

Securities and Exchange Commission (SEC) Expands Nonpublic Review Process for Draft Registration Statements

US – March 2025

On March 3, 2025, the staff of the Division of Corporation Finance (the “Division”) of the SEC announced that it was, effective immediately, expanding the accommodations available for issuers that submit draft registration statements for nonpublic review. The expansion is intended to facilitate capital formation by permitting issuers to consider public offerings, while keeping submissions confidential until a decision is made to proceed with such offering.

Nonpublic SEC Review Process Background

In 2012, upon the enactment of the Jumpstart Our Business Startups (JOBS) Act, emerging growth companies were permitted to submit draft registration statements in connection with initial public offerings for confidential, nonpublic staff review. Draft registration statements submitted to the SEC for nonpublic review are not posted to the SEC’s Electronic Data Gathering, Analysis and Retrieval (“EDGAR”) system at the time of submission, unlike traditionally filed registration statements. As such, issuers can go through the extensive SEC comment process in a nonpublic manner until shortly before launching an offering.

In 2017, the SEC expanded the opportunity for nonpublic review of registration statements to all issuers. Pursuant to its announcement, the Division further broadened the scope of the nonpublic review process through additional accommodations, as described below.

Summary of Enhanced Accommodations

Nonpublic Review of Subsequent Securities Act Offerings and Exchange Act Registrations

Prior to the new accommodations, only subsequent draft registration statements submitted within the 12-month period following the effective date of an issuer’s initial Securities Act registration statement, or an issuer’s Exchange Act Section 12(b) registration statement were eligible for nonpublic review. The new accommodations eliminate the 12-month limitation so that an issuer may submit any subsequent draft registration statement for nonpublic review no matter how much time has passed since the issuer became subject to the reporting requirements of Section 13(a), or 15(d) of the Exchange Act. Note however, that nonpublic review is limited to an issuer’s initial submission. Any registration statements that have been amended to address staff comments will be publicly available. The SEC staff will continue to publicly release staff comment letters and issuer responses to those letters on EDGAR no earlier than 20 business days following the effective date of a registration statement.

Consistent with current practice, any draft registration statement must still be submitted with a cover letter. For a subsequent draft registration statement, the cover letter must attest that the issuer will file its public registration statement and draft registration statement publicly at least two business days prior to the requested effective time, aligning with the timing for an acceleration request in Rule 461 of the Securities Act of 1933. Note that this period is 15 days prior to a road show or requested effectiveness (in the absence of a road show) for initial draft registration statements.

In addition, the staff has expanded the availability of the nonpublic review process beyond Securities Act registration forms, to include the initial registration of a class of securities under Section 12(g) of the Exchange Act on Forms 10, 20-F or 40-F. Nonpublic Exchange Act registration statements will need to be publicly filed so that the full 30- or 60-day period, as further described below, will run prior to effectiveness. A registration statement on Form 10, 20-F or 40-F for registration under Section 12(b) of the Exchange Act goes effective automatically 30 calendar days after the SEC receives approval of the company’s listing from the national securities exchange. A registration statement on Form 10, 20-F or 40-F for registration under Section 12(g) of the Exchange Act goes effective automatically 60 calendar days after the company files the registration statement.

Draft Registration Statements in Connection with a De-SPAC Transaction

Under rules adopted in 2024, the target company of a merger with a Special Purpose Acquisition Company (SPAC) may be required to be a co-registrant where the SPAC is the surviving entity of the merger. The new accommodations permit issuers to submit a registration statement for a de-SPAC transaction for nonpublic review in all de-SPAC transaction structures, including where the SPAC would be the surviving entity. The accommodation is only available if the target company (i.e., the operating company being acquired by the SPAC) would be independently eligible to submit a Securities Act draft registration statement.

Omission of Underwriter Names in Initial Draft Registration Statement Submissions

In a change of practice, under these enhanced accommodations, the staff will allow issuers to omit the name of the underwriter(s) from their initial draft registration statement submissions, even if such information is otherwise required by Items 501 and 508 of Regulation S-K. While the staff previously permitted the omission of the underwriter(s) in initial submissions, during the pandemic, the staff changed its position as a response to an increase in filings. Note that the ability to omit underwriter(s) is limited to the initial submission (both for initial public offerings and subsequent offerings), not any subsequent submissions.

If you are contemplating a public offering, please reach out to your primary Squire Patton Boggs' attorney or one of the contacts listed below.

Contacts

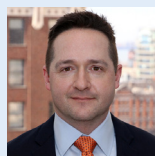


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