

SEC Expands Nonpublic Review Program for Processing Registration Statements

I. Overview of Expansion

The SEC recently announced an expansion of its nonpublic review program for processing registration statements to include all issuers.¹ This program, adopted under the Jumpstart Our Business Startups Act, was previously available only to emerging growth companies (EGCs) (i.e., an issuer with less than 1 billion dollars in gross revenues during the most recent fiscal year).² The expansion is currently effective.

II. Eligibility

The expanded review process applies to initial public offerings (“IPOs”) under the Securities Act of 1933 (“Securities Act”) and to initial registration statements under Section 12(b) of the Securities Exchange Act of 1934 (for example, when using a Form 10 to register shares in a spin-off).³ To be eligible for a nonpublic SEC review, the issuer must agree to file publicly its registration statement and nonpublic draft submissions at least 15 days before a road show, if applicable, or at least 15 days before the effective date of the registration statement.

III. Registration Statements submitted within the first 12 months after Initial Registration

The expanded nonpublic review process also extends to issuers within the first twelve months of the effective date for its IPO or registration. In this case, the SEC will review only the initial submissions on a nonpublic basis. Additional submissions, including in response to SEC comments, will not be subject to nonpublic review. An issuer taking advantage of this option must make its registration statement and nonpublic draft submission available on EDGAR at least forty-eight hours before any requested effective time and date for registration.⁴

IV. Foreign Private Issuers

The expanded nonpublic review process, as well as the existing process available for EGCs, is also available to foreign private issuers.⁵ Foreign private issuers may also elect to follow the guidance provided in the SEC’s May 30, 2012 statement, which describes how the SEC has afforded foreign private issuers and foreign governments the ability to submit registration statements and amendments as part of their first-time registration with the SEC for a nonpublic review.⁶

¹ “Draft Registration Statement Processing Procedures Expanded,” U.S. SEC. AND EXCH. COMM’N (June 29, 2017), <https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>.

² “Jumpstart Our Business Startups Act Frequently Asked Questions,” U.S. SEC. AND EXCH. COMM’N (Dec. 21, 2015), <https://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm>.

³ U.S. SEC. AND EXCH. COMM’N, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* See also, “Non-Public Submissions from Foreign Private Issuers,” U.S. SEC. AND EXCH. COMM’N (Dec. 8, 2011, as updated May 30, 2012), <https://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>.

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V. Process

The nonpublic submission must be accompanied by a letter from the issuer confirming it will comply with the applicable public filing requirement. The nonpublic submission should be substantially complete; however, issuers may omit financial information it reasonably believes will not be required at the time the registration statement will be publicly filed.⁷ The SEC did not provide any specifics on the timing of the nonpublic review but suggested issuers consult with the reviewer and that it would consider “reasonable requests to expedite.”⁸

VI. Conclusion

SEC officials hope that the expansion of nonpublic review will make going public a more attractive option for companies seeking additional capital and believe this benefit “is an important step in our efforts to foster capital formation, provide investment opportunities, and protect our investors.”⁹

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Kimberly Petillo-Décossard at 212.701.3265 or kpetillo-decossard@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.

⁷ In addition, as with EGCs, the submission may be made without signatures, signed audit reports, consents, exhibits or filing fees. See “Voluntary Submission of Draft Registration Statements – FAQ’s” SEC. AND EXCH. COMM’N (June 29, 2017), <https://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>.

⁸ See U.S. SEC. AND EXCH. COMM’N *supra* note 1. An important technical note recommends that new registrants check the “JOBS ACT” box on their applications for an EDGAR access code to maintain confidentiality.

⁹ Press Release, U.S. SEC. AND EXCH. COMM’N, SEC’s Division of Corporate Finance Expands Popular JOBS Act Benefit to All Companies (June 29, 2017), <https://www.sec.gov/news/press-release/2017-121>.