

## Shhhh . . . SEC Expands Opportunities for Confidential Submissions of Registration Statements

March 5, 2025

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On March 3, 2025, the staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “SEC”) announced enhanced accommodations for companies to submit draft registration statements for confidential review.<sup>1</sup>

The new enhanced accommodations are discussed in more detail below and include:

- permitting companies to submit draft registration statements for any offering under the Securities Act of 1933, as amended (the “Securities Act”), or for the registration of a class of securities under Section 12(b) or Section 12(g) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), even after the first anniversary of the companies’ initial public offering (“IPO”);
- expanding the availability of the confidential submission and review process to registration statements on Forms 10, 20-F, or 40-F for the initial registration of a class of securities under either Section 12(b) or Section 12(g) of the Exchange Act;
- allowing confidential submissions and reviews of registration statements for “de-SPAC” transactions in situations where the special purpose acquisition company (the “SPAC”) is the surviving entity as long as the target is eligible to confidentially submit a draft registration statement.

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<sup>1</sup> See [https://www.sec.gov/newsroom/whats-new/draft-registration-statement-processing-procedures-expanded#\\_ftnref6](https://www.sec.gov/newsroom/whats-new/draft-registration-statement-processing-procedures-expanded#_ftnref6).

- permitting companies to omit the name of the underwriter(s) from their initial draft registration statement submissions, when otherwise required by SEC rules, provided that they include the name of the underwriter(s) in subsequent submissions and public filings.

## **BACKGROUND ON THE CONFIDENTIAL SUBMISSION PROCESS**

Registration statements for public offerings filed with the SEC generally are subject to review and comment by the Staff. Companies often file one or more amendments to the registration statement to respond to Staff comments. The registration statement and subsequent amendments are typically publicly available upon filing, often tipping off the public as to a company's financing plans.

The Jumpstart Our Business Startups Act of 2012 (the "JOBS Act") allowed "emerging growth companies" ("EGCs"), i.e., companies with less than \$1.07 billion of annual revenue in their most recently completed fiscal year, to confidentially submit draft IPO registration statements so long as the initial confidential submission and all amendments are publicly filed not later than 15 days before the company begins its IPO road show. The confidential submission process allows companies to defer—or even avoid, if they do not proceed with the offering—the public disclosure of sensitive commercial and financial information to the market and to competitors while they wade through the SEC review and comment process, and wait for favorable market conditions. Beginning in 2017, the Staff allowed all companies to confidentially submit draft registration statements for IPOs and follow-on offerings submitted within one year of their IPO.

## **FOLLOW-ON SECURITIES ACT OFFERINGS AND SUBSEQUENT EXCHANGE ACT REGISTRATION**

Prior to the enhanced accommodations, the Staff allowed a company to submit for confidential review initial registration statements for follow-on offerings within 12 months following the effective date of the company's initial Securities Act or Exchange Act registration statement. The Staff will now allow a company to submit for confidential review initial draft registration statements for any offering under the Securities Act regardless of how much time has passed since the company became subject to SEC ongoing reporting requirements. Since many follow-on offerings do not have road shows, the SEC will only require that the registration statement and all non-public drafts be publicly filed at least two business days prior to any requested effective time and date. The Staff noted that it may comment on the publicly filed registration statement, which could impact a company's desired timing for pricing an offering.

The Staff also will now allow a company to submit for confidential review initial draft registration statements for the registration of a class of securities under the Exchange Act regardless of how much time has passed since the company became subject to SEC ongoing reporting requirements. In the case of Exchange Act registration statements, a company must publicly file the registration statement and all non-public drafts at least 30 days (with respect to registration under Section 12(b)) or 60 days (with respect to registration under Section 12(g)) prior to effectiveness.

Unlike in the context of an IPO, only the initial registration statement may be submitted confidentially. All amendments to a registration statement filed for a follow-on offering or Exchange Act registration, including amendments responding to Staff comments, must be filed publicly.

