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SEC EXPANDS ACCOMMODATIONS FOR ISSUERS SUBMITTING DRAFT REGISTRATION STATEMENTS

On March 3, 2025, the Staff of the Division of Corporation Finance of the Securities and Exchange Commission (the "SEC") announced a new policy, with immediate effect, expanding the accommodations available for issuers that submit draft registration statements for confidential review. The new enhanced accommodations:

- expand the availability of the SEC's confidential review process for the initial registration of a class of securities under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to include both Section 12(b) and Section 12(g) registration statements on Forms 10, 20-F, or 40-F;
- permit issuers to submit draft registration statements regardless of how much time has passed since the issuers became subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act;
- expand 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; and
- permit issuers to omit the name of the underwriter(s) from their initial draft registration statement submissions when otherwise required by Items 501 and 508 of Regulation S-K, provided that they include the name of the underwriter(s) in subsequent submissions and public filings.

While the new Staff policy is helpful and, we believe, a step in the right direction, the accommodations raise a number of practical and legal considerations and questions that we highlight in this Legal Update.

BACKGROUND

In 2012, the Jumpstart Our Business Startups Act ("JOBS Act") established the SEC's confidential review process allowing emerging growth companies ("EGCs") to submit draft registration statements for initial public offerings ("IPOs") for confidential, nonpublic Staff review. The confidential process was intended to allow an EGC to defer the public disclosure of certain material or sensitive information until closer to the offering's marketing. If the EGC decided not to proceed with the marketing, the confidential information would not be publicly disclosed. Building on the success of the JOBS Act provisions, in 2017, the Staff extended to all issuers the ability to submit confidentially draft registration statements under the

Securities Act of 1933, as amended (the "Securities Act"), initial public offerings under Section 12(b) of the Exchange Act, and most securities offerings made within the first 12 months of an issuer becoming an SEC-reporting company.

Over the past ten years, significant market practice has developed in this area, with almost all eligible issuers choosing to submit draft registration statements for review by the Staff on a confidential basis. This enthusiastic market adoption has not raised any credible investor-protection concerns.

SEC STAFF'S NEW POLICY

Confidential review of initial draft registration statements filed pursuant to the Exchange Act

The Staff's new policy expands availability of the confidential review process to the initial registration statement of any class of securities registered under the Exchange Act, including a registration statement filed pursuant to Exchange Act Section 12(g). An issuer may now submit for confidential review any initial registration statement for a class of securities on Forms 10, 20-F or 40-F under either Section 12(b) or Section 12(g) of the Exchange Act.

Importantly, amendments to initial registration statements are still required to be publicly filed.

In terms of timing, registration statements under Section 12(g) will become effective automatically 60 calendar days after the issuer publicly files the registration statement, while registration statements under Section 12(b) become effective automatically 30 calendar days after the SEC receives approval of the company's listing from a national securities exchange. The full 30- or 60-day period, as applicable, must elapse between public filing and effectiveness (in other words, the clock does not begin to run on a confidentially filed draft registration statement). If an issuer is required to file a registration statement by the terms of Section 12(g) of the Exchange Act, a confidential submission will not satisfy the issuer's requirement to file the registration statement within 120 calendar days from the end of its fiscal year. In all cases, issuers seeking to rely on the confidentiality accommodation must do so early enough to receive SEC staff comments and still meet the public filing deadlines.

Confidential review of initial draft registration statements regardless of timing

Prior to the newly adopted accommodations, the SEC only accepted draft registration statements that were submitted prior to the end of the 12-month period following the effective date of an issuer's initial Securities Act registration statement or an issuer's Section 12(b) Exchange Act registration statement. The SEC now will accept for confidential review an initial draft registration statement for any offering regardless of how much time has elapsed since the issuer first became a public reporting company. This includes shelf registration statements on Forms S-3 and F-3 and registration statements on Forms S-4 and F-4 for business combinations and exchange offers. This change significantly expands the number of registration statements that will now have the confidential review option.

