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CURRENT SEC INITIATIVES IMPACTING FOREIGN PRIVATE ISSUERS

Foreign companies seeking a US listing can take advantage of a number of existing recent SEC initiatives designed to ease the requirements for an IPO in the United States. They may also soon be able to take further advantage of proposed additional accommodations for IPOs. The author describes the most significant of these recent and proposed initiatives.

By Paul M. Dudek *

Foreign companies that are listed on a US stock exchange and registered with the US Securities and Exchange Commission play an important role in the US capital markets. Indeed, the SEC estimates that the market capitalization of these companies – widely referred to – under the SEC definition[1] – as "foreign private issuers" or "FPIs," exceeded US $9 trillion as of the end of 2017.[2]

Recently, interest by FPIs in pursuing an initial public offering and listing in the United States has been growing. The number of foreign companies listed on US stock exchanges has increased over the past several years,[3] and foreign companies accounted for over 40% of IPO volume in the United States in late 2017 and

[1] A foreign private issuer is an entity (other than a foreign government) incorporated or organized under the laws of a foreign jurisdiction unless: (1) more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents and (2) any of the following applies: (i) the majority of its executive officers or directors are US citizens or residents; (ii) more than 50% of its assets are located in the United States; or (iii) its business is administered principally in the United States. Securities Act Rule 405 and Exchange Act Rule 3b-4(c).

[2] William Hinman, Director, Division of Corporation Finance, SEC *Keynote Address*, February 1, 2018, *available at* https://www.sec.gov/news/speech/speech-hinman-020118.

[3] Data from Current List of All Non-US Issuers as of December 31, 2016 and 2017 and April 30, 2018, New York Stock Exchange; data from the Annual Statistics Guide, World Federation of Exchanges, 2015 – 2017.

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early 2018, far above the historical average of around 20%.[4]

Under SEC rules, FPIs enjoy a number of key benefits that are not available to domestic US issuers when they are registering an IPO with the SEC under the Securities Act of 1933 and afterward in connection with their SEC filings under the Securities Exchange Act of 1934. Among other matters, FPIs:

- have a choice of preparing their financial statements under International Financial Reporting Standards as issued by the International Accounting Standards Board ("IASB IFRS"); or US generally accepted accounting principles ("GAAP"); or local accounting principles as long as accompanied by a US GAAP reconciliation;[5]
- are not required to file quarterly financial statements on Form 10-Q;
- are not required to file current reports on Form 8-K relating to the many events that are required to be disclosed under that form;[6]
- are exempt, as a technical matter, from Regulation FD;[7]
- are not subject to the rules under the Exchange Act governing the content and process relating to proxy statements for shareholder meetings;[8]
- are not required to disclose executive compensation information on an individual basis or to hold "say-on-pay" votes, unless home country law or stock exchange rules so require;[9]
- have a lengthy time period before their financial information goes stale in an offering prospectus;[10] and
- can follow home country governance practices, provided that the differences between those practices and US practices are disclosed to investors.[11]

In practice, many FPIs do not take full advantage of these accommodations, recognizing that US investors expect a high level of corporate information and governance from the companies in which they invest. And so, it is very typical for US-listed FPIs to publish quarterly financial information on an on-going basis, to have up-to-date financial information in offering prospectuses, and (with an eye towards compliance with Regulation FD) to avoid selectively disclosing material information.

For an FPI that is planning an IPO, one of the most important decisions is the exchange listing venue: will the IPO be listed on a US stock exchange? To be sure, undertaking an IPO in any country is a substantial undertaking, and US regulation of securities offerings is quite complex and can appear almost overwhelming. To address concerns about this complexity, SEC Chairman Jay Clayton has expressed his goal of increasing the attractiveness of the US public capital markets for

[4] "Cross-border IPOs Flourish", Dealogic *available at* http://www.dealogic.com/insight/non-us-companies-us-ipos/.

[5] Item 17(c) of Form 20-F.

[6] Instead of Form 10-Q and 8-K, FPIs are required to file Form 6-K, which largely serves as a cover page for material information that an FPI makes public, either voluntarily or in accordance with home country or exchange requirements.

[7] Rule 101(b) of Regulation FD.

[8] Exchange Act Rule 3a12-3(b).

[9] Item 6.B.1 of Form 20-F; Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Rel. No. 33-9178 (2011) at fn 38.

[10] Item 8.A.4 of Form 20-F.

