

Extending the Deadlines for Filing Quarterly and Annual Reports

FAQs about Rule 12b-25

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Accelerated filers, non-accelerated filers and smaller reporting companies occasionally run up against the Securities and Exchange Commission's reporting deadlines and sometimes simply can't comply with them. In the current environment, smaller reporting companies in particular are having more difficulty than ever in meeting the SEC's deadlines. These companies tend to be less heavily staffed and more resource-constrained than their larger counterparts. All is not lost, however. Rule 12b-25¹, adopted by the SEC under the Securities Exchange Act of 1934², provides issuers of all sizes a near-automatic extension of the reporting deadlines. We offer these issuers and their advisers a brief analysis of this short, relatively straightforward and extremely important rule.

What must an issuer do if it misses the filing deadline for a quarterly or annual report?

Rule 12b-25 requires an issuer that is unable to file all (or any portion) of a quarterly report on Form 10-Q, an annual report on Form 10-K and certain other reports within the prescribed time period to file a Form 12b-25 with the SEC.

When is the Form 12b-25 due?

The Form 12b-25 must be filed with the SEC no later than one business day after the due date for the late report.

How is the Form 12-25 filed?

The Form is filed electronically, through the SEC's EDGAR³ filing system.

What is the benefit of filing the Form 12b-25?

If the conditions of the Rule are met, filing the Form 12b-25 gives the issuer 15 additional calendar days to file a late annual report and five additional calendar days to file a late quarterly report. Moreover, if the report (or the incomplete portion) is actually filed within the 15-day or five-day grace period, the report is deemed to have been timely filed.

What information must be included in the Form 12b-25?

If the issuer wants a late or incomplete report to be deemed to have been filed timely, then the issuer must check a box on the Form 12b-25 that represents, in effect, that the reason(s) the issuer could not make a timely filing "could not be eliminated by the registrant without unreasonable effort or expense"; and that the issuer will, in fact, file the report no later than the 15th calendar day following the prescribed due date, in the case of an annual report on Form 10-K, or not later than the fifth calendar day following the prescribed due date, in the case of a quarterly report on Form 10-Q. In addition, the issuer is required to disclose the reasons for its failure to file in "reasonable detail."

In addition to those representations, the Form 12b-25 may be required to contain additional information. If, for example, the reason the report cannot be filed timely without unreasonable

effort or expense relates to the inability of any person other than the issuer (generally, the issuer's independent public accounting firm), to furnish any required opinion, report or certification, paragraph (c) of Rule 12b-25 requires the issuer to attach to the Form 12b-25 a statement signed by that person stating the specific reasons why that person was unable to furnish the required opinion, report or certification on time.

Moreover, if the issuer anticipates that any "significant change in results of operations from the corresponding period of the last fiscal year will be reflected in the earnings statements to be included in the report," then it must say so and attach an explanation of the anticipated changes, both narratively and quantitatively. If appropriate, the issuer must state the reasons that a reasonable estimate of the results cannot be made.

What kinds of reasons for late filings are acceptable? How much detail is "reasonable detail"?

The SEC does not rule on whether an issuer's stated reasons for a late filing are justifiable or whether the issuer has supplied sufficiently "reasonable" detail. Instead, the Rule is disclosure-based, requiring the issuer to state the reasons and then leaving it to the marketplace to make its own decisions. Reasons stated in filings made by five issuers in mid-June 2009 include the following⁴:

- "The registrant needs additional time to complete the presentation of its financial statements, and the analysis thereof."
- "The registrant's ... 10-Q ... could not be filed by the prescribed due date ... due to staffing limitations. Accordingly, the registrant is unable to file such report within the prescribed time period without unreasonable effort or expense."
- "The [r]egistrant requires additional time to complete the auditor's review of the [r]egistrant's financial statements in order to complete the 10-Q prior to filing."
- "The [registrant] encountered difficulties in completing the accounting and reporting for certain disclosures and could not complete the report in sufficient time to permit the filing of the ... 10-Q ... without unreasonable expense and effort."

The registrant "is still awaiting its reviewed financial statements from its independent auditor in order to prepare Form 10-Q. For the foregoing reason, the [registrant] requires additional time in order to prepare and file its ... Form 10-Q."

