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SEC Expands the Use of Confidential Submissions of Draft Registration Statements

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The staff of the U.S. Securities and Exchange Commission (SEC) recently began accepting from all issuers confidential submissions of draft registration statements for review by the SEC staff in certain cases. Before this policy change, under the *Jumpstart Our Business Startups Act of 2012* (JOBS Act) only emerging growth companies (EGCs) were eligible to make confidential submissions of draft registration statements relating to an initial public offering (IPO). The new confidential submission procedures are not limited to EGCs or IPOs and are intended to provide issuers with more flexibility in planning their public offerings and the public filing of registration statements. Canadian issuers that qualify to file with the SEC certain registration statements under the multijurisdictional disclosure system (MJDS) may also use the new confidential submission procedures.¹

Which Registration Statements May Be Submitted Confidentially for Review?

The following registration statements are eligible for confidential review:

1. A draft registration statement (and related revisions) under the U.S. Securities Act of 1933 (Securities Act) relating to an IPO.

The issuer must publicly file the registration statement and 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.

2. A draft registration statement (and related revisions) regarding the registration of a class of securities to be listed on a U.S. national securities exchange (such as the NYSE or Nasdaq) under section 12(b) of the U.S. Securities Exchange Act of 1934 (Exchange Act).

The issuer must publicly file the registration statement and confidential draft submissions at least 15 days prior to the anticipated effective date of the registration statement.

3. A draft registration statement under the Securities Act for a “follow-on” offering that is submitted within 12 months of the effective date of the issuer’s initial registration statement filed under the Securities Act relating to an IPO or the issuer’s registration statement filed under section 12(b) of the Exchange Act.

The issuer must publicly file the registration statement and confidential draft submission at least 48 hours prior to the requested effective date and time of the follow-on registration statement. The SEC staff will limit its confidential review to the initial submission of the draft follow-on registration statement. An issuer that responds to SEC staff comments on this draft registration statement must do so with a public filing, not with a revised draft registration statement.

To use the new confidential submission procedures, the issuer must confirm its agreement to comply with the guidelines above in a cover letter accompanying its confidential submission to the SEC staff. The new confidential submission procedures do not affect the confidential review process already available to EGCs under the JOBS Act; nor do they affect the confidential review process afforded to foreign private issuers in connection with their first-time registration with the SEC, as provided in SEC staff guidance from December 8, 2011 (as subsequently updated on May 30, 2012).

What Else Should You Know About the New Submission Procedures?

The SEC staff has provided additional guidance on the new confidential submission procedures:

1. The confidential submission of a draft registration statement does not constitute a filing for purposes of section 5(c) of the Securities Act, which prohibits making offers to sell a security in advance of filing a registration statement.

2. An issuer that relies on the new confidential submission procedures should consider requesting confidential treatment under Rule 83 under the *Freedom of Information Act* (FOIA) for its draft registration statement and associated correspondence when seeking confidential review.²

3. The SEC staff will process a confidential submission of a draft registration statement that is substantially complete, but issuers may omit financial information that they reasonably believe will not be required at the time the registration statement is publicly filed. Only an EGC may omit from its publicly filed registration statement financial information that it reasonably believes will not be required to be included in the registration statement at the time of the contemplated offering.

4. Consistent with existing practice, the SEC staff will publicly release its comment letters on the draft registration statement submitted confidentially (and the issuer's responses to SEC staff comment letters) no earlier than 20 business days following the effective date of the registration statement.

5. An issuer may not use the confidential submission procedures to submit a draft post-effective amendment to an effective registration statement.

¹Canadian issuers that file with the SEC a registration statement under the MJDS on a confidential basis are generally permitted to concurrently pre-file a corresponding Canadian preliminary prospectus with regulators in Canada on a confidential basis provided they satisfy certain conditions.

²Rule 83 under FOIA provides a procedure by which issuers submitting information to the SEC may request that it be withheld when requested under FOIA. Draft registration statements confidentially submitted by EGCs to the SEC under the JOBS Act are exempt from FOIA disclosure requests by statute.

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