



Do I have to be current in my '34 Act reports to file a Form 15?

Form 15 is a simple form.

It's one page, and requires only that the issuer check at least one of the five boxes. However, there are complicated conditions to the use of Form 15, and the consequences of the filing are often misunderstood.

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Background

For a variety of reasons, many issuers no longer want to be a reporting company, subject to the requirements of the '34 Act. Most issuers, their management, and their counsel are aware that filing a Form 15 is a common way of exiting the system.

[Form 15](#) serves two distinct purposes. Its title is

CERTIFICATION AND NOTICE OF TERMINATION OF REGISTRATION UNDER SECTION 12(g) OF THE SECURITIES EXCHANGE ACT OF 1934 OR SUSPENSION OF DUTY TO FILE REPORTS UNDER SECTIONS 13 AND 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934.

The form can be used to either as a (a) certification and notice of termination of registration under Section 12(g) of the Securities Exchange Act of 1934, or as a (b) suspension of duty to file reports under Sections 13 and 15(d) of the Securities Exchange Act of 1934.

Section 15(d) Filers

There are two common scenarios whereby an issuer begins filing '34 Act reports with the SEC. One is pursuant to [Section 15\(d\)](#), which applies when an otherwise non-reporting issuer files a '33 Act registration statement.

The following is a quote from SEC Staff Legal [Bulletin No. 18](#):

When an issuer's registration statement under the Securities Act of 1933 becomes effective, Section 15(d) requires the issuer to file the reports required by Section 13(a) of the Exchange Act with respect to each class of securities covered by the registration statement. As the Commission has explained, the purpose of periodic reporting under Section 15(d) is "to assure a stream of current information about an issuer for the benefit of purchasers in the registered offering, and for the public, in situations where Section 13 of the Exchange Act would not otherwise apply." The issuer must continue to file these

reports until the Section 15(d) reporting obligation for each class of securities is suspended.

The Section 15(d) reporting obligation is suspended while a class of securities is registered under Section 12 of the Exchange Act. In addition, there are two other ways in which a Section 15(d) reporting obligation may be suspended. First, Section 15(d) provides for an automatic statutory suspension of this reporting obligation if, on the first day of any fiscal year other than the fiscal year in which a Securities Act registration statement became effective, there are fewer than 300 record holders of the class of securities offered under the Securities Act registration statement. Second, an issuer may seek to avail itself of the suspension provided by Rule 12h-3 at any time *during* the issuer's fiscal year if it meets the conditions of the rule.

In order to rely on Rule 12h-3, the issuer:

- must be current in its Exchange Act reporting obligations;
- must have (1) fewer than 300 record holders of the class of securities offered under the Securities Act registration statement; or (2) fewer than 500 record holders and its assets must not have exceeded \$10 million on the last day of each of the issuer's three most recent fiscal years; and
- must not have had a Securities Act registration statement relating to that class of securities become effective in the fiscal year for which the issuer seeks to suspend reporting, or have had a registration statement that was required to be updated by Section 10(a)(3) of the Securities Act during the fiscal year for which the issuer seeks to suspend reporting, and, if the issuer is relying on the fewer than 500 record holder and \$10 million in assets threshold noted above, during the two preceding fiscal years.

It is this last requirement, contained in Rule 12h-3(c), that has prompted issuers to seek no-action relief from the staff.

In order to avail itself of the suspension provided by Rule 12h-3, the issuer must also file a certification of termination on Form 15. If the certification of termination on Form 15 is subsequently withdrawn or denied, the company must file all reports that would have been required if the Form 15 had not been filed. Similarly, if in the future the issuer no longer satisfies the requirements under which it was able to cease reporting under Section 15(d), the suspension ends and the reporting obligation returns without any action by the issuer.

Therefore, if an issuer is filing '34 Act reports with the SEC because it had a '33 Act registration statement declared effective at some point in the past, that has not been suspended, and thus is required to continue to file '34 Act reports under Section 15(d), then yes, the issuer must be current in its '34 Act filings before it can be relieved of that duty by filing a Form 15. In this scenario, the issuer is relying on [Rule 12h-3](#) and should check the corresponding box on the Form 15.

The issuer's '34 Act filing obligations are suspended immediately upon filing the Form 15, but if for some reason the Form 15 is denied by the SEC, the issuer has 60 days to file with the Commission all reports which would have been required if such certification had not been filed.

Rule 12(g) Filers

The second common scenario is when an issuer *voluntarily* files '34 Act reports pursuant to [Section 12\(g\)](#). This arises, for example, when an issuer has filed a Form 10 registration statement that has been declared effective at some point in the past. This also arises when, following the effectiveness of a '33 Act registration statement, the issuer files a Form 8-A, which bridges the gap between Section 15(d) and Section 12(g).

Note that there are situations where an issuer is *required* to file '34 Act reports pursuant to 12(g), the commonly known "500 shareholders and \$10 million in assets" rule. If an issuer is required to file '34 Act reports because of this rule, then they are not eligible to file a Form 15 at all.

Therefore, if an issuer is filing '34 Act reports with the SEC pursuant to a Section 12(g) obligation, then no, the issuer is not required to be current in its '34 Act filings before it can be relieved of that duty by filing a Form 15. In this scenario, the issuer is relying on [Rule 12g-4](#) and should check the corresponding box on the Form 15.

The issuer's '34 Act filing obligations are suspended immediately, but the Form 15 doesn't actually take effect until 90 days after it is filed. This means that the issuer is still subject to Section 12(g), and thus is a reporting company, during those 90 days.

15(d) or 12(g)?

How do you know if an issuer is filing '34 Act reports under Section 15(d) or Section 12(g)? The easiest way is to review the issuer's edgar filing history and look for registration statements. If there are '33 Act registration statements (such as an SB-2 or S-1), but no '34 Act registration statements (such as a Form 10 or 8-A), then the issuer may be filing pursuant to Section 15(d). If there is a Form 10 or 8-A, then the issuer is likely filing pursuant to Section 12(g). The other way to tell is by the issuers filing number. A filing number that starts with "333" is a '33 Act number, and means the issuer is probably filing pursuant to Section 15(d). In the alternative, a filing number that starts with "34" is a '34 Act number, and mean the issuer is probably filing pursuant to Section 12(g).

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The Lebrecht Group, APLC provides comprehensive advice on a variety of corporate and securities law matters. Please contact us if you have any questions.

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