

## **Alert** | Capital Markets



**March 2025**

### **SEC Expands Confidential Review Process for Draft Registration Statements**

#### **Go-To Guide**

- SEC expands confidential review process for draft registration statements, now available for all Securities Act and Exchange Act registrations.
- New policy removes “initial filing” limitation, allowing both private and public companies to submit draft registration statements confidentially.
- The policy clarifies accommodation for de-SPAC transactions.
- Underwriter details may now be omitted from initial draft submissions, but must be included in later drafts and public filings.

On March 3, 2025, the Securities and Exchange Commission’s Division of Corporation Finance issued **new guidance** expanding the availability of confidential (nonpublic) review of draft registration statements (DRS).

#### **Background**

A DRS is a confidential draft of a registration statement submitted to the SEC for review before a public filing is made, granting issuers flexibility to avoid alerting the public market of the planned offering and sharing sensitive information until a more advanced stage of the offering process, if at all.

The confidential submission process was originally established only for foreign private issuers but was introduced in 2012 under the Jumpstart Our Business Startups Act (JOBS Act) for emerging growth companies (EGCs), allowing them to submit draft registration statements for nonpublic SEC review under Section 6(e) of the Securities Act of 1933, as amended (Securities Act), in order to encourage smaller companies to enter the public markets and streamline the initial public offering (IPO) process.

In 2017, the SEC extended this benefit to all companies—whether or not they qualified as EGCs—when filing:

- an IPO registration statement under the Securities Act;
- an initial registration statement under Section 12(b) of the Securities Exchange Act of 1934, as amended (Exchange Act), when seeking to list securities on a national securities exchange for the first time; or
- an initial submission of a registration statement under the Securities Act during the twelve-month period following the effective date of the IPO registration statement or an issuer’s Exchange Act Section 12(b) registration statement.

The March 2025 guidance extends the benefits of non-public review to all issuers by removing the “initial filing” limitation. Now, both private and public companies can submit a DRS for confidential SEC review in connection with any Securities Act or Exchange Act registration—regardless of whether they are first-time registrants. Affected companies may now forestall market scrutiny of contemplated capital markets transactions triggered by a public SEC filing and, in some cases, during the pendency of the SEC review process, which may offer an advantage for planning and marketing the transaction.

## Key Enhancements

### 1. Expanded Eligibility for Nonpublic Review

#### a. IPOs and Initial Exchange Act Registrations

The confidential review process now applies to initial Exchange Act registrations under both Section 12(b) (exchange listings) and Section 12(g) (required registration for companies exceeding \$10 million in assets with a class of equity securities held by either 2,000 shareholders or 500 non-accredited investors), broadening access to the confidential review process.

Previously, companies filing on Forms 10, 20-F, or 40-F to go public outside the traditional IPO registration statement were not permitted to request non-public review.

#### b. Subsequent Offerings and Registrations

Previously, the SEC would only accept subsequent DRSs for nonpublic review if they were submitted within the 12-month period following the effective date of either (i) the issuer’s IPO registration statement under the Securities Act, or (ii) the issuer’s initial Exchange Act registration statement under Section 12(b).

Under the SEC’s new policy, issuers may now submit DRSs for confidential review in connection with any Securities Act offering or any registration of a class of securities under Section 12(b) or Section 12(g) of the Exchange Act, regardless of how much time has passed since the issuer became public.

## **2. Accommodation for de-SPAC Transactions**

Under rules adopted in July 2024, target companies in de-SPAC transactions (where a SPAC, which is a public company, merges with a private company) must be co-registrants when the SPAC files the registration statement.

The SEC has now clarified that these registration statements—where the SPAC is the surviving entity—are eligible for confidential submission if the target company would itself qualify for non-public review under existing policies.

## **3. Foreign Private Issuers (FPIs)**

FPIs may rely on this expanded non-public review process. Alternatively, if the FPI qualifies as an EGC, it can follow the EGC-specific DRS procedures. FPIs that do not qualify as EGCs may also continue to rely on the separate confidential submission policy the SEC outlined in its May 30, 2012, guidance for FPIs.

## **4. Omission of Underwriter Information**

Issuers are now permitted to omit underwriter names from initial draft submissions, which is consistent with a practice that has developed when an issuer has not yet selected an underwriter. However, underwriter details must still be included in subsequent confidential draft submissions and in the publicly filed registration statement.

### **Submitting a Draft Registration Statement**

The SEC expects a substantially complete submission—meaning the draft should be as close to final as possible. However, the SEC recognizes that some financial information may not be ready (for example, if a fiscal period has not yet ended), and commented that if the issuer reasonably expects that the missing information will not be required at the time of public filing (e.g., due to permitted reporting accommodations), the SEC will proceed with its review despite the omissions, an accommodation previously limited to EGCs.

Issuers can also continue to request relief under Rule 3-13 of Regulation S-X, which allows them to omit or modify certain financial statement requirements if the omitted information is immaterial and providing it would be unduly burdensome. The SEC will assess these requests based on the issuer's particular facts and circumstances.

### **Public Availability and Timing**

DRS submissions remain confidential until the issuer publicly files its registration statement. At that point, previously submitted DRS submissions, along with the SEC's comment letters and the issuer's responses, become publicly available via EDGAR.

For IPOs and initial Exchange Act registrations, the initial public filing must be made at least 15 days before any road show or, in the absence of a road show, at least 15 days prior to the registration statement's requested effective date. This 15-day requirement is not new and mirrors the timeline previously applied to EGCs.

For subsequent public offerings and Exchange Act registrations (regardless of how much time has passed since the company became public), the initial public filing must be made at least two business days prior to the registration statement's requested effective date. However, unlike the non-confidential registration

process for IPOs and initial Exchange Act registrations, the SEC indicated that an issuer responding to staff comments on a DRS will need to do so on a public filing and not in a revised DRS.

Additionally, submissions of Exchange Act registration statements on Form 10, 20-F, or 40-F will need to be publicly filed with the SEC to ensure that the required 30-day or 60-day period runs before effectiveness, in accordance with existing rules.

### Coordinating with the SEC

Issuers should consider communicating directly with SEC staff regarding their anticipated transaction timelines—particularly for filings tied to specific pricing windows or deal milestones. The SEC will consider reasonable requests for expedited review for both confidential and public filings.

The SEC staff indicated that for subsequent public offerings and Exchange Act registrations it may consider reasonable requests to expedite the two-business day period that the registration statement has to be public.

### Takeaways

This expanded confidential submission process provides issuers with greater flexibility, particularly companies that were previously excluded from confidential review (such as seasoned issuers).

In particular, for seasoned issuers that are unable to access shelf-registrations (due to, for example, baby-shelf limitations), the new guidelines allow issuers seeking to raise capital in a registered offering to file a DRS on Form S-1 or F-1 confidentially, and if there is a no review, to quickly pivot to pricing the deal when market conditions are ripe.

By allowing more issuers to engage in a nonpublic review process with the SEC, the new policy may facilitate more capital formation while preserving key investor protections.

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