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# SEC Makes Nonpublic Review Process for Draft IPOs and Initial Registration Statements Available to All Companies

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## Introduction

On June 29, 2017, in a manner consistent with SEC Chairman Jay Clayton's priority of enhancing capital formation, the SEC's Division of Corporation Finance (the "Division") issued an [announcement](#) (the "Announcement") that as of July 10, 2017, the SEC is extending to all companies benefits similar to those related to the confidential review of draft registration statements that are provided to emerging growth companies (EGCs) under the Jumpstart Our Business Startups (JOBS) Act.<sup>1</sup> The Division also released a companion series of [frequently asked questions](#) (FAQs).

"By expanding a popular JOBS Act benefit to all companies, we hope that the next American success story will look to our public markets when they need access to affordable capital." — SEC Chairman Jay Clayton

<sup>1</sup> The JOBS Act was subsequently amended by the Fixing America's Surface Transportation (FAST) Act.

Previously, the benefits that are now being expanded to include all companies were available only to EGCs,<sup>2</sup> a category of issuers created in April 2012 by the JOBS Act. Registrants that qualify as EGCs can avail themselves of certain benefits, including the voluntary submission of confidential draft initial registration statements and certain scaled disclosures during and after an initial public offering (IPO). Certain disclosure relief and accommodations provided by the JOBS Act, such as the ability to file a registration statement for an equity IPO with two years of audited financial statements instead of three years, are still available only to issuers that qualify as EGCs. See the [appendix](#) to this *Heads Up* for a summary of benefits available to EGCs compared with those now available to non-EGCs.

The benefits provided to all registrants by the Announcement are further discussed below.

## Draft Registration Statements

Any company will be able to voluntarily submit the following draft registration statements to the SEC staff for nonpublic<sup>3</sup> review before the company's public filing:

- *IPO and initial registration statement under the Securities Act of 1933 (the "Securities Act")* — The company will be required to publicly file such drafts and any related amendments with the SEC no later than 15 days before (1) its road show<sup>4</sup> or (2) its requested effective date if no roadshow is planned. In addition, the company will be required to confirm, in a cover letter to the SEC accompanying the initial nonpublic filing, that it will publicly file its registration statement and draft submissions within that prescribed time.
- *Registration statement under Section 12(b) of the Securities Exchange Act of 1934 (the "Exchange Act") for a class of securities (e.g., Form 10)* — The company will be required to publicly file such draft and any related amendments with the SEC no later than 15 days before the anticipated effective date of the registration statement. In addition, the company will be required to confirm, in a cover letter to the SEC accompanying the initial nonpublic filing, that it will publicly file its registration statement and draft submissions within that prescribed time.
- *Securities Act offerings within one year of an IPO or Exchange Act Section 12(b) registration* — An issuer may voluntarily submit for nonpublic review a draft registration statement within one year of the effective date of either its initial Securities Act registration statement or its Exchange Act Section 12(b) registration statement. This accommodation is available only for the initial submission. A registrant that files a draft registration statement in these circumstances must subsequently respond to Division staff comments on the draft registration statement by means of a public filing rather than a revised draft registration statement. At the time of the public filing, the previously submitted draft registration statement should also be filed. The public filing must be available on EDGAR for at least 48 hours before the issuer's requested effective date for the registration statement.

Foreign private issuers (FPIs) may follow these new procedures as outlined in the Announcement, those available to EGCs (if the FPI qualifies as an EGC), or the [guidance](#) on nonpublic submissions from FPIs updated on May 30, 2012. The Announcement will not affect the existing confidential submission process for EGCs.

<sup>2</sup> See Topic 10, "Emerging Growth Companies," of the Division's [Financial Reporting Manual](#) (FRM) for the Division staff's guidance on the eligibility and scaled disclosure provisions applicable to EGCs.

<sup>3</sup> Companies should consider the SEC's Rule 83 (17 CFR 200.83) when submitting a draft registration statement for nonpublic review, which may be different from a confidential submission by an EGC.

<sup>4</sup> Rule 433(h)(4) of the Securities Act defines a road show as "an offer . . . that contains a presentation regarding an offering by one or more members of the issuer's management . . . and includes discussion of one or more of the issuer, such management, and the securities being offered."

