

## Using Form S-1 To Go Public

Going public often refers to the process of a company filing a registration statement with the Securities and Exchange Commission (“SEC”) to register its securities under the Securities Act of 1933, as amended (the “Securities Act”), and become an SEC reporting company. Going public can also mean becoming an SEC reporting company. Other times going public may mean the filing a Form 211 with FINRA to obtain a ticker symbol for quotation on the OTCMarkets OTC Pink Sheets without filing a registration statement with the SEC. Going public is a big step for any company. The process of “going public” is complex and at times precarious. While going public offers many benefits it also comes with risks and quantities of regulations with which issuers must become familiar.

### Q. What Are Other Advantages of Going Public?

A. Numerous additional benefits come with public company status:

- Once a going public transaction is complete, the company will be able to use its common stock as a form of currency and as collateral for loans.
- Going public creates value for an issuer’s securities. Going public also creates liquidity for existing and future investors, and provides an exit strategy for shareholders.
- Public companies have greater visibility than private companies. It is easier to build recognition of a public company than a private one. Publicly traded companies are often promoted and gain publicity from their status as a public company.
- Going public allows a private company to attract more qualified employees and key personnel, such as officers and directors because it allows the company’s management and employees to share in its growth and success through stock options and other equity-based compensation.
- There is a certain amount of prestige associated with public company status or service to a public company.



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*It is much easier for a public company to locate capital than it is for a private company. Funds raised in going public transactions can be used for working capital, research and development, retiring existing indebtedness, acquiring other companies or businesses or paying suppliers.*



## SEC Comments in Form S-1 Registration Statements

S-1 registration statements are subject to review by the SEC's Division of Corporation Finance. Upon filing, the statement is typically reviewed by an SEC attorney and an SEC staff accountant to ensure that all required disclosures have been made by the issuer. The SEC does not determine the merits of the issuer's business, management, prospects or of the securities offering being registered. The role of the SEC is to determine whether the disclosures comply with securities laws.

Approximately two weeks after the filing of an S-1 Registration Statement the SEC completes its review. It then sends comments to the issuer and/or its securities attorney concerning the disclosures made. The issuer must file an amendment to the previously filed S-1 registration statement along with a response letter to the SEC's comments. S-1 registration statements are subject to review by the SEC's Division of Corporation Finance. The role of the SEC is to determine whether repeated exchanges with the SEC.

The SEC will review the response letter and the amended S-1 registration statement, and will then send additional comments, if necessary. The review of the S-1 Registration continues until the SEC staff is satisfied with the disclosure provided by the issuer. Once that happens the SEC will declare the S-1 effective. The S-1 must be declared effective before the issuer or any selling shareholder can sell securities registered in the securities offering.

## What is Required in a Form S-1 Registration Statement?

A Form S-1 registration statement has two principal parts which require expansive SEC disclosures. Part I of the form is the prospectus which requires that the company provide certain disclosures about its business operations, financial condition, and management. Part II contains information that doesn't have to be delivered to investors. The disclosures required by a Form S-1 registration statement are set forth in Regulation S-K and include the following:

- Front Cover Page and Summary Information
- Risk Factors
- Use of Proceeds
- Determination of Offering Price and Dilution
- Selling Shareholders and Insiders
- Plan of Distribution
- Legal Proceedings and Indemnification
- Directors, Executive Officers, Promoters, and Control Persons
- Description of Securities
- Description of Business
- Description of Property and Financial Statements
- Management's Discussion and Analysis of Financial Condition and Results of Operations.
- Certain Relationships and Related Transactions
- Market for Common Equity and Related Stockholder Matters
- Executive Compensation, Indemnification of Officers and Directors, and other Expenses of Issuance and Distribution
- Expenses of Issuance and Distribution
- Recent Sales of Unregistered Securities

## Selling Stockholder Disclosures in Form S-1 Registration Statements

SEC Form S-1 Registration Statements are the most common form used to register shares held by selling stockholders. Companies registering stock on a resale registration can simultaneously register shares for a capital raising transaction. This capital can be used for operating capital or to provide funds to offset going public costs.

