporting uninterrupted, some companies suspend their quarterly earnings reports and earnings calls (as neither is an SEC requirement).[16] Further, U.S.-incorporated companies will sometimes delay or potentially forego their annual stockholders' meeting if there is projected to be no value to the company's common equity securities and, after § 12 deregistration, if the company has eliminated its requirements to follow the SEC's proxy rules.

Items to keep track of include the following: (1) updating an SEC report cover page if the common stock has been delisted to delete the name of the exchange and the checkmark for § 12(b) registration; and (2) disclosing in the financial statement footnotes, MD&A, legal proceedings, risk factors and the forward-looking statements legend that the company has filed for chapter 11, plus any other applicable updates (*i.e.*, defaults and events of default, going-concern disclosures and restructuring-support agreements). In addition, major chapter 11 milestones that will trigger Form 8-K filing requirements include, for required Form 8-K filings, plan confirmation (Item 1.03(b)); asset sales under § 363 of the Bankruptcy Code (Item 2.01); and entry into restructuring-support agreements, plan-support agreements, and debtor-in-possession financing agreements and amendments (Item 1.01). The documents required for Common Voluntary 8-Ks include debtor-in-possession financing commitment letters (Items 7.01 and 8.01) and reorganization plans, along with any material amendments (Items 7.01 and 8.01).[17]

Despite the Base Case, the SEC has stated that there are certain conditions under which it may grant no-action relief to allow companies to replace their periodic reporting on Forms 10-K and 10-Q with modified reporting, which consists of detailed monthly reports that are provided to the bankruptcy court, the U.S. Trustee and other parties-in-interest.[18] If a company pursues the modified-reporting approach, it would file its monthly report on a Form 8-K within 15 calendar days after the monthly report is due to the bankruptcy court.[19] Regular Form 8-Ks would also continue to be required throughout the bankruptcy.[20]

The SEC's key considerations in assessing whether a company should be allowed to use modified reporting are whether "the benefits that might be derived by shareholders of the debtor from the filing of the information are outweighed significantly by the cost to the debtor of obtaining the information,"[21] and whether trading in the debtor's securities is minimal.[22] The SEC staff will not allow a company to use modified reporting if its securities remain listed on a national securities exchange (*i.e.*, Nasdaq or NYSE).[23] Even OTC trading on the pink sheets would prevent the use of modified reporting if there is more than minimal trading volume.[24] When deciding whether to grant a company's no-action request, the SEC also considers the following: (1) whether the company has made efforts to inform its securityholders and the market of its financial condition; (2) whether the company has complied with its Exchange Act reporting obligations before the bankruptcy filing; (3) whether the company has promptly filed its Form 8-K after the bankruptcy filing; (4) whether the company has ceased its operations or the extent to which the company has curtailed operations; (5) why filing periodic reports would present an undue hardship to the company; (6) why the company cannot comply with the disclosure requirements; (7) why the company believes that granting the request is consistent with the protection of investors; and (8) the nature and extent of trading in the company's securities.[25]

Modified reporting can be efficient and minimize professional fees, but it does have drawbacks. Namely, a debtor that uses modified reporting is not "current" in reporting requirements, and as such, the company will lose the benefits of short-form registration, and certain shareholders will lose

9 *Id.* at (d).
10 17 C.F.R. § 249.323.
11 15 U.S.C. § 78(l).
12 15 U.S.C. § 78(o).
13 *See* "Form 211," FINRA, *available at* finra.org/filing-reporting/over-the-counter-reporting-facility-orf/form-211.
14 *See* "Stock Up on Information Before Buying Stock," FINRA, *available at* finra.org/investors/alerts/stock-information-buying-stock.
15 SEC Staff Legal Bulletin No. 2, dated April 15, 1997, *available at* sec.gov/interps/legal/slbcf2.txt.
16 *See* Release 33-10588, "Request for Comment on Earnings Releases and Quarterly Reports," at p. 9, *available at* sec.gov/rules/other/2018/33-10588.pdf.
17 *Supra* n.3.
18 *Supra* n.14.
19 *Id.*
20 *Id.*
21 Exchange Act Release No. 9660.
22 *Supra* n.14.
23 *Id.*
24 *Id.*
25 *Id.*

the safe harbor for public resale under Rule 144.[26] Further, a company that seeks to relist its securities after emergence would have to restart its regular reporting and include financial statements for the period(s) when it provided modified reporting.[27] Overall, given these drawbacks and the limited circumstances under which the SEC staff will provide no-action relief, we expect modified reporting to be the exception, not the rule.

