

Memorandum

SEC Expands Availability of Confidential Review Process

June 30, 2017

On June 29, 2017, the Division of Corporation Finance of the Securities and Exchange Commission announced that, beginning July 10, 2017, confidential SEC Staff review of registration statements submitted in connection with initial public offerings will be available to all issuers, and not only to issuers with less than \$1.07 billion in annual revenue that otherwise qualify as “emerging growth companies,” or EGCs. In addition, confidential review will now also be available for registration statements submitted in connection with spin-offs and for registration statements submitted prior to the end of the twelfth month following the issuer’s IPO or spin-off.¹ Confidential review has been one of the most popular of the capital access reforms implemented by The Jumpstart Our Business Startups Act of 2012 (the “JOBS Act”), but prior to the new policy had been available only to EGCs and only in connection with an IPO.

Under the new policy, any issuer will be entitled to confidential review by the SEC of the registration statement for its IPO or spin-off although, consistent with current treatment of IPOs for EGCs, the initial confidential submission and all amendments must be publicly filed at least 15 days prior to the earlier of the start of the road show or the requested effective date, in the case of an IPO, and the effective date of the issuer’s listing on a national securities exchange in the case of a spin-off. In addition, any issuer will be entitled to confidential review of the initial submission of a draft registration statement relating to an offering that is submitted prior to the first anniversary of the pricing of its IPO, or in the case of a spin-off, its initial listing date. In these cases, the registration statement must be made public at least 48 hours prior to the requested effective time and date (typically, shortly before the anticipated pricing of the offering), and nonpublic review will be limited to the initial submission; amendments responsive to SEC comments would be made with a public filing rather than a revised confidential submission.

¹ See Draft Registration Statement Processing Procedures Expanded available at <https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>.

The Division also announced that, consistent with current treatment of IPOs by EGCs, it will not decline to review a draft registration statement that omits financial information that an issuer reasonably believes will not be required at the time the registration statement is publicly filed. This policy change will enable filers to commence the SEC review process prior to the end of a fiscal year without including financial statements for periods that would no longer be required once financial statements for the following fiscal year become available if the IPO or spin-off will not occur until that time.

Issuers that do not qualify as EGCs still will not be eligible for other benefits of such status, including the ability to present only two years of audited financial statements and reduced disclosure regarding executive compensation in an IPO registration statement. Similarly, non-EGCs will still not have the ability to conduct testing the waters meetings with potential IPO investors.

The Division's announcement represents a significant step in furthering the stated policy goal of SEC Chair Jay Clayton to facilitate capital formation and encourage U.S. IPOs in a manner that is consistent with investor protection. In the years since the enactment of the JOBS Act, the majority of U.S. IPOs have involved issuers that qualified as EGCs. The new policy will likely be of particular benefit to issuers backed by private equity sponsors, which tend to be larger than other IPO issuers. The ability to make confidential submissions in the first year after listing will also provide private equity sponsors additional flexibility in the planning and execution of follow-on offerings.

For further information about this memorandum, please contact one of the following members of the Firm's Corporate Department.

WASHINGTON, D.C.

Joshua Ford Bonnie

+1-202-636-5804

jbonnie@stblaw.com

William R. Golden III

+1-202-636-5526

wgolden@stblaw.com

NEW YORK CITY

Joseph H. Kaufman

+1-212-455-2948

jkaufman@stblaw.com

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.



UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000