



Defining Issues[®]

SEC expands nonpublic reviews of registration statements

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Most companies may submit draft initial registration statements to the SEC for nonpublic review.

Applicability

Companies (other than issuers of asset-backed securities) that are planning:

- an initial Securities Act offering or initial registration of securities under Section 12(b) of the Exchange Act, which is required for listing on a national securities exchange;
- a Securities Act offering within one year of an initial public offering (IPO) or Section 12(b) registration.

Key facts and impacts

The SEC's Division of Corporation Finance (the Division) announced that beginning July 10, 2017 it will accept for nonpublic review voluntary draft registration statement submissions from all prospective issuers (other than issuers of asset-backed securities).¹

- Previously, this accommodation applied only to emerging growth companies (EGCs) and some foreign private issuers (FPIs).

- Flexibility will increase for a company to omit in a draft initial registration statement financial information that it will not be required to file with the registration statement.
- The SEC staff has released a series of frequently asked questions that address detailed guidance for submitting registration statements for nonpublic review.²

Registration statements eligible for nonpublic review

The Division has stated the conditions under which it will grant nonpublic review of draft initial registration statements, including the information that it will review on a nonpublic basis.

A company seeking nonpublic review must commit to publicly file the registration statement within specific timelines.

The following table lists the conditions and timelines.

¹ [SEC Division of Corporation Finance announcement](#), Draft Registration Statement Processing Procedures Expanded; issued June 29, 2017

² [Voluntary Submission of Draft Registration Statements – FAQs](#)

Type of registration or offering	Information eligible to be submitted for nonpublic review	Period of time to publicly file the registration statement
Initial Securities Act registration statement (e.g. IPO)	Initial registration statement and related subsequent revisions or amendments.	At least 15 days before a road show. If there is no road show, at least 15 days before the requested effective date of the registration statement.
Initial registration of class of securities under Exchange Act Section 12(b)	Initial registration statement and related subsequent revisions or amendments.	At least 15 days before the anticipated effective date of the registration statement.
Registration statements filed within one year of effectiveness of an initial Securities Act or Section 12(b) registration statement	Initial registration statement only. ³	At least 48 hours before the requested effective date and time.

Foreign private issuers

FPIs have the option to follow the:

- procedures outlined in the announcement;
- procedures available to EGCs if the FPI qualifies as an EGC; or
- guidance separately provided for FPIs in the SEC’s May 30, 2012 release.⁴

KPMG observation

The SEC is permitting most companies to follow the same rules for nonpublic review as EGCs follow under the 2012 JOBS Act. This accommodation provides companies with increased control and flexibility over the timing of their initial public offerings. This change does not affect the EGC draft submission and review process.

It also does not give companies other benefits that are available only to EGCs, such as reduced financial statement requirements and executive compensation disclosure, private company adoption dates for new accounting standards, and the ability to pre-market an IPO before the registration statement is public.

Nonpublic review vs. confidential filing

Under the new policy, non-EGCs may submit registration statements for nonpublic review. The SEC will publicly release its comment letters and issuer responses to staff comment letters on EDGAR no earlier than 20 business days

following the effective date of a registration statement. The registration statements submitted for nonpublic review are subject to requests under the Freedom of Information Act (FOIA). EGCs may submit confidential draft registration statements. Confidential EGC submissions are not subject to FOIA requests.

³ Revisions, amendments and/or responses to Division staff comments must be made with a public filing, and further SEC review would be performed under the Division’s normal review procedures for public filings.

⁴ [Non-Public Submissions from Foreign Private Issuers](#). The staff reviews initial registration statements of foreign issuers that are submitted on a nonpublic basis only when the registrant is (1) a foreign government registering its debt securities; (2) an FPI that is listed or is concurrently listing its securities on a non-US securities exchange; (3) an FPI that is being privatized by a foreign government; or (4) an FPI that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.

Increased flexibility to omit financial information

The SEC staff will not delay processing a draft registration statement that omits required

financial information if the prospective issuer “reasonably believes (the) omitted financial information will not be required at the time the registration statement is publicly filed.”

KPMG observation

The Division’s willingness to process a draft registration statement that omits financial information that the prospective issuer reasonably believes will not be required in the first public filing of the registration statement extends to other companies a similar accommodation provided to EGCs under the FAST Act of 2015.

KPMG’s [Defining Issues 15-59](#) discusses the ability to omit financial information in confidential submissions under the FAST Act and includes examples of omitted financial information such

as financial statements of the registrant or an acquired business for the earliest year presented.

An EGC may omit certain financial information if it will not be required *at the time it distributes a preliminary prospectus to investors*, which may take place after a non-EGC’s first public filing of a registration statement. A non-EGC taking advantage of nonpublic review may omit certain financial information if that information will not be required *at the time it first publicly files its registration statement*.

Additionally, the SEC staff will consider a prospective issuer’s specific facts and circumstances for requests made under Rule 3-13 of Regulation S-X to omit required

financial information. S-X Rule 3-13 allows Division staff to waive the requirement for financial information when the waiver is “consistent with the protection of investors.”

KPMG observation

The Division’s statement that it will consider specific facts and circumstances when a prospective issuer asks to omit required financial information using S-X Rule 3-13 indicates that there may be increased flexibility to omit financial information when that company can demonstrate that the financial information is not needed to protect investors.

The Division staff has a process for considering

requests for alternative financial statement presentations that is frequently used by companies.⁵ For example, a company may ask to include in its registration statement two years of audited financial statements for an acquired business rather than the three years required by SEC rules. The Division staff will evaluate the request to determine whether the omission would be detrimental to investors.

⁵ [Legal Policy and Accounting Offices](#)

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