

Tips for Successful SEC Staff Review of Your IPO

An IPO is a long process, and the review of the IPO by the SEC's Division of Corporation Finance ("Corp. Fin.") is a time-consuming part of the process. Corp. Fin. reviews a company's registration statement to ensure compliance with SEC disclosure rules and federal securities laws, and to elicit clear and balanced disclosure to investors. The typical timeframe for the SEC review is between 90 to 150 days. Below, we shed some light on the SEC Staff IPO review process and offer tips for effectively managing the review.

The general policy is for the Staff to "full review" every IPO. This means your IPO will be assigned to a legal and accounting team who are primarily responsible for the review. Each review team consists of four members, comprised of a legal examiner (junior attorney) and a legal reviewer (senior attorney), and an accounting examiner (junior accountant) and an accounting reviewer (senior accountant). Although the SEC review team has primary responsibility for the IPO review, the teams may also consult with other offices in the SEC regarding any novel or complex issues.

The following tips and guidance should help to ensure that the SEC review process runs as smoothly as possible.

At a glance:

Top Tips

- 1 Consult with the SEC before filing if you expect complex issues like getting an accounting waiver.
- 2 Submit your IPO as a Draft Registration Statement for confidential review.
- 3 Submit supplemental materials under Rules 83 and 418 for back-up for factual disclosure.
- 4 Expect a first letter 27 to 30 days from the initial filing and subsequent letters 14 to 16 days from amending.
- 5 Feel free to call any member of the SEC team with questions. Calls to clarify comments are welcome; deeper materiality discussions should be in writing.
- 6 Consider carefully your timing; the road show cannot start until 15 days after filing your IPO publicly.
- 7 Give the Staff early notice of your timing to help resolve material issues before starting the road show.
- 8 Advise the Staff of your timing for effectiveness and request acceleration 48 hours prior.
- 9 The SEC will call to advise of effectiveness but notify them ASAP if you want to delay effectiveness.

Pre-Filing/Submission Stage

Tip 1

You should contact the SEC to advise them on a pre-filing basis if you anticipate any novel, thorny, or complex issues with your IPO. For instance, in preparing for an IPO, your attorneys or auditors may see issues that are not easily addressed by precedent. Consulting with certain offices within the SEC, such as CF-OCA (Corp. Fin.'s Office of Chief Accountant), may help resolve accounting issues, like seeking a waiver, on a pre-filing basis.

Tip 2

You should "submit" your registration statement as a Draft Registration Statement ("DRS"). DRSs are submitted and not technically "filed." A DRS submission means the registration statement and the Staff's review is confidential and the public cannot view the registration statement until the company "files" the public registration statement. The Staff takes very seriously the confidential review process. For instance, the Staff is not permitted to remove DRSs from inside the SEC headquarters. If you decide not to proceed with your IPO, you may retract your DRS to preserve confidentiality. A simple letter to the Staff retracting the submission is sufficient.

Tip 3

You should be prepared to submit supplemental materials under the SEC's Rule 83 and Rule 418 under the Securities Act. Protection under these rules is predicated on requesting the confidentiality at the same time as the submission, usually to provide back-up for factual statements or claims made in the registration statement or to provide further explanations to the Staff. The Staff may not request the supplemental materials but has the discretion to do so. Rule 83 affords your materials confidential protection while in the possession of the Staff and Rule 418 allows you to request return of the materials or destruction of the materials.

Filing/Submission Stage

Tip 4

You should expect a written comment letter on your initial filing/submission within 27 to 30 calendar days from filing. Generally, your legal examiner will call and inform you the SEC is reviewing the initial filing within about 10 calendar days. If you do not hear from the Staff after 10 calendar days, you should feel free to call the Assistant Director ("AD") group assigned to your company. Every AD group's main telephone number is listed on the SEC webpage. All groups monitor the main telephone number and should respond promptly to your call.

After you amend your DRS or public filing in response to the initial round of comments, you should expect to hear a response from the Staff within 14 to 16 calendar days from the date of the amendment. Generally, it is not advisable to follow-up with the Staff until the 14 to 16 calendar day period is completed or you are close to effectiveness and have resolved material comments. The Staff maintains a dashboard of all filings and amendments and is working expeditiously to respond. Calling to check on the status only slows down the process. However, if you do not hear from the Staff after this period, feel free to call any member of your review team.

You should be aware that all correspondence to the Staff and correspondence from the Staff will be released publicly after you go effective. Generally, if you retract your DRS or withdraw your registration statement, correspondence is not released.

