

# Corporate & Financial Weekly Digest

April 13, 2012 by [Robert L. Kohl](#)

## SEC Issues Guidance and Implementation of the JOBS Act

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The Jumpstart Our Business Startups Act (JOBS Act), which was enacted on April 5, includes reforms intended to facilitate capital raising by small businesses and “emerging growth companies” (EGCs). Among other things, the JOBS Act allows for confidential submission to the Securities and Exchange Commission (SEC) of draft registration statements by EGCs, raises the threshold for registration under the Securities Exchange Act of 1934 (Exchange Act), and eliminates the ban on general solicitation and advertising for offerings to accredited investors under Regulation D under the Securities Act of 1933 (Securities Act) and offerings to qualified institutional buyers under Rule 144A under the Securities Act. (See the March 30, 2012 Katten Muchin Rosenman LLP *Client Advisory* [here](#).)

On April 11, the SEC announced that it is seeking public comments in connection with the rules required under the JOBS Act, and will accept comments before it proposes such rules and amendments.

To view the complete text of the SEC’s press release, click [here](#).

### *Confidential Submission of Draft Registration Statements*

Because Title I of the JOBS Act, containing the EGC “ramp up” provisions, became operative upon enactment, the SEC has published procedures for certain filings by EGCs and foreign private issuers to be submitted in draft form to the SEC for confidential, nonpublic review. Registration statements submitted confidentially will not be deemed “filed” under the Securities Act. According to a set of frequently asked questions issued by the SEC’s Division of Corporation Finance on April 10, the confidential submission process is not available for Exchange Act registration statements, such as Form 10 or Form 20-F.

An EGC is only eligible to confidentially submit a draft registration statement if its common equity securities have not been previously sold pursuant to an effective registration statement. The frequently asked questions clarify that a company that has

had registered sales of securities that are not common equity securities may still qualify for confidential filings of equity offerings as an EGC.

A foreign private issuer is only eligible to confidentially submit a draft registration statement if it is eligible to submit as an EGC or, if it is not an EGC, if it meets the Division of Corporation Finance's policy for nonpublic submissions from foreign private issuers. On December 8, the Division of Corporation Finance announced that it would only review initial registration statements submitted on a nonpublic basis of foreign governments registering debt securities, foreign private issuers listed (or concurrently listing) on a non-U.S. securities exchange, foreign private issuers being privatized by a foreign government, or foreign private issuers that can show that public filing would conflict with the law of their applicable foreign jurisdiction. Foreign private issuers that are shell companies, blank check companies, or that have no or substantially no business operations may not submit registration statements non-publicly. (See the December 16, 2011 edition of [Corporate and Financial Weekly Digest](#).)

Confidential submissions of draft registration statements must be publicly filed at least 21 days prior to the road show for the offering. However, the JOBS Act permits EGCs to make "test the waters" communications with qualified institutional buyers and institutional accredited investors prior to filing a registration statement. The Division of Corporation Finance's frequently asked questions clarify that an EGC does not need to treat such "test the waters" communications as a road show for the purpose of determining when the public filing must be made. However, the frequently asked questions also clarify that if an EGC does not conduct a traditional road show and does not engage in activities that would fall under the definition of a road show (other than "test the waters" communications), then the registration statement and confidential submissions must be filed 21 days prior to the anticipated date of effectiveness. The initial confidential submission and all amendments should be filed as exhibits to the first publicly filed registration statement.

To view the complete text of the SEC announcement and the policy for non-public submissions from foreign private issuers, click [here](#) and [here](#).

To view the complete text of the Division of Corporation Finance's frequently asked questions, click [here](#).

### *Exchange Act Registration Requirements*

Titles V and VI of the JOBS Act, which amend Sections 12(g) and 15(d) of the Exchange Act, were also effective upon enactment. Title V raises the threshold for registration from 500 holders of record to either 2,000 holders or (except for banks and bank holding companies) 500 holders who are not accredited investors. In a set of frequently asked questions issued on April 11, the Division of Corporation Finance clarified that under certain circumstances, issuers that triggered this registration requirement as of a fiscal year-end before April 5, but would not trigger the requirement under the new threshold, are not subject to registration obligations. If such an issuer has

not yet filed an Exchange Act registration statement for the applicable class of equity securities, it does not need to do so. If such an issuer has filed an Exchange Act registration statement but it is not yet effective, the issuer may withdraw it. However, if the issuer has already registered its applicable class of equity securities, it must continue the registration until it is eligible to deregister.

Pursuant to the JOBS Act, the calculation of holders of record for the registration threshold may exclude persons who received securities pursuant to an employee compensation plan in transactions exempted from registration under Section 5 of the Securities Act. The frequently asked questions clarify that, as of April 5, issuers may exclude such persons from the calculation whether or not they are current employees.

The frequently asked questions issued on April 11 also include clarification of requirements relating to banks and bank holding companies.

To view the complete text of the Division of Corporation Finance's frequently asked questions, click [here](#).

#### *Impact on General Solicitation in Private Offerings*

Title II of the JOBS Act will allow issuers to engage in general solicitation and use general advertisements when selling to accredited investors under Regulation D under the Securities Act or qualified institutional buyers under Rule 144A under the Securities Act. However, implementation of Title II requires that the SEC amend Rule 506 of Regulation D and Rule 144A within 90 days of enactment.

On April 5, a memorandum prepared by 14 law firms on the impact of the JOBS Act on private offerings prior to the SEC's implementation of the changes was released. The memorandum affirms that the current versions of Rule 506 and Rule 144A will remain in effect until the SEC amends them, and anticipates that issuers relying on these rules will continue their customary practices with respect to these offerings until the SEC amends the rules.

To view the complete text of the 14 law firm memorandum, click [here](#).

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