## **IPOS AND EXCHANGE ACT REGISTRATION STATEMENTS**

A company publicly offering securities for the first time must file a registration statement (typically on Form S-1 for domestic companies or Form F-1 for foreign private issuers) with the SEC, which the Staff reviews for compliance with applicable disclosure and accounting requirements. The Staff then provides written comments, asking for specific changes to the registration statement, general clarification or additional disclosures or additional supplemental information so that the Staff can better understand the disclosure. The company will then file an amendment responding to the Staff's comments. This process continues until the Staff has no further comments. It is not uncommon for a company to receive four or five rounds of comment letters. The company must publicly file its registration statement and all non-public draft submissions at least 15 days prior to the beginning of its road show or, in the absence of a road show, at least 15 days prior to the requested effective date of the registration statement. The SEC publicly releases Staff comment letters and issuer responses on EDGAR no earlier than 20 business days following the effective date of the registration statement.

A company seeking to list on a national securities exchange (e.g., in connection with a spin-off) must register the class of securities to be listed under Section 12(b) of the Exchange Act by filing a registration statement on Form 10 (for domestic companies), Form 20-F (for foreign private issuers) or Form 40-F (for Canadian companies eligible to use the Multi-Jurisdictional Disclosure System). A company that becomes subject to the ongoing reporting requirements of Section 12(g) of the Exchange Act (i.e., where it had total assets of more than \$10 million and 2,000 record holders of its equity securities (or 500 non-accredited investors) as of the last day of its fiscal year) must file a Form 10, 20-F or 40-F within 120 days after the end of the fiscal year in which it met the filing thresholds. The Staff will now allow confidential submissions and reviews of these registration statements. The Staff did note, importantly, that the confidential submission will not satisfy a company's obligation under Section 12(g) to file the registration statement within 120 days after the end of its fiscal year.

## **REGISTRATION STATEMENTS IN CONNECTION WITH DE-SPAC TRANSACTIONS**

Beginning in July 2024, the SEC has required in certain situations target companies merging with SPACs to be listed as co-registrants on the SPACs' registration statements. The Staff will now allow a SPAC to submit for confidential review a registration statement for a de-SPAC transaction where the co-registrant target would otherwise be independently eligible to submit a draft registration statement. Just like in the context of an IPO, the initial registration statement and subsequent amendments may be confidentially submitted as long as the registration statement and all non-public drafts are publicly filed at least 15 days prior to the requested effective date of the registration statement.

## **FOREIGN PRIVATE ISSUERS**

Foreign private issuers have a number of choices in filing registration statements, including submitting draft registration statements under the newly announced guidance. If a foreign private issuer qualifies as an EGC, it may follow the rules for EGCs (which are generally applicable to IPOs). Alternatively, it may elect to follow the guidance

for non-public submissions from foreign private issuers announced in May 2012.<sup>2</sup> In general, this guidance applies to initial registration statements where the registrant is: (1) a foreign government registering its debt securities; (2) a foreign private issuer that is listed, or is concurrently listing its securities, on a non-U.S. securities exchange; (3) a foreign private issuer that is being privatized by a foreign government; or (4) a foreign private issuer that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.

## CONTENTS OF DRAFT REGISTRATION STATEMENTS

The SEC generally requires that registration statements be substantially complete when submitted or filed. Significant pieces of missing information could cause the SEC to delay beginning its review process. However, the SEC will not delay its review if a company excludes financial information that the company reasonably believes will not be required at the time the registration statement is publicly filed. For example, a filing made in January may omit interim financial statements and financial information for interim periods in the prior fiscal year if the company expects to include audited financial statements for the complete fiscal year in the first public filing of the registration statement. This accommodation may save companies significant accounting and auditing fees.

The final enhanced accommodation provided by the Staff is that it will now allow companies to omit the name of the underwriter(s) from their initial submissions as long as they include the name of the underwriter(s) in subsequent submissions and public filings.

**If you have any questions regarding this client alert, please contact the Willkie attorney with whom you regularly work.**



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<sup>2</sup> See <https://www.sec.gov/corpfin/divisionscorpfininternatnonpublicsubmissionshtm>.