In light of the potentially significant consequences of failing to timely file an Exchange Act report with the Securities and Exchange Commission—including possible loss of eligibility to use Form S-3—issuers have strong reason to try to “correct” or otherwise minimize the impact of a delinquent filing. Depending on the nature of the issuer and the circumstances of the missed filing, issuers may consider taking one or both of the actions described below: seeking a filing date adjustment for technical difficulties, or seeking a Form S-3 registration statement eligibility waiver.

Seek a Filing Date Adjustment for Technical Difficulties

EDGAR—the SEC’s Electronic Data Gathering, Analysis, and Retrieval system that collects, validates and accepts SEC filings—can be unforgiving. Whether an issuer misses a filing deadline by a matter of days, hours, minutes or even seconds, the result is the same and the issuer generally must bear some or all of the consequences discussed in this series’ previous installment. (See October 2008 issue of Wall Street Lawyer, vol. 12, no. 10.) However, SEC regulations offer some opportunity for issuers to cure a late filing due to “technical difficulties.” Rule 13(b) of Regulation S-T adopted by the SEC states that if an issuer “in good faith attempts to file a
document with the Commission in a timely manner but the filing is delayed due to technical difficulties beyond the electronic filer’s control, the electronic filer may request an adjustment of the filing date of such document. . . [whereby], . . . [t]he Commission... may grant the request if it appears that such adjustment is appropriate and consistent with the public interest and the protection of investors.”

The guidelines for submitting a request for a filing date adjustment are set forth on the SEC’s website at http://www.sec.gov/info/edgar/cfedgarguidance.htm.¹ The request must be in writing, addressed to the Chief, Office of Information Technology, Division of Corporation Finance of the SEC, filed via EDGAR as correspondence (i.e., “CORRESP”)² and executed by the issuer or one of its authorized legal representatives. The SEC recommends that the request also include the following information:

- The issuer’s name and Central Index Key.
- The accession number and EDGAR submission type of the late filing.
- “A concise, but detailed, description of the technical difficulties leading to the late filing, including the date and time of the initial attempted transmission or transmissions,” according to the SEC website.
- A statement of how the issuer will be harmed if the SEC Staff does not grant issuer’s request.
- A request pursuant to Rule 13(b) of Regulation S-T to adjust the filing date to the date of the issuer’s initial attempted transmission.
- Any e-mail sent by EDGAR for test filings and all filing attempts that demonstrate the issuer’s good faith effort to timely file.³

A more detailed description of some of these items follows.

Description of technical difficulties—An issuer should describe in detail each technical difficulty that led to the late filing. Although the SEC has not issued formal guidance or rulemaking on which technical difficulties justify a filing date adjustment (or even what constitutes a technical difficulty under the regulations), some that may be considered by the Staff include:

- Outside filing service (e.g., financial printer) failed to timely follow the issuer’s instructions to file, as long as the filing was in a format ready for submission to the SEC and the issuer provided the filing service with instructions to file reasonably in advance of the filing deadline taking into account the size of the filing.⁴

- Delays at an outside filing service as a result of a personnel shortage, an emergency or technical difficulty with the filing service’s software or computers.

- Unexpected problems with the issuer’s EDGAR filing software or computers where an issuer submits filings to the SEC directly, particularly where the issuer can demonstrate that it had not experienced similar problems with its prior filings using the same software, computers and procedures.

- Technical problems with the EDGAR system.

Where an issuer reasonably believes that a technical difficulty is largely or solely the fault of an outside filing service, it is advisable to obtain a written statement to that effect, along with an explanation of the reasons for the late filing, from the filing service and submit the statement as an attachment to the issuer’s request.

Date of issuer’s initial attempted transmission—An issuer has a stronger chance of demonstrating that it attempted to timely file an Exchange Act report in “good faith” if it can provide the Staff with evidence that it or its filing agent first attempted to submit the report a reasonable time in advance of the deadline.⁵ Although the Staff’s guidelines only recommend that the issuer disclose the date of its initial attempted transmission, it appears that the exact time of the initial attempted transmission is important as well, particularly when the late filing is submitted to the SEC on the date it is due, but after the deadline. In assessing whether the issuer took adequate steps to ensure
a timely filing, it also appears that the Staff will give consideration to the size of the Exchange Act filing. That is, to show good faith, the Staff may require that an issuer have initially attempted to transmit the late filing further in advance of the deadline for a Form 10-K (with multiple exhibits) than a short Form 8-K (without exhibits). The issuer should provide as part of the request written evidence of any test filings that it or its filing service submitted prior to the filing deadline.

