

July 7, 2017

SEC Permits All Issuers to Submit Certain Registration Statements on a Confidential Basis

On June 29, the Securities and Exchange Commission (the “SEC”) announced that the Division of Corporation Finance will permit all issuers to submit draft registration statements relating to initial public offerings (“IPOs”) for review by the SEC staff on a confidential basis. In addition to IPOs, this process will be available for certain registrations under the Securities Exchange Act of 1934 (the “Exchange Act”) as well as for most offerings made under the Securities Act of 1933 (the “Securities Act”) in the first year after an issuer has become an SEC reporting company. The confidential submission process is intended to give issuers more flexibility to plan their offerings and reduce the potential for lengthy exposure to market fluctuations that can adversely affect an offering.

The new procedures are also available for Canadian issuers utilizing the Multijurisdictional Disclosure System (“MJDS”).

The new procedures take effect on July 10, 2017.

Under the Jumpstart Our Business Startups Act of 2012 (the “JOBS Act”), emerging growth companies (“EGCs”) are able to submit draft registration statements confidentially in advance of an IPO, which has been one of the JOBS Act’s most widely used accommodations by EGCs. The recently announced confidential submission procedures are consistent in most respects with those that currently apply to EGCs.

Registration Statements Eligible for Confidential Review

The announcement sets forth the following procedures regarding the submission of draft registration statements for review by the Division of Corporation Finance on a confidential basis:

- **Initial Securities Act Registration Statements.** The SEC will review draft initial registration statements intended to be filed under the Securities Act on a confidential basis provided that the issuer confirms in a cover letter that it will publicly file its registration statement and all confidential draft submissions at least 15 days prior to any road show or, in the absence of a road show, at least 15 days prior to the requested effective date of the registration statement.
- **Initial Registration of a Class of Securities under Section 12(b) of the Exchange Act.** The SEC will similarly review draft registration statements and related revisions registering a class of securities under Section 12(b) of the Exchange Act on a confidential basis provided that the issuer

confirms in a cover letter that it will publicly file its registration statement and all confidential draft submissions at least 15 days prior to the anticipated effective date of the registration statement. (This provision does not apply to registration statements registering a class of securities under Section 12(g) of the Exchange Act.)

- ***Securities Act Offerings within One Year of an IPO or Exchange Act Section 12(b) Registration.*** The SEC will accept draft registration statements 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 for confidential review. In these circumstances, the issuer should confirm in its cover letter to the SEC that it will publicly file its registration statement and all confidential draft submissions such that they are publicly available on the EDGAR system at least 48 hours prior to any requested effective time and date. In addition, no offers (as part of a roadshow or other communication) can be made until a registration statement is filed.

The SEC staff will limit its confidential review in these cases to the initial submission, and an issuer responding to staff comments on such a draft registration statement should do so with a public filing, not with a revised confidential submission. Similar to the initial registration procedures described above, the issuer should file the draft registration statement it had previously submitted for confidential review at the time it first publicly files its registration statement.

- ***Foreign Private Issuers.*** Foreign private issuers may elect to proceed in accordance with these procedures or those available to EGCs (if the issuer qualifies as an EGC). Alternatively, they can follow the guidance in the SEC's May 30, 2012 statement (available [here](#)). (Historically, foreign private issuers were able to file all registration statements on a confidential basis; that subsequently was limited to first-time registrants and then to first-time registrants with an offshore listing.)
- ***Content of Draft Registration Statements and SEC Processing.*** While an issuer should take all steps to ensure that a draft registration statement is substantially complete when submitted, the SEC staff will not delay processing if an issuer reasonably believes omitted financial information will not be required at the time the registration statement is publicly filed. In addition, the staff said it will consider an issuer's specific facts and circumstances in connection with any request made under Rule 3-13 of Regulation S-X (regarding the omission of otherwise required financial information), suggesting that it may take a more accommodative approach to responding to such requests.

The staff will consider reasonable requests to expedite processing of draft and filed registration statements and encourages issuers and their advisors to review their transaction timing with the staff assigned to the filing review.

- **FOIA.** Draft registration statements submitted under the new accommodations do not fall within the statutory confidentiality provisions applicable to EGCs and therefore may be subject to discovery under the Freedom of Information Act (“FOIA”) by reporters and others. To ensure that a draft registration statement does not become available pursuant to FOIA, companies should be sure to follow existing SEC procedures relating to confidential treatment.
- **Form ID.** An issuer that does not yet have EDGAR access codes will need to file a Form ID to obtain them. The 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.

Issuers that do not qualify as EGCs will not be able to take advantage of the other IPO accommodations available to EGCs, such as the ability to include two rather than three years of financial information and more limited executive compensation disclosure in their registration statements. Issuers that are not EGCs also will not be able to engage in test-the-waters communications with potential investors, and will not be permitted to omit from its publicly filed registration statement financial information that it reasonably believes will not be required to include in the registration statement at the time of the completed offering (as clarified in a set of SEC FAQs addressing the voluntary submission of draft registration statements, available [here](#)).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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