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## Regulatory Update

# SEC Staff Extends Accommodations to File Confidential Draft Registration Statements: A Small Gift for Certain Issuers Under Certain Circumstances

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On March 3, 2025, the Staff of the SEC Division of Corporation Finance expanded the categories of issuer that may submit draft registration statements confidentially for review by the SEC, effective immediately. Confidential submission of a registration statement is a longstanding accommodation granted by the SEC Staff to certain issuers and provides the following benefits:

- For an issuer that is not already public in the United States, the SEC review process, which involves iterative filings of the draft registration statement, can be conducted outside of the public spotlight and, in some cases, without the public ever knowing the issuer was considering a U.S. offering or listing if subsequently abandoned by the issuer.
- For an issuer that is already public in the United States, the number of days that the registration statement is on file publicly can create uncertainty that adversely impacts its stock price. The ability to submit a registration statement confidentially reduces the period of uncertainty from approximately one week to between zero and two days. This is because the SEC Staff traditionally takes approximately one week to decide whether to review a registration statement after it is publicly filed. The SEC declines to review the significant majority of such registration statements.

The table below summarizes the impact of the new guidance on different categories of issuer.

Category of Issuer	New Accommodation	Implication
Companies conducting an IPO	The first confidential submission of an IPO registration statement will be accepted by the SEC Staff for review even if it does not include the name of the underwriter(s), provided the underwriter(s) are named in subsequent submissions. <sup>1</sup>	This formalizes a practice permitted informally by SEC from time to time. It could assist certain companies to move forward with an IPO more rapidly if the lead underwriter is still completing internal approval formalities or, less commonly, if the company makes the initial filing before selecting underwriters for various reasons.

Category of Issuer	New Accommodation	Implication
<p>Non-WKSI issuers filing <i>any</i> registration statement <i>at any time</i></p>	<p>The prior guidance was limited to the <i>first registration statement</i> submitted <i>before the end of the 12th month</i> after an issuer completed its IPO, direct listing or Level II ADR program. Outside of an initial filing, this effectively limited the confidential submission process to newly public companies.</p> <p>The new guidance permits confidential submission of a registration statement <i>at any time</i>, subject to two limitations. First, the accommodation is still limited to the first submission of a particular registration statement. Therefore, if there are SEC comments, any revised registration statement will need to be filed publicly. Second, the registration statement must be filed publicly two business days prior to effectiveness, which effectively means two days prior to the pricing of an underwritten offering.<sup>2</sup></p>	<p>This is the most impactful change and, as a result, it will likely become standard practice for the following issuers to submit their registration statements confidentially:</p> <ul style="list-style-type: none"> <li>– Public companies conducting an underwritten offering on Form S-1 when ineligible for Form S-3.<sup>3</sup></li> <li>– Issuers that are not WKSI<sup>4</sup> (and therefore ineligible to file an automatically effective shelf registration statement) (1) undertaking an offering using Form S-3 that is <i>not</i> a shelf takedown, or (2) filing a new shelf registration statement on Form S-3<sup>5</sup> in anticipation of an underwritten shelf takedown.</li> </ul>
<p>Private companies establishing an over-the-counter (OTC) trading market</p>	<p>The prior guidance permitted the confidential submission of Exchange Act registration statements on Forms 10, 20-F and 40-F in connection with establishing a <i>stock exchange listing</i> without an offering under the Securities Act. This was used to facilitate direct listings (by U.S. and non-U.S. companies) and the establishment of Level II ADR programs (by non-U.S. companies traded on non-U.S. exchanges).</p> <p>The new guidance extends the accommodation to establishing an OTC trading market without requiring that there be a stock exchange listing.<sup>6</sup></p>	<p>There were 73 initial Exchange Act registration statements filed under Section 12(g) of the Exchange Act in 2024. A number of these were voluntary filings and were subject to full SEC review and comment over a period of months. We expect that most issuers will now submit those registration statements confidentially and only file publicly 15 days prior to effectiveness, similar to an IPO process.<sup>7</sup></p>