Conclusion

Upon filing for chapter 11, most public-reporting companies should continue reporting and complying with Exchange Act requirements. Maintaining pre-petition reporting procedures provides flexibility during the chapter 11 case and promotes continuity and reporting discipline. Public-reporting companies should consider modified reporting if it would be advantageous based on the particular circumstances of the chapter 11 filing. abi

Reprinted with permission from the ABI Journal, Vol. XLI, No. 10, October 2022.

The American Bankruptcy Institute is a multi-disciplinary, nonpartisan organization devoted to bankruptcy issues. ABI has more than 12,000 members, representing all facets of the insolvency field. For more information, visit abi.org.

26 *Id.*
27 *Id.*

By Chad Husnick, Tony Simion, Drew Maliniak and Mason Zurek[1]

Securities Exchange Commission Reporting and Chapter 11: Part II

Chad Husnick
Kirkland & Ellis LLP
Chicago

Tony Simion
Alvarez & Marsal
Detroit

Chad Husnick is a partner in Kirkland & Ellis LLP's Restructuring Practice Group in Chicago. Drew Maliniak and Mason Zurek are associates in the firm's New York and Chicago offices, respectively. Tony Simion is a managing director within Alvarez & Marsal's North American Commercial Restructuring division in Detroit.

Editor's Note: *This is the second part of a two-part series.*

This article continues a discussion of public reporting companies' obligations under the Securities Exchange Act of 1934 (the "Exchange Act") during the life cycle of a restructuring under chapter 11. Part 1 of this article[2] discussed public reporting companies' obligations under the Exchange Act before, upon filing and during a chapter 11 case. It emphasized that to the extent possible, a company should continue to file pre-petition and comply with Exchange Act requirements as a "Base Case." Here is a summary of the Securities Exchange Commission (SEC) reporting considerations for public reporting companies discussed in Part I:

- *Before filing:* The company's reporting obligations remain ongoing,[3] including filing current reports on Form 8-K for certain material events[4] and updating disclosure, as needed, on Form 10-K[5] or 10-Q[6] in advance of a potential restructuring.
- *Upon filing:* The company is required to file a Form 8-K announcing the filing and often certain related material information (*e.g.*, restructuring support agreement or a debtor-in-possession commitment).
- *During chapter 11:* Most companies will continue SEC reporting uninterrupted. Form 8-K filings will be required for material events of chapter 11, including plan confirmation. The SEC allows a certain subset of debtors to make use of "modified reporting" in lieu of periodic reporting on Forms 10-K and 10-Q,[7] but electing to do so can have significant drawbacks and is relatively rare.

Part II discusses the company's options and corresponding obligations upon emergence from chapter 11.

Planning for Emergence (Going Dark vs. Relisting)

It is largely a business decision to either stop SEC reporting (*i.e.*, to "go dark") and become "private," or maintain SEC reporting obligations and potentially relist on a national securities exchange upon emergence from a chapter 11 restructuring. The enhanced liquidity, prestige and optics of being a listed public-reporting company are often weighed against the advantages of being private — namely, lower costs, less scrutiny and more flexibility.

This decision may sometimes be outside of the management team's hands. The equity owners of the company post-emergence will often be large institutional investors, which may prefer that a company go dark to give the company "breathing room" before being subjected to heightened scrutiny from the public markets. In other situations, a desire for investor liquidity outweighs the added scrutiny and costs. That said, certain SEC requirements must be met before a company can terminate its SEC reporting obligations.

Going Dark

A listed public reporting company's securities are registered under §§ 12(b), 12(g) and 15(d) of the Exchange Act as follows:

- Section 12(b)[8] requires registration of securities listed on a national securities exchange, such as Nasdaq or the New York Stock Exchange (NYSE);
- Section 12(g)[9] requires registration of any class of equity securities held by more than 2,000 record-holders or more than 500 record-holders who are not accredited investors as of the last day of its fiscal year (where the registrant has assets of $10 million or more); and
- Section 15(d)[10] requires any company that has sold securities pursuant to an effective registration statement (*i.e.*, typically Form S-8 or S-3) under the Securities Act of 1933, as amended, to follow the SEC's reporting requirements under § 13 of the Exchange Act.

Each of these obligations must be terminated. Thus, to go dark, a company must: (1) delist all securities from any national securities exchanges;

1 The authors thank Lanchi D. Huynh of Kirkland & Ellis LLP.
2 *See* Chad Husnick, Tony Simion, Drew Maliniak & Mason Zurek, "Securities Exchange Commission Reporting and Chapter 11: Part I," XLI *ABI Journal* 10, 30-31, 55-56, October 2022, *available at* abi.org/abi-journal (additional considerations related to nondisclosure agreement and potential securities exchange delisting actions, among other points; unless otherwise specified, all links in this article were last visited on Oct. 20, 2022).
3 SEC Staff Legal Bulletin No. 2, dated April 15, 1997, *available at* sec.gov/interps/legal/slbcf2.txt.
4 Form 8K, *available at* sec.gov/files/form8-k.pdf.
5 Form 10-Q, *available at* sec.gov/files/form10-q.pdf.
6 Form 10-K, *available at* sec.gov/files/form10-k.pdf.
7 *Supra* n.3.

