

The New SEC Policy on Confidential Review of Registration Statements

July 9, 2017

On June 29, 2017, the SEC Division of Corporation Finance announced that starting July 10, as part of its efforts to facilitate capital formation, it is expanding the circumstances in which an issuer may submit a draft registration statement for nonpublic review. In connection with IPOs, initial exchange listings and follow-on offerings within one year of an IPO or initial exchange listing, all issuers can take advantage of the SEC’s nonpublic review process, which was previously available only to emerging growth companies (“EGCs”) and, in certain circumstances, foreign private issuers (“FPIs”). The new policy demonstrates the SEC’s interest in giving issuers more flexibility to access public markets and is an example of an SEC staff initiative to bolster capital formation that does not require SEC rulemaking or Congressional legislation.

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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I. Confidential Submission for EGCs Under the JOBS Act

The new policy does not limit or change the process by which an EGC may submit a draft registration statement under the Jumpstart Our Business Startups Act of 2012 (the “JOBS Act”). The JOBS Act sought to facilitate capital formation for EGCs (generally defined as companies with annual revenues of \$1 billion¹ or less) by providing regulatory accommodations for an IPO. One important accommodation was confidential submission of draft IPO registration statements to the SEC, which allows the issuer to defer—or even avoid, if it does not proceed with the offering—the public disclosure of sensitive commercial and financial information to the market and to competitors. An EGC is permitted to submit a draft registration statement to the SEC confidentially so long as the initial confidential submission and all amendments are publicly filed not later than 21 days before the company begins its pre-IPO roadshow for potential investors.

The Fixing America’s Surface Transportation Act of 2015 (the “FAST Act”) included a provision that reduced from 21 to 15 the number of days required between an EGC’s first public filing of its IPO registration statement and the commencement of its roadshow.

¹ In April 2017, the JOBS Act EGC revenue cap was raised to \$1.07 billion to adjust for inflation.
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II. New Procedures for Nonpublic Review

Registration statements eligible for nonpublic review

Under the new policy, an issuer may submit the following types of registration statements in draft form to the SEC for nonpublic review:

- a registration statement in connection with an IPO;
- an initial registration statement for the listing of a class of securities under Exchange Act Section 12(b); and
- a registration statement for a follow-on offering within one year after the effective date of an IPO or initial Section 12(b) registration statement.

For this final category of registration statement (follow-on offerings within a year), the SEC's nonpublic review will be limited to the initial draft submission. An issuer responding to SEC staff comments on this type of draft registration statement must do so with a public filing, rather than submitting a revised, nonpublic draft registration statement.

Financial statements in draft registration statements

Under its new policy, the Division will process a draft registration statement that is substantially complete except for financial information the issuer "reasonably believes ... will not be required at the time the registration statement is publicly filed." This addresses a difficulty that commonly arises in preparing for an IPO: the financial statements required under the SEC's rules when the issuer first begins the review process are often superseded or no longer required when the offering is ready for launch.

The relief under the new policy is similar, but in two respects not identical, to the disclosure relief provided to EGCs under the FAST Act, which allows EGCs to omit financial information that "relates to a historical period the issuer reasonably believes will not be required to be included at the time of the contemplated offering." First, the SEC's new policy refers to the time of public filing, while the FAST Act refers to the time of the offering. This difference may not prove to be very significant since, in practice, issuers availing themselves of the draft registration statement submission procedures are likely to target a public filing that is not much more than 15 days before the contemplated offering.

Second, the SEC has made it clear the FAST Act does *not* permit an issuer to omit from its submission interim financial statements for a period (for example, the first six months of 2017) that will be included within required financial statements covering 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.² The new relief, however, appears intended to provide more flexibility for nonpublic reviews, because it refers only to what financial information will be required, rather than to periods that will be "included" in required financial statements; but the possible greater scope for relief remains to be clarified.

The Division explained in an accompanying FAQ that its new policy does not provide any flexibility with respect to financial statements included in a filed registration statement (as opposed to a submission for nonpublic review). This is in contrast to the FAST Act accommodation available to EGCs, and it reflects the limits of what the SEC staff can do without rulemaking or legislation.

