

SEC Expands Confidential Filing Options for Companies Submitting Draft Registration Statements

WRITTEN BY

Nicole A. Edmonds | Rakesh Gopalan | Joseph T. Cataldo | Alexander T. Yarbrough

This article was republished in INSIGHTS: The Corporate & Securities Law Advisor (Volume 39, Number 5, May 2025).

On March 3, 2025, the Securities and Exchange Commission's (SEC) Division of Corporation Finance [announced](#) that it has expanded its confidential filing process for certain draft registration statements submitted for nonpublic review. Since 2012, many issuers have been able to confidentially submit draft filings to initially register a class of securities using certain registration statements under the Securities Exchange Act of 1934 (Exchange Act). Companies will now also be permitted to confidentially submit drafts of registration statements under the Securities Act of 1933 (Securities Act) for follow-on offerings, regardless of how much time has passed since their initial public offering (IPO). The SEC hopes this expansion will further promote capital formation, while maintaining important investor protections.

In 2012, the Jumpstart Our Business Startups Act (JOBS Act) provided a mechanism for “emerging growth companies” (EGCs) to submit confidential draft registration statements for IPOs for nonpublic review by the SEC staff. After finding positive results for EGCs, the SEC then expanded these accommodations in 2017 to allow for all issuers to submit confidential draft registration statements in connection with an IPO, along with most types of offerings made in the first year after the given IPO. Virtually all companies considering an IPO have since taken advantage of this confidential submission process as it defers public disclosure and potential market scrutiny during the SEC review process.

Follow-On Securities Act Registration Statements

Under the [enhanced accommodations](#), companies will now be permitted to confidentially submit the first draft of a registration statement under the Securities Act for follow-on offerings, regardless of how much time has passed since their IPO or initial Exchange Act Section 12(b)[1] registration statement. The Division of Corporation Finance's prior policy limited the submission of draft registration statements under the Securities Act for nonpublic review to one year after an issuer's IPO or initial Exchange Act Section 12(b) registration statement. Companies should keep in mind that the SEC will continue its past practice of limiting nonpublic review to only the initial submission. Any subsequent amendments to a registration statement, as well as the confidential submission, will need to be publicly filed at least two business days prior to effectiveness.

This new change in SEC policy has several potential benefits for companies considering raising additional capital

in the U.S. public markets, including:

- *Non-Shelf Follow-On Offerings.* Companies who are not eligible to use a shelf registration statement (or that may be limited due to the “baby shelf” rules of Forms S-3 and F-3) may hesitate or avoid follow-on offerings — for example on Form S-1 — due to the potential for SEC review. Additionally, such follow-on registration statements can attract publicity and unwanted market scrutiny and speculation before an offering begins. Submitting a draft registration statement for nonpublic review allows these companies and underwriters to assess whether SEC review may delay plans for a contemplated offering without the market reacting to an offering prematurely based on a preliminary registration statement filing.
- *New Non-WKSI Shelf Registration Statements.* Companies eligible to file a new non-WKSI^[2] shelf registration statement on Forms S-3 and F-3 are typically sensitive to the timing of a shelf registration statement filing, even if they don’t plan for an imminent capital raise (*i.e.*, a “takedown”), as these types of registration statements register a general dollar amount of securities for offerings in the future. These new accommodations provide additional flexibility in the timing for submitting initial shelf registration statement filings, enabling companies to obtain further clarity on whether the SEC will review and comment on the filing.

Initial Exchange Act Registration Statements

The enhanced accommodations also expand the permitted types of forms that can be submitted for nonpublic review under the Exchange Act. The SEC will now accept for nonpublic review a draft registration statement relating to the registration of a class of securities under Section 12(b) or Section 12(g)^[3] of the Exchange Act using Forms 10, 20-F, or 40-F. This development represents a change from prior policy and adds Section 12(g) registrations to the list of draft registration statements that the SEC staff will review on a nonpublic basis.

Content of Draft Registration Statements

In addition, these enhanced accommodations also allow for the omission of certain underwriter information in the initial draft registration statement submission when otherwise required by Items 501 and 508 of Regulation S-K. This accommodation will offer issuers more flexibility to begin the review process by SEC staff much earlier, even if the underwriter(s) have not yet been finalized for an offering. Issuers will still need to later provide the name of the underwriter(s) in subsequent submissions and public filings.

Foreign Private Issuers

Foreign private issuers (FPI) may also avail themselves of the new guidance. Additionally, consistent with the SEC’s prior policy, if an FPI qualifies as an EGC, it may continue to take advantage of the statutory JOBS Act process for EGCs or it may choose to comply with the SEC staff’s policy-based accommodations.

De-SPACs

Lastly, given the rise in popularity of SPACs^[4] in recent years, the new accommodations also now permit issuers to submit a draft registration statement on Forms S-4 and F-4 for nonpublic review in connection with a “de-

SPAC” transaction (*i.e.*, a business combination between a SPAC and a private target company). The Division of Corporation Finance believes this approach is consistent with the SEC’s position that such transactions are the “functional equivalent” of the private target company’s IPO and should be effectively treated as such.

These enhanced accommodations are a welcome development for many issuers looking for additional procedures to further facilitate capital formation in an efficient manner, while avoiding market speculation.

[1] Section 12(b) of the Exchange Act applies to any class of security that is to be listed on a national securities exchange (*e.g.*, NYSE or Nasdaq).

[2] “**WSKI**” refers to a “well-known seasoned issuer,” which is a category of issuer that allows greater flexibility in accessing U.S. public markets. As of the applicable measuring date, a WSKI generally must have had an outstanding minimum \$700 million in worldwide market value of voting and nonvoting equity held by nonaffiliates or have issued in the last three years at least \$1 billion aggregate amount of nonconvertible securities other than common equity, in primary offerings for cash, not exchange.

[3] Section 12(g) of the Exchange Act requires an issuer to register a class of equity securities if (1) its total assets exceed \$10 million; and (2) it meets the holders of record threshold triggering registration: (A) for issuers that are banks or bank holding companies or savings and loan holding companies, there are 2,000 or more record holders of that class of equity securities; or (B) for issuers that are not banks or bank holdings companies or savings and loan holding companies, there are either 2,000 or more record holders of that class of securities or 500 or more record holders of that class of securities that are not “accredited investors” (as defined in Rule 501(a) of the Securities Act). An issuer that does not meet the size requirements can still voluntarily register a class of equity securities under Section 12(g) (*e.g.*, to enable the quotation of its securities on the over-the-counter market).

[4] “**SPAC**” refers to a “special purpose acquisition company,” which is a blank check company formed for the purpose of effecting a merger, share exchange, asset acquisition, share purchase, reorganization or similar business combination with one or more businesses (a business combination transaction).

RELATED INDUSTRIES + PRACTICES

- [Capital Markets](#)
- [Corporate](#)