Tip 5

Feel free to call all members of the legal and accounting teams who are listed on the comment letter if you have any questions. The comment letter is a collaborative product and the accountants can answer questions on the financial statements more knowledgeably than the attorneys. It is not necessary to funnel your contact through the legal examiner even though he or she may be your primary contact.

Generally, the first comment letter will be the longest

and contain most of the material issues. Subsequent letters should be shorter and each round should resolve the material issues through disclosure or discussions with the Staff. If material issues remain, it is a good idea to request a conference call to understand better the Staff's views to avoid extra back and forth.

In this regard, phone calls to clarify comments or seek further guidance are welcomed by the Staff. However, discussions on materiality or applicability of comments should always be formalized in writing. Similarly, the Staff normally does not pre-clear responses to comments on the phone and always considers the written response to be the official response.

Tip 6

You should carefully consider the commencement of your road show because you must file publicly your registration statement—exit the confidential DRS process—15 calendar days before commencing the road show. The road show is important for timing the market window for your IPO. The day of filing your public registration statement is considered Day 1 and you can begin your road show on Day 16.

Tip 7

You should advise the Staff of the timing of your road show and filing of the red herring prospectus (prospectus with a price range) as you whittle down the comments and material issues with your IPO. It is a good idea to give the Staff notice as early as possible. The Staff is generally amenable and will coordinate to help you meet your reasonable expectations. The best practice is to resolve all the material issues before commencing the road show.

Tip 8

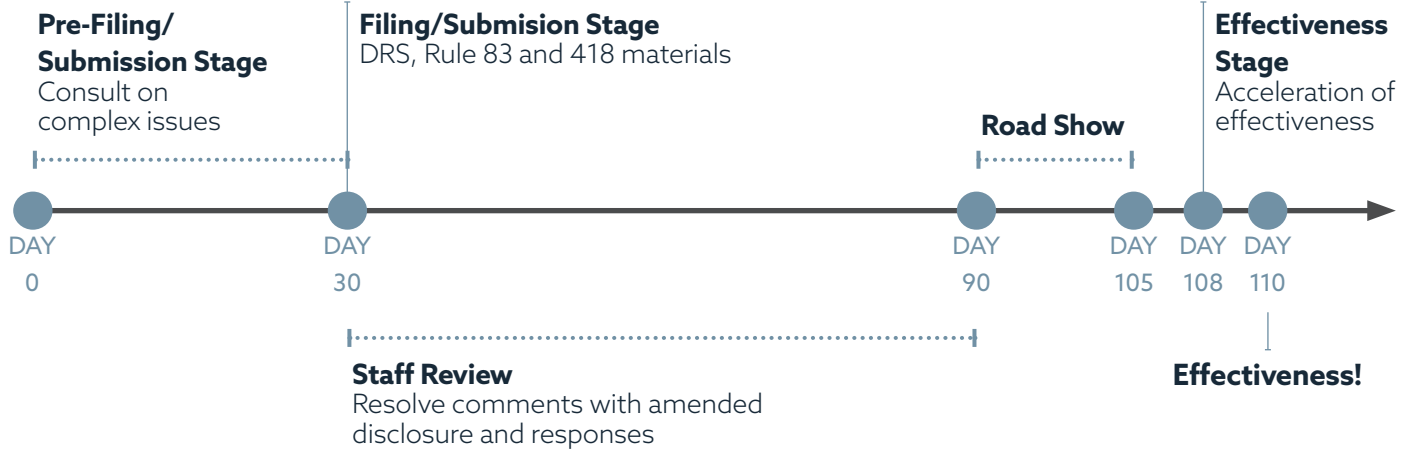
As above, you should advise the Staff as early as possible of your timing to go effective. A company should request effectiveness 48 hours prior to the time of effectiveness. The Staff at times may be amenable to an accelerated time frame, but it is not preferable. Every Associate Director who declares a registration statement effective must make a public interest finding in connection with the filing. This means an AD may ask for further clarification or raise an issue right before effectiveness. It is good practice to ask the Staff to see if the AD will start their review earlier rather than later in the effectiveness process so no surprise issues arise at the last minute.

Effectiveness Stage

Tip 9

Your legal examiner will call to advise that the registration statement is effective. You should notify them as soon as possible if you do not want to go effective or delay effectiveness. The SEC no longer issues paper orders. All orders are electronic and posted publicly on EDGAR very early in the morning the day after effectiveness. You may check your order online. You should also check for return of your supplemental materials (if requested) if you have requested their return.

IPO Timeline



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