

SEC Expands Nonpublic Review of Draft Registration Statement Submissions to All Companies

By Matthew L. Fry | July 12, 2017

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On July 10, 2017, the U.S. Securities and Exchange Commission (SEC) began accepting draft registration statements for nonpublic review from additional issuers. The new policy expands an existing provision of the Jumpstart Our Business Startups Act, or JOBS Act, which applies only to emerging growth companies,¹ to include non-emerging growth companies and foreign private issuers. A copy of the SEC's press release announcing the change in policy is available [here](#).

The expanded process has no effect on emerging growth companies, which have been permitted to confidentially submit draft registration statements with the SEC pursuant to the JOBS Act. Emerging growth companies must publicly file their draft registration statement and all amendments thereto at least 15 days before a road show. Confidential submissions of draft registration statements have been popular among emerging growth companies, as they have allowed the companies to commence the SEC review process without having to disclose sensitive financial, strategic and compensation information to competitors. The JOBS Act also permits emerging growth companies to "test the waters" prior to the public filing of a registration statement in order to gauge potential investors' interest, and thereby help avoid the stigma associated with a failed offering if a registrant elects to abort an offering prior to filing.

The SEC's new policy extends the confidential review process to non-emerging growth companies for initial Securities Act or Exchange Act registrations and follow-on offerings during their first year of being a public reporting company. Other provisions of the JOBS Act affecting emerging growth companies, including the testing-the-waters provisions, have not been extended to other issuers. Foreign private issuers may elect to proceed in accordance with the expanded confidential review process, the procedures available to emerging growth companies (if qualified), or the guidance in the SEC's [May 30, 2012 statement](#).

IPOs And Other Initial Securities Act And Exchange Act Registrations

The confidential review process is available for drafts of initial Securities Act registrations, including IPOs, and initial registrations to list a class of securities on a national securities exchange under Section 12(b) of the Exchange Act, such as in the case of a direct listing or a spin-off. Issuers submitting drafts of initial registration statements under the Securities Act or Section 12(b) of the Exchange Act must confirm in a cover letter to the nonpublic submission that they will publicly file the registration statement and all nonpublic draft submissions at least 15 days before commencing any road show for the offering or, if there is no road show, at least 15 days before the requested or anticipated effective date of the registration statement.

Follow-On Public Offerings During the First Year of Public Reporting

The SEC will also accept drafts of initial registration statements for follow-on offerings submitted prior to the end of the 12th month following the effective date of a registrant's initial registration under the Securities Act or Section 12(b) of the Exchange Act. Notably, the confidential review

process for follow-on offerings only extends to the initial draft of the registration statement. Registrants should respond to any comments to the nonpublic submission with a public filing, not a revised draft registration statement. Issuers submitting drafts of initial registration statements for follow-on offerings during their first year of public reporting must confirm by cover letter that they will publicly file the registration statement and nonpublic draft submission with the SEC at least 48 hours prior to any requested effective time and date.

Content and Processing

Draft registration statements do not need to be signed by officers or directors or include the consents of auditors or other experts. Similar to the relief provided to emerging growth companies under Fixing America's Surface Transportation Act, or the FAST Act, the SEC will not delay processing of a draft registration statement under the expanded confidential review process if an issuer omits financial information for historical periods that the issuer reasonably believes will not be required at the time the registration statement is publicly filed. Draft registration statements should otherwise be substantially complete when submitted.

Confidential submissions by non-emerging growth companies are not governed by the confidentiality provisions under the JOBS Act, and issuers seeking to use the expanded confidential review process should therefore consider requesting confidential treatment under the SEC's Rule 83 for draft registration statements and related correspondence with the SEC.

The SEC stated in its announcement that it will consider reasonable requests to expedite the processing of draft and filed registration statements and encourages issuers to review their transaction timing with the staff assigned to the review of the registration statement.

Conclusion

The expansion of the confidential review process helps alleviate a number of concerns faced by companies looking to conduct an IPO. Although non-emerging growth companies still cannot avail themselves of the testing-the-waters provisions of the JOBS Act, they can now begin the SEC review process for an IPO without having to disclose sensitive financial, strategic or compensation information to competitors. These companies can also avoid the stigma of a failed offering if they withdraw their registration statement before making a public filing. We expect that some companies considering an IPO may initiate the registration process more quickly now that they may do so without having to publicly declare an intention to conduct an IPO, which should allow them to advance the review process and better position themselves to take advantage of market windows as they arise.

If you have any questions about this topic, please contact a member of our [Capital Markets and Securities Practice Group](#).

To learn more about Haynes Boone's IPO Readiness Program, please [click here](#).

¹ Under limits increased effective April 12, 2017, an emerging growth company is an issuer with less than \$1.07 billion in total annual revenues during its most recently completed fiscal year.