

# MORRISON FOERSTER

## FREQUENTLY ASKED QUESTIONS ABOUT PERIODIC REPORTING REQUIREMENTS FOR U.S. ISSUERS – OVERVIEW

*These Frequently Asked Questions may be read together with our Frequently Asked Questions About Periodic Reporting Requirements for U.S. Issuers – Principal Exchange Act Reports.*

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### Becoming Subject to Periodic Reporting Requirements

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#### *What is a Reporting Company and what reports is it required to file?*

An issuer with a class of securities registered under Section 12 or subject to Section 15(d) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), is subject to the periodic and current reporting requirements of Section 13 or 15(d) of the Exchange Act and is often referred to as a “Reporting Company.”<sup>1</sup> The Exchange Act contains ongoing disclosure requirements designed to keep investors informed on a current basis of information concerning material changes in the financial condition or operations of the issuer. The requirements include an obligation to file periodic reports on Form 10-K and Form 10-Q and current reports on Form 8-K with the Securities and Exchange Commission (the “SEC”).

#### *How does an issuer become a Reporting Company?*

There are three statutory provisions that trigger reporting under the Exchange Act. An issuer becomes subject to the Exchange Act under the following circumstances:

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<sup>1</sup> The term Reporting Company is used herein to cover only U.S. reporting companies. We do not discuss reporting obligations for foreign private issuers. Please refer to our Frequently Asked Questions About Foreign Private Issuers, available on our website at: <http://www.mofo.com/files/Uploads/Images/100521FAQForeignPrivate.pdf>.

- **Securities exchange listing - Section 12(b)** - An issuer must register pursuant to Section 12(b) if it elects to list a class of securities (debt or equity) on a national securities exchange, *e.g.*, the Nasdaq Global Market (“Nasdaq”), the New York Stock Exchange (“NYSE”) or another national securities exchange. Typically, when an issuer undertakes an initial public offering (“IPO”), it also lists its securities for trading on a national securities exchange. A Section 12(b) registration statement on Form 8-A or Form 10 must be effective prior to an issuer listing its securities.
- **Issuer size - Section 12(g)** - An issuer must register under Section 12(g) of the Exchange Act if a class of its equity securities (other than exempted securities) is held of record<sup>2</sup> by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors<sup>3</sup> and, on the last day of the issuer’s fiscal year, its total assets exceed \$10 million.

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<sup>2</sup> See Section 12(g)(1)(A). Title V of the Jumpstart Our Business Startups (JOBS) Act (the “JOBS Act”), which was signed into law on April 5, 2012, amends Section 12(g)(1)(A) of the Exchange Act. The “held of record” definition in Section 12(g)(5) does not include securities received by the holder pursuant to an employee compensation plan in exempt transactions under Section 5 of the Securities Act or in a crowdfunding offering. In May 2016, the SEC adopted amendments to Exchange Act Rule 12g5-1 that established a non-exclusive safe harbor for securities received pursuant to an employee compensation plan that relies on the current definition of “compensatory benefit plan” under Exchange Act Rule 701 and the conditions in Rule 701(c).

<sup>3</sup> In May 2016, the SEC adopted amendments to the application of the definition of “accredited investor” in Securities Act Rule 501(a) in making determinations under Exchange Act Section 12(g)(1). The accredited investor determination must be made as of the last day of the fiscal year, and not at the time of the sale of the securities.

- **Public offering (no securities exchange listing)** - **Section 15(d)** - An issuer that files a registration statement under the Securities Act of 1933, as amended (the “Securities Act”), becomes subject to the Exchange Act reporting obligations upon the effectiveness of the registration statement through Section 15(d) of the Exchange Act. The registration statement can be for debt or equity securities.

***Does the JOBS Act impact the thresholds under Section 12(g)?***

Yes. Titles V and VI of the JOBS Act amended the prior record holder threshold by bifurcating it into two thresholds: one applicable generally to issuers regardless of their industry (see “How does an issuer become a Reporting Company?” above), which is effective immediately, and the other applicable specifically to banks and bank holding companies, which is effective at the end of the issuer’s first fiscal year following April 5, 2012, the date of the enactment of the JOBS Act. Accordingly, Title VI also added a new Section 12(g)(1)(B) to the Exchange Act, providing that a bank or bank holding company (as defined in Section 2 of the Bank Holding Company Act of 1956, as amended) with total assets exceeding \$10 million and a class of equity securities (other than exempted securities) held of record by 2,000 or more persons will become subject to Exchange Act reporting requirements. A bank or a bank holding company will no longer be subject to reporting if the number of record holders falls below 1,200 persons.<sup>4</sup> See “How does an issuer deregister under Section 12(g) and suspend reporting obligations under Section 15(d)?”

***What are the consequences of becoming a Reporting Company?***

By registering securities under Section 12(b) or Section 12(g) of the Exchange Act, an issuer becomes subject to the periodic and current reporting requirements of Section 13(a) of the Exchange Act. Exchange Act Section 15(d) issuers must file certain periodic reports and information required by Section 13 of the Exchange Act as if they had registered securities under Section 12. Becoming a Reporting Company under the Exchange Act, whether by registration under Section 12 or becoming subject to Section 15(d) of the Exchange Act, triggers periodic and current reporting requirements pursuant to Sections 13(a) and 15(d), including the requirement to file:

<sup>4</sup> In May 2016, the SEC adopted amendments to Exchange Act Rules 12g-1, 12g-2, 12g-3, 12g-4 and 12h-3 to treat savings and loan holding companies in a manner that is similar to banks and bank holding companies as to registration, termination of registration, and suspension of the Exchange Act reporting requirements.

- Annual reports on Form 10-K;
- Quarterly reports on Form 10-Q; and
- Current reports on Form 8-K.