## Omission of Certain Financial Information From Draft Registration Statements

### Financial Statements of the Registrant

A company may omit financial information from a draft registration statement for historical periods currently required if the company reasonably believes that it will not be required to include these historical periods at the time of the public filing. This provision is likely to apply when the SEC's review process extends through a financial statement staleness date. When a company files publicly for the first time, it must include all financial information required as of the public filing date.

#### Example

A calendar-year-end company submits a draft registration statement in December 2017 and reasonably expects to file publicly in April 2018 when annual financial statements for 2017, 2016, and 2015 will be required. In such a case, the company may omit its 2014 annual financial statements (and include only 2015 and 2016 annual periods) from its nonpublic draft registration statement because the 2014 annual financial statements will not be required at the time of the public filing.

We believe that when evaluating which interim periods to include in a draft registration statement, companies may consider the concepts in the previously issued [Compliance and Disclosure Interpretations \(C&DIs\) related to the FAST Act](#), which clarify that interim financial information for the most recent fiscal period and the comparative prior period should be included in the draft registration statement if the annual fiscal periods will be included in the public filing. Thus, interim financial statements would be required in each filing of a draft registration statement since any periods presented in those statements will ultimately be included in either year-to-date interim periods or the annual periods presented in the registration statement as of the public filing date.

#### Example

A calendar-year-end company submits a draft registration statement in December 2017 and reasonably expects to file publicly in April 2018 when annual financial statements for 2017, 2016, and 2015 will be required. In such a case, the company may not omit its nine-month 2017 and 2016 interim financial statements from its nonpublic draft registration statement because those periods, while not presented separately, will be included in the annual financial statements that will be required when filed publicly in April 2018.



### Connecting the Dots

Question 7 of the FAQs related to the Announcement clarifies that non-EGC registrants would need to include all financial information required at the time the registration statement is **publicly filed** and that the SEC will not process a publicly filed registration statement if such financial information is omitted. This guidance differs from the relief provided by Section 71003 of the FAST Act, which allows EGCs to omit financial information (on Form S-1 or Form F-1) that the company reasonably believes it will not be required to include in the registration statement “at the time of the **contemplated offering**” (emphasis added).<sup>5</sup>

<sup>5</sup> The general instructions to Form S-1 and Form F-1 indicate that before the registrant distributes a preliminary prospectus to investors, the registration statement must be amended to include all financial information required under Regulation S-X.

A company that does not take advantage of the Division's new nonpublic review process and elects to publicly file its initial registration statement would not be allowed to omit from its initial registration statement financial information that it reasonably believes will not be required at the time of the contemplated offering. If a company believes that an accommodation would be appropriate in a registration statement that is publicly filed, reasonable requests for such an accommodation may be directed to the relevant Assistant Director Office in the Division that is responsible for performing the review. See [Rule 3-13 Waivers and Other Requests](#) below.

## Financial Statements of Other Entities

Financial statements of other entities (e.g., an acquired business under Regulation S-X, Rule 3-05<sup>6</sup>) may also be required in a draft registration statement. We believe that in a manner consistent with the accommodations already available to EGCs, a company may omit from its draft registration statement such financial statements and the related pro forma financial information required under Regulation S-X, Article 11,<sup>7</sup> if the company reasonably believes that those financial statements will not be required at the time of the public filing.

### Example

A calendar-year-end company that plans to submit a draft registration statement in the fall of 2017 completes a significant acquisition in the fourth quarter of 2016. The acquisition is significant in such a way that one year of the acquiree's financial statements would generally be required under Rule 3-05. The company plans to update its draft registration statement to include its 2017 annual financial statements before a public filing in 2018. Thus, after that update, the acquired business will have been part of the company's financial statements for a sufficient amount of time to eliminate the need for separate financial statements. In this scenario, the Division staff will not delay its review of the draft registration statement in the fall of 2017 if the acquiree's financial statements and the related pro forma financial information are omitted from the submission.

