Down for the Account: Steps to Take When Facing a Change in Accountant

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A discussion of the steps a US reporting company should take when facing the resignation or dismissal of its accountant. The Note explains the related Form 8-K disclosure requirements, including when past financial statements may no longer be relied on. It further discusses how a change in accountant may lead to the late filing of a Form 10-K or Form 10-Q, how to announce a late filing on Form 12b-25 and the related implications under SEC rules and NYSE and NASDAQ listing standards. Finally, the Note addresses the risk that a late filing may trigger a debt default and the importance of investor and creditor relations.

A company may decide to change its accountant for any number of reasons, including problems with or disagreements about:

- The auditor's independence.
- The scope of an audit.
- The accountant's ability to rely on management.
- An accounting practice or procedure.
- Some other issue that has complicated the company's relationship with its accountant.

This Note describes the factors that a US reporting company should consider and the actions it should take when facing the resignation or dismissal of its accountant.

When changing accountants, a US reporting company faces disclosure requirements and may face other risks and complications, especially if the change in accountant causes a delay in filing required periodic reports under the Securities Exchange Act of 1934 (Exchange Act).

Specifically, a company changing its accountant must file one or more current reports on Form 8-K with the SEC. These reports must include information responsive to:

- Item 4.01(a) of Form 8-K, which requires disclosure about any resignation or dismissal of the company's accountant.
- Item 4.01(b) of Form 8-K, which requires disclosure about the appointment of a new accountant.

Additional disclosure is required under Item 4.02 of Form 8-K if management or the company's accountant has determined that the company's previously filed annual or interim financial statements may no longer be relied on.

In addition to these Form 8-K disclosure requirements, if the change in accountant causes the company to miss SEC filing deadlines for any annual report on Form 10-K, any quarterly report on Form 10-Q or any combination of Form 10-K and Form 10-Q filings, the company must file a notification of late filing on Form 12b-25 to disclose and explain each late filing. The late filing of a Form 10-K or Form 10-Q may result in:

- Limitations on a company's use of Form S-3, Form S-4 or Form S-8 registration statements.
- Impermissibly stale information under Exchange Act Rule 15c2-11 and under Rule 144 and Rule 144A under the Securities Act of 1933 (Securities Act).
- Non-compliance with the listing standards of the securities exchange or exchanges on which the company's securities are listed.
- Defaults under the company's debt securities and other instruments and agreements.

Because the dismissal or resignation of a company's accountant may cause confusion or concern in the market, the company should also be prepared to handle questions from its investors and creditors.

The discussions in this Note apply only to US reporting companies. Foreign issuers may be subject to different or conflicting requirements under federal securities law and SEC rules and regulations.

REQUIRED SEC DISCLOSURE ON FORM 8-K

Any US reporting company facing a change in accountant must file a Form 8-K with the SEC within four business days of the accountant's:

- Resignation.
- Refusal to stand for re-appointment.
- Dismissal.

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This filing requirement is triggered by a change in either:

- The principal accountant that is auditing the company's financial statements.
- Any independent accountant:
  - responsible for auditing a significant subsidiary of the company; and
  - upon whom the principal accountant is expected to rely in its report.

In particular, the company should focus on the requirements of Item 4.01 of Form 8-K and, if applicable, Item 4.02 of Form 8-K, as described in more detail below.

TIMING OF THE FILING

For purposes of the Form 8-K filing requirement, neither Form 8-K nor Regulation S-K indicates when the resignation or removal of the accountant is deemed to have occurred.

In cases involving **dismissal** of an accountant, many companies refer to the date of any relevant audit committee or board of directors action as the date of the event.

In cases involving a **resignation**, many companies refer to the date of receipt of the resignation as the date of the event, while some companies refer to the date of acceptance of the resignation by the audit committee or board of directors as the date of the event.