[11] NYSE Listed Company Manual Rule 303A.00, Nasdaq Stock Market Rule 5615(a)(3), Item 16G of Form 20-F.

IPOs[12] and senior SEC Staff have echoed their strong support of this goal.[13]

This article discusses the most significant initiatives that have recently been undertaken by the SEC that impact US-listed FPIs. For a foreign company that is weighing the benefits and drawbacks associated with listing its IPO in the United States, these initiatives can help ease the path to a successful IPO.

DISCLOSURE EFFECTIVENESS

In April 2012, the US Congress enacted the Jumpstart Our Business Startups ("JOBS") Act, which was intended to increase US economic growth by improving issuer access to the capital markets. The JOBS Act made significant changes to the IPO process and other aspects of the US securities laws. Above all, it created a new category of issuer, called an emerging growth company (EGC),[14] which became entitled to various new beneficial accommodations.

Among its many provisions, the JOBS Act required the SEC to review Regulation S-K, the main compendium of disclosure requirements applicable to US issuers, for the purpose of assessing whether there were changes that could be implemented to simplify the disclosure requirements applicable to EGCs.[15] Although Congress was focused on EGCs, the SEC used the mandate as the springboard for a larger initiative with the goal of improving the SEC's disclosure requirements applicable to companies at all stages of their development. This broad initiative is referred to as the disclosure effectiveness project.

The disclosure effectiveness project has been comprised of several independent workstreams, none of which have yet to come fully to fruition. Much of the work on the disclosure effectiveness project has been focused on Regulation S-K, which has less importance for FPIs. Although some rules under Regulation S-K apply specifically to FPIs, the main source of SEC disclosure requirements for FPIs is Form 20-F. This form was entirely revised by the SEC in 1999 in order to conform the SEC's disclosure requirements for FPIs to those adopted by the International Organization of Securities Commissions ("IOSCO") as its core set of internationally recognized disclosure standards for the non-financial statement portions of a securities disclosure document.[16] Nonetheless, portions of the SEC's disclosure effectiveness project have the potential to substantially relieve significant burdens from FPIs with respect to their SEC filings: possible relief from requirements relating to the disclosure of financial information of other entities; possible omission of repetitive discussion of prior years' financial results; and proposed streamlined procedures relating to confidential treatment requests. These are described below.

Financial statements of other entities. In October 2015, the SEC published a request for public comment on the usefulness of the financial disclosure requirements in Regulation S-X that apply to certain entities other than the registrant itself; that is, other than the company that is actually the issuer of the securities.[17] Some of the other entities whose financial information may need to be included in an SEC registration statement or periodic report include acquired businesses, equity method investees,[18] subsidiaries of the registrant that are the legal issuers or guarantors of guaranteed securities, and affiliates whose securities serve as collateral for registered securities.

These financial disclosure requirements relating to other entities can have a disproportionate impact on FPIs that are already registered with the SEC or that are planning an initial or follow-on offering registered with the SEC. For example, if an FPI has an equity method investee that surpasses certain bright-line significance thresholds based on income, investment and assets of the FPI, the issuer is required to provide financial

[12] SEC Chairman Jay Clayton, Remarks at the Economic Club of New York, July 12, 2017, *available at* https://www.sec.gov/news/speech/remarks-economic-club-new-york.

[13] William Hinman, Testimony on "Oversight of the SEC's Division of Corporation Finance," before the US House of Representatives Committee on Financial Services, Subcommittee on Capital Markets, Securities and Investment, April 26, 2018, *available at* https://www.sec.gov/news/testimony/testimony-oversight-secs-division-corporation-finance.

[14] A company must have annual revenue of less than $1.07 billion in order to qualify as an EGC, among other requirements. Securities Act Rule 405 and Exchange Act Rule 12b-2.

[15] Section 108 of the JOBS Act.

[16] International Disclosure Standards, Rel. No. 34-41936 (1999).

[17] Request for Comment on the Effectiveness of Financial Disclosures about Entities Other than the Registrant, Rel. No. 33-9929 (2015).

[18] An equity method investee is an entity (such as a joint venture) in which an issuer has an ownership interest but does not control the entity. As a result, the entity's financial results are not consolidated in the issuer's financial statements but are accounted for under the equity method of accounting.

information about the investee in a Form 20-F Annual Report or Securities Act registration statement. In general, if financial statements are required, they will need to be audited under US standards and prepared in accordance with IASB IFRS, US GAAP, or another GAAP with a reconciliation to US GAAP.[19] An FPI may have a far-flung equity investee which started small but which has grown in size as measured by the SEC's significance tests. If the FPI did not have the foresight to negotiate with its other joint venture partners in the investee for the provision of financial information that is acceptable to the SEC, the FPI may find that it is between a rock and a hard place, with an SEC requirement to provide information and no practical way to obtain it (since by definition with an equity method investee, the FPI does not have control over the entity). This circumstance may be less likely for a US issuer with a US joint venture partner, for which SEC reporting obligations are familiar territory.

