

All Issuers Eligible to Confidentially Submit Draft IPO Registration Statements

July 6, 2017

One of the more utilized provisions of the Jumpstart Our Business Startups Act (JOBS Act) has been the confidential submission of IPO registration statements by Emerging Growth Companies (EGCs) to the Securities and Exchange Commission¹. The nonpublic nature of the SEC review process has allowed EGCs to submit IPO registration statements and respond to SEC comments outside the public eye and without having to alert the market of their intention to go public. As of July 10, 2017, all issuers will now have the ability to submit draft registration statements to the SEC on a confidential basis.

The confidential submission and review process will apply to:

- initial Securities Act registration statements;
- initial registration statements related to a class of securities under Section 12(b) of the Securities Exchange Act; and
- registration statements filed within one year of the effective date of the above-referenced registration statements (the SEC noted that nonpublic review in these cases will be limited to the initial submission; responses to SEC comments should be done via a public filing).

Draft submissions do not need to be signed by an issuer's officers and directors or include auditor consents. Additionally, no fee is required until a registration statement is filed publicly. In order to avail itself of the confidential submission and review process, an issuer is required to confirm in a cover letter to the SEC that it will publicly file its registration statement and all nonpublic draft submissions at least 15 days prior to the commencement of a road show (or at least 15 days prior to the requested effective date of the registration statement if no road show is taking place). The SEC announcement notes that although draft registration statements should be substantially complete when submitted, it will not delay its review if an issuer reasonably believes that omitted financial information will not be required at the time the registration statement is publicly filed.

The SEC subsequently issued a list of [FAQs](#) that address some of the technical

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- Capital Markets
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aspects of its new policy, including how an issuer obtains EDGAR codes. Importantly, non-EGCs cannot take advantage of some of the other benefits available to EGCs under the JOBS Act, including the ability to use test-the-water communications and reduced disclosure and governance requirements.

The SEC's new policy should facilitate capital formation by allowing a potential issuer to commence the review process for a registration statement without making known publicly its intention to go public, thus avoiding the stigma associated with a failed IPO if it decides to abort the process prior to the public filing of its registration statement. In addition, the upfront costs associated with the confidential submission process are typically lower than those for the public filing and review process, making confidential submissions an attractive option for companies considering going public.

¹ An Emerging Growth Company is defined as an issuer with total annual gross revenues of less than \$1.07 billion during its most recently completed fiscal year.