

SEC Clarifies what Financial Information Companies Can Omit from Draft Registration Statements

August 21, 2017

On August 17, 2017, the SEC Division of Corporation Finance clarified its prior guidance regarding what financial information companies can omit from draft registration statements they submit confidentially. The clarification follows the Division’s announcement on June 29, 2017 that it would begin accepting confidentially submitted draft registration statements from issuers even if they are not emerging growth companies (“EGCs”) or foreign private issuers (“FPIs”).¹

The clarification came in the form of (1) an [update](#) to the Division’s June policy announcement,² (2) a revision of the FAST Act [FAQ](#) published by the SEC staff in December 2015 regarding financial information permitted to be omitted by EGCs in draft registration statements pursuant to the FAST Act and a corresponding new Compliance and Disclosure Interpretation (“C&DI”)³ and (3) a new [C&DI](#) extending (in part) the FAST Act EGC accommodation to a broader group of issuers.⁴

If you have any questions concerning this memorandum, please reach out to your regular firm contact or any of our partners and counsel listed under [Capital Markets](#) in the “Our Practice” section of our website.

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¹ For a discussion of the new policy, see Cleary Gottlieb, [The New SEC Policy on Confidential Review of Registration Statements](#) (July 9, 2017).

² SEC Announcement, Draft Registration Statement Processing Procedures Expanded (June 29, 2017 (revised Aug. 17, 2017)).

³ SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Fixing America’s Surface Transportation (FAST) Act, Question 1 (Dec. 10, 2015 (revised Aug. 17, 2017)) and SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Forms – Question 101.04 (Aug. 17, 2017).

⁴ SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Forms – Question 101.05 (Aug. 17, 2017).



What information can be omitted?

The new policy permits both EGCs and non-EGCs to omit from confidentially submitted draft registration statements annual *and* interim financial statements that will not be required to be presented separately at the time of the first public filing (for non-EGCs) or the offering (for EGCs).⁵

With respect to the omission of interim periods, the Division's August 17th guidance revises the position taken by the staff in 2015 (in the now superseded FAST Act FAQ), in which the staff stated that it would not permit an EGC – in a confidential submission or in a publicly filed registration statement – to omit interim financial statements for a period (for example, the first six months of 2017) that will be included within required financial statements for a longer interim or annual period (for example, the first nine months of 2017) at the time of its offering, even though the shorter period will not be required to be presented separately at that time. The new guidance does not change the interpretation as it applies to a registration statement *publicly filed* by an EGC.⁶

The Division has now highlighted the practical implications of its new guidance for confidential submissions in two new C&DIs – one that applies to EGCs and one that applies to non-EGCs.⁷ According to the examples provided by the Division, this means that in a November 2017 confidential submission for an offering

(for EGCs) or filing (for non-EGCs) expected in April 2018, an issuer can omit:

- financial information for the earliest year that will not be required for an April offering or filing, as applicable (2015 for EGCs and 2014 for non-EGCs); and
- interim period financial information for 2017 (whether June or September).

If an issuer, whether an EGC or a non-EGC, files publicly in January 2018, however, notwithstanding that the April registration statement will include financial information for the full year 2017, the January filing will need to include 2017 interim period financial information for June (for FPIs) or September (for all other issuers).

The only difference in this hypothetical between an EGC and a non-EGC is that an EGC can omit from both its November submission and its January filing financial information for the earliest year that will not be required for an April offering. A non-EGC needs to include in all filings all required information, so it would need to include 2014 financial statements in a January filing even though the April registration statement will not require them.

This ability to omit certain annual and interim periods from draft registration statements addresses a difficulty that commonly arises in preparing for an IPO: the financial statements required under the SEC's rules when the issuer

⁵ Under the FAST Act, only EGCs are afforded the additional flexibility to omit certain information from public filings. Extending that relief to non-EGCs is beyond the authority of the SEC staff and would require rulemaking or legislation.

⁶ “[I]nterim financial information that will be included in a historical period that the issuer reasonably believes will be required to be included at the time of the contemplated offering may not be omitted from its filed registration statements. However, under staff policy, an [EGC] may omit from its draft registration statements interim financial information that it reasonably believes it will not be required to present separately at the time of the contemplated offering.” SEC, Division of Corporation

Finance, Compliance and Disclosure Interpretations, Fixing America's Surface Transportation (FAST) Act, Question 1 (Dec. 10, 2015 (revised Aug. 17, 2017)) and SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Forms – Questions 101.04 (Aug. 17, 2017).

⁷ For EGCs, see SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Fixing America's Surface Transportation (FAST) Act, Question 1 (Dec. 10, 2015 (revised Aug. 17, 2017)) and SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Forms – Questions 101.04 (Aug. 17, 2017); for non-EGCs, see Question 101.05.

first begins the review process are often superseded or no longer required when the offering is ready for launch. Division of Corporation Finance Director Bill Hinman acknowledged last Thursday that the policy can save issuers the cost of at least one quarter of review while still providing the investing public with all of the relevant and required interim financial information at the time of the first public filing.⁸ Overall, the policy reflects the SEC's continued efforts to facilitate capital formation under new Chairman Jay Clayton.

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⁸ SEC Clarifies Rules for Info On Confidential IPOs (Law360, Aug. 17, 2017) .