Similarly, when an FPI concludes a significant business acquisition, the issuer may be required to include in an offering document up to three years of the acquiree's pre-acquisition audited annual financial statements and unaudited interim financial statements. US public companies are required to file financial statements for a significant acquisition on a Form 8-K report within 75 days of the acquisition, and so SEC reporting obligations would likely be top of mind for them. There is no similar filing requirement for FPIs, except for when the issuer is offering securities that are registered with the SEC.[20] Thus, an FPI may be caught unawares and may find itself foreclosed from a US-registered offering because it is not able to provide the required acquiree financial statements in a form acceptable to the SEC.

Even more significantly, these SEC requirements can prevent an FPI from undertaking a US IPO at all, such as when a significant acquisition was made two or three years prior to the planned IPO and Regulation S-X calls for audited financial statements for the acquired business from that time period. At the time of the acquisition, a US IPO might not have been contemplated. If the FPI does not have access to pre-acquisition accounting records, it may find that it has to delay its US IPO until sufficient time has passed so that financial statements of the acquired business are no longer required.

The October 2015 Regulation S-X release was a general request for comment and did not propose specific revisions to SEC rules. In order to change the requirements in this area, the SEC would first have to publish another release that proposes specific rule changes to Regulation S-X, discusses the reasons for the proposed changes, and provides an economic analysis of the proposal. Commenters would have another opportunity to offer views on the proposals and only then could the SEC move forward to adopt final definitive revisions. Although there are indications that the SEC may be developing specific proposals, any final action would seem many months away.[21]

FPIs can request that the SEC waive or modify the financial statements that would normally be required in a registration statement or periodic report. To its credit, the SEC has shown awareness that its requirements relating to the financial statements of other entities can impose significant burdens on issuers and that these financial statements can be of limited usefulness to investors. Issuers have been encouraged to request waivers or modifications in these situations.[22]

Reduced OFR / MD&A disclosure. In Form 20-F Annual Reports filed with the SEC, FPIs are required to provide audited financial statements covering the past three fiscal years. In complement to this requirement, under Item 5 of Form 20-F, "Operating and Financial Review and Prospects," FPIs are required to provide disclosure on their results of operations and financial condition that corresponds to that same three-year period. This is similar to the disclosure provided by US issuers under "Management's Discussion and Analysis of Financial Condition and Results of Operations," known as "MD&A." Issuers typically use a year-to-year format for this disclosure; another format that enhances understanding of the information provided is also permitted.

[19] SEC Division of Corporation Finance Financial Reporting Manual Section 6350.

[20] The SEC proposed an annual filing requirement for significant business acquisitions by FPIs but did not adopt it. Foreign Issuer Reporting Enhancements, Rel. No. 34-58620 (2008), at Part III.

[21] The SEC's 2018 unified regulatory agenda – the "Reg Flex Agenda" – published on May 9, 2018 includes proposed amendments to financial disclosures about acquired businesses on the current agenda, indicating a plan to take up the matter within the next 12 months. The SEC also recently published proposals to revise financial disclosures relating to guarantors. Rel. No. 33-10526 (2018).

[22] SEC Chairman Clayton has encouraged issuers to request modifications of financial reporting requirements in appropriate situations. *See supra* note 12.

In October 2017, the SEC proposed amendments to Form 20-F (as well as to Regulation S-K applicable to US issuers) to permit companies to provide in an annual report only the comparison for the two most recent fiscal years and omit the comparison for the two earliest fiscal years.[23] The prior years' comparison could be omitted only if (1) the comparison is not material and (2) the company had in fact filed an annual report in the prior year that contains the relevant disclosure. This proposal is designed to help discourage needless repetition of disclosures that are no longer material to investors. While the comment period on this proposal has expired, the timing of finalizing this change is not clear.