Statement of harm—Depending on the issuer, including whether it is otherwise eligible to use Form S-3 and has securities traded on a national securities exchange, it may wish to discuss one or more of the potential consequences of late filings outlined in this series’ previous installment. An issuer may also wish to emphasize that any of these penalties could expose the issuer to significant additional costs, drain its management’s resources and result in a decline in the issuer’s stock price, all of which would harm the issuer’s investors.

Additional information—Where applicable, issuers may wish to raise additional points in their request for a filing date change. First, if the issuer has a history of making timely filings with the SEC, this point should be stated. A history of timely filings may further support the issuer’s claim that a late filing was an isolated event due to a technical difficulty outside the issuer’s control, rather than evidence of a systematic problem with the issuer’s disclosure controls and filing procedures. Second, where a late filing is accepted by EDGAR after the close of business on its due date, but prior to the opening of the market on the next business day, issuers should consider emphasizing that the delay would not be expected to, and in fact did not, have a material impact on its stockholders’ or any prospective investors’ investment decision (i.e., the late filing did not impair investor protection).

The issuer should also include its contact telephone and facsimile numbers.

Staff response—The Staff generally processes a filing date adjustment request within five to seven business days of receipt and notifies issuers of its determination by telephone, followed by a facsimile. If a request is granted, the Staff will adjust the filing date on EDGAR and the Exchange Act report will be deemed to have been timely filed.

Seek a Form S-3 Registration Statement Eligibility Waiver

Where an issuer has one or more Form S-3 registration statements currently effective or anticipates filing a Form S-3 registration statement within 12 months (plus any partial month) following the date of the delinquency and does not obtain a technical filing date adjustment for a late Exchange Act filing, it may seek a Form S-3 eligibility waiver from the SEC. According to the Staff, Form S-3 eligibility waivers are difficult to obtain and granted sparingly. As a result, issuers may wish to contact the Staff to discuss the suitability of a proposed waiver request before investing the time and resources to prepare one. In any event, issuers are advised to notify the Staff before submitting a waiver request, which may help expedite the Staff’s review.

The Form S-3 waiver request must be in writing, addressed to the Chief Counsel’s office of the SEC, 100 F. Street, N.E., Washington, D.C. 20549, and filed via EDGAR as correspondence (i.e., “CORRESP”). The SEC has not issued formal guidance regarding the content to include in a waiver request. However, based on public disclosures made by Staff members, a request should address each of the following points applicable to the issuer.

Short description of the issuer—The request should include a brief description of the issuer and its Exchange Act filing status—large accelerated filer, accelerated filer, smaller reporting company or non-accelerated filer—and identify the national securities exchange or other quotation system on which the issuer’s securities are listed or quoted.

Reason for waiver request—The request should explain why the waiver request is necessary—whether the issuer is seeking continued use of one or more current Form S-3 registration statements and/or the issuer anticipates filing a new Form S-3 registration statement.

Whether the issuer is seeking a waiver with respect to a current or future Form S-3, the Staff has indicated that the waiver request must be
“ripe” before it will be considered. This generally means that the issuer must either be at risk of losing Form S-3 eligibility for a current Form S-3, or anticipate filing a new Form S-3 registration statement, within 30 days of the waiver request. As discussed above, once a Form S-3 registration statement is declared effective, issuers are only required to reassess their eligibility to continue to use Form S-3 upon filing each Form 10-K and any post-effective amendment under Section 10(a)(3) of the Securities Act. Because the issuer’s Form S-3 eligibility is not reassessed at any other time, a waiver request for a current Form S-3 registration statement may potentially not be ripe for consideration for a number of months following the date of the late filing.

If an issuer is seeking to maintain eligibility for a currently effective Form S-3 registration statement, it should list the registration statement’s initial filing date and registration number, provide a short description of the securities included in the registration statement and identify on whose behalf they are registered (i.e., the issuer and/or its selling security holders). It is important to note that a Form S-3 eligibility waiver is only a waiver that would allow an issuer to file or use a specific Form S-3 registration statement to commence or continue an offering. It does not result in a filing date adjustment and is not a “general” waiver that would allow the issuer to use Form S-3 for any offering or a waiver of the issuer’s failure to timely file an Exchange Act report. Accordingly, to use a Form S-3 registration statement, an issuer must obtain a waiver from the Staff as to that specific Form S-3.

