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Facilitating Capital Formation: SEC Expands Access to Confidential Submission Process for Registration Statements

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With a view to facilitating capital formation, the Securities and Exchange Commission [announced](#) on June 29, 2017 that the Division of Corporation Finance will allow all companies to confidentially submit draft registration statements for non-public SEC review. Before this change, confidential submissions were only available to emerging growth companies, or companies with less than \$1 billion in revenue (“EGCs”), under the JOBS Act of 2012.¹ This new policy took effect on July 10, 2017. Bill Hinman, the Director of the Division of Corporation Finance, lauded this as “an important step in our efforts to foster capital formation, provide investment opportunities, and protect investors. This process makes it easier for more companies to enter and participate in our public company disclosure-based system.”²

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Expanded Availability for Issuers

The confidential submission and review process will now be available for:

- all draft initial registration statements (and related revisions) under the Securities Act of 1933, as amended, for IPOs;
- draft registration statements (and related revisions) for registration of a class of securities under Section 12(b) of the Exchange Act of 1934, as amended, relating to the listing of that class on a national securities exchange (such as direct listings and Form 10 “spin-off” filings); and
- draft registration statements (but NOT related revisions) under the Securities Act for follow-on securities offerings by issuers within one year following the effective date of an issuer’s initial Securities Act registration statement or initial Exchange Act Section 12(b) registration (e.g. for an IPO or spin-off).³

Foreign private issuers may choose to proceed in accordance with these new procedures, those available to EGCs (if qualified as such), or previous Division of Corporation Finance staff (“Staff”) guidance issued on May 30, 2012.

While confidential submission and review of registration statements has been extended to issuers that are not EGCs, other provisions of the JOBS Act that afford EGCs the use of testing-the-waters communications, reduced financial statement requirements, and phase-in compliance with the Sarbanes-Oxley Act of 2002, among other things, have not been extended to other issuers.

Benefits to Issuers

Confidential submissions and nonpublic review and comments from the Staff affords an issuer increased flexibility and control in its decision to ultimately pursue an initial public offering, and potentially shields an already public issuer from possible market fluctuations that can be occasioned by a public filing. This process also is beneficial in protecting an issuer’s commercially sensitive or competitive financial or proprietary information until the issuer is comfortable that an acceptable offering of securities is reasonably likely, due to general market conditions.

Under this system, all first-time issuers will benefit from being able to privately advance a Staff review while maintaining confidentiality vis-à-vis the public as well as their competitors.

Additionally, the Staff will permit issuers to omit from their confidential submissions financial information that they reasonably believe will not be required at the time the registration statement is publicly filed. Previously, the Staff had taken the position that a registration statement confidentially submitted to the Staff must be complete in all material respects at the time of first submission. Among other things, this accommodation may allow an issuer to avoid the expense of obtaining audits of certain earlier periods that have not previously been subject to audit. The Staff also noted that it will consider requests to omit required financial information under S-X Rule 3-13, which permits the Staff to waive financial information requirements “where consistent with the protection of investors” based on the “specific facts and circumstances” of the company. This statement indicates a greater willingness of the Staff to grant those requests than has historically been the case.

The Staff believes that the extension of confidential submissions to non-EGCs will encourage private companies of all sizes to pursue significant market transactions with added comfort and confidence. It has been reported that only 105 IPOs were completed in 2016, the lowest total since 2009.⁴ SEC Chairman Jay Clayton has expressed concern over the recent decline in IPO activity and hopes that this change in policy will encourage companies to “look to our public markets when they need access to affordable capital.”⁵

Public Review Period Will Remain

Even in the case of confidential submissions, the Staff has indicated that a public review period of some sort will remain. Any non-EGC wishing to confidentially submit its registration statement will be required to also submit a cover letter confirming its commitment to file both its registration statement and all of its non-public draft submissions publicly at least 15 days prior to starting its road show (or, if the issuer is not doing a road show, 15 days prior to the desired effective date of the registration statement).⁶ This public review period is meant to maintain the public’s opportunity to review and evaluate the upcoming offering. This change will not affect the submission and review process available to EGCs.

Additional SEC Guidance

Shortly after its initial announcement, the Staff released [FAQs](#) that clarify procedural guidelines related to voluntary submission of draft registration statements.

For example, a non-EGC issuer that is relying on the new policy should consider requesting confidential treatment for its draft registration statement and associated correspondence under Rule 83 and should submit a draft registration statement for nonpublic review by using EDGAR submission type DRS. Issuers are instructed to include a legend at the top of each page of the electronically submitted draft registration statement indicating that they have requested confidential treatment.

With respect to public communications in connection with an offering, the SEC clarified that the Securities Act Rule 134 safe harbor is not available until the issuer files a registration statement that satisfies the requirements of Rule 134. An issuer may make public communications about its draft registration statement in reliance on Securities Act Rule 135, but the Staff reminds issuers that a public statement about its offering may affect whether the SEC can withhold the draft registration statement in response to a request under the Freedom of Information Act.

The Staff will continue to monitor the results of this new set of procedures and maintains the right to expand, limit or otherwise modify as it deems appropriate. Based on recent public statements by Chair Clayton and Director Hinman about their priorities, we understand that additional changes intended to facilitate public offerings may be forthcoming.

Emily K. Albertson assisted in the preparation of this article.

1 The Staff of the Division of Corporation Finance also affords first-time foreign private issuers and foreign governments the ability, in some circumstances, to submit registration statements and amendments to the staff on a non-public basis.

2 <https://www.sec.gov/news/press-release/2017-121>

3 The Staff clarified that nonpublic review will be limited to the initial submission and not to revised draft registration statements responding to Staff comments. <https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>

4 <https://blogs.wsj.com/moneybeat/2016/12/29/year-in-review-ipos-struggled-again-in-2016/>

5 <https://www.sec.gov/news/press-release/2017-121>

6 In the case of secondary follow-on offerings within 12 months of an IPO, this deadline is accelerated to 48 hours prior to the requested effective time and date.

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