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Securities Exchange Commission Reporting and Chapter 11: Part II

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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/corpfin/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.

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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-326 and/or Rule 15d-527 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 securityholders 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.