8 15 U.S.C. § 78(l).
9 *Id.*
10 15 U.S.C. § 78(o).

(2) ensure that the number of outstanding holders of record is below 2,000[11] (note that securities held through "street" name via DTC are generally considered to be held "of record" by the bank or broker, not the underlying beneficial owners, which reduces the number of holders of record);[12] and (3) not have sold or issued any securities pursuant to an effective registration statement in the prior fiscal year.[13]

Form 25 Requirement

To deregister securities that were registered under § 12(b), either the company's national securities exchange or the company must file a Form 25 to delist the securities.

Form 25 Initiated and Filed by a National Securities Exchange (i.e., Nasdaq or NYSE): A national securities exchange can file a Form 25 and delist under the exchange's rules in as few as 10 calendar days,[14] but they can halt and suspend trading earlier (potentially before the bankruptcy petition) under the exchange's rules.[15] The national securities exchange must provide notice to the company and an opportunity to appeal, and post a public notice no fewer than 10 calendar days before the delisting.[16]

Form 25 Initiated and Filed by a Company: A company may voluntarily file a Form 25 to delist its securities from the securities exchange. The company first must notify the exchange and issue a press release at least 10 calendar days before filing the Form 25.[17] The delisting becomes effective 10 calendar days after filing the Form 25, which suspends the company's reporting obligations under § 12(b) at that time.[18] Trading will typically cease on the morning after the effectiveness of the Form 25 (so, if a trading day, the 11th day after filing the Form 25 or the 21st day after notifying the exchange). As previously discussed, a company may voluntarily file a Form 25 if its exchange has not done so. It is important to coordinate and confirm precise timing for a suspension of trading with the securities exchange.

Form 15 Requirement

Once the company is no longer subject to § 12(b) reporting obligations, the company can then turn to eliminating its obligations under §§ 12(g) and 15(d). Eliminating obligations under §§ 12(g) and 15(d) requires the filing of a Form 15.[19] To terminate registration under § 12(g), the company must certify that it has fewer than 300 record-holders, or 500 record holders and $10 million or less in assets on the last day of each of its last three fiscal years.[20] The company's reporting obligations under § 13(a) (*i.e.*, periodic reports) will be suspended on the day that the Form 15 has been filed, but until 90 days after the Form 15 is filed, the securities will not be deregistered, and reporting obligations under the proxy rules and § 16 will not be suspended.[21]

Even if a company takes the appropriate steps to deregister under §§ 12(b) and (g) of the Exchange Act, it will still need to suspend reporting obligations under § 15(d) to the extent applicable. There are two methods to suspend reporting under § 15(d): automatic suspension under Rule 15d-622, and registrant-initiated suspension under Rule 12h-3.[23]

Under Section 15(d) and Rule 15d-6, reporting obligations are automatically suspended for any fiscal year other than the fiscal year in which a registration statement became effective if, at the beginning of the fiscal year, the registrant had fewer than 300 record-holders. Note that a registration statement will be treated as becoming effective if it was updated through the filing of the Form 10-K. In such a case, while suspension is available under this provision, the SEC has stated under Staff Legal Bulletin No. 18, dated March 15, 2010 ("SLB 18"), that, to rely on the § 15(d) automatic-reporting suspension, a company must post-effectively deregister any remaining unsold securities from all existing Forms S-3 and S-8 registration statements before filing the Form 10-K for the prior fiscal year (*e.g.*, the Form 10-K for fiscal 2021). As an example, the Form 10-K for fiscal year 2021 would serve as a post-effective amendment that updates the company's registration statements, requiring a Form 10-K for fiscal year 2022 (due in 2023 as a trailing Form 10-K). Under Rule 12h-3, companies may suspend § 15(d) reporting obligations *at any time* during the fiscal year upon filing a Form 15 if, among other things, the company (1) is current and has been current in its SEC reporting for the last three fiscal years; (2) has fewer than 300 record-holders (where the registrant has assets of $10 million or more); and (3) no registration statements have become effective in the current fiscal year (note, again, that a registration statement that is updated due to a Form 10-K filing is treated as becoming effective).