However, according to analogous SEC guidance regarding the resignation, retirement or refusal to stand for re-election of a director or officer, the Form 8-K reporting obligation is triggered when the company receives notice of the event, regardless of whether that notice is written or subject to acceptance (*Question 117.01, Compliance and Disclosure Interpretations: Exchange Act Form 8-K* (*C&DIs: Form 8-K*)). The same guidance also states, "Whether communications represent discussion or consideration, on the one hand, or notice of a decision, on the other hand, is a facts and circumstances determination."

ITEM 4.01(a): RESIGNATION OR DISMISSAL OF A CERTIFYING ACCOUNTANT

The resignation or dismissal of an independent accountant (or its refusal to stand for re-appointment) must be disclosed under Item 4.01(a) of Form 8-K.

Item 304(a)(1) of Regulation S-K specifies the information that must be disclosed under Item 4.01(a) of Form 8-K. This information includes:

- Whether the former accountant resigned, declined to stand for re-appointment or was dismissed, and the date of such event.
- Whether the accountant's report for either of the past two years contained an adverse opinion or a disclaimer of opinion or was qualified or modified as to uncertainty, audit scope or accounting principles and, if so, the nature of each adverse opinion, disclaimer, qualification or modification.
- Whether the company's audit committee (or board of directors, in the absence of an audit committee) recommended or approved the decision to make the change of accountant.

However, neither Form 8-K nor Regulation S-K requires disclosure of the reasons for the change in accountant, and companies disclosing changes in accountant frequently omit that information from their filings. According to SEC guidance, however, if a principal accountant resigns, declines to stand for re-appointment or is dismissed because its registration with the Public Company Accounting Oversight Board (PCAOB) has been revoked, then the company must disclose that revocation (*Question 114.01, C&DIs: Form 8-K*).

A company must also state whether, during the two most recent fiscal years or any subsequent interim period preceding the change in accountant, there were any disagreements with the accountant on any unresolved matter of accounting principles or practices, financial statement disclosure or auditing scope or procedure that the accountant would have referenced in its report. If so, additional disclosure is required regarding:

- The nature of the disagreement.
- Whether the company discussed the disagreement with the accountant.
- Whether the accountant has been authorized by the company to discuss the disagreement with its successor.

The types of disagreements contemplated here are those occurring at the decision-making level, which Regulation S-K defines as disagreements between personnel of the company responsible for presentation of its financial statements and personnel of the accounting firm responsible for rendering the accountant's report. For more on the types of disagreements covered by this disclosure requirement, see Item 304(a)(1)(iv) of Regulation S-K and the Instructions to Item 304.

The same disclosure is required for "reportable events," as defined by Item 304(a)(1)(v) of Regulation S-K. A reportable event has occurred if the accountant has advised the company of any of the following:

- The company lacks adequate internal controls.
- The accountant is unable to rely on management's representations or unwilling to be associated with the financial statements prepared by management.
- The accountant needs to significantly expand the scope of its audit.
- Information materially impacting the fairness or reliability of a previous audit report or previous financial statements has come to its attention.

If the change in accountant was related to a disagreement or a reportable event, an accountant's oral advice to the company of the disagreement or event is sufficient to require disclosure on Form 8-K. The communication of the disagreement or the reportable event need not be in writing.

The company must also include, as an exhibit to its Form 8-K, a letter from the former accountant addressed to the SEC stating whether it agrees with the statements made in the filing and, if not, stating the respects in which it does not agree. Because of this requirement, companies typically provide a draft of their Form 8-K to the former accountant to obtain its approval before the filing.

ITEM 4.01(b): APPOINTMENT OF A NEW INDEPENDENT ACCOUNTANT

The company's engagement of a replacement independent accountant must be disclosed under Item 4.01(b) of Form 8-K within four business days of the appointment of the new accountant.

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A company should disclose the new engagement in the same Form 8-K that includes the disclosure required under Item 4.01(a) if the company has engaged a replacement at the time. If not, the company may file a later Form 8-K to provide the information required by Item 4.01(b). Where possible, companies typically arrange for the appointment of a new accountant to occur within four business days following the resignation of the previous accountant so that both events may be disclosed on the same Form 8-K.

