



SEC Issues & Trends

The SEC has made the capital raising process easier for companies

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The SEC clarifies eligibility for its expanded nonpublic review of registration statements and omission of certain financial information from draft registration statements.

The SEC recently announced changes to the securities registration process to reduce the regulatory burden on companies conducting IPOs and other securities offerings.

The SEC's most important initiatives focus on expanding the nonpublic review of registration statements, allowing certain financial information to be omitted from draft registration statements and encouraging prospective filers to seek relief from overly burdensome filing requirements.

Expanded nonpublic reviews of registration statements

The SEC's Division of Corporation Finance is accepting voluntary draft registration statement submissions for nonpublic review from prospective issuers other than issuers of asset-backed securities.¹ KPMG's [Defining Issues 17-14](#) discusses the conditions under which the SEC staff will grant nonpublic review of draft initial registration statements, including the information that the staff will review on a nonpublic basis. The type of registrations or offerings covered by this announcement are:

- Initial Securities Act registration statements (e.g. IPO);
- Initial registration of securities under Section 12(b) of the Securities Exchange Act of 1934 (Exchange Act); and
- Registration statements filed within one year of the effective date of an initial Securities Act registration or Section 12(b) registration statement.

Eligibility

In a recent informal discussion, the SEC staff clarified what offerings are eligible for nonpublic review. Eligibility depends on the issuer's history as a registrant and what Form is used for the filing. A registration statement used to register debt or equity securities for the first time would generally be eligible.

However, a registration that does not result from issuing new debt or equity securities (e.g. registration is required because a company exceeds the SEC assets and number of security holder thresholds) would not be eligible. The following table summarizes filings that are eligible for nonpublic review.

¹ SEC Division of Corporation Finance announcement, [Draft Registration Statement Processing Procedures Expanded](#), June 29, 2017 (supplemented August 17, 2017)

Eligible for nonpublic review	Not eligible for nonpublic review
<ul style="list-style-type: none"> — Equity IPOs — Registrations of public debt before an IPO — Resale of privately acquired securities (initial offerings) — Exxon Capital Debt Exchanges on Form S-4 (if before an IPO) — Registration statements under Exchange Act Section 12(b): <ul style="list-style-type: none"> — Form 10 — Form 20-F — Form 40-F 	<ul style="list-style-type: none"> — Proxy statements (and a related Form S-4)² — Form 8-A under Exchange Act Section 12(b) — Registration statements under Exchange Act Section 12(g)

Omission of financial information from draft registration statements

The SEC staff issued two Compliance and Disclosure Interpretations (C&DIs) that address when Emerging Growth Companies (EGCs) and non-EGCs may omit annual and interim financial information from draft registration statements.³

Subsequent clarification from the SEC staff points out the difference between what is required in a *draft* registration statement and what is required in a *filed* registration statement.

While companies may submit draft registration statements that omit certain financial information that won't be required when they eventually *file* for the first time, the filed registration statement must comply with all of the offering form requirements at the date of filing.

An EGC must publicly file its registration statement at least 15 days before it begins a road show. A non-EGC must publicly file its initial registration statement at least 15 days before a road show or effectiveness.

EGCs – What can they omit? (C&DI 101.04)

Draft registration statements	Filed registration statements
<p>An EGC may omit interim financial information that it reasonably believes will not be required to be presented <i>separately</i> at the time of the contemplated offering.</p>	<p>An EGC may not omit interim financial information included in a historical period that it reasonably believes will be required at the time of the contemplated offering. An EGC must comply with Regulation S-X requirements for the age of financial statements in a filed registration statement.</p>

² The eligibility of a Form S-4 used for a merger transaction depends on the specific facts and circumstances. The SEC staff encourages these issuers to contact them to discuss whether a nonpublic review is acceptable based on specific facts and circumstances.

