

SEC Staff Issues Guidance on the JOBS Act

On April 5, 2012, the Jumpstart Our Business Startups Act (the “JOBS Act” or the “Act”) was signed into law.¹ Among its other objectives, the JOBS Act is intended to facilitate the initial public offering (“IPO”) process for small-scale businesses by easing compliance with certain requirements of the federal securities laws, reducing public disclosure requirements and establishing a confidential submission process for the registration statements of “Emerging Growth Companies” (“EGCs”). As defined in the Act, EGCs are companies with less than \$1 billion in “total annual gross revenue;” and an IPO registration statement effective after December 8, 2011.²

On April 5, 2012, the SEC Division of Corporation Finance (the “Division”) issued preliminary guidance regarding the new confidential submission and review process.³ On April 10, 2012 and April 16, 2012, the Division provided additional guidance in the form of “Frequently Asked Questions”, regarding all of Title 1 of the Act.⁴ The SEC noted that EGCs may comply with Title I’s provisions in its registration statements, periodic reports and proxy statements, even if doing so would be inconsistent with existing rules and regulations because the disclosure provisions in Title I supersede, in relevant part, existing rules and regulations.⁵ The SEC guidance also addresses the following specific topics in greater detail:

I. Qualifying for EGC Status

An “EGC” is defined in the Act as an issuer with “total annual gross revenues” of less than \$1 billion during the issuer’s most recently completed fiscal year. The phrase “total annual gross revenues” means total revenues as presented on the issuer’s income statement consistent with U.S. GAAP (or consistent with IFRS for a foreign private issuer). Issuers with financial statements presented in a foreign currency should calculate total annual gross revenues in U.S. dollars using the exchange rate as of the last day of the most recently completed fiscal year.⁶

Securities Act Section 2(a)(19)(C) provides that an issuer may lose its EGC status on the “date on which such issuer has during the previous 3-year period, issued more than \$1,000,000,000 in non-convertible debt,” provided that none of the other disqualifying conditions in Section 2(a)(19) have been triggered. The 3-year period covers any rolling 3-year period and is not limited to completed calendar or fiscal years. “Non-convertible debt” means any non-convertible security that constitutes indebtedness, whether issued in a registered offering or not.⁷

¹ Jumpstart Our Business Startup Act, H.R. 3606, 112th Cong. (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf>.

² Sections 101(a) and (d). Citations are to Sections of the Act unless otherwise noted.

³ Available at: <http://sec.gov/divisions/corpfin/cfannouncements/draftregstatements.htm>.

⁴ Available at: <http://sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm> and <http://www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-title-i-general.htm>.

⁵ For example, the SEC notes that Section 102(c) of the JOBS Act, which was not enacted as part of the Exchange Act, provides that an emerging growth company may comply with Item 402 of Regulation S-K by providing only the information required of a smaller reporting company, even if it does not qualify as a smaller reporting company. An emerging growth company’s CEO and CFO are required to certify in their Sarbanes-Oxley Act Section 906 certifications that the company’s periodic report fully complies with the requirements of the Exchange Act. The SEC views compliance with Sections 102(c) and 103 of the JOBS Act as being consistent with full compliance with the requirements of Sections 13(a) or 15(d) of the Exchange Act. See Answer to Question 15. (April 16, 2012 FAQs).

⁶ Answer to Question 1. (April 16, 2012 FAQs.)

⁷ Answer to Question 17. (April 16, 2012 FAQs.)

II. Eligibility for Non-Public Review

Under the new Section 6(e) of the Securities Act, EGCs may submit an initial draft submission, and subsequent amendments, to the Securities and Exchange Commission (the “SEC”) for a confidential, non-public review prior to filing.⁸ However, the confidential submission, and all amendments, must later be publicly filed at least 21 days before the EGC commences a “road show,” as defined in Securities Act Rule 433(h)(4).

Any EGC may submit a draft registration statement for confidential review by the SEC, provided that the draft is submitted prior to the company’s “initial public offering date.” As defined in the JOBS Act, the “initial public offering date” is the “date of the first sale of common equity securities of an issuer pursuant to an effective registration statement under the [Securities Act].”⁹ The “date of first sale” is not limited to a company’s offering of equity securities for cash; rather, it could also include an offering of common equity securities pursuant to an employee benefit plan registered on Form S-8 or a selling shareholder’s secondary offering registered on a resale registration statement. A company with securities other than common equity securities in a transaction covered by an effective Securities Act registration statement can also use the confidential review process.¹⁰

A company must qualify as an EGC at the time of submission in order to submit a confidential draft registration statement, or any amendment thereto. In order to continue the registration process, a company that ceases to qualify as an EGC must file a public registration statement on EDGAR, comply with all current rules and regulations applicable to companies that are not EGCs and file the prior confidential draft submissions as exhibits to the registration statement (see Section IV below).¹¹

