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SEC to Permit All Issuers to Submit Confidential Draft Registration Statements

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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The U.S. Securities and Exchange Commission (SEC) announced on June 29, 2017, that the staff (staff) of the Division of Corporation Finance will accept draft registration statement submissions from all companies for nonpublic review, thereby expanding a popular JOBS Act benefit previously available only to emerging growth companies (EGCs).¹

The expanded nonpublic review process (also commonly referred to as the confidential submission process) will take effect on July 10, 2017, and will be available for initial public offerings (IPO) as well as most offerings made in the first year after a company has entered the SEC reporting system. The nonpublic review process also will be available for the initial registration of a class of securities under Section 12(b) of the Securities Exchange Act of 1934, as amended (Exchange Act). The existing confidential submission process available to EGCs conducting an IPO remains unchanged.

The new policy is limited to the confidential submission process. It does not similarly ease the testing-the-waters provisions of the Securities Act of 1933, as amended (Securities Act). As was the case before this announcement, only an EGC (or a person authorized to act on an EGC's behalf) is permitted to make oral and written testing-the-waters communications to qualified institutional buyers and institutional accredited investors before or after the filing of a registration statement to gauge their interest in the offering.

Existing Confidential Submission Process

An EGC currently may submit its IPO registration statement confidentially in draft form for the staff to review, provided that the initial confidential submission and all amendments are publicly filed with the SEC no later than 15 days prior to the EGC's commencement of its road show. The confidential submission process permits an EGC to commence the SEC review process without publicly disclosing sensitive strategic, proprietary or financial information. Further, an EGC may withdraw its draft registration statement and terminate the IPO process without ever making a public filing, thus removing a potential disincentive to commencing an IPO and permitting the immediate pursuit of a private placement. This is particularly helpful in the case of adverse market conditions, regulatory concerns or weak investor demand in response to testing-the-waters communications.

¹ An EGC is defined as an issuer (including a foreign private issuer) with total annual gross revenues of less than \$1.07 billion during its most recently completed fiscal year.

Expanded Confidential Submission Process — Eligible Issuers and Transactions

Recognizing that the confidential submission process for EGCs proved highly popular and quickly became standard practice for eligible companies seeking to conduct an IPO, the SEC has made the nonpublic review process available to an expanded class of issuers and transactions. Those issuers and transactions include the following:

Securities Act initial public offerings and initial registrations for all registrants

A company that does not qualify as an EGC may submit a draft initial Securities Act registration statement for nonpublic review, provided that the initial draft registration statement and all subsequent nonpublic draft submissions are publicly filed with the SEC at least 15 days prior to any road show (or at least 15 days prior to the requested effective date, if no road show). By requiring a public filing period prior to the launch of marketing, the expanded nonpublic review process incorporates an important feature of the EGC review process that provides an opportunity for the public to evaluate the offering.

The expanded confidential submission process for IPOs addresses some of the typical concerns associated with engaging in the IPO process by giving a company more time and flexibility to determine whether it actually will be able to achieve the benefits of going public before it incurs the burdens and expenses of doing so. Under the new review process, a company can take the initial steps toward going public without revealing sensitive information to the public, including competitors. The confidential submission process also can allow an earlier dialogue with the staff on accounting methods and other disclosures. In addition, a company can withdraw its draft registration statement and terminate its IPO process without having made a public filing if it determines not to pursue a public sale of securities. Companies, even those for which an initial public filing was not a disincentive, also may be encouraged to move more quickly to start the IPO process, better positioning themselves to timely access the market.

Initial registration of a class of securities under Exchange Act Section 12(b)

A company may submit a draft initial Exchange Act registration statement for nonpublic review, provided that the draft registration statement and all subsequent nonpublic draft submissions

are publicly filed with the SEC at least 15 days prior to the anticipated effective date of the registration statement for listing on a national securities exchange. The expanded nonpublic review process may prove particularly attractive to companies considering spin-off transactions, given the need to effect Exchange Act registration as part of the spin-off process.

Securities Act offerings within one year of an IPO or Exchange Act Section 12(b) registration

A company may submit a draft Securities Act registration statement for nonpublic review within one year of the effective date of an initial Securities Act registration statement or Exchange Act Section 12(b) registration statement.

In these cases, the staff's nonpublic review will be limited to the initial submission. An issuer responding to staff comments on such a draft registration statement should do so with a public filing, not with a revised draft registration statement. Any further review will follow normal, non-confidential staff procedures. Similar to the initial registration procedures described above, the issuer should file the draft registration statement it had submitted previously for nonpublic review at the time it publicly files its registration statement, in this case at least 48 hours prior to any requested effective time and date.

This one-year expansion of the confidential submission process will reduce the potential for lengthy exposure to market fluctuations that can adversely affect an offering process and harm existing public shareholders.

Foreign Private Issuers

Foreign private issuers may elect to proceed in accordance with these expanded procedures or those available to EGCs (if the issuer qualifies as an EGC) or follow the guidance [in the staff's May 30, 2012](#), statement, which outlines the circumstances where a foreign private issuer (whether an EGC or not) may confidentially submit a draft initial Securities Act or Exchange Act registration statement for nonpublic review.

Expanded Confidential Filing Process — Content and Staff Processing

The staff has announced that an issuer should take all steps to ensure that a draft registration statement is substantially complete when submitted, but acknowledged that it generally will not delay processing if an issuer reasonably believes

Capital Markets Alert

omitted financial information will not be required at the time the registration statement is publicly filed. This accommodation is intended to conform the expanded nonpublic review process to relief provided by the FAST Act, which allows an EGC to omit financial information that “relates to a historical period that the issuer reasonably believes will not be required to be included ... at the time of the contemplated offering.”

The staff also announced that it will consider reasonable requests to expedite processing of draft and filed registration statements and encourage issuers and their advisors to review their transaction timing with the staff members assigned to the filing review. Absent an accommodation from the staff, issuers should continue to expect that initial staff comments on an IPO registration statement will be delivered approximately 30 days from the initial submission or filing.

Expanded Confidential Filing Process — Technical Notes Regarding Edgar Filings

Any issuer choosing to take advantage of the expanded nonpublic review process should follow the EDGAR process EGCs use to submit draft registration statements.

An issuer that does not yet have EDGAR access codes will need to file a Form ID to obtain them. Pending further updates to Form ID, the new issuer should indicate on that form that it intends to use the codes to submit a draft registration statement, even if it is not an EGC. This will help preserve the nonpublic status of the issuer’s drafts until they are publicly filed.

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The staff will monitor practices under the expanded nonpublic review processing procedures and may make modifications to limit or terminate these procedures. A copy of the staff’s announcement regarding the expanded confidential submission process is available [here](#), and a copy of the SEC’s press release is available [here](#).

Capital Markets Alert

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