Confidential treatment requests. In an IPO registration statement as well as in Annual Reports on Form 20-F, FPIs are required to publicly file as exhibits material contracts relating to the company.[24] When these contracts contain terms that are commercially sensitive, FPIs can take advantage of an SEC procedure under which they can request that those terms be kept confidential and blocked out (or redacted) as part of the public filing.[25]

The process for seeking confidential treatment can be both burdensome and costly. Under current procedures, when an exhibit is first filed, the company must file electronically on EDGAR a version of the contract with proposed redactions, and submit on a confidential basis an unredacted paper copy of the contract with markings specifically showing the redacted terms. Together with the contract, the company must file an application for confidential treatment that supports why the redacted terms are not material and why public disclosure of the terms would result in substantial competitive harm. The SEC must then act to grant or deny confidential treatment.

As part of its disclosure effectiveness initiative, the SEC proposed a more streamlined procedure for these confidential treatment requests under which companies would be permitted to omit confidential information from a filed contract without submitting a formal confidential treatment request.[26] The SEC would still be entitled to request from companies an analysis that justifies the omission of information. This new process would be most relevant for Form 20-F Annual Reports; confidential treatment requests in connection with IPO registration statements on Form F-1 always will require a separate application for confidential treatment that the SEC will act upon.

DRAFT SUBMISSIONS BY FOREIGN PRIVATE ISSUERS

Since the early 1990s, the SEC has permitted FPIs to submit registration statements for US-registered offerings and US listings on a draft, non-public basis so that review staff in the SEC's Division of Corporation Finance could review and comment on financial statements and corporate disclosure prepared by FPIs without having every successive iteration of a registration statement subject to public scrutiny. This draft submission policy grew out of accommodations in connection with cross-border privatizations and other global offerings when a registration statement under the Securities Act was being reviewed by the SEC for the US portion of the offering, and at the same time a virtually identical document was being reviewed by a home country regulator under a non-public review procedure for the non-US portion of the offering.

At one point, the draft submission process for FPIs extended to any registration statement to be filed under the Securities Act or the Exchange Act, even for repeat and frequent issuers of securities. This liberal policy was curtailed in 2001 to be limited to situations involving an initial registration of securities by an FPI; repeat issuers that were FPIs were no longer permitted to submit registration statements on a draft non-public basis.[27] This policy was still further cut back in 2011 when only FPIs that were already listed, or that were concurrently listing, on a non-US securities exchange and were undertaking their initial registration with the SEC were permitted to submit registration statements on a non-public basis.[28]

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[23] FAST Act Modernization and Simplification of Regulation, Rel. No. 33-10425 (2017).

[24] Item 8 of Form F-1, Item 4 of Instructions as to Exhibits, Form 20-F.

[25] Exchange Act Rule 24b-2 explains the procedure to be followed in requesting confidential treatment of information required to be filed. SEC Staff Legal Bulletin No. 1 (CF) (1997) also provides a useful description of the confidential treatment request process.

[26] *See supra* note 22.

[27] Staff Willingness to Review Draft Submissions of International Reporting and Disclosure Issues in the Division of Corporation Finance (November 1, 2004) *available at* https://www.sec.gov/divisions/corpfin/internatl/cfirdissues1104.htm#P299_40241.

[28] Non-Public Submissions from Foreign Private Issuers (December 8, 2011, updated May 30, 2012) *available at* https://www.sec.gov/divisions/corpfin/internatl/nonpublic submissions.htm.

The draft submission process provides a number of advantages to issuers, such as allowing the issuer to begin the SEC review process without publicly revealing sensitive and non-public information, such as financial data that had never been publicly released. Also, this process allows an issuer to pursue a "dual-path" process, under which a company can complete some of the initial steps for a US IPO, and at the same time pursue steps for either a private sale of the entire company or a private offering for a portion of the company. Further, this non-public process also permits an issuer to gauge the severity of the SEC's comments on its offering prospectus. This can be especially helpful for FPIs, which may never have had their financial statements subject to the type of in-depth review conducted by the SEC.

Recognizing that US companies could also benefit from the draft submission process, as part of the JOBS Act the US Congress added Section 6(e) to the Securities Act under which EGCs were permitted to submit to the SEC a draft IPO registration statement for SEC review. This change followed the recommendation of the IPO Task Force, a national group of industry experts under the guidance of the US Treasury Department.[29] The draft submission process for EGCs has been widely used and without any apparent material impact on timely investor access to information. About five years after the JOBS Act permitted EGCs to make draft submissions, the SEC on its own initiative expanded the draft submission process to all companies, not just EGCs and FPIs, that were undertaking any type of initial registration of securities under the Securities Act or that were registering securities under the Exchange Act for the purpose of a US stock exchange listing.[30]

Under the JOBS Act and the SEC's policies, an FPI undertaking its initial SEC registration has three alternatives for making a draft submission to the SEC for its IPO:[31]

- An FPI that qualifies as an EGC may use the confidential submission procedure under Section 6(e) to the same extent and subject to the same requirements as an EGC that is not an FPI.

