

CAN YOU KEEP A SECRET?

SEC EXPANDS AVAILABILITY OF CONFIDENTIAL SUBMISSIONS OF DRAFT REGISTRATION STATEMENTS

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WHAT HAPPENED

The SEC staff recently published new guidance easing restrictions for public offerings:

- Expanding the range of companies that can make confidential submissions of draft registration statements to include:
 - Initial Exchange Act registrants, such as spin-offs or widely-held companies.
 - Seasoned companies, regardless of how much time has passed since their IPOs.
 - De-SPACs, even where the SPAC is the surviving company.
 - Foreign private issuers.
- Permitting companies to start the filing process without having to:
 - Disclose the names of underwriters.
 - Include financial statements that will not be needed in their first public submissions.

TAKEAWAYS

The SEC has declared its intent to “return[] to its narrow mission to facilitate capital formation, while protecting investors and maintaining fair, orderly, and efficient markets.” See Remarks of Mark Uyeda at Florida Bar's 41st Annual Federal Securities Institute and M&A Conference.

The new accommodations will allow any company to make an initial submission for a follow-on offering on a confidential basis, thereby improving the ability to calibrate the announcements of potential offerings with market conditions.

The disclosure accommodations will allow companies to start the review process earlier by omitting the names of underwriters that may not yet have been selected or financial statements that will not be needed at the time of the first public filing.

As a reminder, SEC staff comment letters and responses eventually become public on Edgar following effectiveness of the registration statement.

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EXPANSION OF PERMISSIBLE CONFIDENTIAL SUBMISSIONS

The JOBS Act first allowed confidential submissions of draft IPO registration statements by non-public companies in 2012 for emerging growth companies. In 2017, the SEC [announced the expansion of this option](#) for other IPOs as well as follow-on offerings within one year of the IPO.

The SEC staff [will now allow confidential submissions](#) in many other situations:

- ***New Exchange Act companies.*** The initial registration of a class of securities under the Exchange Act, including on Forms 10, 20-F, or 40-F, as well as revised draft registration statements.
 - As with IPOs, the company must confirm it will publicly file its registration statement and nonpublic submissions at least 15 days before any roadshow or 15 days before the requested effective date.
 - The staff will continue to publicly release comment letters and responses on Edgar no earlier than 20 business days following the effective date of a registration statement.
 - For a company required to register under Section 12(g) – e.g., because widely-held – the confidential submission does not satisfy its obligation to file the registration statement within 120 calendar days from fiscal-year end. That company will need to submit its draft registration statement early enough to receive staff comments and still meet the public filing deadline.
- ***Seasoned companies.*** The initial draft registration statement for any Securities Act offering or Exchange Act registration, regardless of how much time has passed since the company became a reporting company.
 - By implication, the guidance appears to include business combinations or exchange offers on Form S-4 and shelf offerings on Form S-3.
 - The company must confirm it will publicly file its registration statement and nonpublic submissions at least two business days before any requested effective time and date.

- In the case of Exchange Act registration statements on Forms 10, 20-F, and 40-F, the public filing must be made so that the full 30- or 60-day period (for Section 12(b) versus Section 12(g) registration, respectively) will run prior to effectiveness.
- Confidentiality is available only for the initial submission.
- **De-SPACs.** Expanding the availability of the nonpublic review process for a de-SPAC transaction in situations where the SPAC is the surviving entity, provided the target company is eligible to submit a draft registration statement.
- **Foreign Private Issuers.** Foreign private issuers will now have three options for non-public submission of initial registration statements: (1) the procedures described above, (2) the procedures available to emerging growth companies, or (3) procedures for FPIs first announced in May 2012.

ADDITIONAL ACCOMMODATIONS

The SEC staff announced two other accommodations:

- Financial information may be omitted if the company reasonably believes such information will not be required at the time the registration statement is publicly filed.
 - This is an exception to the staff's policy that draft registration statements must be substantially complete when submitted.
 - The staff will consider a company's specific facts and circumstances in connection with any request to omit or substitute required financial statements made under Rule 3-13 of Regulation S-X.
- Companies may omit the names of the underwriter(s) from their initial draft registration statement submissions, when otherwise required by Items 501 and 508 of Regulation S-K, provided such names are included in subsequent submissions and public filings.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

MEET THE TEAM



R. Randall Wang

St. Louis

randy.wang@bclplaw.com

+1 314 259 2149

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