³ [Securities Act Forms - Compliance and Disclosure Interpretations](#), updated August 17, 2017

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Example 1: EGCs

A calendar year-end EGC submits a draft registration statement in November 2017, and reasonably believes it will begin its offering in April 2018 after audited 2017 financial statements are included in a filed registration statement

- The EGC may omit from its draft registration statement its 2015 annual financial statements and financial information for the nine months ended September 30, 2016 and 2017 because it expects only its 2017 and 2016 annual financial statements will be required at the time of the offering.

Assume the same draft registration statement above, but the EGC files its registration statement in January 2018 instead of April 2018

- The EGC may omit from its filed registration statement its 2015 annual financial information, but would include its interim financial information for the nine months ended September 30, 2016 and 2017 because that interim information relates to historical periods (i.e. the year ended December 31, 2017) that will be included at the time of the offering.

A calendar year-end EGC publicly files its registration statement in October 2017 in advance of its contemplated offering in late November 2017

- The EGC must include interim financial information for the six months ended June 30, 2017 and 2016 in the public filing even though those interim periods will not be required to be separately presented at the time of the contemplated offering (i.e. interim financial information for the nine months ended September 30, 2017 and 2016 will be filed before the effective date of the registration statement).

Non-EGCs – What can they omit? (C&DI 101.05)

Draft registration statements	Filed registration statements
<p>A non-EGC may omit interim and annual financial information that it reasonably believes will not be required to be presented separately at the time it publicly files its registration statement.</p> <p>The SEC staff confirmed that this omission applies to the financial statements of other companies under Rules 3-05, 3-09 and 3-14 of Regulation S-X.⁴</p>	<p>A non-EGC may not omit any required financial information from its filed registration statement.</p>

Example 2: Non-EGCs

A calendar year-end non-EGC submits a draft registration statement in November 2017, and reasonably believes it will publicly file for the first time in April 2018 after audited 2017 financial statements are required in the registration statement

- The non-EGC may omit from its draft registration statement its 2014 annual financial information and interim financial information for the nine months ended September 30, 2016 and 2017 because it expects this information will not be required in April 2018. The 2017, 2016 and 2015 annual financial statements will be required.

⁴ Regulation S-X, Rule 3-05, Financial statements of businesses acquired or to be acquired; Rule 3-09, Separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons; and Rule 3-14, Special instructions for real estate operations to be acquired.

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Example 2: Non-EGCs

The EGC submits a draft registration statement in September 2017, and reasonably expects to publicly file for the first time in December 2017

- The non-EGC may omit its interim financial information for the six months ended June 30, 2017 and 2016 from its draft registration statement, but it will include interim financial information for the nine months ended September 2017 and 2016 (which includes the June interim results) when the registration statement is publicly filed.

KPMG observation

The SEC is giving companies the opportunity to submit draft registration statements for review without including all of the financial information that it previously required. Before omitting information from their draft registration statements, companies should consider that the omission will mean that the SEC staff will not be able to review the most recent financial information available. This omission could result in a longer review by the SEC staff and ultimately delay the offering or filing.

Waiver of financial statement requirements under S-X Rule 3-13

Rule 3-13 of Regulation S-X gives the Division of Corporation Finance staff the authority to waive financial information requirements when the waiver is “consistent with the protection of investors.”⁵ In August 2017 the SEC updated its

Financial Reporting Manual⁶ to include the names of the staff members to contact to request relief under S-X Rule 3-13. Additionally, to encourage a prompt response, the SEC staff recommends that companies prepare concise waiver requests with company-specific facts and circumstances and consider discussing the request with the SEC staff before submitting a written request.

KPMG observation

The Division of Corporation Finance has made multiple announcements about a prospective issuer’s ability to request a waiver to omit required financial information using S-X Rule 3-13. For example, a company may ask to include in its registration statement two years of audited financial statements for an acquired business instead of the three years required by SEC rules.

The SEC staff’s update of its Financial Reporting Manual and August 2017 announcement continues a trend toward increased flexibility to omit financial information when a company can demonstrate that the information is not needed to protect investors.

⁵ Regulation S-X, Rule 3-13, Filing of other financial statements in certain cases

⁶ SEC Division of Corporation Finance, [Financial Reporting Manual](#)

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KPMG’s Financial Reporting View

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