III. Procedure and Content for Draft Submissions for Non-Public Review

Issuers seeking to submit a draft registration statement to the SEC for a confidential, non-public review should submit either a text-searchable PDF file on CD or DVD, or an unbound, unstapled paper copy, to the following address:

Draft Registration Statement
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

The submission must be substantially complete, including exhibits and a signed audit report of the issuer’s registered public accounting firm. However, the filing may omit offering related disclosures such as the public offering price. The submission should also include a letter attesting to the issuer’s EGC status and should disclose the issuer’s EGC status on the cover page of its prospectus.¹²

In addition, the initial confidential submission must also contain a notice informing the SEC whether the issuer chooses to take advantage of the extended transition period provided by Securities Act Section 7(a)(2)(B)

⁸ Section 106, amending new Section 6(e) to the Securities Act of 1933 (the “Securities Act”).

⁹ Section 101(c)(2).

¹⁰ Answer to Question 1. (April 10, 2012 FAQs.)

¹¹ Answer to Question 3. (April 16, 2012 FAQs.)

¹² Answer to Question 4. (April 16, 2012 FAQs) and

<http://sec.gov/divisions/corpfin/cfannouncements/draftregstatements.htm>.

for complying with new or revised accounting standards. EGCs currently in registration, or that are subject to Exchange Act reporting, should make and disclose their choice in their next amendment to the registration statement or in their next periodic report, respectively. An EGC's decision to opt out of the extended transition period provided in Securities Act Section 7(a)(2)(B) is irrevocable.¹³ On an ongoing basis, an EGC that chooses to adopt the extended transition period should disclose the date on which the EGC will adopt any recently issued accounting standard that will apply to its financial statements, assuming it remains an EGC.¹⁴

IV. Public Filing of Non-Public Submissions

The SEC emphasized that the confidential draft submissions (and any amendments) must be publicly filed at least 21 days before the issuer commences a "road show."¹⁵ As defined in Rule 433(h)(4), a "road show" is an offer of securities "that contains a presentation regarding an offering by one or more members of the issuer's management . . . and includes discussion of one or more of the issuer, such management, and the securities being offered." If an EGC does not conduct a traditional road show, it must publicly file its confidential submissions and registration statement no later than 21 days before the anticipated date of effectiveness of the registration statement.¹⁶ Each draft registration statement and amendment should be attached as an Exhibit 99 to the first registration statement filed on EDGAR and that statement should be complete, including signatures, signed audit reports, consents, other exhibits and filing fees.¹⁷ The Division did not indicate whether SEC comment letters related to EGC filings would be released to the public.¹⁸

Under Securities Act Rule 401(a), a company's status at the time of the initial filing date of its registration statement will determine the requirements for the contents of that publicly-filed registration statement. If a company files its registration statement at a time when it qualifies as an EGC, the disclosure provisions for EGCs will continue to apply through effectiveness of the registration statement, even if the company loses its EGC status during registration. By contrast, a company which qualified as an EGC at the time it submitted a draft registration statement for confidential review, but which no longer qualifies as an EGC when it files its initial registration statement must comply with all requirements applicable to issuers that are not EGCs.¹⁹

V. Switching to the Non-Public Submission Process

Issuers that qualify as EGCs and were in registration at the time of the JOBS Act's enactment may switch to the confidential submission process for future amendments, rather than withdrawing the registration statement and confidentially submit a new draft registration statement.²⁰ An issuer with a registration statement declared effective on or before December 8, 2011 may still avail itself of the non-public, confidential submission process,

¹³ Answer to Question 13. (April 16, 2012 FAQs.)

¹⁴ Answer to Question 15. (April 16, 2012 FAQs.)

¹⁵ Answer to Question 8. (April 10, 2012 FAQs.)

¹⁶ Answer to Question 9. (April 10, 2012 FAQs.)

¹⁷ Answer to Question 10. (April 10, 2012 FAQs.)

¹⁸ Since May 12, 2005, the SEC has made publicly available the comment letters issued by the Division of Corporation Finance and the Division of Investment Management regarding disclosure filings with the SEC, and the responses to those comment letters, after completion of the staff review process. Documents are released on the SEC's website within 45 days after completion of the SEC's review of the filing. See <http://www.sec.gov/news/press/2004-89.htm>.

¹⁹ Answer to Question 1. (April 16, 2012 FAQs.)

²⁰ Answer to Question 10. (April 10, 2012 FAQs.)

so long as the issuer's first sale of common equity securities occurs after December 8, 2011.²¹ Any issuer that wishes to make such a switch should contact its review team.

