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Feature

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Securities Exchange Commission Reporting and Chapter 11: Part I

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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.

5 17 C.F.R. § 243.

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

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

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26 *Id.*
27 *Id.*