Regardless of the structure chosen, Form S-1 requires the registrant to provide specific selling stockholder disclosures. These disclosure requirements are set forth in Item 507 of Regulation S-K of the Securities Act of 1933, as amended.

Item 507 of Regulation S-K requires the following selling stockholder disclosures:

- Name of each selling security holder and if the selling stockholder is a corporate entity, its control person must be provided
- Relationship between each selling shareholder and the company
- Relationship between each selling shareholder and one another
- Number of shares being registered
- Number of outstanding shares held before and after the offering
- Percentage of shares owned before and after the offering assuming all shares are sold

## Reporting Obligations After Effectiveness

Once the SEC staff declares a company's Securities Act Form S-1 effective, the company becomes a reporting company and must file annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K with the SEC on an ongoing basis.

If a company qualifies as a "smaller reporting company" or an "emerging growth company," it will be eligible to follow scaled disclosure requirements for these reports.

Once a company begins reporting, it will be required to continue reporting unless it satisfies one of the following "thresholds," in which case its filing obligations are suspended:

- the company has fewer than 300 shareholders of record of the class of securities offered (1,200 shareholders of record if the company is a bank or bank holding company); or
- the company has fewer than 500 shareholders of record of the class of securities offered and less than \$10 million in total assets for each of its last three fiscal years.

## Exchange Act Registration Requirements

Even if a company has not registered securities under the Securities Act, it could still become an SEC reporting company. In general, a company will be required to file a registration statement under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act"), registering the pertinent class of securities if:

- it has more than \$10 million in total assets and a class of equity securities, like common stock, that is held of record by either (1) 2,000 or more persons or (2) 500 or more persons who are not accredited investors; or
- it lists the securities on a U.S. stock exchange.

For banks and bank holding companies, the threshold is 2,000 or more holders of record; the separate registration trigger for 500 or more non-accredited holders of record does not apply.

In calculating the number of holders of record for purposes of determining whether Exchange Act registration is required, a company may exclude persons who acquired their securities under an employee compensation plan in a transaction that was exempt from Securities Act registration.



# Keeping Draft Form S-1's Confidential

The Jumpstart Our Business Startups Act (the "JOBS Act") allows an "emerging growth company" to submit a draft of its registration statement and exhibits to the SEC on a confidential basis. This is particularly useful to companies in going public transactions who are unfamiliar with the SEC registration statement process.

**Q. What are the benefits of confidential submission of a Form S-1 registration statement to the SEC?**

A. The confidential submission of a registration statement allows a company to keep the registration statement confidential and out of the public domain until it decides whether it will proceed with its registered public offering. If a company abandons its offering before its registration statement becomes effective, its submission remains confidential.

**Q. If a company submits its registration statement on a confidential basis, can the company still announce its registration statement or IPO?**

A. SEC Rule 135 allows an issuer to announce limited information about the confidential submission of a registered securities offering submitted to the SEC.

**Q. How long will my company's Form S-1 registration statement remain confidential?**

A. Registration statements submitted to the SEC on a confidential basis do not remain confidential if a company goes forward with its Initial Public Offering ("IPO") or pre-IPO offering.

**Q. Does anything contained within a confidentially submitted Form S-1 registration statement remain confidential?**

A. Limited information from the confidential submission of a registration statement can remain confidential. Rule 406 allows a company to keep portions of its registration statement confidential. Rule 406 requires the issuer to state the specific reasons why a confidential request is made and provide a detailed explanation of why, based on the related facts and circumstances, disclosure of the information is unnecessary to protect investors. The most common request for confidential submission of certain information in a registration statement is made for trade secrets, proprietary information, confidential commercial or financial information that would cause substantial competitive harm to the issuer if disclosed.

## Contact Us

Give us a call for more information about periodic reporting, securities law and going public!

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