Item 304(a)(2) of Regulation S-K sets out the information about the new accountant that a company must disclose under Item 4.01(b) of Form 8-K. This includes:

- The name of the new accountant.
- The date of the new accountant's engagement.
- That the engagement has been approved by the company's audit committee or board of directors.

Additional disclosure is required if, during a company's two most recent fiscal years (or any subsequent interim period before the new engagement), it consulted with the new accountant about either:

- The application of accounting principles to a specified transaction or the type of audit opinion that might be rendered on the company's financial statements and the new accountant provided a written report or oral advice on the matter.
- Any matter that was the subject of a disagreement with the former accountant or any reportable event, as defined by Item 304(a)(1)(v) of Regulation S-K (see *Item 4.01(a): Resignation or Dismissal of a Certifying Accountant*).

If the company engaged in this type of consultation with the new accountant, the company must disclose:

- The issues about which the new accountant was consulted.
- The new accountant's views on those issues.
- Whether the former accountant had also been consulted on those issues.

Although not explicitly required, if the company did not consult its new accountant about any disagreement or reportable event, it is common practice to include a statement to that effect. For example, a company may elect to include a statement like the following, which echoes the language of Item 304(a)(2) of Regulation S-K:

> "During the two fiscal years ended [DATE] and the subsequent interim period through [DATE], the company has not consulted with [NEW ACCOUNTANT NAME] regarding either: (i) the application of accounting principles to any specified transaction, either completed or proposed, or the type of audit opinion that might be rendered on the company's financial statements; or (ii) any matter that was either the subject of a disagreement (as defined in Regulation S-K, Item 304(a)(1)(iv) and the related instructions) or reportable event (as defined in Regulation S-K, Item 304(a)(1)(v))."

Disclosure of non-audit services provided by the new accountant is not required under Item 4.01, but some companies include a statement to the effect that the company's audit committee or board of directors "considered all relevant factors, including any non-audit services previously provided," in making the decision to engage the new accountant.

The company must request that the new accountant review the Form 8-K before it is filed. The company must provide the new accountant with the opportunity to furnish a letter containing any new information or clarification of its views, or stating any respects in which it does not agree with the statements made by the company under Item 4.01(b). Typically, however, the company drafts its disclosure so that no such letter is necessary. If a letter from the accountant is necessary, it must be addressed to the SEC and filed as an exhibit to the Form 8-K.

ITEM 4.02: NON-RELIANCE ON FINANCIAL STATEMENTS

Often, an accountant's resignation or dismissal involves a conclusion by management or by the accountant that the company's annual or interim financial statements (including the related audit report or any completed interim review) should no longer be relied on. In that case, the company must report this determination of non-reliance under Item 4.02 of Form 8-K. It may do so in a single filing together with the disclosure required under Item 4.01, if applicable.

Regardless of whether the non-reliance determination was made by the company or by the accountant, the company must disclose:

- The date of the determination by the company or, where the determination was made by the accountant, the date the company was notified.
- The financial statements, audit reports and interim reviews (and years or periods covered) that should no longer be relied on.
- A brief description of the facts underlying the determination of non-reliance to the extent known to the company at the time of filing or, where the determination was made by the accountant, a brief description of the information provided by the accountant.

The filing should also include a statement of whether the company's audit committee (or board of directors, in the absence of an audit committee) or an authorized officer, as applicable, discussed with the accountant the underlying matters being disclosed.

If the former accountant is the party that made the non-reliance determination, the company must also include, as an exhibit to its Form 8-K, a letter from the former accountant addressed to the SEC stating whether it agrees with the statements made in the filing and, if not, stating the respects in which it does not agree. As discussed above, companies typically consult with the former accountant to avoid any such disagreements (see *Item 4.01(a): Resignation or Dismissal of a Certifying Accountant*).