The Exchange Act’s other provisions applicable to Reporting Companies are different, depending on whether issuers have registered under Section 12 or are subject to Section 15(d) of the Exchange Act. Following a Section 12(g) or Section 12(b) registration, in addition to the Exchange Act’s periodic and current reporting requirements, Section 13(a)<sup>5</sup> also subjects the issuer to all of the Exchange Act’s relevant provisions, including:

- Section 16 and 13(d) beneficial ownership reporting and short-swing trading rules; and
- Tender offer and proxy rules (Sections 13(e) and 14).

Section 15(d)<sup>6</sup> of the Exchange Act requires the issuer to comply with the same periodic and current reporting requirements (i.e., filings on Forms 10-K, 10-Q and 8-K) that apply (albeit through Section 13(a)) to issuers with a class of securities registered under Section 12. However, unlike Sections 12(b) and 12(g) of the Exchange Act, Section 15 does not subject an issuer (and its directors, officers and large shareholders) to Sections 16, 13(d) and 13(f) beneficial ownership reporting and short-swing trading rules. Similarly, the issuer does not have to comply with the tender offer and proxy rules (Sections 13(e) and 14 of the Exchange Act).

Becoming a Reporting Company also triggers certain recordkeeping requirements, internal accounting controls, and certain prohibitions on foreign corrupt practices. In addition, the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”) applies to Reporting Companies. See “Does the Sarbanes-Oxley Act apply to Reporting Companies?”

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Categories of Filers of Periodic Reports

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***What are the different categories of filers?***

The SEC has divided all issuers into four categories for purposes of Exchange Act filings, and filing deadlines vary depending on the filer category. Below are the four categories of filers:

- Large Accelerated Filers;
- Accelerated Filers;
- Non-Accelerated Filers; and

<sup>5</sup> See Rules 13a-1 through 13a-20 under the Exchange Act.

<sup>6</sup> See Rules 15d-1 through 15d-25 under the Exchange Act.

- Smaller Reporting Companies.

Rule 12b-2 under the Exchange Act specifically defines three of the four filer categories. Additionally, the category of Non-Accelerated Filers is implicitly defined in Rule 12b-2.

#### ***What is a Large Accelerated Filer?***

A “Large Accelerated Filer” is an issuer that meets the following requirements at the end of its fiscal year:

- The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of the issuer’s most recently completed second fiscal quarter;
- The issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months;
- The issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and
- The issuer is not eligible to use the requirements for smaller reporting companies in Part 229 of the Exchange Act for its annual and quarterly reports.<sup>7</sup>

#### ***What is an Accelerated Filer?***

An “Accelerated Filer” is an issuer that meets the following requirements at the end of its fiscal year:

- The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$75 million or more, but less than \$700 million, as of the last business day of the issuer’s most recently completed second fiscal quarter;
- The issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months;
- The issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and
- The issuer is not eligible to use the requirements for Smaller Reporting Companies in Part 229 of this chapter for its annual and quarterly reports.<sup>8</sup>

#### ***What is a Non-Accelerated Filer?***

While the SEC does not specifically define the term “Non-Accelerated Filer,” it is implicitly defined in Exchange Act Rule 12b-2 where one finds the definitions of Accelerated Filer and Large Accelerated

Filer as described above. A Non-Accelerated Filer is a Reporting Company that, as a result of having a public float of less than \$75 million, has not had to accelerate its periodic reporting deadlines.

#### ***What category does an IPO issuer fall into?***

IPO issuers will be Non-Accelerated Filers during the first year following their IPO, irrespective of their worldwide market value, also often referred to as “public float.” By definition, an IPO issuer would not satisfy the second or third condition for Accelerated Filer status set forth above under “*What is an Accelerated Filer*” and “*What is a Large Accelerated Filer*.” Accordingly, an IPO issuer’s first annual report on Form 10-K will be due 90 days after its fiscal year-end. See “*What are the filing deadlines for Form 10-K and Form 10-Q?*”

#### ***What is a Smaller Reporting Company?***

As defined in Rule 12b-2 under the Exchange Act, a “Smaller Reporting Company”<sup>9</sup> is an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that:

- Had a public float of less than \$75 million as of the last business day of its most recently completed second fiscal quarter;<sup>10</sup> or
- In the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than \$75 million as of a date within 30 days of the date of the filing of the registration statement;<sup>11</sup> or

<sup>9</sup> In June 2016, the SEC proposed amendments to the definition of Smaller Reporting Company which would expand the number of issuers that qualify as Smaller Reporting Companies. Issuers with less than \$250 million in public float would qualify, as would issuers with zero public float if their revenues were below \$100 million in the previous year.

<sup>10</sup> Computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity. See paragraph (1) of the definition of “Smaller Reporting Companies” in Rule 12b-2 under the Exchange Act.

<sup>11</sup> Computed by multiplying the aggregate worldwide number of such shares held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement by the estimated public offering price of the shares. See paragraph (2) of the definition of “Smaller Reporting Companies” in Rule 12b-2 under the Exchange Act.

<sup>7</sup> See Rule 12b-2(2) under the Exchange Act.

<sup>8</sup> See Rule 12b-2(1) under the Exchange Act.

- In the case of an issuer whose public float as calculated under paragraph (1) or (2) of the definition was zero, had annual revenues of less than \$50 million during the most recently completed fiscal year for which audited financial statements are available.

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#### Determining Smaller Reporting Company Status

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##### *How is the public float of a Reporting Company calculated?*

The public float of a Smaller Reporting Company is calculated by using the price at which the stock was last sold, or the average of the bid and asked prices of such stock, on a date within 60 days prior to the end of its most recent fiscal year. The public float of an issuer filing an initial registration statement under the Exchange Act is determined as of a date within 60 days of the date the registration statement is filed.

