

## SEC expands availability and flexibility of draft registration statements

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The SEC's Division of Corporation Finance has announced improvements to its policies for draft registration statements that will be welcomed by both companies and underwriters.

Following recent [statements](#) by Acting SEC Chair Mark Uyeda calling for a return to the SEC's "narrow mission to facilitate capital formation, while protecting investors and maintaining fair, orderly, and efficient markets", on March 3, the staff of the SEC's Division of Corporation Finance announced [welcome changes](#) expanding accommodations available to companies that submit draft registration statements for nonpublic review. The new guidance is available for companies to rely on immediately.

The changes fall into two broad categories:

- 1. Accommodations for public companies that are not WKSIs.** Currently, the SEC permits private companies to submit registration statements confidentially and allows companies that are WKSIs (who must be public for one year, have a specified market capitalization and not be otherwise ineligible) to file and launch immediately without SEC review. For those public companies that are not WKSIs, the SEC currently permits confidential submissions for one year after they are public so long as the registration statement is public for 48 hours ahead of pricing a transaction.

For most companies, this accommodation bridges the gap between IPO and WKSI status. But companies that are public for more than one year and are not WKSIs (because their market capitalization is too small, they missed an SEC filing deadline or are otherwise "ineligible") must file their registration statement publicly and wait for SEC review, suffering from market pressure as they have effectively pre-announced a transaction before launch.

Under the new guidance, the staff will permit all companies to submit an initial draft registration statement for nonpublic review (including a non-WKSI shelf registration statement) at any time, so that every non-WKSI benefits from the prior accommodation to minimize public announcement of deals in advance of their execution.

When a SPAC (which is a public company) is seeking to close its de-SPAC transaction and acquire a private company by filing an S-4 registration statement, it has usually had to file that registration statement publicly if the filing occurred more than one year after the SPAC's IPO. Under the new guidance, these registration statements will also be eligible for nonpublic review subject to certain conditions. In addition, all operating companies that became public as a result of a de-SPAC transaction (regardless of structure) can now submit an S-1 for nonpublic review in their first year as a public company regardless of when the SPAC's IPO took place.

- 2. General accommodations for all companies.** Currently, companies that have already completed their IPO and that file confidentially must wait two days after public filing before they can price their transaction. The staff will now consider reasonable requests to shorten the 2-business day period ahead of effectiveness for follow-on's initially submitted for nonpublic review.

In addition, prior to this announcement, companies could not file a registration statement for review without naming underwriters. The staff will now allow a company to omit the names of its underwriters from its initial draft registration statement submission as long as they are included in subsequent submissions and public filings.

These accommodations expand the flexibility for processing draft registration statements that the staff had [announced](#) under former SEC Chair Jay Clayton in 2017, which, among other things, extended certain EGC benefits to all companies.

Unchanged from the 2017 guidance is the staff's statement that it will consider "reasonable requests" to expedite processing of draft and filed registration statements, encouraging companies to review their transaction timing with the personnel assigned to the filing review. Considering the re-inclusion of this statement in the new guidance, we are hopeful that the staff will in practice become more responsive to, and willing to work with, market participants.

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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