- An FPI that does not qualify as an EGC may use the confidential submission procedure under the Staff's expanded policy to the same extent and subject to the same requirements as a non-EGC issuer that also is not an FPI.

- An FPI that is already listed on a non-US stock exchange or that is concurrently listing on a non-US stock exchange in connection with its initial SEC registration may use the separate policy for dual-listed FPIs.

By and large, there is a good deal of similarity in how draft submissions are reviewed, processed, and treated by the SEC, regardless of the policy chosen. For example, one would expect the SEC Staff's level of review and comments would not be significantly impacted by whether an FPI chose to proceed under one alternative or another. However, there can be important distinctions based on the alternative selected by an FPI. Companies that strictly proceed under the FPI policy are not required to wait 15 days after their first public filing to begin their road show, which may be an important consideration in coordinating a concurrent offering in the home country; companies that strictly proceed under the Section 6(e) policy for EGCs have the benefit of disclosure accommodations allowed for EGCs under the JOBS Act,[32] and being able to claim an exemption from the Freedom of Information Act in the event a request under that Act is made for non-public submissions.

Because FPIs have a choice of draft submission alternatives and these alternatives can have an impact on SEC processes, a best practice for FPIs that submit

[29] "Rebuilding the IPO On-Ramp," issued by the IPO Task Force (October 20, 2011) *available at* https://www.treasury.gov/connect/blog/Pages/Putting-Emerging-Companies-Back-on-the-Road-to-Growth.aspx.

[30] Draft Registration Statement Processing Procedures Expanded, announcement by Division of Corporation Finance (June 29, 2017, supplemented August 17, 2017).

[31] Under the expanded submission policy, Securities Act registration statements for subsequent offerings within one year of an IPO or Exchange Act Section 12(b) registration may also be submitted on a confidential basis. In addition, an FPI that qualifies as an EGC and that was initially able to take

footnote continued from previous column…

advantage of the confidential submission policy under the "dual-listing" procedure in connection with a US listing (such as with either a spin-off or a secondary listing that would be effected through a Form 20-F or 40-F Exchange Act registration statement) without a Securities Act registration statement could continue to make a confidential submission under Section 6(e). This could be well after one-year of the initial registration, for as long as the FPI qualifies as an EGC and has not registered an offering under the Securities Act.

[32] For example, EGCs are permitted to provide only two years of audited financial statements rather than three years. Securities Act Section 7(a)(2)(A), as amended by JOBS Act Section 102.

registration statements to the SEC on a confidential basis is to specify in the transmittal letter that accompanies the initial submission the alternative being used by the company. This should help alleviate any misunderstandings or confusion.

EXPANDED TEST-THE-WATERS PROCEDURES

It had long been a bedrock tenet of the Securities Act that an issuer could not offer its securities for sale in an SEC-registered offering until a registration statement under the Securities Act relating to those securities was on file with the SEC. Violation of this restriction, commonly referred to as gun-jumping, could result in delays in a proposed offering of securities that was being registered under the Securities Act, enforcement actions brought by the SEC, and private rights of action for rescission and damages on the part of purchasers in the registered offering.

In 2005, the SEC adopted a number of rule amendments that significantly liberalized issuer communications in connection with registered offerings of securities.[33] Most notably, under new Securities Act Rule 163, large issuers that were already registered with the SEC (so-called well-known seasoned issuers or WKSIs) were permitted to offer securities prior to the filing of a registration statement, subject to certain conditions. This revision largely eliminated gun-jumping concerns for these issuers.

The SEC's 2005 rule revisions left in place the basic gun-jumping prohibition for most other companies, including those planning an IPO in the United States. The gun-jumping prohibition serves a strong investor protection interest, because prospective investors could not be solicited to purchase securities without having available to them a written document that was publicly available through the SEC and that was prepared in accordance with SEC requirements. However, the gun-jumping prohibition also served to inhibit capital formation – private companies that were considering an IPO could not approach potential investors to assess the feasibility of an IPO in the first place. Preparing for an IPO is a significant and costly undertaking, as an issuer is required to hire independent accountants to audit its financial statements, and outside counsel and other advisers to help prepare a registration statement. The inability of companies to assess investor interest without incurring substantial upfront costs discouraged public capital-raising.