##### *How does an issuer without a calculable public float determine its eligibility as a Smaller Reporting Company?*

An issuer without a calculable public float determines its eligibility as a Smaller Reporting Company based on its annual revenues in the most recent fiscal year completed before the last business day of the second fiscal quarter. To qualify, it must have less than \$50 million in revenue in its last fiscal year.

##### *When is the determination in respect of Smaller Reporting Company status made?*

An issuer must determine whether it is a Smaller Reporting Company on an annual basis. The precise timing depends on whether the issuer is a Reporting Company or a non-reporting issuer filing its initial registration statement:

- For issuers required to file reports under Section 13(a) or 15(d) of the Exchange Act, the determination is based on whether the issuer came within the definition of Smaller Reporting Company as of the last business day of the second fiscal quarter of the issuer's previous fiscal year. An issuer in this category must reflect this determination in the information it provides in its quarterly report on Form 10-Q for the first fiscal quarter of the next year, indicating on the cover page of that filing, and in subsequent filings for that fiscal year, whether it is a Smaller Reporting Company. If a determination based on public float indicates that the issuer is newly eligible to qualify as a Smaller Reporting Company, the issuer may

choose to reflect this determination beginning with its first quarterly report on Form 10-Q following the determination, rather than waiting until the first fiscal quarter of the next year.

- For determinations based on an initial Securities Act or Exchange Act registration statement, the issuer must reflect the determination in the information it provides in the registration statement and appropriately indicate on the cover page of the filing, and subsequent filings for the fiscal year in which the filing is made, whether it is a Smaller Reporting Company.
- The issuer must assess its status at the end of its second fiscal quarter and then reflect any change in status on the cover page of its quarterly report on Form 10-Q.
- In the case of a determination based on an initial Securities Act registration statement, an issuer that was not determined to be a Smaller Reporting Company has the option to re-determine its status at the conclusion of the offering covered by the registration statement based on the actual offering price and number of shares sold.

##### *What happens when an issuer fails to qualify for Smaller Reporting Company status?*

A Smaller Reporting Company that is no longer eligible for scaled disclosure will no longer be permitted to file registration statements or periodic reports using scaled disclosure. The issuer may continue to report as a Smaller Reporting Company for the rest of the fiscal year, including in its annual report on Form 10-K. The issuer must provide the standard non-scaled disclosure in the first quarterly report on Form 10-Q for the new fiscal year following the eligibility determination date.

Once an issuer fails to qualify for Smaller Reporting Company status (*e.g.*, becomes an accelerated or large-accelerated filer), the issuer will maintain that new status until its public float falls below \$50 million as of the last business day of its second fiscal quarter. Or, if that calculation results in zero because the issuer had no public equity outstanding or no market price for its equity existed, if the issuer had annual revenues of less than \$40 million during its previous fiscal year.

***How does an issuer enter Accelerated Filer status and what are the consequences?***

The determination made at the end of an issuer's fiscal year as to a Non-Accelerated Filer or Accelerated Filer status governs the applicable deadlines for:

- the annual report to be filed for that fiscal year;
- the quarterly and annual reports to be filed for the subsequent fiscal year; and
- annual and quarterly reports to be filed thereafter so long as the issuer remains an Accelerated Filer or Large Accelerated Filer.

Once an issuer enters the universe of Accelerated Filer status, the filing deadlines for the annual reports on Form 10-K and quarterly reports on Form 10-Q become accelerated, *i.e.*, shortened. See "What are the filing deadlines for Form 10-K and Form 10-Q?"

***How does an issuer exit Accelerated Filer status?***

Once an issuer becomes an Accelerated Filer, it remains an Accelerated Filer, unless the issuer determines at the end of a fiscal year that the aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of the issuer was less than \$50 million, as of the last business day of the issuer's most recently completed second fiscal quarter. An issuer making this determination becomes a Non-Accelerated Filer.

***How does an issuer exit Large Accelerated Filer status?***

Once an issuer becomes a Large Accelerated Filer, it will remain a Large Accelerated Filer, unless the issuer determines at the end of a fiscal year that the aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of the issuer was less than \$500 million as of the last business day of the issuer's most recently completed second fiscal quarter. The issuer may either become an Accelerated Filer or fall entirely outside of the accelerated filer deadline system and become a Non-Accelerated Filer, depending on its new worldwide market value:

- If the issuer's aggregate worldwide market value was \$50 million or more, but less than \$500 million, as of the last business day of the issuer's most recently completed second fiscal quarter, the issuer becomes an Accelerated Filer.

- If the issuer's aggregate worldwide market value was *less than \$50 million* as of the last business day of the issuer's most recently completed second fiscal quarter, the issuer becomes a Non-Accelerated Filer.

***How is the worldwide market value calculated?***

The aggregate worldwide market value of the issuer's outstanding voting and non-voting common equity is calculated by use of the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity.<sup>12</sup>

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Overview of Periodic and Current  
Reports and Filing Deadlines

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***What are the filing deadlines for Form 10-K and Form 10-Q?***

The table below lists the deadlines for when Reporting Companies' annual report on Form 10-K and quarterly report on Form 10-Q are due, depending on the issuer's status:

| Filer Category           | Form 10-K                     | Form 10-Q                        |
|--------------------------|-------------------------------|----------------------------------|
| Large Accelerated Filers | 60 days after fiscal year end | 40 days after fiscal quarter end |
| Accelerated Filers       | 75 days after fiscal year end | 40 days after fiscal quarter end |
| Non-Accelerated Filers   | 90 days after fiscal year end | 45 days after fiscal quarter end |

For purposes of filing Form 10-Ks and Form 10-Qs with the SEC, the deadlines for such reports for a Smaller Reporting Company are those of a Non-Accelerated Filer.