Should the issuer use Rule 12b-25 if its filing is late because it had problems with EDGAR?

No. Form 12b-25 should not be used for issuers that are unable to timely file a required report solely due to "electronic difficulties," such as a problem with the SEC's EDGAR filing system, or by issuers with difficulty in submitting or posting an Interactive Data File within the prescribed time period. See General Instruction Numbers 5 and 6 to Form 12b-25.

Are there negative consequences to filing a Form 12-25?

As noted, if the conditions of the Rule are met, the issuer is deemed to have made a timely filing even though the report was not filed by the prescribed deadline. However, issuers and their management should never rely lightly on the Rule and should always make every effort to submit filings on time. The biggest practical consequence of filing a Form 12b-25 may be that it signals to the marketplace that the issuer's financial house may not be in order. Companies that provide vague statements or reasons that illustrate more than a temporary, isolated problem with its financial reporting, and companies that rely on Rule 12b-25 more than occasionally, are at particular risk. Investor confidence is a precious commodity and, once shaken, is extremely difficult to regain.

Another concern is that, during the period between the prescribed filing date and the date the report is actually filed, an issuer will not be eligible to use any registration statement under the Securities Act of 1933 the use of which is predicated on timely filed reports. Stockholders whose

shares are registered for resale on a Form S-3⁵, for example, cannot sell shares under that registration statement until the report is actually filed. Issuers that fail to file a report on time, therefore, should consider notifying those stockholders that they are prohibited from selling shares during that period. If the issuer is in violation of a contractual obligation to keep the registration statement effective, it may have legal liability to stockholders who are damaged by their inability to sell shares.

Finally, issuers have the same duties to be truthful, to disclose all material facts and to avoid material omissions in their Form 12b-25 as they do in any other filings under the federal securities laws. Moreover the Form itself states that “Intentional misstatements or omissions of fact constitute Federal Criminal Violations. (See 18 U.S.C. 1001.)”

Can the original extension be renewed by a second filing?

No. Issuers receive only one automatic extension per filing. In the absence of extraordinary circumstances, as determined in the sole discretion of the SEC’s staff, no further extensions are available.

What happens if the issuer fails to file the report by the extended deadline?

The obligation to file annual and quarterly reports originates in Section 13 or 15(d) of the Exchange Act, and the rules promulgated thereunder (see Rule 13a-1 and Rule 13a-13). The SEC has the power to enforce its rules by instituting enforcement actions against a delinquent issuer and/or its officers and directors seeking monetary or other penalties, including revoking the issuer’s registration pursuant to Section 12(j) of the Exchange Act⁶. In the absence of egregious and/or repeated violations, or inferences of fraud, however, the SEC is more likely to rely on the stock exchange(s) to police listed companies. Section 1002(d) of the NYSE Amex’s Company Guide⁷, for example, permits the exchange to suspend trading or delist a company’s securities altogether for failure of the company to file its quarterly annual reports. The OTC Bulletin Board⁸ has a more specific “three-strikes” rule, FINRA Rule 6530(e)⁹, that prohibits the OTCBB from quoting the securities of any issuer that is delinquent in its reporting obligations three times in a 24-month period.

For additional information on this topic, please do not hesitate to contact **Carl Barnes**.

Footnotes.

1. <http://www.law.uc.edu/CCL/34ActRIs/rule12b-25.html>
2. <http://www.law.uc.edu/CCL/34Act/index.html>
3. <http://www.sec.gov/edgar/aboutedgar.htm>
4. These examples are for purposes of illustration only, may not be representative, and are not intended as models for adoption by any particular issuer.
5. <http://www.sec.gov/about/forms/forms-3.pdf>
6. See, for example, Commission Release 34-59624, March 25, 2009 (www.sec.gov/litigation/admin/2009/34-59624.pdf).
7. http://www.wallstreet.cch.com/AMEXtools/PlatformViewer.asp?SelectedNode=chp_1_1_4&manual=/AMEX/CompanyGuide/amex-company-guide/
8. <http://www.otcbb.com/>
9. http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4513