In the announcement adopting the new policy, the Staff confirmed that an issuer submitting a draft registration statement for confidential review under the new accommodations will need to publicly file its registration statement at least two business days prior to any requested effective date. The Staff also

confirmed that it will continue to limit the availability of the confidential review process to a single initial submission. All amendments to the registration statement, whether responding to Staff comments, updating applicable financial information or otherwise, must be made with a public filing.

Non-public review process available to certain de-SPAC transactions

On January 24, 2024, the SEC adopted rules addressing the treatment under the federal securities laws of special purpose acquisition companies ("SPACs") in connection with their IPOs and their subsequent business combination transactions ("de-SPAC transactions") with target operating companies. Now, the target company in a de-SPAC transaction must be a co-registrant in connection with the registration statement on Form S-4 or Form F-4 that is filed as part of the de-SPAC transaction (the "de-SPAC Registration Statement"). As part of its new policy, the Staff will allow issuers to submit a de-SPAC Registration Statement for confidential review so long as the co-registrant target company would otherwise be independently eligible to submit a draft registration statement. This approach is consistent with the Staff's stated view that a de-SPAC transaction is the functional equivalent of an IPO of the target company's securities.

Omission of certain financial information and names of underwriters

Finally, the Staff confirmed that an issuer may omit financial information so long as it reasonably believes the information will not be required at the time the registration statement is publicly filed. In addition, an issuer may omit the name of the underwriter(s) from their initial registration statement submissions so long as the underwriter(s) is identified in subsequent submissions and public filings.

PRACTICAL IMPLICATIONS AND THOUGHTS ON NEXT STEPS

Companies taking advantage of the Staff's confidential review process should discuss the timing of the proposed transaction with the Staff member assigned to review their submissions. The Staff noted that it will process confidential submissions and filed registration statements in the normal course, but indicated that it will consider reasonable requests to expedite processing of drafts. Issuers wishing expedited processing should speak to the Staff members responsible for reviewing their registration statements as early in the review process as possible, and provide updates on timing to the Staff as appropriate.

In addition, foreign private issuers may choose to take advantage of the new accommodations, but, like domestic issuers, are not required to do so.

Overall, the additional flexibility and overall accommodative approach from the Staff is welcome, but raises important practical considerations and questions with respect to the intended operation and mechanics of these new provisions. For instance, the confidential review process has the potential to change the typical shelf-offering timeline. Currently, only issuers qualifying as well-known seasoned issuers ("WKSIs") can file immediately effective registration statements, providing flexibility to make offers of securities at any time. Now, non-WKSIs can have a registration statement with specific financing details reviewed confidentially and only need to have the registration statement publicly filed for two days before proceeding with a capital raise. Similar to an IPO's pricing, this timing will require coordination with the Staff, including expedited review. Further guidance from the Staff on the type of reasonable request that

would result in expediting the two-business-day period would be useful to market participants. Other potential questions include, but are not limited to, the following:

- Will issuers be required to wait two business days after publicly filing a registration statement before submitting an acceleration request seeking effectiveness pursuant to Rule 461 under the Securities Act, and then be required to wait up to an additional two business days before the registration statement is declared effective?
- May issuers make sales of securities after submitting a draft registration statement for confidential review if the issuer has an effective shelf registration statement?
- If an issuer is confidentially marketing a public offering while its registration statement is under confidential review, may the issuer share the confidential submission with prospective investors, assuming they have made a confidentiality undertaking?
- May an issuer engaged in negotiations in connection with an M&A opportunity confidentially submit a Form S-4 registration statement relating to the transaction prior to a definitive agreement being entered into or publicly announced?
- May an expiring shelf registration statement be granted the 180 day effectiveness extension pursuant to Rule 415(a)(5)(ii) under the Securities Act if a new draft shelf registration statement is submitted for confidential review prior to the expiration of the existing shelf registration statement?
- The reliance on the Securities Act's current communication safe harbors depends in part on the filing status or timing of an issuer's registration statement. What communication safe harbors would issuers be permitted to rely on while a registration statement is being confidentially reviewed?

In sum, this policy is a helpful expansion of the confidential review process, which has proven widely popular and universally embraced by issuers. We hope that the Staff provides additional guidance on the operation of the policy and continues down this path in the future.

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