***What is the filing deadline for Form 8-K?***

Subject to certain exceptions described below, a Form 8-K must generally be filed within four business days after occurrence of the event. If the event occurs on a Saturday, Sunday or holiday on which the SEC is not open for business, then the four-business day period shall begin to run on and include the first business day thereafter. See also "What are the hours of operation of the SEC for filing submissions via EDGAR?" below.

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<sup>12</sup>See Note to Rule 12b-2(1), (2) and (3) under the Exchange Act.

***What are the exceptions to the four-business day filing deadline for Form 8-K?***

- Regulation FD filings must be (i) simultaneous with the release of the material that is the subject of the filing (if such material is intentionally released to the public) or (ii) the next trading day (if the release was unintentional);
- Voluntary disclosures (Item 8.01) have no deadline;
- Filing of earnings press releases (Item 2.02(b)) must be completed before any associated analyst conference call;
- It is permissible to delay the filing of a Form 8-K related to the announcement of new officers until another public announcement of the appointment (e.g., press release, trade conference, etc.);
- The filing of a Form 8-K related to an issuer's receipt of an auditor's restatement letter (Item 4.02) must be completed within two business days; and
- The financial statements of an acquired business (Item 9.01) must be filed no later than 71 calendar days after the date that the initial report on Form 8-K must be filed (four business days plus 71 calendar days).

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Filing Requirements

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***What are the filing requirements for periodic and current reports and proxy statements?***

The issuer must file its Form 10-K, Form 10-Q and Form 8-K (including financial statements, financial statement schedules, exhibits, as applicable) electronically with the SEC via EDGAR. No filing fee is required. These periodic reports must also be filed with any stock exchange on which any class of the issuer's securities is listed. Nasdaq and NYSE treat filings made with the SEC via EDGAR as being simultaneously filed with Nasdaq and NYSE, as applicable.

Similarly, Section 12 issuers must file their proxy statement with the SEC via EDGAR and with any stock exchange on which any class of the issuer's securities is listed. There is no filing fee for a proxy statement relating to an annual shareholders' meeting or a special meeting that relates to any matter other than approval of a business combination, whereas for proxy statements relating to a business combination, the SEC requires a filing fee.

***What are the hours of operation of the SEC for filing submissions via EDGAR?***

The hours of operation for submissions of periodic and current reports via the SEC's EDGAR system are 6.00 a.m. to 10.00 p.m. Eastern Time, weekdays, excluding federal holidays. Transmissions started but not completed by 10.00 p.m. Eastern Time may be canceled, and the issuer may have to re-submit on the next business day.<sup>13</sup> Note that filings of Form 10-Ks, 10-Qs and 8-Ks submitted after 5.30 p.m. Eastern Time will receive the next business day's filing date. To access EDGAR, a filer must have EDGAR access codes, which can be obtained by completing and submitting an electronic Form ID.

***What happens if a filing deadline falls on a weekend or federal holiday?***

If a filing deadline falls on a weekend or federal holiday, the due date is "adjusted" to fall on the next business day pursuant to Rule 0-3(a) under the Exchange Act. Thus, if a filing is due on a Saturday or Sunday, the issuer must instead submit the filing to the SEC via EDGAR on the next Monday before 5.30 p.m. Eastern Time.

***Can an issuer amend its periodic and current reports?***

Yes. An issuer may need to amend a filed periodic report, to, among other things:

- provide restated financial statements and update any related disclosure, as a result of a restatement of its financial statements;
- provide information that was unknown at the time of the original filing;
- revise the disclosed information, based on SEC comments; or
- correct any misstatements, omissions or errors.

An amendment to Form 10-K can be used to correct any material inaccuracies, misstatements or omissions that the issuer subsequently discovers. An issuer cannot use later periodic reports, such as Form 10-Q or Form 8-K filed after a Form 10-K, to correct inaccuracies in the Form 10-K. If an issuer discovers mistakes or inaccuracies in its Form 10-K, before or after it has already filed its Form 10-Q for the following fiscal quarter containing accurate and complete information, and it determines the mistakes or inaccuracies were material, the issuer must amend its Form 10-K (regardless of any later accurate periodic reports). Similarly, an amendment to Form 10-Q can be used to correct any material inaccuracies, misstatements or omissions that the issuer subsequently discovers.

<sup>13</sup> See EDGAR Filer Manual (Volume I, November 2011).

An amendment to Form 10-K, Form 10-Q or Form 8-K is filed using the same form by adding the letter "A" (Form 10-K/A, Form 10-Q/A and Form 8-K/A) as applicable. Other than for an amendment to provide Part III information in the case of Form 10-Ks, the SEC does not specify any specific deadline for filing amendments; however, amendments should be filed as promptly as possible.

The amendment need not restate the entire form; only the complete text of the relevant item that it amends. The Form 10-K/A, Form 10-Q/A and Form 8-K/A, as applicable, is filed with the SEC electronically via EDGAR.

***Can an issuer obtain a filing extension for Form 10-K and Form 10-Q?***

Yes. An issuer may request more time to file Form 10-Ks and 10-Qs. The issuer must file via EDGAR a Form 12b-25 (designated as an "NT 10-K" or "NT 10-Q" in the EDGAR filing system) no later than the next business day after the original filing deadline (for which the extension is requested). The Form 12b-25 must disclose the issuer's inability to file the report timely and the reasons therefor in reasonable detail. An extension of up to 15 calendar days is available for Form 10-K and up to five calendar days for Form 10-Q. The extension period begins to run the day the report was due, and further extensions are not available. For example, a Form 10-Q that was due on a Saturday must be filed no later than the next Monday. The extension period under Rule 12b-25 would commence on Monday. Therefore, assuming a five-day extension, the Form 10-Q must be filed no later than the following Monday to be considered timely filed.

