

New SEC guidance facilitates IPOs during the shutdown

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Davis Polk sought guidance from the SEC to pave the way for companies to go public during the shutdown.

Following discussions with Davis Polk and other leading capital markets law firms, the SEC posted [updated guidance](#) that provides a path forward for companies seeking to IPO during the shutdown. Because the SEC is currently shut down, it cannot declare registration statements “effective” and instead companies must file a fully complete registration statement and wait 20 days for it to automatically become effective.

We summarize the key points resulting from the new guidance below:

— **You can launch your IPO with a price range.** Under existing SEC rules, a company that amends its registration statement to remove the delaying amendment must also include complete information, which includes the offering price. This is because Rule 430A (which allows the offering price to be omitted at launch) only applies to registration statements that are *declared* effective by the staff, as opposed to registration statements that become effective after 20 days pursuant to Section 8(a) of the Securities Act.

The updated guidance says a company can rely on Rule 430A during the shutdown, which means a company can launch its IPO with a price range on the cover and include the offering price in the final prospectus after the registration statement becomes effective (as it normally would in an IPO where the SEC declares the registration statement effective).

— **You can price outside the range as in a regular IPO.** In addition, the availability of Rule 430A means companies have the ability to price above or below the range and benefit from the 20% safe harbor under the rule, just like they would in a regular way IPO that is declared effective by the SEC.

The staff’s existing guidance for IPOs is that a “price range in excess of \$2, for offerings up to \$10 per share, or in excess of 20% of the high end of the range, for offerings over \$10 per share, will not be considered bona fide.” ([C&D 134.04](#)) We believe that given the price range will be included in the publicly filed registration statement 20 days before effectiveness, it would not be unreasonable for a company to include a price range in excess of the limits included in existing staff guidance, so long as the range is reasonable.

As noted in the guidance, “companies that remove their delaying amendment with outstanding staff comments should carefully consider the material issues raised by the staff and not remove their delaying amendments prior to making the necessary changes to the registration statement.” In addition, companies that choose to remove the delaying amendment must instead include the following language from Rule 473(b) to go effective pursuant to Section 8(a):

This registration statement shall hereafter become effective in accordance with the provisions of section 8(a) of the Securities Act of 1933.

Given the uncertainty around the duration of the shutdown, the new guidance provides flexibility and clarity for companies seeking to go public during the shutdown. Other than as updated for the points above, the existing guidance remains the same for public companies and capital markets transactions as we addressed in our prior [client update](#).

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

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