## Rule 3-13 Waivers and Other Requests

The Announcement states that the Division staff "will consider an issuer's specific facts and circumstances" when reviewing any waiver requests made under Regulation S-X, Rule 3-13.<sup>8</sup> Rule 3-13 has historically given the staff the authority to permit the omission or substitution of certain financial statements otherwise required under Regulation S-X "where consistent with the protection of investors."<sup>9</sup> While the staff has historically permitted the omission or substitution of certain financial statements under this provision in certain circumstances, the reference to Rule 3-13 in the Announcement emphasizes that the staff will consider granting such waivers, particularly when a company can demonstrate that the information is not meaningful, relevant, or necessary to protect investors.

In this regard, at the SEC and Financial Reporting Institute Conference on June 8, 2017, Mark Kronforst, chief accountant of the Division, discussed Rule 3-13 waivers. Mr. Kronforst's remarks focused on the history of Rule 3-13 and the current landscape, and he urged companies to discuss their facts and circumstances with the Division staff.

Examples of waiver requests under Rule 3-13 include:

- Provision of abbreviated financial statements (e.g., statement of revenues and direct expenses) in lieu of full financial statements for a recently acquired business under Rule 3-05.

<sup>6</sup> SEC Regulation S-X, Rule 3-05, "Financial Statements of Businesses Acquired or to Be Acquired."

<sup>7</sup> SEC Regulation S-X, Article 11, "Pro Forma Financial Information."

<sup>8</sup> SEC Regulation S-X, Rule 3-13, "Filing of Other Financial Statements in Certain Cases."

<sup>9</sup> Quoted from Rule 3-13.

- Omission of one or more years of historical financial statements for a recently acquired business subject to Rule 3-05.
- Omission of certain financial statements of an equity method investment under Regulation S-X, Rule 3-09.<sup>10</sup>



### Connecting the Dots

The Division's Office of the Chief Accountant answers written requests about the form and content of financial statements and other financial information that needs to be included in SEC filings; such requests are often referred to as waiver letters or prefiling letters.

At the December 2016 AICPA Conference on Current SEC and PCAOB Developments, the Division staff discussed the prefiling letter process and recommended that when a registrant prepares a prefiling letter to the Division, the registrant should (1) focus on relevant facts, (2) propose solutions and provide adequate support for such proposals, and (3) show the letter to its auditors and consider their input before submitting the letter.

Separately, registrants may also be faced with complex accounting matters. Registrants are encouraged to submit a prefiling letter to the SEC's Office of the Chief Accountant (OCA) on the proposed application of U.S. GAAP to resolve these complex issues before filing. This may help avoid significant changes to the document that may result from the SEC review process. For best practices related to consulting with the OCA, see the [guidance](#) on the SEC's Web site.

Further, the Announcement clarifies that the Division staff will consider reasonable requests to expedite the processing of both draft and filed registration statements. Companies and their advisers are encouraged to review their timing with the staff members assigned for review.



### Connecting the Dots

Requests to expedite the processing of both draft and filed registration statements should be directed to the relevant Assistant Director Office in the Division that is responsible for performing the review.

## Considerations Related to Filing a Draft Registration Statement

If a company elects to submit its registration statement to the SEC under the Announcement, the submission will not immediately be posted to EDGAR (unlike a typical registration statement, which is posted to EDGAR shortly after being filed). Any nonpublic draft registration statements will be publicly filed at the time of the first public filing. SEC comment letters and the related responses that the company submitted to the SEC staff for nonpublic review will be made publicly available on EDGAR by the staff no sooner than 20 business days after the effective date of the registration statement.

When filing a draft registration statement for nonpublic review, companies should consider the following:

- The draft registration statement must be "substantially complete" (i.e., it must contain a signed audit report from the company's registered public accountant and meet all line item requirements applicable to the registration statement, including the requirement to provide all necessary exhibits).

<sup>10</sup> SEC Regulation S-X, Rule 3-09, "Separate Financial Statements of Subsidiaries Not Consolidated and 50 Percent or Less Owned Persons."

- For a draft registration statement, companies do not need to include items such as the required signatures of executives and directors, the auditor's consent, and the filing fee.
- An issuer's registration statement at the time of its initial public filing should:
  - Be devoid of any indications that it is nonpublic.
  - Be complete (e.g., it should include signatures, signed audit reports, consents, exhibits, and any required filing fees).
  - Include the filing of any previously submitted draft registration statements.

