

NEW SEC STAFF GUIDANCE EXTENDS FAST ACT FINANCIAL DISCLOSURE RELIEF AND THE JOBS ACT CONFIDENTIAL REVIEW PROCESS TO ALL ISSUERS, INCLUDING REITS

EXTENDING THE FAST ACT'S FINANCIAL DISCLOSURE RELIEF

The SEC Staff issued new guidance in the form of an amended [Guidance Announcement](#) and new [Compliance and Disclosure Interpretations](#) ("C&DIs") that (1) extend the financial disclosure relief granted by the FAST Act to Emerging Growth Companies ("EGCs") filing on Form S-1 or Form F-1 to all issuers, even those that file on other Securities Act registration forms, including REITs, and (2) allow issuers to omit interim financial statements for historic periods if those interim periods will be covered by audited financial statements when the registration statement is publicly filed.

In December 2015, the FAST Act simplified the financial statement disclosure of EGCs on Form S-1 and Form F-1. The text of the law allowed a confidentially-filed draft registration statement on Form S-1 and Form F-1 to omit financial statements for otherwise required historical periods if the omitted financial information relates to periods that the issuer reasonably believes will not be required to be included in the Form S-1 or Form F-1 at the time of the eventual offering because a new fiscal year's financial information will be available. As a consequence of this provision in the FAST Act, an EGC issuer that submitted a draft registration statement in November 2016 and reasonably believed it would first publicly file in April 2017 could omit its audited 2014 financial statements from the initial submission on the basis that, at the time of the eventual initial public offering in April 2017, the issuer would satisfy the two year annual audited financial statement requirement by including annual 2015 and 2016 financial statements in the registration statement.

However, the staff initially took a somewhat narrow reading of this aspect of the FAST Act and concluded in the original FAST Act C&DIs "Question 1" that the statutory relief did not allow an EGC to exclude from a registration statement the most recent interim period financial statements required by Regulation S-X, even if the period covered by the interim financial statements are expected to be replaced in the registration statement with a longer interim or annual period at the time of the public offering. The initial view of the staff was that (unlike the 2014 audited statements in the example cited above) because the interim financial statements are not going to drop out of the registration statement at the time of the initial public offering but are going to be subsumed within audited financial statements for all of 2016 and 2015, the interim financial statements were not caught within the language of the FAST Act. As a result, such interim financial statements

Key issues

- The FAST Act allowed EGCs to omit audited financials for certain historic periods at the time of filing a confidential draft registration statement if those financials would not be needed at the time of the public offering.
- The latest guidance extends this relief to all companies regardless whether or not they are an EGC and allows the omission of interim financial statements under certain circumstances if they would not be required at the time the registration statement is publicly filed.
- The latest guidance extends this relief to all Securities Act registration statements, even for REITs that file on Form S-11.
- Additional guidance now permits all issuers to file an initial registration statement for confidential review (even if not an EGC or FPI) and allows for the confidential filing of additional registration statements within 12 months of the initial registration statement.

would have been required to be included. Consequently, in the example cited on the previous page, an EGC would have been required to include nine-month interim financial statements for 2016 and 2015.

The new guidance announced by the Staff changes this interpretation and now allows an EGC to omit all interim financial statement information for each period that is not expected to be required to be presented as a stand-alone period at the time of the initial public offering.

This is a very big development for all IPOs and should reduce accounting resources and costs associated with initial public offerings.

Prior to this guidance, issuers would face substantial additional costs in needing to update interim financial statements over multiple periods as the registration statement moved through the SEC staff review process. Now, interim financial statement information will not be required until much later in the process and with proper planning, should only require interim financial information to be prepared for one pre-launch period and for the corresponding period in the prior calendar year.

And because interim financial information will now be omitted, initial filers will now not have to worry about hitting filing date deadlines to avoid filings that include interim financial information that has gone stale.

The SEC staff guidance has also extended this disclosure relief to all issuers, so that if a non-EGC issuer submits a confidential draft registration statement in November 2017 and reasonably believes it will first publicly file in April 2018 when annual financial information for 2017 will be required, that issuer may omit from its draft registration statements: (1) its 2014 annual financial information and (2) interim financial information related to 2016 and 2017, because this information is not expected to be required at the time of its first public filing in April 2018. If however, this non-EGC issuer were to file publicly in January 2018, it may still omit its 2014 annual financial information, but it must include its 2016 and 2017 interim financial information in its January filing because that interim information relates to historical periods that will be included at the time of the public filing.