However, in some situations, the SEC has previously granted no action relief where the company (1) plans to cancel upon emergence the securities causing the company's reporting obligations (with no successor company issuing securities that would trigger a new reporting obligation under §§ 12(g) or 15(d)), and (2) meets all of the aforementioned requirements *except* that registration statements have become effective in the current fiscal year (*e.g.*, a Form S-8 made effective because of the filing of the company's prior fiscal year Form 10-K). As a diligence matter, before seeking or relying on prior no-action relief, it is imperative that the company confirm that no issuances or sales of securities have occurred pursuant to those registration statements during that same fiscal year (*e.g.*, due to the settlement of securities related to an equity compensation plan). If issuances or sales of securities have occurred during the fiscal year in which the company is seeking relief, no relief is available.[24]

Under a typical "going dark" scenario (with no trailing Form 10-K requirement), shortly before emerging from chapter 11, the company should terminate any effective registration statements (*i.e.*, registration statements on Form S-3 or S-8). After which, assuming the company has fewer than

11 17 C.F.R. § 240.12g-1.
12 17 C.F.R. § 240.12g5-1 (*see also* 6S in the SEC's *Manual of Publicly Available Telephone Interpretation*).
13 *See also* Staff Legal Bulletin No. 18, Sec. & Exch. Comm'n (March 15, 2010), *available at* sec.gov/corp-fin/exchange-act-rule-12h-3-staff-legal-bulletin-18.
14 17 C.F.R. § 240.12d2-2(b).
15 *See, e.g.*, Nasdaq Listing Center, *available at* listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5000.
16 *Supra* n.14.
17 *Id.* at (c).
18 *Id.* at (d).
19 Form 15, *available at* sec.gov/files/form15.pdf.
20 17 C.F.R. § 249.323.
21 *Id.*

22 17 C.F.R. § 240.15d-6.
23 17 C.F.R. § 240.12h-3.
24 *See* n.13 to Staff Legal Bulletin No. 18.

continued on page 73

from page 25

300 record-holders and has remained current in its SEC reporting obligations, the company may file a Form 15 to suspend its § 15(d) reporting obligations and immediately stop SEC reporting.

If a company anticipates that it can terminate its Exchange Act reporting obligations, it should ensure that its post-emergence loan agreements, indebtedness, stockholder agreements and other contracts do not include contractual obligations to file reports with the SEC. While the company should expect to have ongoing reporting obligations to its lenders, the company should generally post these reports to a private lender and/or investor website rather than filing them with the SEC. The company also should consider including provisions in its organizational documents that prohibit transfers of equity that would result in the company being required to register with the SEC.

Stopping OTC Trading for Pre-Petition Securities

If the securities are being canceled at emergence, the company should notify FINRA at least 10 calendar days before the emergence date so that brokers cease over-the-counter (OTC) trading on the emergence date.[25]

Relisting with a National Securities Exchange and Registration with the SEC

If a company chooses to emerge as an SEC reporting company, it may seek to relist its post-emergence securities with the national securities exchange. Typically, under the base case, if a successor registrant is being used at emergence, that new legal entity would file a Form 8-K pursuant to Rule 12g-3[26] and/or Rule 15d-5[27] to assume the successor's registration status with the SEC. At that point, the company or its successor would need to satisfy the exchange's listing procedures with the national securities exchange to have the securities relisted. The exchange may also require that a Form 8-A 12(b) be filed.[28] In certain situations, if Rule 12g-3 is unavailable, a Form 10 may be necessary to complete the registration before the relisting.[29] A Form 10 would require several weeks to prepare, as it requires financial statements and IPO-like disclosure.

With planning, relisting could theoretically be done at the date of emergence. However, due to timing considerations, typically a relisting is completed, at the earliest, on the date after the notice of effective date for a confirmed reorganization plan. Exchanges should be contacted at least four to six weeks (or earlier) before the planned emergence date to ensure that the exchange's listing requirements are met, as many exchange-driven listing requirements depend on analyzing the number and make-up of post-emergence security-holders as well as any new directors.

Conclusion

Upon emergence from chapter 11, a public reporting company has two choices: cease SEC reporting (*i.e.*, "go dark") and become a "private" company, or maintain reporting obligations and potentially relist its securities on a national exchange. Going dark requires a company to terminate its obligations under each of §§ 12(b), 12(g) and 15(d) of the Exchange Act. Relisting, such as after a delisting due to the chapter 11 proceedings, may be accomplished through a number of avenues depending on the circumstances surrounding emergence, with some requiring significant lead time, since they are essentially a "re-IPO." When making its decision, management and the equity-owners must weigh the liquidity, prestige and optics of being a listed public-reporting company against the lower costs, less scrutiny and more flexibility of being private. abi

25 FINRA Rule 6490.

26 17 C.F.R. § 240.12g-3.

27 17 C.F.R. § 240.15d-5.

28 Form 8-A, *available at* sec.gov/files/form8-a.pdf.

29 Form 10, *available at* sec.gov/files/form10.pdf.

Copyright 2022
American Bankruptcy Institute.
Please contact ABI at (703) 739-0800 for reprint permission.