For additional information about submitting a draft registration statement on EDGAR, see the Technical Note in the Announcement.

Allowing all companies to submit initial registration statements for nonpublic review will give initial filers (1) more flexibility when they are planning their IPO, (2) the ability to keep such statement nonpublic for an extended period and thereby delay any public review or scrutiny of their private business, and (3) the opportunity to evaluate the significance of the SEC comment letter process and its potential effects on the intended timeline. For secondary offerings, this process may help reduce exposure to potential market fluctuations. The changes described in the Announcement are a first step in achieving the SEC's priority of improving access to the capital markets. Stay tuned since further changes may be coming.

## Appendix — Key Benefits Under the JOBS Act

The table below compares JOBS Act benefits available to EGCs and non-EGCs, respectively.

Description of Benefit	EGCs <sup>(a),(b)</sup>	Non-EGCs <sup>(b)</sup>
Submit draft registration statements for:		
Securities Act IPOs and initial registration statements	X	X
Exchange Act Section 12(b) registration statement (e.g., Form 10)	X	X
Securities Act offerings within one year of an IPO or Exchange Act Section 12(b) registration statement	X	X
Omit financial information <sup>(c)</sup> from a draft registration statement if a company reasonably believes that it will not be required:		
At the time of the <b>offering</b> <sup>(d)</sup>	X <sup>(e)</sup>	
At the time of the <b>public filing</b>	X	X
Include only two years of audited annual financial statements in:		
An IPO of common equity securities	X	
An IPO of debt securities or Exchange Act registration statements (e.g., Form 10)	<sup>(f)</sup>	
May limit the annual financial statements of significant acquisitions under Rule 3-05 or equity method investments under Rule 3-09 to a maximum of two years in:		
An IPO of common equity securities	X	
An IPO of debt securities or Exchange Act registration statements (e.g., Form 10)	<sup>(f)</sup>	
Not required to present selected financial data <sup>(g)</sup> for periods before the earliest year of financial statements presented in the IPO	X	
May elect to defer the adoption of new or revised accounting standards until they become effective for private companies (i.e., nonissuers) <sup>(h)</sup>	X	
Eligible for reduced executive compensation disclosures	X	
May omit management's assessment of internal control over financial reporting under Sarbanes-Oxley Act (SOX) Section 404(a) in the <b>first</b> Form 10-K after an IPO	X	X
May omit the auditor's assessment under SOX Section 404(b):		
In the first Form 10-K after an IPO	X	X
In the next four annual periods if the registrant continues to qualify as an EGC	X	

<sup>(a)</sup> See Topic 10 of the FRM for additional information about the eligibility requirements for, and accommodations available to, EGCs.

<sup>(b)</sup> See Topic 5, "Smaller Reporting Companies," of the FRM for information about the eligibility requirements for, and additional relief available to, smaller reporting companies.

<sup>(c)</sup> We believe this may also include financial information of entities other than the registrant (i.e., under Rule 3-05 or Rule 3-09).

<sup>(d)</sup> The general instructions to Form S-1 and Form F-1 indicate that before the registrant distributes a preliminary prospectus to investors, the registration statement must be amended to include all financial information required under Regulation S-X.

<sup>(e)</sup> This applies only to IPOs of debt or equity securities on Form S-1 or Form F-1. For example, it would not apply to draft registration statements on Form S-11 or Form 10.

<sup>(f)</sup> An EGC would generally be required to present three years of financial statements for an IPO of debt securities or a registration statement on Form 10. See paragraph 10220.1 of the FRM for more information.

<sup>(g)</sup> In accordance with SEC Regulation S-K, Item 301, "Selected Financial Data."

<sup>(h)</sup> EGCs should refer to Section 10230, "Accounting Standards Transition Period Accommodation," of the FRM for more information.

The table above is not intended to be all-inclusive. We recommend that an issuer refer to the SEC regulations, read the guidance in the FRM, and consult with its external auditors and SEC counsel on the application of SEC reporting requirements before submitting any registration statement or current report on Form 10-K.

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