REITS NOW ELIGIBLE FOR THIS RELIEF

The text of the FAST Act specified that this disclosure relief applied to filings made on Form S-1 and Form F-1 and when the SEC amended their regulations and forms to comply with the FAST Act, they declined to extend this relief to issuers that file on any other form. This meant that REITs, which file their Securities Act registration statements on Form S-11, could not take advantage of this relief.

However, under this latest guidance, the SEC Staff has confirmed Form S-11 filers (including REIT issuers) are now eligible for all of the above refined FAST Act relief. An issuer relying on these provisions must include all the required financial information before the public filing of a registrations statement or, in the case of an EGC, commencement of the public offering.

EXTENDING THE JOBS ACT'S CONFIDENTIAL REVIEW PROCESS

The SEC confidential filing and review process for draft registration statements had been limited to EGCs and FPIs. In order to take advantage of the extension of the FAST ACT disclosure relief to all issuers, all issuers would need to be eligible to submit their registration statement as a confidential draft. This new guidance therefore also makes all issuers eligible for confidential review and filing of an initial registration statement and any additional registration statements within 12 months of an IPO.

Under this new guidance:

- The SEC staff will review a draft registration statement and related revisions on a non-public basis; provided that the issuer confirms in a cover letter to the non-public draft submission that it will publicly file its registration statement and all non-public draft submissions at least 15 days prior to the anticipated effective date of the registration statement for its listing on a national securities exchange.
- The SEC staff will also accept draft registration statements submitted prior to the end of the 12th month following the effective date of an issuer's initial Securities Act registration statement or an issuer's Exchange Act Section 12(b) registration statement for non-public review. An issuer submitting a draft registration statement for non-public review in these circumstances should confirm in its cover letter that it will publicly file its registration statement and non-public draft submission such that it is publicly available on the EDGAR system at least 48 hours prior to any requested effective time and date.
 - The SEC Staff will limit the non-public review in these cases to the initial submission.
 - An issuer responding to staff comments on such a draft registration statement should do so with a public filing, not with a revised draft registration statement.
 - Any further review will follow normal procedures and the SEC staff will act upon requests for acceleration in accordance with Securities Act Rule 461.
 - Similar to the initial registration procedures described above, the issuer should file the draft registration statement it had previously submitted for non-public review at the time it publicly files its registration statement.
- An issuer that has a registration statement on file and in process may switch to the non-public review process for future pre-effective amendments to its registration statement; provided it is eligible to participate in the non-public review process and it agrees to publicly file its amended registration statement and all draft amendments in accordance with the time frame specified above.

This guidance continues the trend of Congress, the SEC and the SEC staff easing some of the regulatory burdens around capital-raising activities and continuing to smooth the on-ramp to a U.S. IPO.

CONTACTS

Jay Bernstein

Partner

T +1 212 878 8527
E jay.bernstein
@cliffordchance.com

Richard Catalano

Partner

T +1 212 878 8421
E richard.catalano
@cliffordchance.com

Clifford Cone

Partner

T +1 212 878 3180
E clifford.cone
@cliffordchance.com

Andrew Epstein

Partner

T +1 212 878 8332
E andrew.epstein
@cliffordchance.com

Jake Farquharson

Partner

T +1 212 878 3302
E jacob.farquharson
@cliffordchance.com

John Healy

Partner

T +1 212 878 8281
E john.healy
@cliffordchance.com

Larry Medvinsky

Partner

T +1 212 878 8149
E larry.medvinsky
@cliffordchance.com

Jason Myers

Partner

T +1 212 878 8324
E jason.myers
@cliffordchance.com

Kathleen Werner

Partner

T +1 212 878 8526
E kathleen.werner
@cliffordchance.com

Michael Kessler

Counsel

T +1 212 878 3152
E mike.kessler
@cliffordchance.com

Ari Kahn

Professional Support
Lawyer

T +1 212 878 8023
E ari.kahn
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

© Clifford Chance 2017

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • Jakarta* • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.