For some issuers, providing the Staff with the option to grant a waiver as to some of the issuer’s current and anticipated Form S-3 registration statements, rather than all or none, may increase the issuer’s chances of obtaining a waiver for those registration statements the issuer deems to be most important. For example, under this approach, an issuer could first request a Form S-3 eligibility waiver as to all currently effective Form S-3 registration statements and any specific Form S-3 registration statement the issuer intends to file within the following 30 days. However, the request would further provide that if the Staff is unwilling to grant a Form S-3 waiver as to all currently effective and anticipated Form S-3 registration statements, then the issuer requests that it grant a waiver for only the issuer’s currently effective Form S-3 registration statements (i.e., the issuer effectively withdraws its waiver request as to any new Form S-3 registration statement the issuer intends to file). As a further option, where an issuer has one or more currently effective Form S-3 registration statements for primary offerings (i.e., securities registered on behalf of the issuer) and secondary offerings (i.e., securities registered on behalf of selling security holders) and the Staff is unwilling to grant a waiver as to each registration statement, the issuer may request that the Staff grant a waiver to only those for secondary offerings, which may help avoid penalizing selling security holders who would lose their ability to resell securities under the prospectus even though they had no control or involvement in the circumstances that resulted in the issuer’s late filing. It may also help the issuer avoid incurring the financial penalties in favor of selling security holders discussed above.

Description of late filing—The request should identify the Exchange Act report that was filed late and include the date on which the report was due and the date and time it was received by the SEC. If the late Exchange Act report has not been filed as of the time of the eligibility request, the issuer should state when it expects to file the report. If the issuer has failed to timely file multiple Exchange Act reports that would each cause the issuer to lose Form S-3 eligibility, each of those late filings should be addressed in the issuer’s waiver request. Based on informal guidance provided by Staff members, it appears that the Staff is highly unlikely to grant a waiver request for a loss of eligibility due to a delinquent Form 10-K and will not consider a waiver request for a late Form 8-K filed under Item 4.01 (Changes in Registrant’s Certifying Accountant), Item 4.02(b) (Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review), Item 5.06 (Change in Shell Company Status) or Item 9.01 (Financial Statements and Exhibits) under any circumstances. The issuer may wish to seek the Staff’s opinion
regarding a particular late report by telephone before submitting a waiver request.

**Explanation why the filing was or is late**—The issuer should also describe the reasons the Exchange Act report was not timely filed. These may include, for example, one of the technical difficulties discussed above, unexpected absences of key personnel at the issuer or its auditors, failed or inadequate disclosure controls and procedures or a combination of these factors. If the issuer experienced unusual or extenuating circumstances in connection with preparing or filing the report, those circumstances should be discussed in detail. In some cases, it may be advisable to provide the Staff with a timeline of events that led to the filing being late.

**Whether and when the issuer publicly disclosed the contents of the late filing through other means**—If an issuer publicly disclosed the contents of a late Exchange Act report before the report was filed with the SEC, the issuer should discuss when and how the information was publicly disseminated. Sources of prior public disclosure may include other Exchange Act filings, press releases or website postings. Prior public disclosure is a factor the Staff may consider when evaluating the impact of the late filing on the market and may help substantiate the issuer’s contention that the late filing resulted in little or no harm to investors.

**Whether the issuer otherwise meets the requirements to use Form S-3**—The issuer should also state in its waiver request letter whether, aside from its failure to timely file the Exchange Act report(s) identified in the letter, it meets the Form S-3 eligibility requirements. To use Form S-3, the issuer must generally satisfy all the “registrant” requirements under Form S-3 and at least one of the “transaction” requirements. The Staff has indicated that it will not consider a waiver request for a late filing if the issuer would not otherwise qualify to use Form S-3 despite receiving the waiver.

**Whether the issuer has a history of timely filings**—The request should also discuss whether the issuer has historically filed its other Exchange Act reports in a timely manner. A strong compliance record may be considered by the Staff when evaluating the issuer’s request. Where an issuer has failed to timely file another report, it should disclose the type of report, the date it was due and the date it was filed. The issuer may also wish to explain the reason for the delinquency.