[33] Securities Offering Reform, Rel. No. 33-8591 (2005).

As part of the JOBS Act, Congress added new Section 5(d) to the Securities Act to provide EGCs with the ability to "test the waters" for a registered offering. Under the statute, EGCs may "engage in oral or written communications with potential investors . . . . to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following" the filing of a registration statement under the Securities Act. In some respects, this provision was broader than Rule 163 adopted for WKSIs in that Section 5(d) could be used by issuers and their authorized persons, including underwriters; and in some respects, this provision was more limited than Rule 163 in that pre-filing communications are limited to investors who are qualified institutional buyers under Securities Act Rule 144A or institutions that are accredited investors under Securities Act Rule 501(a) under Regulation D.

Companies that do not qualify as EGCs, however, are not able to use the test-the-waters procedures under Section 5(d) and remain fully subject to the gun-jumping restrictions. As a result, non-EGCs are unable to approach potential investors to assess whether there is interest in a potential IPO without incurring the time and expense of preparing a Form F-1 or S-1 registration statement.

SEC Chairman Jay Clayton and other SEC Staff have on a number of occasions noted that facilitating capital formation is a key priority.[34] In recent Congressional testimony, William Hinman, Director of the Division of Corporation Finance, noted that his Division is considering recommending that the SEC propose rule amendments that would extend the test-the-waters provisions to non-EGCs.[35] While the details of such a proposal have not yet been publicly disclosed, there are a number of threshold questions that such a proposal will need to address. For example, will the proposed new test-the-waters procedures for non-EGCs:

- be limited to IPOs or also available for follow-on offerings. Although Section 5(d) may have been written with IPOs in mind, by its terms it is available for any registered offering by an issuer that

[34] SEC Chairman Jay Clayton, Testimony before the Financial Services and General Government Subcommittee of the Senate Committee on Appropriations (June 5, 2018), *available at* https://www.sec.gov/news/testimony/testimony-financial-services-and-general-government-subcommittee-senate-committee .

[35] *See supra* note 13.

qualifies as an EGC. Since an issuer can continue to qualify as an EGC for up to five years after its IPO, the Section 5(d) test-the-waters procedures are available for follow-on equity offerings, as well as debt and other offerings subsequent to an IPO;

- allow for unrestricted communications as under Rule 163 for WKSIs, or limit communications to qualified international buyers ("QIBs") and institutional accredited investors, as under Section 5(d), or to some yet other subset of potential investors, for example to all accredited investors (institutions and individuals) under Securities Act Rule 501(a); or

- be available for use by potential underwriters and other third parties who are authorized to act on behalf of the issuer as under Section 5(d), or only available to the issuer as under Rule 163.

There has been little firm indication of likely timing of a proposal to expand the test-the-waters procedures. It is significant then, that on May 9, 2018, the SEC published its agenda under the Regulatory Flexibility Act of rule-writing projects it anticipates considering. For the first time, this agenda included as a new project a proposal to expand test-the-waters procedures to non-EGCs.[36] The agenda included this project among those that the SEC foresees taking up within the next 12 months. Any such proposal would be subject to comments from the public as well as to the economic analysis that the SEC undertakes in when it is engaged in rule writing.

For EGCs, "test-the-waters" meetings with key institutional accounts has become a standard part of the IPO process. In light of the generally positive experiences of issuers and other market participants under both Section 163 and Section 5(d), as well as other similar experiences when the SEC has relaxed communications restrictions,[37] issuers can look forward to a time when tedious gun-jumping concerns are a thing of the past.

CONCLUSION

With recent and proposed initiatives, the SEC has sought to promote an environment that is conducive to capital formation while also making sure that investors receive the protections to which they are entitled under the federal securities laws. The SEC process for IPOs will continue to require a high level of dedicated effort by issuers to comply with SEC requirements, but FPIs seeking a US listing can look to past and future changes in those requirements. These changes should alleviate some of the burdens associated with the SEC registration, reducing costs and the time required for a successful US-listed IPO. ■

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[36] *See supra* note 20.

[37] *See* Regulation of Takeover and Security Holder Communications, SEC Rel. No. 33-7760 (1999), that the SEC said would "permit increased communications with security holders and the markets" in takeover transactions such as tender offers, mergers, and other extraordinary transactions.