Discussing Non-reliance and the Item 4.02 Disclosure with the SEC Staff

A company should assume that any financial statements subject to a non-reliance determination are likely to require restatement and the related filing of amended annual and quarterly reports (see *Restating Financial Statements Checklist (http://us.practicallaw.com/5-505-8390)*).

However, the company may consider contacting the SEC in advance to discuss potential relief from those requirements. The SEC staff has granted relief in circumstances where it accepts that the change in accountant did not have any material impact on the financial statements previously filed by the company and audited or reviewed by the prior accountant.

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Whether or not the company contacts the SEC in advance, once it has filed a Form 8-K to disclose an Item 4.02 event, the SEC may contact the company to discuss the withdrawn financial statements, reports or interim reviews further. The company should therefore be prepared to discuss the reasons for, and its plan to address, any determination of non-reliance disclosed under Item 4.02.

LATE SEC FILING ISSUES: FORM 10-K AND FORM 10-Q

The types of audit-related issues that can lead to an accountant's resignation or dismissal are often discovered at the end of the audit or interim review process, shortly before a periodic filing and its related financial statements are due to be filed. In this situation, the Form 10-K or Form 10-Q filing may be delayed beyond its due date because there is not enough time for both:

- The company to find and engage a new accountant.
- The new accountant to complete its audit or review of the relevant period or periods.

The late filing of a Form 10-K or Form 10-Q and its related financial statements can affect a reporting company in a number of ways. Among other things, the company must notify the SEC through an NT 10-K or NT 10-Q filed on Form 12b-25 that it is unable to file the report by the SEC's filing deadline.

Late filings may also:

- Limit the company's eligibility to use a registration statement on Form S-3, Form S-4 or Form S-8 to offer and sell its securities.
- Result in impermissibly stale information under Exchange Act Rule 15c2-11 and Securities Act Rule 144 and Rule 144A.
- Constitute a delinquency under NYSE or NASDAQ listing standards.
- Trigger a default under the company's debt instruments, including its credit agreements and bond indentures.
- Adversely affect investor and creditor confidence, with a corresponding effect on the trading price of the company's common stock and other securities.

Each of these risks is discussed in greater detail below.

NT 10-K AND NT 10-Q ON FORM 12b-25

If a reporting company is unable to file a Form 10-K or Form 10-Q with the SEC prior to the SEC's filing deadline (for reasons other than electronic-filing difficulties), it must file a Form 12b-25 (identified on EDGAR as an NT 10-K or NT 10-Q, as the case may be).

The form must be signed by an executive officer or other duly authorized representative of the company and must be electronically filed through EDGAR. A reporting company must file Form 12b-25 within one business day of the due date of any missed filing deadline.

Form 12b-25 consists of four parts:

- Part I identifies the company filing the form.
- Part II consists of representations to the SEC.
- Part III contains a narrative disclosure of the reason for the late filing.
- Part IV provides additional basic information about the company.

Parts I and IV of Form 12b-25 are unlikely to require significant effort by the company when the late filing is due to a change in accountant. However, Part IV requires the company to disclose whether it anticipates any significant change in the results of operations compared to the corresponding period for the last fiscal year and, if so, to provide a narrative and quantitative explanation of the anticipated change. In cases where a missed filing was the result of delayed financial statements, the company must also attach as an exhibit a statement from its former accountant succinctly stating the reasons why the accountant cannot timely furnish its opinion or report.

A company may opt to request relief under Rule 12b-25(b) under the Exchange Act by making the representations to the SEC set out in Part II of Form 12b-25. If the box in Part II is checked, the late filing will be deemed to have been filed on the original due date, as long as all the other requirements are met (as discussed more fully below). In checking the box, the company represents that:

- The reasons causing the inability to file by the applicable filing deadline could not be eliminated without unreasonable effort or expense.
- The late filing will be filed within:
  - in the case of Form 10-K, the fifteenth calendar day following the due date; or
  - in the case of Form 10-Q, the fifth calendar day following the due date.

