

Client Alert

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SEC Permits Draft Registration Statements for All Initial Public Offerings and Direct Listings

On June 29, 2017, the Securities and Exchange Commission (SEC) announced that the Division of Corporation Finance will permit all companies to submit draft registration statements relating to initial public offerings (IPOs) for review on a nonpublic basis. Previously only available for use by emerging growth companies (EGCs) and, in certain circumstances, foreign private issuers, all issuers may submit a registration statement in draft form for an initial registration, as well as for offerings made within the first year after a company has become an SEC-reporting company.

This new policy will take effect on July 10, 2017.

DRAFT REGISTRATION STATEMENTS PREVIOUSLY ONLY PERMITTED FOR USE BY EGCs

Section 6(e) of the Securities Act of 1933 (Securities Act) provides that a company that qualifies as an EGC at the time of submission may confidentially submit to the SEC a draft registration statement for confidential, nonpublic review by the SEC staff prior to public filing.

The EGC filer status was created by the Jumpstart Our Business Startups Act of 2012 (JOBS Act). The Securities Act and the Securities Exchange Act of 1934 (Exchange Act) defines an EGC as an issuer with “total annual gross revenues” of less than \$1 billion during its most recently completed fiscal year. A company will retain EGC status until the earliest of the: (i) fifth anniversary of the company’s IPO; (ii) last day of the first fiscal year in which its annual gross revenue exceeds \$1 billion; (iii) date it becomes a large accelerated filer; or (iv) date on which the company has issued more than \$1 billion in non-convertible debt during the preceding three-year period. The \$1 billion threshold was recently increased to adjust for inflation.

EGCs receive favorable accommodations during the IPO process, including, among other benefits, confidential submission and review of IPO registration statements. The number of EGC filers has grown rapidly since the passage of the JOBS Act, and EGCs now represent approximately 15% of exchange-listed companies.

SUBMISSION OF A DRAFT REGISTRATION STATEMENT

Following effectiveness of these new procedures, issuers may submit the following registration statements in draft form:

- a Securities Act registration statement for an IPO;
- an Exchange Act registration statement for registration of a class of securities under Section 12(b), relating to the listing of that class on a national securities exchange; and

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- a Securities Act registration statement submitted prior to the end of the twelfth month following the effective date of an issuer's initial Securities Act registration statement or an issuer's Exchange Act Section 12(b) registration statement.

Note that issuers may not submit draft registration statements for post-effective amendments to effective registration statements.

Foreign private issuers may elect to proceed in accordance with the new guidance, the procedures available to EGCs (if they so qualify) or the Division of Corporation staff guidance issued on [May 30, 2012](#).

Issuers will submit the draft of their initial registration statement and exhibits to the SEC on a confidential basis through the EDGAR system. An issuer submitting a draft registration statement in these circumstances must confirm in a cover letter to the registration statement that the issuer will file publicly its registration statement and nonpublic draft submissions:

- in the case of an IPO, at least 15 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4);
- in the case of an initial registration statement under Exchange Act Section 12(b), at least 15 days prior to the anticipated effective date of the registration statement; and
- in the case of a follow-on offering within the first twelve months following the effective date of the IPO or Section 12(b) registration statement, at least 48 hours prior to any requested effective time and date.

For non-EGC companies pursuing an IPO or registration of a class of securities under Exchange Act Section 12(b), the SEC will review, on a non-public basis, the initial submission of a draft registration statement and related revisions. For non-EGC issuers conducting a follow-on offering within twelve months of an IPO or Section 12(b) registration, the SEC will limit its nonpublic review to the initial submission; such issuers responding to SEC staff comments on a draft registration statement must do so with a public filing and not with a revised, nonpublic draft registration statement.

BENEFITS OF SUBMITTING A DRAFT REGISTRATION STATEMENT

The confidential submission and review process provides issuers with greater control over the timing of their IPO process and keeps them out of the public spotlight during the planning phase of the transaction. The confidential process also affords issuers an opportunity to determine whether there will likely be significant issues in getting the registration statement through the registration process. The nonpublic review process for follow-on offerings soon after the IPO reduces the potential for lengthy exposure to market fluctuations that can adversely affect the offering and harm existing shareholders. By requiring a public filing period prior to the launch of marketing, the process incorporates a feature of the EGC review process that provides a sufficient opportunity for the public to evaluate those offerings.

"DIRECT" LISTINGS

Although issuers that meet the relevant securities exchange standards have always been able to register a class of securities under the Exchange Act using a registration statement on Form 10 (for U.S. issuers) or Form 20-F (for foreign private issuers), registration under the Exchange Act without a concurrent capital raise has been infrequent.

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Nonetheless, given changes in the capital markets and increased reliance on private placements, many companies that are deferring IPOs may not seek to raise capital in the public markets, but may value having a class of securities listed on a securities exchange. Having a listed security may provide a company with an acquisition currency, may provide for better alternatives for stock-based compensation, and may provide for liquidity opportunities for existing holders. The SEC's change aligns treatment of Exchange Act registration statements with the treatment afforded to Securities Act registration statements, potentially making direct listings more appealing.

ADDITIONAL SEC GUIDANCE

Following its announcement, the SEC released [frequently asked questions](#) related to these new procedures. Among other topics, these FAQs clarify the processes concerning the submission of a draft registration statement on the EDGAR system. Notably, the FAQs explain that an issuer may seek confidential treatment when it submits its responses to staff comments on draft registration statements; the issuer is directed by the FAQs to appropriately 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.

In addition, the FAQs addressed public communications made in connection with the submission of draft registration statements. The SEC clarified that the Securities Act Rule 134 safe harbor for public communications is not available until the issuer files a registration statement that satisfies the requirements of Rule 134. The issuer may make a public communication about its draft registration statement in reliance on Securities Act Rule 135, but a public statement about its offering may affect whether the SEC can withhold the draft registration statement in response to a request under the Freedom of Information Act.

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