

SEC permits all issuers to submit confidential draft registration statements

Andrew Brady, Brian Breheny, Michelle Gasaway, Stacy Kanter, Michael Zeidel and Monika Zhou

Andrew Brady (andrew.brady@skadden.com) is of counsel, M&A, Brian Breheny (brian.breheny@skadden.com) is a SEC reporting and compliance partner, Michelle Gasaway (michelle.gasaway@skadden.com) is a corporate finance partner, Stacy Kanter (stacy.kanter@skadden.com) is a corporate finance partner, and Michael Zeidel (michael.zeidel@skadden.com) is a corporate finance partner, all at Skadden Arps Slate Meagher and Flom LLP, New York, New York, USA. Monika Zhou (monika.zhou@skadden.com) is a corporate associate at Skadden Arps Slate Meagher and Flom LLP, Los Angeles, California, USA.

Abstract

Purpose – To explain the US Securities and Exchange Commission's (SEC's) June 29, 2017 announcement (as updated August 17, 2017) that the staff of its Division of Corporation Finance will accept draft registration statement submissions from all companies for nonpublic review, thereby expanding a popular benefit previously available only to emerging growth companies (EGCs) under the JOBS Act and, in limited circumstances, to certain foreign private issuers under historical Staff practices.

Design/methodology/approach – Explains the rationale and limitations of the new policy, the existing confidential submission process, the expanded class of issuers and transactions that now qualifies for the nonpublic review process, and content and staff processing details.

Findings – 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. 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.

Originality/value – Practical guidance from experienced securities and corporate finance lawyers.

Keywords US Securities and Exchange Commission (SEC), Confidential submission process, Emerging growth companies, Expanded non-public review process, Initial public offerings (IPOs), JOBS Act

Paper type Technical paper

On June 29, 2017, as updated on August 17, 2017, the SEC Division of Corporation Finance ("Staff") announced^[1] that it will accept draft registration statement submissions from all companies for nonpublic review, thereby expanding a popular benefit previously available only to emerging growth companies ("EGCs")^[2] under the JOBS Act and, in limited circumstances, to certain foreign private issuers under historical Staff practices.

The expanded nonpublic review process (also commonly referred to as the confidential submission process) has been in effect since July 10, 2017, and is available for initial public offerings ("IPOs") as well as most follow-on offerings made in the first year after a company has entered the SEC reporting system. The nonpublic review process also is 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 reflects continued efforts by the SEC under new Chairman Jay Clayton and Division of Corporation Finance Director William Hinman to encourage IPOs and generally ease the regulatory burdens on the formation of public capital. It should be noted, however,

that the new policy is limited to the confidential submission process. It does not similarly extend to all companies other EGC benefits, such as the ability to engage in testing-the-waters communications, omit the auditor attestation on the effectiveness of internal control over financial reporting, or provide abbreviated executive compensation disclosure.

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.

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 Staff 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. A company also can seek to resolve potentially complicated Staff comments regarding accounting methods and other disclosures before publicly filing the IPO registration statement, thereby eliminating the public scrutiny that otherwise might arise from changing disclosure during the review process. 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, including where it determines to pursue a sale as part of a dual-track IPO/M&A process. 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 or direct (exchange) listings, given the need to effect Exchange Act registration as part of each of these processes.

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.

The expansion of the confidential submission process to certain follow-on offerings will reduce the potential for lengthy exposure to market fluctuations that can adversely affect an offering process and harm existing public shareholders. In fact, in the case of an offering with at least a two-day marketing period, where the transaction has not been selected for review by the Staff, the registration statement will not become public until launch of the offering[3].

Foreign private issuers. Foreign private issuers may elect to proceed in accordance with these expanded procedures or those currently available to EGCs (if the issuer qualifies as an EGC) or follow the guidance in the Staff's May 30, 2012 statement ("Pre-JOBS Act Procedures"), which outlines the limited 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.

Under the Pre-JOBS Act Procedures, an eligible foreign private issuer can engage in numerous rounds of nonpublic review and, in contrast to an EGC, generally may wait to publicly file its initial registration statement until the commencement of any roadshow. This added degree of flexibility may benefit any IPO or initial exchange listing. It should be noted, however, that any eligible foreign private issuer that takes advantage of any of the substantive or procedural accommodations available to an EGC under the JOBS Act will be treated as an EGC with respect to any confidential submission and the timing of the public filing of its registration statement. Accordingly, it will lose its ability to use the Pre-JOBS Act Procedures and instead will be required to publicly file its confidential submission and all amendments at least 15 days before commencement of the road show[4].