If the issuer timely files the Form 12b-25 and represents the report is not timely filed because the registrant is unable to do so "without unreasonable effort or expense," such report will be deemed filed on the filing due date for such report, if the issuer then files the report not later than the 15th calendar day (for a 10-K) or fifth calendar day (for a 10-Q) following the due date for the missed report.<sup>14</sup>

***Can an issuer obtain a filing extension for Form 8-K?***

No. Rule 12b-25 filing extensions are not available for Form 8-K filings.

***Does the failure to file periodic and current reports on time or at all subject the issuer to liability?***

Yes. The failure by a Reporting Company to file a required annual, quarterly or current report constitutes

<sup>14</sup> See Rule 12b-25 under the Exchange Act.

a violation of Section 13(a) or Section 15, as applicable, of the Exchange Act and subjects the issuer to potential liability. The SEC could institute administrative proceedings against the late filer seeking revocation of its registration under the Exchange Act. These proceedings by the SEC are uncommon though, and typically aimed at recurring and egregious violations.

In addition, the issuer is subject to liability under the antifraud provisions under the Exchange Act. The failure to file a Form 10-K, Form 10-Q or Form 8-K can be considered a failure by the issuer to disclose material information or a material omission. This can give rise to liability under Section 10(b) and Rule 10b-5 of the Exchange Act, which prohibit material misstatements and omissions in connection with the purchase or sale of securities. For Form 8-Ks, however, no failure to file under the following Items shall be deemed a violation of Section 10 of the Exchange Act and Rule 10b-5: Items 1.01, 1.02, 2.03-2.06, 4.02(a), 5.02(e), or 6.03.

***What are the main consequences of a late filing?***

Late filings can have severe consequences for issuers. Late filings may have an impact on an issuer's ability to remain listed on the NYSE or the Nasdaq. They will also impact an issuer's ability to use a short-form registration statement on Form S-3 for both primary and secondary offerings and the issuer's ability to maintain Well Known Seasoned Issuer ("WKSI") status. If an issuer fails to file a periodic or current report on time or at all, the issuer is no longer considered to have timely filed all of the Exchange Act reports that it is required to file, which is one of the requirements to use Form S-3. An issuer will not be eligible to use a Form S-3 for a period of 12 months. This will, in turn, limit the issuer's ability to conduct certain types of registered securities offerings. For Form 8-Ks, there are some exceptions. Failure to file a Form 8-K within the required time period with respect to reportable events subject to Items 1.01, 1.02, 2.03-2.06, 4.02(a), or 5.20(e) will not affect an issuer's eligibility to use Form S-3.

In addition, until the late Form 10-K or Form 10-Q is filed, the issuer will also lose its ability to file a Form S-8 registration statement and its eligibility under Rule 144 under the Securities Act ("Rule 144"). Form S-8 is a short-form registration statement used for offering securities under an employee benefit plan, and Rule 144 provides a safe harbor for the resale of restricted and control securities. These are temporary consequences, however, because neither Form S-8 nor Rule 144 requires that an issuer's reports be filed timely, only that they are filed. Accordingly, once the periodic report is filed, even if it is late, the issuer will have restored its ability to file or use a Form

S-8 registration statement and will have “current information” available for Rule 144 eligibility.

Rule 144 specifically excludes Form 8-K reports from its requirement that an issuer must have adequate current information about itself publicly available. As a result, if an issuer fails to file a Form 8-K on time or at all, for purposes of Rule 144, the issuer is considered to have filed all of the Exchange Act reports required to be filed. As it relates to Form 8-Ks however, SEC guidance makes clear that the failure to file a Form 8-K may be considered prima facie evidence of a lack of sufficient disclosure controls under the Sarbanes-Oxley Act.

In addition, late filers also need to be aware of and consider company-specific consequences, such as whether a late filing will trigger an event of default under the terms of debt instruments or violate any other contractual covenants.

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## SEC Review of Periodic Reports

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### *Are periodic reports subject to SEC review?*

Yes. The Sarbanes-Oxley Act requires the SEC to undertake some level of review of Reporting Companies’ periodic reports at least once every three years. In addition, the SEC selectively reviews transactional filings, such as registration statements, when issuers engage in public offerings, business combination transactions, and proxy solicitations. Accordingly, the SEC may review an issuer more often than every three years if an issuer files a registration statement under the Securities Act for an offering of securities, or if the SEC is monitoring compliance with a new (or existing) rule, or a specific industry. For example, following the 2008 financial crisis, the SEC began reviewing the periodic reports of large financial institutions on an ongoing basis.

While the SEC Staff may review as many (or as few) of the issuer’s periodic reports as it chooses, in practical terms, the SEC Staff will review the most recent Form 10-K and Form 10-Q filed up to the date the SEC review begins.

### *What is the scope of review?*

If the SEC selects an issuer or a filing for review, the extent of that review depends on many factors, including the criteria set forth in Section 408 of the Sarbanes-Oxley Act and the factors identified through the SEC’s selective review criteria. The scope of a review may be:

- a full cover-to-cover review in which the SEC Staff will examine the entire filing for compliance with the applicable requirements of the federal securities laws and regulations;
- a financial statement review in which the SEC Staff will examine the financial statements and related disclosure, such as the MD&A, for compliance with the applicable accounting standards and the disclosure requirements of the federal securities laws and regulations; or
- a targeted issue review in which the SEC Staff will examine the filing for one or more specific items of disclosure for compliance with the applicable accounting standards and/or the disclosure requirements of the federal securities laws and regulations.