VI. Foreign Private Issuers

A foreign private issuer that qualifies as an EGC may use the confidential submission process to the same extent as a domestic issuer.²² A foreign private issuer that is not an EGC may also submit a confidential draft registration statement if it meets the requirements for non-public submissions as set forth in the SEC's policy on Non-Public Submissions from Foreign Private Issuers.²³ Foreign private issuers that meet the requirements for non-public submissions must now submit their drafts in the same manner and to the same address as domestic EGCs (see Section III), rather than to the email address that was used previously.²⁴

If a foreign private issuer chooses to take advantage of any benefit available to EGCs, it will then be treated as an EGC and will be required to publicly file its confidential submissions at least 21 days before commencing a road show. If the foreign private issuer chooses not to take advantage of EGC company benefits, then it may continue to follow the Division's policy on Non-Public Submissions from Foreign Private Issuers.²⁵

Although the Act refers only to Regulation S-K and does not refer to the corresponding items in Form 20-F, the SEC will not object if a foreign private issuer that qualifies as an EGC complies with the reduced disclosure provisions available to EGCs (discussed in greater detail in Section VII), to the extent relevant to the form requirements for foreign private issuers.²⁶

The disclosure requirements of a Canadian issuer filing under the Multi-Jurisdictional Disclosure System ("MJDS") that qualifies as an EGC continue to be established under the issuer's home country standards, in accordance with the MJDS. Other provisions of Title 1 of the Act such as the test-the-waters provision in Section 5(d) of the Securities Act and the deferral of compliance with Section 404(b) of the Sarbanes-Oxley Act, would be available to an MJDS filer that qualifies as an EGC.²⁷

VII. Reduced Disclosure Requirements

Under Title 1 of the JOBS Act, EGCs benefit from reduced financial disclosure obligations in registration statements and periodic reports. An EGC is not required to present more than two years of audited financial statements in a registration statement for an IPO of its common equity securities or two years of audited financial statements in the financial data required to be included under Item 301 of Regulation S-K registration.²⁸ An issuer that qualifies as an EGC, and that filed its registration statement before April 5, 2012, may amend its registration statement to comply with the limited disclosure options available to EGCs in a pre-effective amendment to a pending registration statement or in a post-effective amendment. Likewise, an EGC that

²¹ Answer to Question 2. (April 16, 2012 FAQs.)

²² Answer to Question 3. (April 10, 2012 FAQs.)

²³ Available at: <http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>.

²⁴ Answer to Question 3. (April 10, 2012 FAQs.)

²⁵ Answer to Question 9. (April 16, 2012 FAQs.)

²⁶ Answer to Question 8. (April 16, 2012 FAQs.)

²⁷ Answer to Question 10. (April 16, 2012 FAQs.)

²⁸ Answer to Question 11. (April 16, 2012 FAQs.)

completed its initial public offering after December 8, 2011 and prior to April 5, 2012 may file its next periodic report using the reduced disclosure provisions in Title I.

With respect to registration statements not issued in connection with an IPO, the SEC will not object if an EGC does not present audited financial statements for any period prior to the earliest audited period presented in connection with its IPO of common equity securities.²⁹ Other than the optional extended period to comply with new accounting standards (discussed above in Section III) an EGC may choose to follow only some of the limited disclosure provisions for EGCs but not others.³⁰

If an issuer is required to present up to three years of financial statements of other related entities in its registration statement based on the “significance” of those entities (e.g., the financial statements of acquired businesses and equity method investees under Rules 3-05 and 3-09 of Regulation S-X, respectively) the SEC will not object if the EGC presents only two years of financial statements for those entities in the issuer’s registration statement as well.

VIII. “Test the Waters” Communications

Under the new provisions, the SEC will not object if an EGC chooses to engage in “test-the-waters” communications or meetings with potential investors prior to filing a registration statement, provided that: (x) such communications are limited to communications with qualified institutional buyers (“QIBs”) or institutional accredited investors³¹ and (y) the company qualifies as an EGC at the time it engages in such communications.³² An EGC that engages in communications with investors not limited to QIBs or institutional accredited investors must file a registration statement at least 21 days prior to those communications.³³

If a company qualifies as an EGC at the time it engages in test-the-water communications before filing a registration statement, but is no longer an EGC at the time it files a registration statement, the SEC will not view the earlier communications as a violation of Securities Act Section 5.³⁴

IX. Conclusion

The Division’s responses to “Frequently Asked Questions” provide useful guidance on the submission and review process for draft registration statements and the public registration process for EGCs under the JOBS Act.³⁵

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²⁹ Answer to Question 12. (April 16, 2012 FAQs.)

³⁰ Answer to Question 7. (April 16, 2012 FAQs.)

³¹ Answer to Question 8. (April 10, 2012 FAQs.)

³² Answer to Question 3. (April 16, 2012 FAQs.)

³³ Answer to Question 9. (April 10, 2012 FAQs.)

³⁴ Answer to Question 3. (April 16, 2012 FAQs.)

³⁵ The full text of the “Frequently Asked Questions” is available at:
<http://sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm> and at:
<http://www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-title-i-general.htm>.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.

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