

## SEC Expands Confidential Processing of IPO-Related Registration Statements

The staff of the Division of Corporation Finance (Staff) of the US Securities and Exchange Commission (SEC) announced that, beginning July 10, 2017, it will allow all companies to submit registration statements for initial public offerings (IPOs) to the Staff for review on a confidential basis.<sup>1</sup> The Staff will also allow nonpublic treatment of follow-on draft registration statements submitted within one year of an IPO.

The Staff's announcement expands the confidential review process for registration statements, which currently is available only for emerging growth companies (EGCs), i.e., companies with less than \$1.07 billion of annual revenue in their most recently completed fiscal year, under the Jumpstart Our Business Startups Act (JOBS Act). According to the director of the SEC's Division of Corporation Finance, the new procedure is intended to make "it easier for more companies to enter and participate in our public company disclosure-based system."<sup>2</sup>

**Initial Filings.** If a company wants to submit its initial registration statement and related revisions under the Securities Act of 1933 (Securities Act) for review by the Staff on a nonpublic basis, it must confirm in a cover letter that it will publicly file its registration statement and nonpublic draft submissions at least 15 days prior to any road show or, if there is no road show, at least 15 days prior to the requested effectiveness date. Similarly, if a company wants its draft registration statement and related

revisions under Section 12(b) of the Securities Exchange Act of 1934 (Exchange Act) to be reviewed by the Staff on a confidential basis, it must include a similar confirmation in a cover letter with respect to that registration statement, with the timing tied to the effective date of the registration statement for its listing on a national securities exchange.

**Filings within One Year of IPO or Section 12(b) Exchange Act Registration.** The Staff's procedure allowing draft registration statements to be reviewed on a nonpublic basis extends to follow-on drafts submitted prior to the end of the 12th month following the effective date of a company's initial Securities Act or Section 12(b) Exchange Act registration statement. In that circumstance, the company's cover letter must confirm that the registration statement and nonpublic draft submission will be available on EDGAR at least 48 hours prior to the requested effective time and date. The Staff will only allow this confidential review for the initial submission. A revised draft of the registration statement in response to Staff comments would need to be made in a public filing.

**Foreign Private Issuers.** Foreign private issuers have several choices regarding confidential submissions of registration statements. They may proceed under the new procedures for confidential filings. Or, if the company qualifies as an EGC, it may use the procedures available for EGCs. Alternatively, foreign private issuers may follow the

guidance that the Staff set forth in its May 2012 statement on nonpublic submissions from foreign private issuers.<sup>3</sup>

**Omitted Financial Information.** Draft registration statements submitted for confidential review by the Staff pursuant to the newly expanded procedure should be substantially complete. The Staff will not delay processing if the company reasonably believes that any financial information that it omitted from its draft registration statement will not be required at the time the registration statement is publicly filed. For example, the draft registration statement could omit financials that would be required for a company filing before the end of a fiscal year but that would not be required for a filing during the next fiscal year once the financials for the completed fiscal year become available, assuming that the company intends to publicly file its initial registration statement containing the new financial statements after the end of the current fiscal year.

**Other JOBS Act Provisions Not Extended.** Other provisions of the JOBS Act applicable to EGCs—notably the use of testing-the-waters communications, reduced financial statement requirements, reduced executive compensation disclosure and the extended phase-in for compliance with the Sarbanes-Oxley Act of 2002—were not extended to all companies under the new policy.

**Frequently Asked Questions.** Following its announcement that it would accept certain draft registration statements for review on a nonpublic basis, the Staff released answers to 18 frequently asked questions (FAQs),<sup>4</sup> covering points such as:

- **Financial information omission.** According to the FAQs, although the new policy allows *draft submissions* to omit financial information that will not be required at the time the registration statement is publicly filed, only EGCs may omit from *publicly filed registration statements*

financial information that they reasonably believe will not be required to be included in the registration statement at the time of the contemplated offering (which EGCs are authorized by statute to do under Section 71003 of the Fast Act).

- **Signatures and filing fees.** The FAQs clarify that the draft registration statement submitted for nonpublic review does not need to be signed or accompanied by consents of auditors and other experts, even when those draft submissions are later filed publicly with the first publicly filed registration statement. However, the filed registration statement should be complete, including signatures, signed audit reports, consents and exhibits. The FAQs indicate that the filing fee is due with the first publicly filed registration statement; no filing fees are due with draft registration statements submitted for nonpublic review under the Staff's new policy.
- **Post-effective amendments.** The FAQs state that the draft submission process is not available for post-effective amendments to an effective registration statement.
- **Applicability to certain issuers.** The FAQs also specify that Canadian issuers filing under the Multi-Jurisdictional Disclosure System may take advantage of the nonpublic review accommodations. On the other hand, the FAQs indicate that asset-backed issuers are not permitted to confidentially file draft registration statements.
- **Confidential treatment.** If a company is seeking confidential treatment for a draft registration statement, it may make this request when it electronically submits its draft registration statement. The top of each page in the draft registration statement should contain a legend referencing the confidential treatment request. In addition, the FAQs suggest that when responding to Staff comments on a draft registration statement, companies should appropriately identify information for which they will be seeking confidential treatment to ensure that the Staff

does not include that information in its comment letters.

- **Impact on offers and other communications.** The FAQs state that the draft submission of a registration statement does not constitute a filing for the purposes of the Section 5(c) prohibition against making offers in advance of filing a registration statement. Similarly, the draft submission does not enable a company to make a public communication about its offering in reliance on Rule 134 of the Securities Act. A company that submits a draft registration for nonpublic review may make a public communication about its offering under Rule 135 of the Securities Act, but doing so may affect whether the SEC can withhold the draft registration statement in response to a request under the Freedom of Information Act.

## Practical Considerations

Companies taking advantage of the Staff's confidential review process should discuss the timing of the proposed transaction with the Staff assigned to review their submissions. The Staff noted that it will process confidential submissions and filed registration statements in the normal course but indicated that it will consider reasonable requests to expedite processing of drafts. As a result, it makes sense to keep the Staff informed of the schedule and any changes to the timing.

The expansion of the confidential review process does not limit the process by which EGCs submit their draft registration statements for nonpublic review. Companies must qualify as an EGC in order to avail themselves of the other accommodations afforded to EGCs under the JOBS Act, such as two-year audited financials, reduced executive compensation disclosure and the ability to conduct testing-the-waters meetings.

A company wishing to avail itself of the confidential registration statement review process must obtain EDGAR codes if it does not already have them. Until the Form ID (which is the form used to request EDGAR codes) is updated to reflect the Staff's new policy on nonpublic review, the company should indicate on its Form ID that it intends to use the codes to submit a draft registration statement pursuant to the JOBS Act (even if it is not an EGC).

Companies considering submission of draft registration statements for nonpublic review under the Staff's new policy should review the FAQs, which contain additional information, including numerous details of the mechanics of the process.

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*For more information about the topics raised in this Legal Update, please contact the author, Laura D. Richman, at +1 312 701 7304, any of the following lawyers or any member of our Corporate & Securities practice.*

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## Endnotes

- <sup>1</sup> <https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>.
- <sup>2</sup> <https://www.sec.gov/news/press-release/2017-121>.
- <sup>3</sup> <https://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>
- <sup>4</sup> <https://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>.

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