### *What is the typical SEC review process?*

There are typically three steps in the SEC review process:

- **SEC Staff comments.** When the SEC Staff identifies instances where it believes an issuer can improve its disclosure or enhance its compliance with the applicable disclosure requirements, it provides the issuer with comments, a so-called “comment letter.” The range of possible comments is broad and depends on the issues that arise in a particular filing review. The SEC Staff completes many filing reviews without issuing any comments, though.
- **Issuer response to comments.** An issuer generally responds to each comment in a letter to the SEC Staff, a so-called “response letter” and, if appropriate, by amending its filings. An issuer’s explanation or analysis of an issue will often resolve a comment. Depending on the nature of the issue, the SEC Staff’s concern, and the issuer’s response, the SEC Staff may issue additional comments following its review of the issuer’s response to its prior comments. This comment and response process continues until the SEC Staff and the issuer resolve the comments.
- **Closing a filing review.** When an issuer has resolved all SEC Staff comments on a periodic or current report, or a preliminary proxy statement, the SEC Staff provides the issuer with a letter to confirm that its review is complete.

In resolving comments to the satisfaction of both the SEC Staff and the issuer, the issuer may be required to restate and/or amend its earlier periodic reports.

### *How long does the SEC review process take?*

It depends. The time involved with the SEC review process depends primarily on the number and type of comments, the issuer's (and its outside counsel's) reactions to the comments, and whether the issuer decides to argue with any of the SEC Staff requests for revisions. The issuer may need to consider whether it would be misleading to file its next periodic report without first resolving all of the comments on its earlier reports, depending on the timing of the comment letter, the type of comments and the affected disclosure. Any potential delay in filing its periodic reports will likely cause an issuer to try to accelerate the SEC review process by responding as quickly as possible to the comments and communicating frequently and directly with its SEC reviewer.

### *Will comment and response letters become publicly available?*

Yes. When the SEC Staff completes a filing review, it makes its comment letters and issuer response letters publicly available on the SEC's EDGAR system no earlier than 20 business days after it has completed its review of a periodic or current report. In making correspondence publicly available on the EDGAR system, the SEC Staff redacts any information subject to a Rule 83 confidential treatment request without evaluating the substance of that request. Only if and when a request is made for that information under the Freedom of Information Act does the SEC Staff undertake any substantive review of the confidential treatment request.<sup>15</sup>

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## The Sarbanes-Oxley Act's Application to Reporting Companies

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### *Does the Sarbanes-Oxley Act apply to Reporting Companies?*

Yes. The Sarbanes-Oxley Act applies to both U.S. and non-U.S. issuers with debt or equity securities registered under Section 12 of the Exchange Act, or required to file reports under Section 15(d) of the Exchange Act. The Sarbanes-Oxley Act even applies to issuers that file, or have filed, a registration statement that has not yet become effective under the Securities Act.<sup>16</sup> Accordingly, immediately upon filing a registration

<sup>15</sup>Please refer to our Frequently Asked Questions About Confidential Treatment Requests, available on our website at: <https://media2.mofo.com/documents/faq-confidential-treatment-requests.pdf>.

<sup>16</sup>See Section 2(a)(7) of the Sarbanes-Oxley Act.

statement on Form S-1 in connection with an IPO, a private company becomes an "issuer" under the Sarbanes-Oxley Act. It will remain an "issuer" unless the registration statement is withdrawn. Additionally, an issuer offering debt securities pursuant to a registration statement filed under the Securities Act, will be subject to the Sarbanes-Oxley Act, regardless of the fact that the issuer did not register the debt securities under Section 12 of the Exchange Act.

### *Which Sarbanes-Oxley Act provisions apply to Reporting Companies?*

The Sarbanes-Oxley Act provisions applicable to Reporting Companies, include:

- audit committee requirements;
- CEO/CFO certifications;
- prohibition on director and executive officer loans;
- restrictions on improper influence on conduct of audits;
- bonus forfeiture in case of accounting restatements due to misconduct;
- bar on service as a director or officer of persons found guilty of federal securities law violations;
- prohibition of insider trading during employee plan blackout periods; and
- whistleblower protections.

These provisions are implemented through various Exchange Act rules.

### *What are Sarbanes-Oxley certifications?*

The chief or principal executive officer and the chief or principal financial officer of the issuer, typically the CEO and CFO, are personally required to certify the content of the issuer's periodic reports filed with the SEC and the procedures established by the issuer to prepare financial statements and disclosures generally. Rules 13a-14(a) and 15d-14(a) promulgated under the Exchange Act, adopted pursuant to Section 302 of the Sarbanes-Oxley Act, require CEOs and CFOs of public companies to include certifications in their periodic reports filed with the SEC that address the following:

- the material accuracy and fair presentation of the report's disclosure;
- establishment and maintenance of "disclosure controls and procedures"; and
- deficiencies in, and material changes to, internal control over financial reporting.

As adopted pursuant to Section 906 of the Sarbanes-Oxley Act, 18 U.S.C. Section 1350 requires CEOs

and CFOs of Reporting Companies that file periodic reports with the SEC containing financial statements to certify each report's compliance with the Exchange Act and that the information contained in the report fairly presents the financial condition and results of operation of the issuer.

The precise wording of the required certifications is set forth in the form of certifications at the end of Form 10-K and Form 10-Q. Criminal penalties can be levied against CEOs and CFOs personally if they submit inaccurate certifications under Sections 302 or 906 of the Sarbanes-Oxley Act, which could result in significant fines.

***What types of reports are subject to the Sarbanes-Oxley certification requirements?***

Sections 302 and 906 of the Sarbanes-Oxley Act state that the required certification is to be included in each annual or quarterly report filed or submitted under either Section 13(a) or 15(d) of the Exchange Act. Accordingly, the certification requirement applies to:

- annual reports on Form 10-K;
- quarterly reports on Form 10-Q; and
- amendments to any of the foregoing reports.

Current reports on Form 8-K, rather than periodic (quarterly and annual) reports, are not covered by the certification requirement. The certifications are filed as exhibits to the Form 10-K and Form 10-Q.