Omitting certain financial statements

The Staff announcement, as clarified by several new and updated compliance and disclosure interpretations ("C&DIs") issued August 17, 2017[5], permits EGCs and non-EGCs conducting IPOs, follow-on offerings within one year of the company's IPO and initial registrations under the Securities Exchange Act to confidentially submit draft registration statements that omit interim and annual financials (and the related MD&A discussion) that they reasonably believe will not be required to be presented separately at the time they launch their public offering, in the case of EGCs, and file publicly, in the case of non-EGCs and any issuer conducting an initial Securities Exchange Act registration[6].

With respect to the omission of interim periods, the C&DI guidance reverses prior Staff guidance under the FAST Act that EGCs could not exclude from any registration statement the most recent interim period required by Regulation S-X, even if that period would have

been replaced with a longer interim or annual period in the registration statement at the time of the offering.

For IPOs, where the time to market often is four months or longer, the new C&DI guidance effectively means that interim financial statements (and the related MD&A discussion) no longer will be required in any initial draft registration statement and, depending on the timing of the transaction, in certain subsequent amendments to the draft registration statement. This change will provide issuers and their advisers significantly more flexibility in planning the IPO, including the ability to commence (and hopefully complete) the SEC review process faster than had been previously possible because they will be able to submit the initial draft registration statement earlier in the process.

To illustrate the impact of the new policy, consider the example of a calendar year-end domestic EGC that submits a draft IPO registration statement in December 2017 and reasonably expects to publicly file and commence its offering in April 2018 when annual financial statements for 2017 and 2016 will be required.

	Old Guidance	New Guidance
Annual Financial Statements	FY 2016 is required. FY 2015 may be omitted.[7]	No change. FY 2016 is required. FY 2015 may be omitted.
Interim Financial Statements	Nine-month interim financial statements for 2016 and 2017 are required.	Change. Nine-month interim financial statements for 2016 and 2017 are <i>not</i> required.[8]

The result is similar if the issuer is a calendar year-end domestic non-EGC that submits a draft IPO registration statement in December 2017 and reasonably expects to publicly file and commence its offering in April 2018 when annual financial statements for 2017, 2016 and 2015 will be required.

	Old Guidance	New Guidance
Annual Financial Statements	FY 2015 and 2016 are required. FY 2014 may be omitted.[9]	No change. FY 2015 and 2016 are required. FY 2014 may be omitted.
Interim Financial Statements	Nine-month interim financial statements for 2016 and 2017 are required.	Change. Nine-month interim financial statements for 2016 and 2017 are <i>not</i> required.[10]

As was the case under the prior Staff guidance, however, any publicly filed registration statements may not omit interim financial information (and the related MD&A discussion) that will be part of a longer historical period – either interim or annual – that the issuer reasonably believes will be required to be included at the time it launches its public offering, in the case of an EGC, and files publicly, in the case of a non-EGC and any issuer conducting an initial Securities Exchange Act registration. Issuers must keep this principle in mind when considering whether a publicly filed registration statement that will precede the preliminary prospectus used to market the offering must contain interim financial statements.

To illustrate this point, consider the earlier example of a calendar year-end domestic EGC that submits a draft IPO registration statement in December 2017 and reasonably expects to commence its offering in April 2018 when annual financial statements for 2017 and 2016 will be required. If the issuer were to publicly file in early January 2018 (as compared to April 2018), it would be required to include nine-month interim financial statements for 2016 and 2017, as that financial information will be part of the historical periods that will be included at the time the issuer commences the public offering.

The Staff announcement also noted that the Staff will consider an issuer's specific facts and circumstances in connection with any request for relief made under Rule 3-13 of Regulation S-X, which is a rule that allows the Staff to waive certain financial statement requirements. Along with a recent speech by SEC Chairman Jay Clayton and certain informal remarks by Staff members, this suggests the Staff may be willing to take a more accommodating

position with respect to written requests by issuers to omit or substitute certain financial statements[11].

Procedures to facilitate EDGAR submissions

Any issuer choosing to take advantage of the expanded nonpublic review process should follow the EDGAR process EGCs use to submit draft registration statements[12].

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.