Form 12b-25 includes a legend stating that intentional misstatements on, or omissions of fact from, Form 12b-25 constitute violations of federal securities law. Accordingly, to avoid making a misrepresentation to the SEC, any company that does not anticipate being able to file its periodic report within the timeframe described above should not check the box in Part II.

Under Part III of the form, the company must provide narrative disclosure explaining the reason for the late filing. While the form requires the company to provide a "reasonably detailed" explanation (more than mere boilerplate), the disclosure requirement may be satisfied by both:

- Referring to a previously filed Form 8-K disclosing the change in accountant.
- Including a statement that, as a result of the accountant's resignation or dismissal, the company will be unable to file the required report by its due date without unreasonable effort or expense.

The company may also provide an estimated time period in which it expects to file the report, including whether or not it expects to make the filing within the fifteen or five calendar days, as applicable, prescribed by Rule 12b-25.

A Form 12b-25 filing is required regardless of whether a company is seeking to have its late periodic report deemed timely filed. If a company does wish to have the report deemed timely filed, however, it must:

- File a complete Form 12b-25 on time, including any required exhibit.
- Check the representation box in Part II of the form.
- Actually file its missed report within the prescribed timeframe.

If the company cannot file its report within the prescribed grace period, the filing will remain a late filing, but the company will have met its related disclosure obligations under the Exchange Act once it has filed its late report.

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For more on the requirements of Form 12b-25, see *Practice Note, Late Filings on Form 12b-25: What is included in a Form 12b-25? (http://us.practicallaw.com/0-500-3588#a199359)*

IMPLICATIONS OF A LATE FILING UNDER SEC RULES AND NYSE AND NASDAQ LISTING STANDARDS

Limitations on the Use of Form S-3, Form S-4 and Form S-8 Registration Statements

The late filing of a Form 10-K or Form 10-Q may affect a company's ability to offer and sell its securities, including its common equity, through a registration statement on Form S-3.

While a late filing would not affect a company's status as a well-known seasoned issuer (WKSI), a company that qualifies as a WKSI may nonetheless become an ineligible issuer with respect to Form S-3 because of the late filing (see *Practice Note, Registration Statement: Form S-3: Eligibility Requirements for Form S-3: Registrant Requirements (http://us.practicallaw.com/9-381-2600#a585304)*). Unless the company is able to file its late report within the applicable grace period provided under Rule 12b-25 (see *NT 10-K and NT 10-Q on Form 12b-25*) or it receives a waiver from the SEC, it will be ineligible to file a **new** Form S-3 registration statement (including to establish an automatic shelf registration) until it has timely filed all of its periodic reports for a full 12 calendar months.

However, the late filing of a Form 10-K or Form 10-Q will not affect a company's ability to offer and sell its securities under an **existing**, already effective shelf registration statement on Form S-3 unless the company determines that, after the original due date of the late filing, it must update the registration statement through a post-effective amendment to either:

- Include new audited financial statements to comply with the timing requirements of Section 10(a)(3) of the Securities Act (see *Practice Note, Updating Financial Statements: The Staleness Rules: The Staleness Rules and Shelf Registration (http://us.practicallaw.com/5-517-7208#a662293)*).
- Disclose "fundamental changes" to address potential anti-fraud concerns and to comply with company undertakings under Item 512(a)(1)(i) of Regulation S-K (see *Practice Note, Shelf Registrations: Overview: Legal Framework (http://us.practicallaw.com/5-381-0962#a813578)*).

In this situation, even though the Form S-3 requirements may be met, depending on the circumstances, the offering participants may choose not to proceed with the offering until additional disclosure is included in the offering document or the required financial information is available. For more on the interaction between a Form 12b-25 filing and Form S-3 eligibility, including applicable SEC guidance, see *Practice Note, Late Filings on Form 12b-25: What Happens During the Rule 12b-25 Extension Period?: Use of Form S-3 or F-3 (http://us.practicallaw.com/0-500-3588#a393991).*

In addition, a company's Form S-3 ineligibility would prevent it from incorporating by reference its periodic reports into any Form S-4 registration statement (see *Practice Notes, Registration Statement: Form S-4 and Debt Exchange Offers: Incorporation by Reference (http://us.practicallaw.com/6-384-4103#a179359)* and *Registration Statement: Form S-4 and Business Combinations: Incorporation by Reference (http://us.practicallaw.com/5-384-6225#a147362)*).