***What are disclosure controls and procedures?***

"Disclosure controls and procedures" (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) is a term of art. "Disclosure controls and procedures" are controls and other procedures designed by issuers to ensure that the information required to be disclosed in the reports filed by them under the Exchange Act are recorded, processed, summarized and reported on a timely basis. Disclosure controls and procedures include, but are not limited to, controls and procedures designed to ensure that information required to be disclosed by an issuer in its Exchange Act reports is appropriately accumulated and communicated to the issuer's management, including its principal executive and financial officers, in order to allow timely decisions regarding required disclosure and to permit the CEO and CFO to provide the required Section 302 and Section 906 certifications pursuant to the Sarbanes-Oxley Act.

***What is internal control over financial reporting?***

"Internal control over financial reporting" (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)), which

is also subject to the Sarbanes-Oxley certifications, is defined by the SEC as a process designed by, or under the supervision of, the issuer's principal executive and principal financial officers, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP.

"Internal control over financial reporting" includes those policies and procedures that:

- pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
- provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and
- provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements.

Section 404(b) of the Sarbanes-Oxley Act requires auditor attestation regarding the adequacy of an issuer's internal controls. Newly public issuers must comply with the auditor attestation requirements upon filing their second annual report, except for Non-Accelerated Filers and Smaller Reporting Companies that are exempt from the requirement entirely. Additionally, the JOBS Act has established certain phase-in requirements for emerging growth companies (companies with total annual gross revenues of less than \$1.7 billion in their most recently completed fiscal year). An emerging growth company will not be subject to the auditor attestation of internal controls requirement pursuant to Section 404(b) of the Sarbanes-Oxley Act; however, it will be subject to the requirement that management establish, maintain, and assess internal control over financial reporting.

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Termination of Reporting Obligations

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***Can a Reporting Company terminate its requirements to file periodic reports with the SEC under the Exchange Act?***

Yes. An issuer may wish to delist and deregister under the Exchange Act for multiple reasons, including a

voluntary delisting from an exchange, or upon its dissolution. In many cases, an issuer will gradually have accumulated obligations under Section 15(d), and either or both Section 12(g) and Section 12(b), all of which need to be taken into account when the issuer is seeking to completely exit the reporting system. The process involves several steps, and the rules can be complex and highly technical in their practical application.

#### ***How does an issuer delist and deregister under Section 12(b)?***

For a typical IPO issuer that has a class of securities registered under Section 12(b) and is listed on a national securities exchange, *e.g.*, Nasdaq or NYSE, Rule 12d2-2 and Form 25 initiate the delisting and deregistration process, with respect to the issuer's current Section 12(b) registration. The first step is to delist the securities. Listed issuers are entitled to delist their securities voluntarily and to deregister them under Section 12(b) of the Exchange Act by filing a Form 25 with the SEC. The issuer must give notice of its intention to file the Form 25 and issue a press release announcing that intention 10 days prior to filing the Form 25. The delisting will become effective 10 days after filing the Form 25. As of the effective date of the delisting, the issuer's duties to file reports under Section 13(a) are suspended.<sup>17</sup> However, the actual termination of registration under Section 12(b) does not occur until 90 days after effectiveness of the delisting. Delisting and deregistration under Section 12(b) are not the end of the process.

#### ***How does an issuer deregister under Section 12(g) and suspend reporting obligations under Section 15(d)?***

Once delisted under Section 12(b) of the Exchange Act, an issuer may still be subject to reporting obligations pursuant to Section 12(g) of the Exchange Act if it had more than either 2,000 record holders<sup>18</sup> or 500 non-accredited record holders<sup>19</sup> and total assets exceeding \$10 million, or pursuant to Section 15(d) of the Exchange Act, if it at any time had an effective registration statement under the Securities Act. To deregister under Section 12(g) and suspend its reporting obligations under Section 15(d), the issuer must file a Form 15. The Form 15 may be filed on (or after) the effective date of the delisting (*i.e.*, 10 days after filing the Form 25). In order to deregister under Section 12(g), the Form 15 must certify that the

<sup>17</sup> However, an issuer must still comply with Sections 14(a), 16 and 13(d) of the Exchange Act during the suspension period.

<sup>18</sup> See *supra*, note 2.

<sup>19</sup> See *supra*, note 3.

issuer has less than 300 shareholders of record of the class of securities to be deregistered.<sup>20</sup> The Section 15(d) suspension can occur either: (i) automatically, if the class of securities is held by less than 300 record holders at the beginning of any fiscal year (other than a year in which the registration statement became effective) or (ii) at any time, by relying on Exchange Act Rule 12h-3's conditional suspension, if the class of securities is held by less than 300 record holders or less than either 2,000 record holders or 500 non-accredited record holders and the issuer's assets do not exceed \$10 million at the end of each of its last three fiscal years.

An issuer's periodic reporting obligations under the Exchange Act will be suspended immediately upon its filing of Form 15, and deregistration under Section 12(g) becomes effective 90 days after. While an issuer can suspend its Section 15(d) obligations by filing a Form 15, it can never terminate its Section 15(d) reporting obligations. If at any time the issuer no longer satisfies the requirements under which its Section 15(d) obligations were suspended (if, for example, the issuer exceeds the limit on the number of record holders on the first day of any following fiscal year), the reporting obligations come back to life without any action by the issuer.

