



Additional JOBS Act Guidance

On April 11, 2012, the Practicing Law Institute hosted the webcast “The JOBS Act: A Dialogue with Senior Staff from the SEC Division of Corporation Finance and Private Practitioners” with members of the senior staff of the Division of Corporation Finance of the Securities and Exchange Commission¹ to discuss various interpretive issues arising in connection with the Jumpstart Our Business Startups Act (the “JOBS Act”). The Division already has addressed many of the most immediate concerns relating to the JOBS Act by issuing a statement relating to the process for confidential submissions of registration statements by issuers that qualify as emerging growth companies (“EGCs”)², as well as by releasing a set of Frequently Asked Questions (“FAQs”) addressing the confidential submission process³ and a set of FAQs addressing the Exchange Act reporting threshold.⁴ During the PLI webcast, the Staff provided additional perspective on these FAQs and addressed a number of other timely issues.

The panel discussed the Exchange Act reporting threshold, and provided some additional guidance relating to the Staff’s FAQs on this topic, which we have recently addressed.⁵ The Staff noted that the guidance contained in the FAQs reflect a pragmatic approach that is intended to permit issuers that would have been subject to Exchange Act reporting at their fiscal year end, but relieved of that obligation by virtue of the passage of the JOBS Act, to avoid Exchange Act registration.⁶

In response to a question regarding how a company should ascertain the accredited investor status of its existing security holders (in order to assess its potential registration obligations), the Staff indicated that an issuer would be presumed to know its security holders and be able to ascertain their status, but noted that the Staff had not determined whether further guidance would be required in this area. In the near term, the Staff will be considering the process for issuer verification of accredited investor status for purposes of Rule 506, which may shed some light on the Exchange Act question.

In connection with counting “holders of record”, the Staff noted that while the JOBS Act made clear that an issuer need not count purchasers in crowdfunding offerings nor employees who received their stock pursuant to employee compensation programs in transactions exempt from the Section 5 registration requirements,

¹ Meredith B. Cross, the Director of the Division of Corporation Finance, Lona Nallengara, the Deputy Director of the Division of Corporation Finance and Shelley E. Parratt, the Deputy Director of Disclosure Operations for the Division of Corporation Finance.

² See our March 26, 2012 client alert, available at <http://www.mofo.com/files/Uploads/Images/120326-The-JOBS-Act.pdf>.

³ See the recently released FAQs addressing confidentiality dated April 10, 2012 (“Confidentiality FAQs”), available at <http://www.sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm>.

⁴ See the recently released FAQs addressing the reporting threshold dated April 11, 2012 (“Threshold FAQs”), available at <http://www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-12g.htm>.

⁵ See our April 11, 2012 client alert, available at <http://www.mofo.com/files/Uploads/Images/120411-SEC-Guidance-JOBS-Act.pdf>.

⁶ See also Threshold FAQs.

transferees would generally count as “holders of record.” As directed by the JOBS Act, the SEC will undertake rulemaking to adopt these exemptions.

The panelists discussed the Staff’s guidance relating to the confidential submission of registration statements by emerging growth companies in some detail. The Staff advised that an issuer already on file with an IPO registration statement that now qualifies as an EGC and that would like to switch to a confidential process should call the review team and make that known to the team. The Staff noted that an issuer and its advisers should be attentive to timing and the requirement to file publicly at least 21 days before commencement of its roadshow. The Staff noted that issuers should review the Staff’s guidance concerning roadshows set forth in the recently released FAQs.⁷ The timing is clear in the context of a traditional roadshow, but may not be as easily determined if the issuer will not conduct a traditional roadshow and instead will rely on meetings with institutional investors. If the issuer will not have a road show, then the issuer will have to file publicly 21 days prior to effectiveness. If the issuer’s meetings with investors will extend beyond permitted test-the-waters communications, then those discussions will be treated as a roadshow and the public filing should be made 21 days before those discussions commence. The Staff indicated that the 21 day period is a minimum, and that the issuer will still need to go through the comment process with the Staff. All in all, it is likely that there will be considerable discussion regarding the optimal timing of an issuer’s public filing, and the timing of the public filing in relation to ongoing investor discussions.

The Staff offered guidance on the timing of the EGC determination. The Staff noted that if an issuer confidentially submits a draft registration statement and while the issuer’s draft registration statement is pending with the Staff the issuer crosses the \$1 billion revenue threshold (or one of the other tests for losing EGC status) it will lose its EGC status. The Staff pointed to Rule 401(a) of the Securities Act, further noting that in this context one would test EGC status at the time of filing, which is the first public filing, not the confidential submission. For other purposes, the Staff indicates that an issuer would need to assess EGC status at the time it undertook certain permitted activities. For example, if the issuer was an EGC at the time it engaged in test-the-waters communications, and subsequently lost its EGC status, the issuer’s activities would not be seen as violating Section 5. The Staff noted that this was an area it would address in future guidance.

The Staff clarified that for purposes of the EGC definition, the Staff interpreted “annual gross revenues” as U.S. GAAP “revenues.” The Staff also confirmed that the testing period for debt issuances referenced in the EGC definition was not tied to a fiscal year end, but was a rolling three-year period from the time the issuer established its EGC status. The Staff also noted that the definition of “debt” for these purposes differed from the WKSI definition in that the definition under the JOBS Act included debt issued in a public or an exempt offering, and focused on the issuance of debt securities (not whether the securities were outstanding).

The Staff also confirmed that an EGC was required only to provide two years of audited financial statements and two years of selected financial data in its registration statement and other filings as permitted under the JOBS Act, and that these requirements would be applied to foreign private issuers that were EGCs as well. The panelists noted that it would be important for investors to be able to ascertain that an issuer was relying on EGC status, and the Staff confirmed that it anticipated seeing clear and prominent disclosure regarding the issuer’s status.

The Staff also indicated that it was interested in the test the waters materials, and finding ways to learn about the contents of test the waters materials. The Staff noted that it will want to understand whether information in the test the waters materials may be of interest to investors generally.

⁷ See Confidentiality FAQs.

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