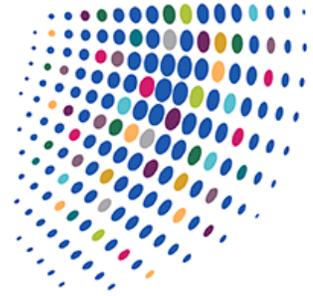


Alerts & Publications



SEC Staff Expands Nonpublic Review Process for Registration Statements and Announces Related Accommodations

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On June 29, 2017, the SEC's Division of Corporation Finance announced several accommodations to facilitate capital formation (available [here](#)). The accommodations support Chairman Jay Clayton's promise to meaningfully improve the competitiveness of the US capital markets, further evidenced by the Chairman's first public remarks on July 12, 2017 (available [here](#)). On July 10, 2017, the Division began accepting nonpublic draft registration statements from all issuers covering IPOs and initial registrations under Exchange Act Section 12(b). This expands a benefit granted solely to "emerging growth companies" (EGCs) by the JOBS Act of 2012, but does not otherwise extend EGC benefits to non-EGCs. In addition, the Division announced a more liberal treatment for certain financial statement requirements in draft registration statements and fuller consideration of reasonable requests to expedite the Division's processing of draft and filed registration statements. The Division also posted FAQs addressing preliminary questions regarding the process and scope of the new policies (available [here](#)).

Eligible Registration Statements

Voluntary nonpublic review by the Staff will now be available to all issuers for the following registration statements:

- Initial draft registration statements and related amendments filed under the Securities Act, including initial public offerings on Forms S-1 and F-1;
- Initial draft registration statements and related amendments in connection with the initial registration of a class of securities under Section 12(b) of the Exchange Act, including the registration of a class of securities on Form 10 for spin-offs; and
- Follow-on draft registration statements (but not related amendments) filed within 12 months of the effective date of the issuer's initial Securities Act or Section 12(b) Exchange Act registration statement.

Financial Statements in Draft Registration Statements

In addition to the benefits of a nonpublic review mentioned above, the Division has stated that it 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 largely mirrors the benefit 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.” Both accommodations serve the practical benefit of allowing an issuer to omit detailed financial information from the draft registration statement that will become stale and will no longer be required when the offering is ready to launch. However, it appears that by referring to what financial information will be required, rather than to periods that will be “included” in the registration statement, the new relief may provide greater flexibility for nonpublic reviews. That is, unlike the FAST Act, which does not permit an issuer to omit from its submission interim financial statements for a period that will be included within required financial statements covering a longer interim or annual period, the new relief may permit issuers to omit a wider range of financial information from draft registration statements.

The Division also drew particular 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. Historically, the Staff has granted relief pursuant to Rule 3-13 under various circumstances, including, for example, to omit financial statements for a period during which the issuer was subject to bankruptcy court jurisdiction, to include statutory rather than GAAP financial statements, and to omit standalone financial statements for wholly owned finance subsidiaries. The Division’s reference to Rule 3-13, as well as informal Staff comments encouraging the use of Rule 3-13, seem to indicate that the Division generally may be receptive to the expanded use of Rule 3-13 in the future. This, of course, assumes that the facts and circumstances support the conclusion that the financial statement information in question is of no or little benefit to investors.

Chairman Clayton also highlighted the potential for relief in his July 12 remarks, noting that SEC reporting rules may require disclosures that are “burdensome to generate” but that may not be material to investors and specifically identifying Rule 3-13 as a potential avenue for reporting companies to modify burdensome financial reporting requirements. The Chairman encouraged reporting companies to consider whether such modifications “may be helpful in connection with their capital raising activities” and assured that the Staff “is placing a high priority on responding with timely guidance.”

Procedures for Submission

Requests for nonpublic review of draft registration statements should be made through the SEC's EDGAR system. The cover letter should confirm that the issuer will publicly file its registration statement, together with any confidential draft submissions, at least 15 days prior to the earlier of its road show or the requested effective date of the registration statement, or, in the case of a follow-on offering, at least 48 hours prior to any requested effective time and date. A draft registration submission is not required to be signed by the issuer or to include an auditor consent. Further, no filing fee is due at the time of submission of the draft registration statement. The Staff has advised that an issuer that doesn't have EDGAR codes and submits a draft registration statement for nonpublic review should check the JOBS Act Section 106 box on the Form ID when applying for codes, even if the issuer isn't an EGC. This will assist the Staff in preserving the nonpublic status of the filing until a public filing.

Distinctions between Nonpublic Review of EGCs and non-EGCs

As mentioned above, the new relief expands a benefit previously granted solely to EGCs (i.e., nonpublic review of registration statements) but does not otherwise extend EGC benefits to non-EGCs. In addition, the following distinctions between the nonpublic review of EGC and non-EGC registration statements merit special attention:

- **Testing the Waters.** Unlike EGCs, non-EGCs relying on the nonpublic review process may not “test the waters” or otherwise make offers until the registration statement is publicly filed. Accordingly, non-EGCs will have to decide whether the benefits of a nonpublic review—which include (i) deferring public disclosures of sensitive commercial and financial information until the issuer is close to launching the IPO, (ii) reduced media attention, and (iii) increased flexibility in timing the offering, thereby potentially reducing exposure to market volatility—outweigh the ability to pre-market the offering.
- **Confidential Treatment.** The Securities Act includes specific confidentiality provisions for draft registration statements submitted by EGCs. These provisions protect against disclosure under the Freedom of Information Act and other statutory provisions. These provisions do not, however, apply to non-EGC registration statements. With this in mind, issuers should consider requesting confidential treatment under SEC Rule 83 for sensitive information in draft registration statements and related correspondence. Such requests may be made electronically using submission type DRSLTR.

Expedited Processing of Registration Statements

Consistent with the SEC's overall initiative to promote capital formation, the Division stated that it will consider all reasonable requests to expedite the processing of both draft and filed registration statements. As with any submission or filing, it often makes sense to review the timing and any unique aspects of the transaction with the Staff at the time of the initial submission.

Foreign Private Issuers

Foreign private issuers have the option of following the Division's new policy, the procedures available to EGCs (if the foreign private issuer is an EGC), or the guidance for nonpublic submissions for foreign private issuers released by the Division on December 8, 2011 and updated on May 30, 2012 (available [here](#)).

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