**Why the Staff should approve the issuer’s request**—Next, the issuer should discuss why approval of its request would be in the public interest and consistent with the SEC’s goal of investor protection. The issuer may choose to explain the harm that would result to the issuer and its security holders if the issuer lost Form S-3 eligibility, including those discussed above. Depending on the nature of the late filing and the circumstances surrounding its delinquency, the issuer may suggest to the Staff that a 12-month loss of Form S-3 eligibility represents a penalty on the issuer and its stockholders that is disproportionate to the harm to the investor community, if any, caused by the late filing. This is particularly applicable where an issuer has one or more effective Form S-3 registration statements that would need to be deregistered or converted into Form S-1 registration statements if the Staff denied the waiver request.

**Steps the issuer is implementing to ensure future reports will be timely filed**—Where the proposed reasons for the issuer’s late filing can be addressed with corrective action, the issuer should identify any measures it has taken or intends to take to ensure the timely submission of future reports. Depending on the cause of the late filing, remedial actions may include forming a disclosure committee, reconstituting membership on a disclosure committee, conducting employee training, imposing internal company deadlines for collecting disclosure information and preparing Exchange Act reports or changing the issuer’s EDGAR filing software or third-party filing service. Obviously, not every late filing necessitates corrective action or an overhaul of the issuer’s disclosure processes.

**Staff response**—The Staff will notify issuers of their answer to a Form S-3 eligibility waiver request by phone. Neither the issuer’s request nor the Staff’s response is posted on EDGAR.
Conclusion

In the current environment where the level of required disclosure in an issuer’s Exchange Act reports has increased significantly and the filing deadlines have decreased considerably since the adoption of the Sarbanes-Oxley Act of 2002, it has become increasing difficult for a number of issuers to meet their filing deadlines. The consequences of a late filing can be significant and expose an issuer and its security holders to number of penalties.

Fortunately, the SEC provides issuers with some options, although limited, to seek to “cure” a late filing by requesting a filing date adjustment or to otherwise minimize one of its primary adverse effects for a number of public issuers—the loss of Form S-3 eligibility—by requesting a waiver from the Staff. In the event of a late filing, it is advisable for issuers and their counsel to consider and explore these options.

NOTES

1. Instructions for investment management companies are set forth on the SEC’s website at http://www.sec.gov/info/edgar/ednews/imedgarpac.htm.
2. Issuers are also “strongly” encouraged to confirm their submissions by sending an e-mail to cfitedgar@sec.gov. (http://www.sec.gov/info/edgar/cfedgarguidance.htm)
3. If an issuer wishes to discuss a request for a filing date adjustment prior to submitting it on EDGAR, it may call the Staff at (202) 551-3600 (http://www.sec.gov/info/edgar/cfedgarguidance.htm).
4. Based on the Staff’s guidance, issuers should not expect to receive a favorable response to a filing date adjustment request in the event they instructed their outside filing service to submit the filing just prior to the filing deadline.
5. Form 10-Ks, Form 10-Qs and substantially all Form 8-Ks must be accepted by EDGAR by 5:30 p.m. (Eastern Time) on the applicable due date. One exception applies to Form 8-Ks filed under Items 7.01 (Regulation FD Disclosure) and 8.01 (Other Events) if filed solely to satisfy the issuer’s obligations under Regulation FD of the Exchange Act.
7. Note that prior to the time the Staff approves the issuer’s request, the issuer may receive a late filing notice from a national securities exchange on which its securities are listed. The issuer should promptly notify the national securities exchange of its filing date adjustment.
8. The Office of the Chief Counsel of the SEC can be reached at (202) 551-3500.
9. However, based on comments provided by Staff members, it appears that an issuer may have some opportunity to seek a waiver for a future Form S-3 filing more than 30 days prior to the filing date if it can demonstrate a strong need for more advance notice (e.g., where a failure to obtain a waiver would foreclose the issuer from obtaining a specific type of financing or entering into an agreement with a specific investor).
10. For example, where an issuer’s late filing occurs shortly after the issuer has timely filed its Form 10-K for the preceding fiscal year, it may be approximately 11 months before the waiver request would become ripe.
11. If an issuer missed a deadline by a matter of hours, minutes or seconds, this should be stated in the waiver request letter.
12. An example of this may occur when a single event or transaction triggers disclosure under multiple Form 8-K items, but the issuer fails to provide the required disclosure under each item in an otherwise timely Form 8-K filing. In this case, although the Form 8-K may be deemed deficient and therefore delinquent with respect to the omitted item(s), an issuer would likely receive a more favorable review from the Staff if the omitted items would only have included the same or substantially the same disclosure set forth in the disclosed item that was timely filed.