

SEC Staff Expands Ability to File Registration Statements on a Nonpublic Basis

July 5, 2017

Staff also suggests greater willingness to waive financial statement requirements, and more flexibility in accommodating expedited review requests

Following up on Chairman Jay Clayton's promise to improve access to the capital markets, on June 29 staff in the SEC's Division of Corporation Finance **announced several welcome changes** to the filing process for IPO and newly public companies. Beginning on July 10, 2017, the staff will accept 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. The SEC will also grant nonpublic review to the first submission of a draft registration statement within one year after an IPO or initial registration under Exchange Act Section 12(b). Subsequent amendments to these registration statements must however be filed publicly.

This expansion of nonpublic review does not extend other EGC benefits to all companies, such as the ability to engage in "testing the waters" prior to the filing of a registration statement, or relief from auditor attestation of the effectiveness of internal control.

The staff also noted that it will consider a company's "specific facts and circumstances in connection with any request made under Rule 3-13 of Regulation S-X," the rule allowing the staff to waive otherwise-required financial information requirements, likely signaling an intent to treat these requests in a more accommodating manner than has traditionally been the case.

Finally, the staff stated that it will consider "reasonable requests" to expedite processing of draft and filed registration statements, and it encouraged companies to review their transaction timing with the personnel assigned to the filing review.

Eligibility for Nonpublic Review of Draft Registration Statements

The SEC will grant nonpublic review to draft registration statements under the following conditions:

- *IPOs*. The JOBS Act permits confidential filings of IPO registration statements only for EGCs, but the SEC will permit nonpublic filing for a non-EGC IPO so long as the company confirms in a cover letter that it will publicly file the registration statement and nonpublic draft submissions:
 - at least 15 days prior to the road show; or
 - in the absence of a road show, at least 15 days before the requested effective date of the registration statement.

This requirement is consistent with the requirement applicable to EGCs.

One important difference between EGCs and other companies is that the JOBS Act permits "testing the waters," or pre-marketing, of an EGC's IPO before the registration statement is publicly filed. For non-EGCs, on the other hand, no "offers" can be made until the registration statement is public. Non-EGCs will therefore need to choose between nonpublic filing and an ability to pre-market. We are hopeful that the SEC, through rule-making, will permit pre-filing offers for non-EGCs, consistent with the treatment of EGCs under Section 5(d) of the Securities Act and well-known seasoned issuers (WKSIs) under Rule 163.

- *Initial registrations under Exchange Act Section 12(b), including Form 10 filings for spin-offs or listings.* The JOBS Act does not permit nonpublic filings of spin-offs or listings, but the staff will permit these so long as the company confirms in a cover letter that it will publicly file the registration statement and nonpublic draft submissions at least 15 days prior to the anticipated effective date.
- *Initial submissions of registration statements within one year of an IPO or Exchange Act 12(b) registration statement becoming effective.* Currently, a WKSII can file a shelf that is automatically effective, which allows it to announce a transaction at filing, decreasing the risk of market selling pressure in anticipation of a transaction. An IPO company cannot become a WKSII until a year after the IPO, and instead must file a registration statement that is public for a period of time before a deal is launched, which risks creating downward selling pressure on the stock. The SEC will now permit a company during that first year to file registration statements nonpublicly, so long as the company confirms in a cover letter that it will file its registration statement and nonpublic draft submission publicly at least 48 hours before the effective time.

For these offerings, nonpublic review will be limited to the initial submission. Responses to staff comments (or any other amendments to the initial submission) must be made with a public filing, not a revised draft registration statement. Any further review would be in accordance with the SEC's normal procedures.

For a follow-on offering with at least a two-day marketing period, the public filing requirement effectively means that, if there is no staff review, the registration statement will only become public at launch.

- *Foreign private issuers.* Foreign private issuers have the option of electing to follow the above procedures for draft registration statements, the procedures available to EGCs (if the foreign private issuer qualifies) or the [guidance](#) for nonpublic submissions from foreign private issuers released by the SEC on May 30, 2012.

Omitting Financial Information

The staff will not delay processing a draft registration statement that omits required financial information if the company reasonably believes the information will not be required at the time the registration statement is publicly filed. This relief is intended to be similar to that granted to EGCs under the FAST Act of 2015.

The staff also stated that it will consider requests to omit required financial information under S-X Rule 3-13 based on the "specific facts and circumstances" of the company. Rule 3-13 permits the staff to waive financial information requirements "where consistent with the protection of investors." Historically the staff has been somewhat reluctant in exercising this authority, and so the express mention of this power raises the intriguing possibility that relief may be forthcoming when a company is able to argue that required financial information – such as one or more years of historical financial statements for an acquired business, or financial statements for certain joint ventures – is not necessary for investor protection.

Implementation

In order to take advantage of the registration statement relief, companies should follow the submission process for draft registration statements used by EGCs. However, because the staff's willingness to accept this new set of draft registration statements on a nonpublic basis is not grounded in statute, these draft registration statements are subject to discovery under the Freedom of Information Act by the press, competitors and others. A company wishing to ensure that its draft registration statement is not made publicly available pursuant to a FOIA request should follow the procedures for confidential treatment in SEC Rule 83.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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