The Division also drew attention to Rule 3-13 of Regulation S-X under the Securities Act, which provides for special written requests by issuers to omit or substitute certain financial statements, indicating that it will take

² See SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Fixing America's Surface Transportation (FAST) Act, Question 1 (Dec. 10, 2015).

a “facts and circumstances” approach to requests under the Rule. In informal public comments, Division staff have encouraged issuers to make use of Rule 3-13, indicating that the Division may be more flexible than it has been historically in granting requests.³

Procedures for submission

An issuer that wishes to submit its draft registration statement to the SEC for nonpublic review must do so through the EDGAR system. The issuer must confirm in a cover letter that it will publicly file its registration statement and nonpublic draft submissions (a) in the case of an IPO, at least 15 days prior to any roadshow, as that term is defined in Securities Act Rule 433(h)(4) (or, in the absence of a roadshow, at least 15 days prior to the requested effective date of the registration statement), (b) in the case of an initial Exchange Act registration statement, at least 15 days prior to the anticipated effective date of the registration statement or (c) in the case of a follow-on offering within one year of an initial registration statement, at least 48 hours prior to any requested effective time and date.

The draft registration statement submission process gives an issuer the flexibility to begin the SEC review process without making its filings public. As the EGC experience under the JOBS Act has shown, this has considerable advantages:

- It defers the public disclosure of sensitive commercial and financial information until the issuer is close to launching the IPO.
- It can avoid disclosure entirely if the issuer ultimately decides not to proceed with the offering, making it easier to conduct a “dual-track” process (concurrently pursuing an IPO and a sale of the company).
- The successive filings, and the give-and-take between the issuer and the SEC, will still be made public, but only near the end of the process, reducing the impact of media attention to changing disclosures during the SEC review process.
- It can give the issuer increased flexibility in timing the offering, reducing its exposure to market volatility.
- In the case of follow-on offerings within one year of initial registration, the ability to submit a draft registration statement allows the issuer to know whether the registration statement will be subject to staff review before it becomes public and to plan accordingly.

On the other hand, nonpublic review will also decrease the market’s visibility into deals that are in the pipeline, which could make it more difficult for banks to advise issuers as to optimal timing for an offering and will reduce the amount of time investors have to familiarize themselves with IPO candidates before they come to market.

A draft registration statement submission is not required to be signed by the issuer or to include consents of auditors and other experts. No filing fee is due at the time of submission of a draft registration statement.

Based on the new guidance, it seems that the Form ID application for EDGAR filing codes has not yet been updated to reflect the new procedures. The SEC advises that an issuer that does not yet have EDGAR codes and submits a draft registration statement for nonpublic review should check the JOBS Act § 106 box on the

³ In the past, the SEC has granted relief pursuant to Rule 3-13 in instances where the issuer requests to file statutory financial statements in lieu of GAAP financial statements, to omit financial statements for a period during which the issuer was subject to bankruptcy court jurisdiction, to omit reports with respect to debentures that have been guaranteed by a former (pre spin-off) parent company or to omit standalone financial statements for wholly owned finance subsidiaries. These examples do not readily indicate what expanded Rule 3-13 relief the SEC staff has in mind, but the staff’s objective of facilitating capital formation suggests it should be open to requests predicated on the preparation of financial statements being more burdensome for the issuer than the information is beneficial to investors.

Form ID when applying for codes, even if the issuer is not an EGC. This will help the SEC preserve the nonpublic status of the issuer's draft submissions until the issuer publicly files them.

The Division indicated that it will consider reasonable requests to expedite processing of both draft and filed registration statements and encourages issuers to review transaction timing with the Division staff.

Confidentiality concerns

There are specific confidentiality provisions in Securities Act Section 6(e)(2) for certain draft registration statements submitted by EGCs. Under these provisions, a draft registration statement submitted by an EGC is expressly protected from disclosure under the Freedom of Information Act and other statutory provisions.