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## XBRL for Financial Statement Filings

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### ***What is XBRL?***

The SEC adopted final rules in January 2009 requiring issuers to provide financial statement information in eXtensible Business Reporting Language ("XBRL") to improve the information's usefulness to investors.<sup>21</sup>

XBRL provides interactive data tags that uniquely identify individual items in an issuer's financial statements. Instead of treating financial information as a block of text, XBRL provides a computer-readable tag to identify each individual item of data. By attaching identifying tags to individual pieces of data, a business

<sup>20</sup> The threshold is 1,200 record holders for bank and bank holding companies and savings and loan holding companies pursuant to new Section 12(g)(1)(B) added by the JOBS Act and amended by the Fixing America's Surface Transportation Act. See *supra*, note 4. The SEC also has issued guidance relating to how bank or bank holding companies and savings and loan holding companies deregister under Section 12(g), available at: <http://www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-12g.htm>.

<sup>21</sup> The SEC's adopting release regarding final rules for XBRL is available at <http://www.sec.gov/rules/final/2009/33-9002.pdf>.

reporting document becomes “intelligent” data, allowing the exchange of business reporting data by encoding the information in a meaningful way.

Computer applications can use the XBRL data to recognize the information in an XBRL document—selecting, analyzing, storing, and exchanging it with other computers—and present it in a variety of ways for users.

#### *Which SEC filings does XBRL impact?*

XBRL-tagged financial data must be filed with several SEC forms, including as it relates to U.S. Reporting Companies:

- Quarterly reports on Form 10-Q and annual reports on Form 10-K and transition reports for a change in fiscal year;
- Current reports on Form 8-K that contain updated or revised versions of financial statements that were previously filed with the SEC; and
- Registration statements on Forms S-1, S-3, S-4 and S-11 if they include, rather than incorporate by reference, financial statements, once a price or price range has been determined and at any later time when the financial statements are changed.

The XBRL requirement does not change the substance or format of the information disclosed in the body of the periodic reports or registration statements. Rather, issuers are required to include a new exhibit containing their financial statements, financial statement schedules and footnotes in XBRL. *See “To what parts of the filing do the XBRL requirements apply?”*

#### *Is the issuer also required to make a website posting?*

Yes. Issuers are also required to post the XBRL data on their public websites by the end of the calendar day on which the periodic report was filed with the SEC or was required to be filed (whichever is earlier). The XBRL data must remain on the issuers’ website for 12 months. This also applies to XBRL exhibits and files for registration statements.

#### *Which issuers have to comply with XBRL and by when?*

The SEC had adopted a phase-in period for the XBRL requirements that was completed on June 15, 2012. All Reporting Companies that use U.S. GAAP currently must comply with the XBRL requirements.

On March 1, 2017, the SEC made International Financial Reporting Standards (“IFRS”) taxonomy available. Previously, the SEC’s EDGAR filing system was not able to support an IFRS taxonomy, and, as a

result, foreign private issuers had been relieved of the XBRL requirement. With the publication of the IFRS taxonomy, foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the International Accounting Standards Board must submit their financial data in XBRL format beginning with their first annual report on Form 20-F or 40-F for fiscal periods ending on or after December 15, 2017.

#### *To what parts of the filing do the XBRL requirements apply?*

The XBRL requirements apply to an issuer’s primary financial statements, notes to financial statements and schedules. The parts of the financial statements and other information that must be tagged include:

- Balance Sheet
- Income Statement
- Statement of Comprehensive Income
- Statement of Cash Flows
- Statement of Owner’s Equity
- Notes to the financial statements
- Schedules

Issuers are not required, or permitted, to provide their MD&A, executive compensation information or other financial disclosure, such as selected financial data and pro forma information, in XBRL format.

#### *What are the consequences of failing to comply with XBRL?*

Issuers that fail to provide the XBRL data to the SEC or post it on their website on the date required will not satisfy Rule 144’s current public information requirement and will lose Form S-3 eligibility until they provide the delinquent XBRL data to the SEC and/or post it to their website, as the case may be.

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### Liability Issues for Periodic Reports

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#### *Is the issuer subject to both Exchange Act and Securities Act liability?*

Yes. The issuer is subject to Exchange Act liability, and under certain circumstances also liability under the Securities Act.

The content of the information and the disclosures made by the issuer in the periodic and current reports may be subject to liability under Sections 10, 13(a), 15(d) and 18 of the Exchange Act and Rule 10b-5 under

the Exchange Act. The issuer may also be subject to liability under Sections 11, 12, and 17 of the Securities Act if, for example, the Form 10-K, Form 10-Q or parts of the proxy statements, are incorporated by reference into a Securities Act registration statement, such as a shelf registration statement on Form S-3 in connection with an offering off the shelf registration statement.

Section 18(a) of the Exchange Act provides an express private right of action for any person who, relying on a false or misleading statement or omission made in an Exchange Act report or other filings made with the SEC, buys or sells a security at a price affected by that statement or omission. Accordingly, the issuer has potential Section 18 liability for the content and disclosures in Form 10-K, Form 10-Q and Form 8-K that are filed, as opposed to furnished, with the SEC. Form 8-Ks under Items 2.02 (Results of Operation and Financial Condition)<sup>22</sup> and 7.01 (Regulation FD Disclosure), are not considered filed with the SEC for purposes of Section 18 liability. Accordingly, issuers have potential Section 18 liability for the disclosure in a Form 8-K relating to any Item other than Items 2.02 and 7.01.

Under Rule 14a-3 under the Exchange Act, the annual report to shareholders is provided to the SEC for informational purposes only. If the annual report has not been filed as an exhibit to Form 10-K, it is not subject to liability under Section 18 of the Exchange Act. In contrast, if some or all of the annual report is incorporated by reference into the Form 10-K and filed as an exhibit to the Form 10-K, the information is subject to liability under Section 18.

***Are there any limited liability provisions related to XBRL data?***

No. XBRL data currently is subject to the same liability provisions as the related filing.

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ÄS"## Morrison & Foerster LLP

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<sup>22</sup> An issuer typically provides its earnings releases pursuant to Item 2.02, which should be "furnished," rather than "filed."