Of particular interest for companies with employee benefit plan registration statements on Form S-8, the eligibility requirements of that form require the company to have filed all reports required to be filed during the last 12 months under Section 13 or 15(d) of the Exchange Act. Accordingly, a late-filing company may not register any shares issuable under its equity incentive plans on a Form S-8 until any late reports have been filed. For more on the interaction between a Form 12b-25 filing and Form S-8 eligibility, including applicable SEC guidance, see *Practice Note, Late Filings on Form 12b-25: What Happens During the Rule 12b-25 Extension Period?: Use of Form S-8 (http://us.practicallaw.com/0-500-3588#a498082).*

Impermissibly Stale Information under Exchange Act Rule 15c2-11 and Securities Act Rules 144 and 144A

In addition to the registration statement limitations discussed above, a company's failure to file a periodic report by the SEC's filing deadline may create stale information issues.

For example, under Exchange Act Rule 15c2-11(a), brokers and dealers must review a reporting company's most recent annual report on Form 10-K and quarterly reports on Form 10-Q before publishing any quotations for the company's securities.

A late-filing company will also be unable to conduct unregistered offerings under Rule 144A, and holders of restricted securities of the company will be unable to resell those securities under the Rule 144 safe harbor, until its periodic reports have been filed, due to the company's failure to satisfy current public information requirements of those rules. (See *Practice Notes, Resales Under Rule 144A and Section "4(1½)": Rule 144A: Information Requirement (http://us.practicallaw.com/6-382-8768)* and *Resales Under Rule 144: Conditions to Use Rule 144: Current Public Information About the Issuer (http://us.practicallaw.com/4-382-8769).*)

Delinquency under NYSE and NASDAQ Listing Standards

A late Form 10-K or Form 10-Q filing may also constitute a delinquency under NYSE or NASDAQ listing standards.

In the case of the NYSE, a filing is considered delinquent when either:

- Not filed within the grace period afforded by filing a Form 12b-25.
- The company has disclosed a determination of non-reliance for previous financial statements under Item 4.02 of Form 8-K and the affected financial statements are not corrected within 60 days of the filing date of that Form 8-K.

Late-filing NYSE companies are required to contact the NYSE to discuss the situation and to issue a press release disclosing the late filing. Late-filing companies are also subject to a 60-day cure period that includes ongoing monitoring by the NYSE. See *Section 802.01E, NYSE Listed Company Manual*.

Under similar NASDAQ listing standards, a late-filing company:

- Must submit a plan of compliance within 60 days of any late filing.
- May remain listed for up to 180 days after the due date of the late filing, at the NASDAQ staff's discretion, before the staff issues a delisting notification.

See *Rule 5250(c)(1) and Rule 5810(c)(2)(F), NASDAQ Listing Rules*.

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RISK OF DEBT DEFAULTS TRIGGERED BY LATE SEC FILINGS

A missed filing may constitute a default under a bond indenture, credit agreement or other instrument or agreement.

While exact language differs from document to document, many debt instruments and agreements include an undertaking to deliver copies of any reports filed with the SEC to bondholders or lenders, to a trustee or agent representing bondholders or lenders or to other interested parties. Some debt agreements contain further covenant language explicitly requiring that reports be timely filed with the SEC or delivered to investors by a specified deadline regardless of whether they are filed with the SEC.