The issuer must confirm in a cover letter that it will publicly file its registration statement and nonpublic confidential submission and all amendments (1) in the case of an IPO or initial Exchange Act registration statement, at least 15 days prior to any roadshow or, in the absence of a roadshow, at least 15 days prior to the requested effective date of the registration statement, or (2) in the case of a qualified follow-on offering, at least 48 hours prior to any requested effective time and date.

Additional procedures to ensure confidentiality

Under the existing confidential submission process, a draft registration statement submitted by an EGC is statutorily protected from disclosure under the Freedom of Information Act and other statutory provisions[13]. These statutory confidentiality provisions, however, will not apply to registration statements submitted under the new nonpublic review process.

The Staff has advised issuers relying on the expanded confidential submission process to consider requesting confidential treatment under Rule 83 for their draft registration statements and associated correspondence when seeking nonpublic review[14]. An issuer seeking confidential treatment for a draft registration statement submitted pursuant to the new policy should make its request electronically using submission type DRSLTR. If it does, it is not necessary to also send paper copies of the request and the materials to the Staff or to the SEC's Freedom of Information Act Office. The issuer should include a legend at the top of each page of the electronically submitted draft registration statement indicating that it has requested confidential treatment of the draft registration statement pursuant to Rule 83[15].

In its response letters to the SEC, the issuer should identify information for which it intends to seek confidential treatment upon public filing to ensure that the Staff does not include that information in its comment letters[16].

Switching to a draft registration statement from a publicly filed registration statement

An issuer that has a public registration statement on file (including a registration statement currently under active Staff review) may switch to the nonpublic review process for future pre-effective amendments to its registration statement provided the issuer is eligible to participate in the nonpublic review process and it agrees to publicly file its amended registration statement and all draft amendments in accordance with the time frames specified above.

Staff processing

The Staff also announced that it will consider reasonable requests to expedite the processing of draft and filed registration statements and encourages 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.

Notes

1. SEC Announcement, Draft Registration Statement Processing Procedures Expanded (June 29, 2017; supplemented August 17, 2017), available at: www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded
2. 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.
3. Deal teams should consider whether in certain cases the abbreviated period of public disclosure prior to launch of an offering might result in greater market volatility and price and execution risk.
4. JOBS Act Frequently Asked Questions, Generally Applicable Questions on Title I of the JOBS Act, Question 9 (December 21, 2015), available at: www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-title-i-general.htm
5. Fixing America's Surface Transportation (FAST) Act C&DIs, Question 1 (August 17, 2017), available at: www.sec.gov/divisions/corpfin/guidance/fast-act-interps.htm; Securities Act Forms C&DIs Question 101.04 (August 17, 2017), available at: www.sec.gov/divisions/corpfin/guidance/safinterp.htm#101.04; Securities Act Forms C&DIs, Question 101.05 (August 17, 2017), available at: www.sec.gov/divisions/corpfin/guidance/safinterp.htm#101.05
6. The temporal difference between the two standards can be traced to their different origins. The accommodation for EGCs (omitted financial information must be provided "at the time of the contemplated offering") is contained in the statutory language in the FAST Act; the accommodation for non-EGCs and initial Securities Exchange Act registrations (omitted financial information must be provided "at the time the registration statement is publicly filed") originates from the initial July 29, 2017 Staff announcement.
7. The ability of an EGC to omit annual financial statements from its draft registration statement (and, in certain cases, its publicly filed registration statement) is derived from Section 71003 of the FAST Act.
8. FAST Act C&DIs, Question 1 (August 17, 2017); Securities Act Forms C&DIs, Question 101.04 (August 17, 2017).
9. Voluntary Submission of Draft Registration Statements – FAQs (June 30, 2017), Question 7, available at: www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs
10. Securities Act Forms C&DIs, Question 101.05 (August 17, 2017).
11. SEC Speech, SEC Chairman Jay Clayton, Remarks at the Economic Club of New York (July 12, 2017), available at: www.sec.gov/news/speech/remarks-economic-club-new-york
12. Voluntary Submission of Draft Registration Statements – FAQs (June 30, 2017), Question 1, available at: www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs
13. Securities Act Section 6(e)(2).
14. Voluntary Submission of Draft Registration Statements – FAQs (June 30, 2017), Question 1, available at: www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs
15. Voluntary Submission of Draft Registration Statements – FAQs (June 30, 2017), Question 4, available at: www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs
16. Voluntary Submission of Draft Registration Statements – FAQs (June 30, 2017), Question 6, available at: www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs

Corresponding author

Andrew Brady can be contacted at: andrew.brady@skadden.com

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