

Avoiding Removal from the OTC Bulletin Board (OTCBB) due to Late SEC Filings

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Introduction

If you are a Securities Exchange Act of 1934 (“1934 Act”) reporting “small business issuer” (a U.S. or Canadian issuer of equity securities that has revenues of less than \$25,000,000) it is likely that your securities are quoted on either the Pink Sheets or the OTC Bulletin Board (“OTCBB”).

In order to maintain your stock quotation, the OTCBB, but not the Pink Sheets, requires that you consistently and timely file your 1934 Act quarterly reports and annual reports with the SEC. As a small business issuer, it is quite likely that your quarterly reports are filed on Form 10-QSB and your annual reports on Form 10-KSB.

The following Q&A deals with common issues that confront small business issuers that are delinquent in the submission of their quarterly or annual reports on 1934 Act Form 10-QSB or Form 10-KSB.

Will a company’s failure to timely file its quarterly or annual report affect its listing on the OTCBB?

Yes. NASD Rule 6530 sets out the eligibility rules for quotation on the OTCBB. Under Rule 6530, in order to be quoted on the OTCBB, a small business issuer must comply with 1934 Act reporting requirements and timely file both quarterly and annual reports with the SEC.

If for some reason an issuer falls behind on its 1934 Act reporting requirements, the OTCBB adds an “E” to the issuer’s stock trading symbol. Under Rule 6530, the issuer or the stock is then given a grace period (typically 30 days) during which it must become current in its 1934 Act reporting requirements. “E” stocks are removed from the OTCBB if the Rule 6530 grace period expires and the issuer has not met its 1934 Act filing requirements.

If a company knows that it won’t be able to make its SEC filing deadline, should it notify either the OTCBB or the SEC? How?

Under 1934 Act Rule 12b-25, an issuer that fails to timely file its annual or quarterly report is obligated to notify the SEC. The issuer is required to notify the SEC by filing a “Notification of Late Filing” on Form 12b-25 “no later than one business day after the due date” of the annual or quarterly report. [Click here for a copy of Form 12b-25.](#)

If you know your company will not make its filing deadline, the OTCBB suggests that you notify it by electronically filing a “Notification of Late Filing” on Form 12b-25 with the SEC on or before the filing due date.



Will the SEC penalize a company for failing to make a filing on time?

Failure to comply with the 1934 Act and its associated rules and regulations could result in an issuer's securities being de-registered. Under Section 12(j) of the 1934 Act, the SEC has the power to suspend the registration of an issuer's securities for up to 12 months. The SEC can also revoke the registration of an issuer's securities.

Is it possible for a company to get a filing extension from the SEC? How?

If an issuer files a "Notification of Late Filing" on Form 12b-25 with the SEC, the issuer benefits from a 15 calendar day extension of its annual filing requirement or a 5 calendar day extension of its quarterly filing requirement.

What if a company needs more time than the SEC filing extension. Will the SEC give it another extension?

Filing a "Notification of Late Filing" on Form 12b-25 will give your company some breathing room; 15 days for annual reports and 5 days for quarterly reports. Some issuers may be able to suspend their duty to file periodic reports under Rule 12h-3.

What are the OTCBB consequences of failing to file during the SEC extension period?

Under NASD Rule 6530, issuers that are delinquent in the 1934 Act reporting requirements have at least 30 days to become current. This 30 day grace period is longer than the filing extension that an issuer can obtain from the SEC by filing a "Notification of Late Filing" on Form 12b-25.

For example, if an issuer's 1934 Act filing delinquency is due to a late annual report on Form 10-KSB, the issuer can file a "Notification of Late Filing" on Form 12b-25 and receive a 15 day filing extension. If for some reason the issuer fails to file its Form 10-KSB during the 15 day filing extension, the issuer should still be within the OTCBB grace period and should therefore have up to 15 additional days to bring its filing current.

If we file our 1934 Act report during the OTCBB grace period, will the SEC or EDGAR inform the OTCBB?

It is best to alert the OTCBB that the issuer is back in compliance with its 1934 Act reporting requirements. If an "E" has been added to an issuer's trading symbol and the issuer is currently in compliance with its 1934 Act reporting requirements, the issuer should immediately contact the OTCBB Issuer Filings Department. Once the OTCBB confirms that the issuer is in compliance with NASD Rule 6530 and is eligible for quotation, it will

remove the “E” from the issuer’s trading symbol. If the “E” is not removed, the issuer’s stock will be removed from quotation on the OTCBB.

How will a company’s inability to become current with its 1934 Act reporting requirements affect the quotation of its stock on the OTCBB?

If an issuer continues to be delinquent in its 1934 Act reporting obligations after the expiration of the NASD Rule 6530 grace period, the issuer’s stock will be removed from quotation on the OTCBB. Under NASD Rule 6530(e), an issuer that is delinquent in its reporting obligations three times in a 24-month period and/or is actually removed from the OTCBB for failure to file two times in a 24-month period is ineligible for quotation on the OTCBB for a period of one year.

Once removed from the OTCBB, can a company’s stock be quoted again in the future?

If an issuer’s stock is removed from quotation on the OTCBB, the issuer has the option of appealing the decision. However, the Panel that hears the appeal will only rule on whether or not the issuer was current with its 1934 Act reporting obligations at the time its stock was removed from quotation.

Assuming the issuer chooses not to appeal, or is unsuccessful in its appeal, the issuer would have to wait for one year before seeking to again be quoted on the OTCBB. Issuers cannot directly petition the OTCBB. In order to be quoted on the OTCBB, the issuer must request a Market Maker to file a Form 211 and a Form 211 Addendum.

[Click here to download Form 211 and the Form 211 Addendum.](#)

How strict is the OTCBB with companies that repeatedly make late 1934 Act quarterly or annual reports?

The OTCBB uses a “three strikes” system to track issuers that are repeatedly late in meeting their 1934 Act reporting requirements. Once an issuer accumulates three strikes, the OTCBB removes the issuer’s stock from quotation on the OTCBB.

AbdulJaami, PLLC advises businesses that have US\$1 million – US\$100 million in annual sales on the successful completion of corporate finance, trade finance, and project finance transactions in the Americas. AbdulJaami, PLLC maintains a securities law practice.

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