These confidentiality provisions will not, however, apply to registration statements submitted under the new procedures. The Division has indicated that an issuer relying on the new draft registration statement submission policy should consider requesting confidential treatment under Rule 83 for its draft registration statements and associated correspondence when seeking nonpublic review. An issuer seeking confidential treatment for a draft registration statement submitted pursuant to the new policy should make its request electronically using submission type DRSLTR. If it does, it is not necessary to also send paper copies of the request and the materials to the Division or to the SEC's Freedom of Information Act Office. The issuer should include a legend at the top of each page of the electronically submitted draft registration statement indicating that it has requested confidential treatment of the draft registration statement pursuant to Rule 83.⁴ In its response letters to the SEC, the issuer should identify information for which it intends to seek confidential treatment upon public filing to ensure that the SEC staff does not include that information in its comment letters.

The Division has indicated that, consistent with its practice in all filing reviews, it will publicly release its comment letters and issuer responses to the comment letters on EDGAR no earlier than 20 business days following the effective date of the registration statement.

III. Considerations for FPIs

Under a separate, long-standing policy, the SEC staff provides for nonpublic review of draft registration statements for foreign issuers that meet certain requirements.⁵ An FPI may now elect to proceed under the new draft registration statement submission procedures available to all issuers, the procedures available to EGCs (if the issuer qualifies) or the pre-JOBS Act procedures applicable to certain FPIs. Under the pre-JOBS Act procedures, an eligible FPI can engage in multiple rounds of nonpublic SEC review and, unlike EGCs, may wait to file publicly until the commencement of the roadshow.

The pre-JOBS Act procedures for nonpublic review of draft registration statements may thus give a qualifying FPI the maximum degree of flexibility in planning an IPO or initial Exchange Act registration. However, if a qualifying FPI takes advantage of *any* of the EGC procedures available under the JOBS Act or the FAST Act, it will no longer be able to submit draft registration statements in accordance with the FPI procedures.⁶

⁴ See Voluntary Submission of Draft Registration Statements – FAQs, Question 4, available at <https://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>.

⁵The following categories of foreign private issuers are available for confidential review under the pre-JOBS Act procedures: a FPI that is listed or is concurrently listing its securities on a non-U.S. securities exchange, a FPI that is being privatized by a foreign government and a FPI that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction. Confidential review is also available for a foreign government registering its debt securities (for both initial registrations and follow-on offerings). See Non-Public Submissions from Foreign Private Issuers, December 8, 2011, as amended May 30, 2012, available at <https://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>.

⁶ See JOBS Act Frequently Asked Questions, Generally Applicable Questions on Title I of the JOBS Act, Question 9 (Dec. 21, 2015), available at <https://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm>.

Canadian issuers filing under MJDS may also take advantage of the new draft registration statement submission procedures.

IV. Pre-Deal Communications

Securities Act Section 5(c) prohibits, subject to certain exceptions, all “offers” in any form prior to the filing of a registration statement with the SEC. The submission of a draft registration statement for nonpublic review does not constitute a filing, and therefore certain pre-deal communications cannot occur until the public filing of the registration statement with the SEC. These communications include oral or written offers and also press releases pursuant to the Rule 134 safe harbor for limited communications not deemed to be a prospectus.

The JOBS Act added Section 5(d) to the Securities Act, allowing an EGC to engage in qualifying approaches to certain investors (referred to as “testing the waters”) either before or after the public filing of a registration statement. This provision continues to be available *only* for EGCs; expanding this benefit to other issuers would require Congressional action or SEC rulemaking.

The Division also pointed out that if an issuer that has submitted a draft registration statement for nonpublic review makes a public communication about its offering (which would be permitted if the communication complies with Securities Act Rule 135), that might adversely affect the SEC’s ability to withhold the draft registration statement if it receives a request under the Freedom of Information Act.⁷

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⁷ See Voluntary Submission of Draft Registration Statements – FAQs, Question 18, available at <https://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>.