

Capital Markets & Securities

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SEC's Expanded Confidential Review Process Provides Issuers Greater Flexibility To Explore and Plan Public Offerings

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Summary

On March 3, 2025, the Securities and Exchange Commission's (SEC) Division of Corporation Finance announced significant enhancements to the accommodations available for issuers confidentially submitting draft registration statements. These changes, effective immediately, are designed to facilitate capital formation without diminishing investor protection. The new enhanced accommodations include:

- Permitting issuers to submit draft registration statements regardless of how much time has passed since they become subject to Exchange Act reporting requirements
- Expanding the availability of the confidential review process for de-SPAC transactions
- Permitting issuers to omit the names of underwriters from their initial draft registration statements
- Expanding the availability of the confidential review process to include both Section 12(b) and Section 12(g) registration statements on Forms 10, 20-F, and 40-F

We believe that the enhancements will be immediately impactful for issuers seeking to access the public capital markets. The enhanced accommodations should provide issuers, particularly those that do not have the benefit of well-known issuer status, with greater flexibility to explore and plan public offerings.

Background

The enhancements stem from an almost universally used accommodation initially included in the Jumpstart Our Business Startups (JOBS) Act of 2012 permitting Emerging Growth Companies (EGCs) to submit draft registration statements for initial public offerings for confidential, nonpublic staff review. In 2017, the SEC expanded this accommodation to all issuers submitting draft registration statements for initial public offerings and offerings within the subsequent 12 months. The current enhancements broaden the scope of the confidential submission and review process in meaningful ways for a variety of issuers and registration types.

Confidential Review Process Enhancements for Subsequent Securities Act Offerings and Exchange Act Registrations

Previously, issuers could only submit subsequent draft registration statements within 12 months of their initial Securities Act or Exchange Act registration statement's effective date. Under the SEC's new policy, the SEC will now accept subsequent drafts for nonpublic review at any time, regardless of how much time has passed since the issuer became subject to Exchange Act reporting requirements under Section 13(a) or 15(d) and for any offer under the Securities Act or the registration of a class of securities under either Section 12(b) or Section 12(g) of the Exchange Act. The enhanced accommodation provides issuers with greater flexibility to access the capital markets. Previously, if an issuer did not seek to access the capital markets within 12 months of its initial public offering, it was unable to take advantage of a more favorable registration process for a public offering. Notably, issuers may also now use the confidential review process for shelf offerings on Forms S-3 and F-3 and business combinations and exchange offers on Forms S-4 and F-4.

Publicly filing a registration statement in advance of launching a capital markets transaction often puts downward pressure on a public company's stock price and can lead to market speculation and increased volatility. The increased spotlight on and trading activity in the company's stock can make execution of a capital markets transaction more challenging. By taking advantage of the confidential submission process, an issuer can mitigate some execution risk by conducting its planning and preparation activities outside the public view. Additionally, if a company starts planning for but for any number of reasons, including market conditions, determines not to proceed with a capital markets transaction, it can withdraw the registration statement without having to make any of its disclosures or exploratory activities public.

Issuers submitting a subsequent draft for nonpublic review must include a cover letter confirming their commitment to publicly file the registration statement and the nonpublic draft on EDGAR at least two business days before the desired effective date. Importantly, the SEC may comment on the publicly filed draft, which could impact the issuer's timing for effectiveness.

After submitting the initial draft for nonpublic review, issuers must file any amendment to the initial filing or any responses to SEC comments via a public filing, not as a revised confidential draft. The SEC will follow its normal procedures for public review of amendments and acceleration requests (pursuant to Securities Act Rule 461) from there on.

Other Enhanced Accommodations

In addition to expanding confidential review for subsequent Securities Act offerings and Exchange Act registrations, the new accommodations provide that:

- **De-SPACs**—Issuers are permitted to confidentially submit a registration statement on Form S-4 or F-4 for a de-SPAC transaction as if it were an initial Securities Act registration statement (i.e., an initial public offering) where the target company would otherwise be independently eligible to submit a draft registration statement. This is helpful for business combinations structured with the SPAC continuing as the surviving company.
- **Initial Exchange Act Registrations**—The SEC is expanding the availability of the nonpublic review process for the initial registration of a class of securities under Exchange Act to also include Forms 10, 20-F, or 40-F filed to register a class of securities under Exchange Act Section 12(g). As a result, an issuer may now submit for nonpublic review the initial registration of a class of securities on Forms 10, 20-F, or 40-F under either Exchange Act Section 12(b) or Exchange Act Section 12(g).
- **Omitting Underwriter Names and Financial Information**—Issuers may now omit the names of underwriters in their initial draft registration statements. This will allow issuers to begin the SEC review process before underwriters have been formally engaged or completed their investment committee or other internal approval processes. By not being required to include underwriter information in the initial draft, an issuer gains greater flexibility (and potential time savings) in being able to continue its discussions and/or negotiations with underwriters for the transaction while advancing planning and the SEC review process on a parallel path. Over the years, we've experienced situations where SEC staff have required underwriter information in a filing prior to commencing any registration statement review process. The SEC also noted, in accordance with its existing policy, that any financial statements the issuer reasonably believes will not be separately required at the time of the public filing of the registration statement may be omitted from a draft registration statement.

We believe that these accommodations will be particularly helpful to newly public companies and small- and mid-cap public company issuers. The SEC also encouraged issuers and their advisors to review transaction timing with SEC staff and indicated they will consider reasonable requests to expedite processing of draft and filed registration statements. The announcement provided a dedicated email address, CFDraftPolicy@sec.gov, for issuers with questions about their eligibility to use the expanded processing procedures.

If you'd like to discuss how these enhancements could benefit a capital markets transaction you are considering or to follow up regarding any of the matters covered by this alert, please contact your usual Lowenstein Sandler LLP attorney.

Contacts

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