These are some of the factors a company should consider when analyzing its instruments and agreements in light of a late filing:

- Whether any reporting covenant includes an explicit timeliness requirement.
- The procedures by which a default may be declared, including:
  - whether the company must notify any party (for example, lenders or bondholders, or an agent or trustee) of the default, as well as whether any agent or trustee must notify lenders, bondholders or any other parties of the default;
  - whether the covenant requires delivery of only those reports actually filed with the SEC, or instead requires delivery regardless of whether they are actually filed with the SEC;
  - whether the failure to file with the SEC constitutes an immediate event of default, or if an event of default occurs only upon notice to the company, passage of time or both; and
  - if applicable, the proportion of lenders, bondholders or other parties that must participate to send the company a notice of default or to accelerate the debt.
- The length of time the company has from receipt of any notice of default to cure that default by making the required filings.

Under existing case law, courts have generally not held that a company has defaulted due to a late filing if the relevant covenant required the company to forward SEC filings to lenders or bondholders (or an agent or trustee), but did not expressly require the timely filing of those reports (see *Racepoint Partners, LLC v. JPMorgan Chase Bank, N.A., 902 N.Y.S. 2d 14 (N.Y. 2010)*; *Affiliated Computer Servs. Inc. v. Wilmington Trust Co., 565 F. 3d 924 (5th Cir. 2009)*; *UnitedHealth Grp. Inc. v. Wilmington Trust Co., 548 F. 3d 1124 (8th Cir. 2008)*; *Finisar Corp. v. U.S. Bank Trust Nat. Ass'n, 2008 WL 3916050 (N.D. Cal. August 25, 2008)*; and *Cyberonics, Inc. v. Wells Fargo Bank Nat. Ass'n, 2007 WL 1729977 (S.D. Tex. June 13, 2007)*).

However, courts have read implied timeliness requirements into covenants in cases involving particularly egregious failures to file periodic reports (see *Bank of New York v. BearingPoint, Inc., 13 Misc. 3d 1209(A), 824 N.Y.S. 2d 752, 2006 N.Y. Slip Op. 51739(U) (N.Y. Sup. Ct. 2006)* (unpublished table decision); and Finisar, *2008 WL 3916050 at *5* (distinguishing BearingPoint on the basis that "in BearingPoint, 'the company disavowed any obligation to file information with the SEC whatsoever.'")).

In making a default determination, courts have also found relevant whether a company has worked to provide some measure of current information to investors and creditors in light of a missed filing. This concern is particularly important in light of the Eighth Circuit's finding that the New York implied covenant of good faith and fair dealing was not breached by a late filing where the obligor "took all reasonable and necessary steps to provide its noteholders with as much information as possible and as accurately as possible" (see *UnitedHealth, 548 F. 3d at 1131).* Also see *Affiliated Computer Servs., Inc. v. Wilmington Trust Co., 2008 WL 373162 at *6*.

INVESTOR AND CREDITOR RELATIONS

When creditors or investors (particularly those with large stakes in the company's securities) or a trustee or agent under the company's debt instruments or agreements notice that a required report has not appeared on EDGAR by the report's due date, they may contact the late-filing company.

In some cases, the company should consider reaching out to creditors and investors shortly after it learns that a late filing will be inevitable, in order to obtain a waiver of default under any applicable debt agreements (other than public bond indentures).

While a late filing may breach a covenant under an indenture or credit agreement, a recent study entitled *Enforcement of Bondholders' Rights and Delay in Financial Reporting* has found that the likelihood of investors or lenders declaring a default is relatively low. According to the study, "[A]mong the 797 firms that failed to file their financial statements in a timely manner...during the period 2003-2009, 67 firms...received the default notice from bondholders."

Listed below are some of the factors a late-filing company should consider when assessing the risk of a declaration of default:

- Whether it will be possible to file the late report within the cure period prescribed under the relevant debt instrument or instruments.
- Whether an accountant's resignation or dismissal may relate to reasons that foreshadow possible defaults under financial covenants.
- The financial condition and operating results of the company.
- The types of investors holding the issuer's debt securities or other debt.
- The current market price of any debt securities relative to their yield.

In light of the risk of receiving a declaration of default and the importance of providing current information to investors and creditors in potential default situations, it is critical to maintain good relationships with investors and lenders, particularly large or otherwise important investors and lenders.

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