

SEC Expands Availability of Confidential Review Process to Encourage Flexibility in Capital Formation

On March 3, 2025, the Securities and Exchange Commission (SEC) staff issued guidance that expands the existing accommodations available to companies to submit draft registration statements to the SEC for confidential, nonpublic review. The new SEC guidance has the following effect:

- Makes the confidential review process available for the initial registration of a class of securities under the Exchange Act to include both Section 12(b) and Section 12(g) registration statements on Forms 10, 20-F, or 40-F.
- Permits a company to submit draft registration statements regardless of how much time has passed since it became a reporting company.
- Expands the availability of the confidential review process for a de-SPAC transaction in situations where the SPAC is the surviving entity (*i.e.*, SPAC-on-top structure) as long as the target is eligible to submit a draft registration statement.
- Allows companies to omit the name of the underwriter(s) from their initial draft registration statement submissions, when otherwise required, as long as they include the name of the underwriter(s) in subsequent submissions and public filings.

The expanded accommodations, further described below, make the confidential review process available to more companies and types of filings and, according to the SEC's statement, are intended "to provide new and existing companies greater flexibility to explore and plan public offerings."

IPOs and Initial Exchange Act Registrations

The SEC will continue its current practice to confidentially review draft initial registration statements under the Securities Act and Section 12(b) of the Exchange Act as long as the company confirms in a cover letter that it will publicly file its registration statement and nonpublic draft submissions at least 15 days prior to a road show or the intended effective date of the registration statement. The SEC will continue to publicly release its comment letters and the company responses no earlier than 20 business days after the effective date of the registration statement.

Under the new SEC guidance, this process has also been expanded and will now be available for the initial registration of a class of securities under Section 12(g) of the Exchange Act on Forms 10, 20-F or 40-F.

Follow-On Offerings

Prior to the new guidance, the SEC would only allow confidential submissions for follow-on offerings prior to the end of the IPO or registration under Section 12(b) of the Exchange Act. Under the new SEC guidance, the SEC will accept initial confidential submissions in connection with any offering under the Securities Act or registration of a class of securities under the Exchange Act (either Section 12(b) or 12(g)) regardless of how much time has passed since the company became a reporting company. Consistent with prior guidance, the SEC will limit its nonpublic review to the initial submission with a public filing required for any company response to staff comments or amendments to the registration statement. The company will also be required to confirm that it will file its registration statements and nonpublic draft submission at least two business days before a requested effective time and date. In addition, companies will need to publicly file Exchange Act registration statements on Forms 10, 20-F, and 40-F so that the full 30- or 60-day period, as applicable, will run prior to effectiveness.



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De-SPAC Transactions

Under the new guidance, a company can confidentially submit a registration statement for a de-SPAC transaction as if it were an IPO if the co-registrant target would otherwise be independently eligible to submit a draft registration statement under the new guidance. The SEC has indicated it views the de-SPAC as the functional equivalent of the target's IPO.

Foreign Private Issuers

Foreign private issuers have the option to either submit draft registration statements in accordance with this new guidance, continue to follow the existing procedures available to emerging growth companies (if they qualify as such) or follow the SEC's guidance from 2012.

Process and Content of Draft Registration Statement

In the new guidance, the SEC reiterated its prior position that although a draft registration statement should be substantially complete, the SEC will not delay processing if a company reasonably believes omitted financial information will not be required at the time the registration statement has to be publicly filed.

The new guidance also allows companies to omit the name of their underwriter(s) from their initial submissions as long as the name of the underwriter(s) are included in subsequent submissions and public filings. This will give companies the ability to start the confidential submission process earlier.

Companies may submit questions about their eligibility to use the enhanced accommodations to the SEC at CFDraftPolicy@sec.gov.
