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BLOG

SEC Staff Expands Nonpublic Review Process to Facilitate Capital Formation and Public Offerings

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On March 3, 2025, the staff of the U.S. Securities and Exchange Commission's (SEC) Division of Corporation Finance announced enhancements to the nonpublic review process for draft registration statements, aiming to provide companies with greater flexibility in their capital-raising endeavors.

EVOLUTION OF THE NONPUBLIC REVIEW PROCESS

The nonpublic review process allows companies to confidentially submit draft registration statements for SEC staff review before they are publicly filed. This approach enables issuers to address regulatory feedback without immediate public scrutiny, thereby refining their disclosures and mitigating potential market reactions during the early stages of the registration process.

In 2012, the Jumpstart Our Business Startups Act permitted emerging growth companies to confidentially submit draft registration statements for initial public offerings (IPOs). Recognizing the benefits of this nonpublic review, the SEC staff expanded these accommodations in 2017 to include all companies conducting certain securities offerings, including IPOs and follow-on offerings within a year of the IPO.

RECENT ENHANCEMENTS TO THE NONPUBLIC REVIEW PROCESS

The SEC staff's latest announcement introduces several enhancements to the nonpublic review process:

1. **Broadened Eligibility for Exchange Act Registrations**: Previously, the nonpublic review process was primarily available for registration statements under the Securities Act, such as for IPOs. The recent changes extend this accommodation to include initial registrations of a class of securities under the Securities Exchange Act of 1934 (the Exchange Act). This means companies seeking to register securities under Section 12(b) or 12(g) of the Exchange Act, using Forms 10, 20-F, or 40-F, can now utilize the nonpublic review process.
2. **Removal of Time Constraints for Reporting Issuers**: Under previous guidelines, a company could only access the nonpublic review process if it had been subject to Exchange Act reporting requirements for less than 12 months. The recent amendments eliminate this time-based restriction, allowing issuers to submit confidential draft registration statements regardless of how much time has passed since they became subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act.

3. **Accommodation for de-SPAC Transactions**: The SEC staff's new accommodations extend the nonpublic review process to registration statements for special purpose acquisition company (SPAC) business combinations, even when the SPAC's initial business combination target is not a shell company. This expansion aims to streamline the process for companies transitioning from private to public status through mergers with SPACs.

IMPLICATIONS FOR COMPANIES PLANNING PUBLIC OFFERINGS

These enhancements are poised to significantly impact companies planning public offerings:

- **Increased Flexibility**: By broadening the scope of the nonpublic review process, more companies can confidentially address regulatory feedback, leading to more polished initial public filings.
- **Encouragement for Public Capital Raising**: The ability to confidentially submit draft registration statements may incentivize companies that were hesitant about public offerings due to disclosure concerns, thereby promoting capital formation.
- **Streamlined SPAC Mergers**: Extending the nonpublic review process to de-SPAC transactions can facilitate smoother transitions for companies going public through SPAC mergers, potentially reducing time and costs associated with the process.

CONCLUSION

With the ability to refine disclosures and address regulatory concerns confidentially, companies may feel more confident in navigating the registration process. Companies should continue to stay attuned to regulatory developments to maximize the benefits of these new accommodations. For issuers considering public offerings or seeking to file registration statements, leveraging these streamlined procedures could enhance their readiness and strategic positioning in the capital markets.

Winston's Capital Markets and Securities Law Watch will continue to monitor developments in this area and will provide our readers with updates.

For further information or if you have any questions, please contact the authors of this blog post or your regular Winston contacts.

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