Category of Issuer	New Accommodation	Implication
deSPACs	<p>Most deSPAC transactions are structured so that the SPAC acquires a private company target by issuing shares to the private company target shareholders in connection with the private company target merging into the SPAC. Unless an exemption is available, those shares must be registered on Form S-4, and the Form S-4 registration statement contains information of both the shell company SPAC, which is generally limited, and the operating company target, which is more extensive. Historically, when the business combination Form S-4 was filed by the SPAC (with the target as co-registrant) more than one year after the effective date of the Form S-1 for the SPAC's IPO, similar to a traditional IPO issuer, the Form S-4 could not be submitted confidentially.<sup>8</sup> The new guidance clarifies that the Form S-4 can be submitted confidentially because it is functionally the equivalent of an IPO registration statement for the target.</p>	<p>SPAC transactions continue to provide a viable alternative for companies to go public, especially in a challenging IPO market. The new guidance offers SPACs and related targets pursuing a business combination, regardless of merger structure, greater flexibility to navigate SEC comments confidentially and file publicly only days prior to the mailing date for the proxy statement proposing shareholder approval of the related business combination.</p>

**Conclusion**

The new guidance offers a tangible benefit to companies with less than \$700 million of unaffiliated market capitalization when they look to raise capital outside of a shelf takedown scenario. It also benefits certain categories of issuer that were excluded from the prior guidance with limited justification.



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- <sup>1</sup> Items 501 and 508 of Regulation S-K otherwise require the names of the underwriters.
- <sup>2</sup> The guidance states that the Staff will consider “reasonable requests” to expedite the two-business-day period between public filing and effectiveness. This could further shorten the time between an issuer’s public filing and pricing of a deal.
- <sup>3</sup> The need for a seasoned issuer to use Form S-1 could occur due to a variety of reasons. A company that failed to timely file certain Form 8-Ks would lose the ability to use Form S-3. In addition, a company with less than \$75 million unaffiliated market capitalization could find itself limited as to the amount of capital that it can raise in a primary offering using Form S-3 due to the “baby shelf” limitations, which effectively permit the company to raise no more than an amount equal to one third of its market capitalization. In that case, it is necessary to use a Form S-1.
- <sup>4</sup> A WKSI, or well-known seasoned issuer, is a company that has more than \$700 million in unaffiliated market capitalization within 60 days of the filing of a registration statement or an amendment thereto. A registration statement on Form S-3 filed by a WKSI is not subject to SEC review and becomes effective automatically upon filing.
- <sup>5</sup> Form S-1 may also be used as a shelf registration statement solely for the resale on a delayed or continuous basis of shares of selling securityholders pursuant to Rule 415(a)(1)(i) under the Securities Act. Such a resale shelf registration statement could also be filed confidentially under the new guidance, although such a construct is uncommon and the first filing of such a registration statement would already have been accommodated under the prior SEC guidance.
- <sup>6</sup> The prior guidance was limited to Exchange Act registration statements registering securities under Section 12(b), which relates solely to securities traded on a national securities exchange. The new guidance extends the accommodation to Exchange Act registration statements registering securities under Section 12(g). Section 12(g) is triggered by a company having at the end of its fiscal year total assets over \$10 million and more than 2,000 holders of record of its securities or more than 500 holders of record of its securities that are nonaccredited investors. In such a circumstance, a company must register its securities under the Exchange Act within 120 days after the end of the fiscal year. In addition, any company can voluntarily register its equity securities under Section 12(g) and thereby subject itself to Exchange Act reporting obligations.
- <sup>7</sup> In the guidance, the Staff notes that filings on Forms 10, 20-F and 40-F will need to be publicly filed so that the full 30-day or 60-day period, as applicable, concludes prior to the registration statement’s effectiveness, meaning that an earlier confidential filing does not start the clock. However, issuers are able to request earlier effectiveness.
- <sup>8</sup> Conversely, regardless of when a SPAC’s IPO registration statement was declared effective, the SEC has permitted confidential submission of a Form S-4 in connection with a deSPAC, i.e., business combination, utilizing a “double dummy” structure where the SPAC forms a new holding company as the Form S-4 registrant (NewCo) with both the SPAC and target merging into subsidiaries of NewCo upon the business combination because NewCo, unlike the SPAC, is an initial registrant.

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