

## SEC Confidential Review of Draft Registration Statements Available for All IPOs and First Year Reporting Companies

The Division of Corporation Finance of the U.S. Securities and Exchange Commission (“SEC”) has expanded the availability of confidential review of draft registration statements effective July 10, 2017. The new policy seeks to foster capital formation by providing a mechanism to support new issuers’ preparation of their registration statements and flexibility in planning their offerings.

The new policy does not impact the ability of emerging growth companies (“EGCs”) to obtain confidential review of their draft registration statements under existing procedures adopted in 2011 pursuant to the Jumpstart Our Business Startups Act of 2012 (“JOBS Act”). Confidential review will also continue to be available to certain foreign private issuers (“FPIs”), according to SEC policy in place since 2011 (and updated in 2012). An FPI will be able to seek review in accordance with the new policy, or in accordance with the existing policy covering EGCs in the event that the FPI is an EGC or the existing 2012 policy for FPIs.

### Initial Offerings and Securities Exchange Listings

Under the new policy, the SEC will confidentially review an issuer’s initial draft registration statement and related revisions for its initial public offering (“IPO”) under the Securities Act of 1933 (the “Securities Act”). The issuer must confirm in the cover letter accompanying the draft that it will, and must, publicly file its registration statement and all confidentially submitted drafts at least 15 days prior to any road show or, in the event that there will not be a road show, at least 15 days prior to the requested effective date of the registration statement.

Similarly, the SEC will confidentially review an issuer’s initial draft registration statement and related revisions for its initial registration of a class of securities under Section 12(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) (which is required to list securities on a national securities exchange). In this case, the issuer must confirm in its cover letter that it will, and must, publicly file its registration statement and all confidentially submitted drafts at least 15 days prior to the anticipated effective date of the registration statement.

### Follow-On Offerings and Securities Exchange Listings

The SEC will also confidentially review initial drafts of an issuer’s registration statements for follow-on offerings and securities exchange listings submitted prior to the end of the twelfth month following the effective date of the issuer’s Securities Act IPO registration statement or Exchange Act Section 12(b) registration statement. In these cases, the issuer must confirm in its cover letter that it will, and must, publicly file the registration statement and the confidentially submitted draft in time for it to be publicly available at least 48 hours prior to the requested effective date and time. Unlike the case for initial registration statements, the SEC will confidentially review only a single draft of a follow-on registration statement. Responses to the SEC’s comments on the initial confidential draft must be reflected in a public filing.

## Other Requirements

Draft registration statements submitted for confidential review should be substantially complete. However, the SEC has stated that it will not delay processing in cases where an issuer reasonably believes that omitted financial information will not be required at the time the registration statement is publicly filed.

## Certain Other Considerations

Form ID, the form submitted by new issuers to apply for EDGAR access codes, contains a section for EGCs and FPIs to indicate that they will use the codes to submit draft registration statements and the basis of their submission. The SEC has indicated that until the SEC updates Form ID, a new issuer should indicate on Form ID that it intends to use its EDGAR access codes to submit a draft registration statement pursuant to Section 106 of the JOBS Act. The issuer should do this even if it is not an EGC.

Confidential submission of a registration statement to the SEC does not by itself protect the registration statement from disclosure under the Freedom of Information Act ("FOIA"), even if the filer were to determine not to proceed with a public filing of the registration statement. The SEC has indicated that it will keep submitted nonpublic draft registration statements confidential subject to the provisions of applicable law, and has noted that Exemption 4 of FOIA provides for an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Issuers seeking such protection must comply with SEC Rule 83. Pursuant to Rule 83, issuers may request that information be withheld when requested under FOIA. Under Rule 83, a submitter must mark each page with "Confidential Treatment Requested by [Issuer Name]" and an identifying number and code. The words "FOIA Confidential Treatment Request" must appear on the top of the first page of the request, and the submitter must provide contact information.

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