

July 3, 2017

Confidential Submission of Draft Registration Statements Expanded

SEC Expands JOBS Act Benefit to All IPO Issuers and Follow-On Offerings within One Year of Initial Registration, including Related Relief for Required Financial Statements

SUMMARY

On June 29, 2017, the SEC announced that the Division of Corporation Finance (the Division) will permit all companies to confidentially submit draft registration statements for review in connection with initial public offerings (IPOs),¹ similar to the accommodation available to “emerging growth companies” (EGCs)² under the Jumpstart Our Business Startups Act (the JOBS Act).³ The expanded confidential submission process, which takes effect on July 10, 2017, will also apply to follow-on offerings made within one year of the effective date of an initial registration statement. The Division’s announcement also permits non-EGC filers to omit financial information that the filer reasonably believes will not be required at the time the registration statement is publicly filed, consistent with the relief available to EGCs under the JOBS Act. In announcing the new policy, SEC Chair Jay Clayton stated that the SEC was “striving for efficiency in [its] processes to encourage more companies to consider going public, which can result in more choices for investors, job creation and a stronger U.S. economy.”⁴

BACKGROUND

The confidential submission process is one of the procedural and disclosure accommodations provided under the JOBS Act to encourage smaller companies to undertake an IPO. The confidential submission process provides EGCs with greater flexibility in planning their IPOs by allowing them to commence the SEC review process without having to disclose publicly their intentions, business strategies or operating performance. The confidential submission process is one of the most frequently used accommodations in

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the JOBS Act, with approximately 88% of EGCs that filed IPO registration statements taking advantage of this process since passage of the JOBS Act in 2012.⁵

DISCUSSION

Confidential Submissions Permitted for All IPOs. Beginning July 10, 2017, the Division will accept from all companies for non-public review draft submissions for IPO registration statements, as well as other initial registrations under the Securities Act of 1933 (the Securities Act) and initial registrations of a class of securities under Section 12(b) of the Securities Exchange Act of 1934 (the Exchange Act), including spin-offs. In addition, the SEC will accept initial draft registration submissions in connection with follow-on offerings that occur within one year of the pricing of the IPO or Exchange Act Section 12(b) registration. For these follow-on offerings, confidential review will be limited to the initial draft submission; any amendments in response to staff comments will need to be publicly filed.

An issuer choosing to avail itself of the confidential submission process should follow the process that EGCs use to submit draft registration statements for non-public review.⁶ In particular, for IPOs and other initial registrations, an issuer must confirm in a cover letter to the non-public draft submission that it will publicly file its registration statement and non-public 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. For eligible follow-on offerings, the issuer must publicly file its registration statement and non-public draft submission at least 48 hours prior to any requested effective time and date.

Additional Flexibility regarding Financial Statements. The announcement also provides additional relief relating to required financial statements for non-EGC filers. In particular, similar to the relief extended to EGCs under the JOBS Act, a draft registration statement submitted confidentially may omit financial information that the issuer reasonably believes will not be required at the time the registration statement is publicly filed.⁷ Similarly, the staff will consider requests for waivers of required financial statements made under Rule 3-13 of Regulation S-X. This is consistent with recent remarks made by Mark Kronforst, the Division's Chief Accountant, encouraging companies to speak with the staff and noting that waivers have been granted historically "in the vast majority of the cases."⁸ The staff will also consider reasonable requests for expedited processing, and issuers are encouraged to discuss their transaction timeline in advance with the staff.

No Impact on Existing EGC and FPI Processes and Accommodations. The Division's announcement clarifies that the expansion of the confidential submission process does not affect the process for EGCs under the JOBS Act. Nor does it affect the confidential submission processes otherwise available to foreign private issuers, whether under prior SEC staff guidance⁹ or the procedures available to EGCs, if applicable. Finally, the expanded confidential submission procedures do not expand any of the other

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procedural or disclosure accommodations under the JOBS Act; an issuer must qualify as an EGC to take advantage of such relief.

CONCLUSION

The announcement is the first policy statement by Chair Clayton, signaling the SEC's commitment to improving the attractiveness of U.S. capital markets and providing investors with access to more investment opportunities. The expansion of the popular JOBS Act confidential submission process and related relief for required financial statements for non-EGC filers is intended to encourage more large companies to initiate the IPO process. Further reforms are expected to be announced by the Division as part of the ongoing efforts to facilitate access to capital and expand investment opportunities.

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ENDNOTES

- ¹ See SEC Press Release, Draft Registration Statement Processing Procedures Expanded (Jun. 29, 2017), *available at* <https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>.
- ² An EGC is an issuer that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year.
- ³ For a discussion of the process for confidential submissions by EGCs, see SEC Frequently Asked Questions, Confidential Submission Process for Emerging Growth Companies (Dec. 21, 2015) (revised), *available at* <https://www.sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm>.
For an overview of the JOBS Act, see our presentation, Jumpstart Our Business Startups (“JOBS”) Act – An Overview (Jul. 2012), *available at* https://www.sullcrom.com/files/upload/JOBS_Act_Presentation_PDF.pdf.
- ⁴ SEC Press Release, SEC’s Division of Corporation Finance Expands Popular JOBS Act Benefit to All Companies (Jun. 29, 2017), *available at* <https://www.sec.gov/news/press-release/2017-121>.
- ⁵ For further discussion of the impact of the JOBS Act on the IPO market, see Ernst & Young, Update on Emerging Growth Companies and the JOBS Act (Nov. 2016), *available at* [http://www.ey.com/Publication/vwLUAssets/ey-update-on-emerging-growth-companies-and-the-jobs-act-november-2016/\\$FILE/ey-update-on-emerging-growth-companies-and-the-jobs-act-november-2016.pdf](http://www.ey.com/Publication/vwLUAssets/ey-update-on-emerging-growth-companies-and-the-jobs-act-november-2016/$FILE/ey-update-on-emerging-growth-companies-and-the-jobs-act-november-2016.pdf).
- ⁶ See SEC Press Release, Draft Registration Statement Processing Procedures Expanded (Jun. 29, 2017), *available at* <https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>.
- ⁷ This relief is similar to the accommodation provided to EGCs under the Fixing America’s Surface Transportation Act (the FAST Act), which permits those companies to omit certain financial information that the issuer reasonably believes will not be required to be included at the time of the offering. *Id.*
For further discussion regarding the relief provided by the FAST Act, see the SEC staff’s C&DI, Fixing America’s Surface Transportation (FAST) Act (Dec. 21, 2015), *available at* <https://www.sec.gov/divisions/corpfin/guidance/fast-act-interps.htm>.
- ⁸ Bloomberg BNA, SEC’s Staff Flexible on Slimmer Filings in Acquisitions, Listings (Jun. 9, 2017), *available at* <https://www.bna.com/sec-staff-flexible-n73014453123/>.
- ⁹ See SEC Guidance, Non-Public Submissions from Foreign Private Issuers (Dec. 8, 2011, updated May 30, 2012), *available at* <https://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>.

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