Securities Law

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JOBS Act Update: SEC Issues Initial Guidance on the Implementation and Application of the JOBS Act

Authors: Craig D. Miller | Matthew S. O'Loughlin | Scott A. Schwartz

The Staff of the Division of Corporate Finance of the Securities and Exchange Commission recently issued a series of Frequently Asked Questions and other guidance on the implementation and application of certain provisions of the JOBS Act. Below is a summary of certain aspects of this initial guidance.

Manatt, Phelps & Phillips, LLP, will continue to monitor and provide updates on the implementation of the JOBS Act. Our lawyers are available to assist with any questions you may have.

Emerging Growth Company Status and Scaled Disclosure Provisions

According to the FAQs recently released by the Staff regarding emerging growth company status and scaled disclosure provisions under Title I of the JOBS Act:

- If a company ceases to qualify as an emerging growth company while undergoing a confidential review of its draft registration statement (for example, by exceeding the $1 billion revenue test), it would need to file a traditional "public" registration statement to continue the review process.
- Qualifying companies should disclose their status as emerging growth companies on the cover pages of their prospectus.
- Emerging growth companies that filed registration statements in an IPO prior to April 5, 2012, may amend the registration statement to provide scaled disclosures set forth in the JOBS Act, and emerging growth companies that filed registration statements between December 8, 2011, and April 5, 2012, and completed their IPO, may file their next periodic report using scaled disclosures set forth in the JOBS Act.
- An emerging growth company may comply with scaled disclosure provisions under the JOBS Act in its registration statements, periodic reports and proxy statements, even if doing so would be inconsistent with existing rules and regulations that have not yet been updated by the SEC and conformed to the JOBS Act.

The complete text of the Division's FAQs and answers (including additional FAQs) with respect to emerging growth company status and scaled disclosure provisions can be found here.

Confidential Submission of IPO Registration Statements

According to the FAQs recently released by the Staff regarding the submission of confidential registration statements by emerging growth companies:

- An emerging growth company may submit a registration statement

Newsletter Editor

Blase P. Dillingham
Partner
Email
310.312.4159

Practice Area Links

Practice Overview
Members

Authors

Craig D. Miller
Partner
Email
415.291.7415

Matthew S. O'Loughlin
Partner
Email
714.338.2710

Scott A. Schwartz
Associate
Email
202.585.6534

for confidential review prior to the company's "initial public offering date" of common equity securities under the Securities Act. Subsequent offerings would not be eligible for the confidential nonpublic review. In addition, this confidential review is not available for Exchange Act-only registration statements.

- A confidential submission does not need to be made under the Rule 83 confidential treatment process because the Staff is implementing a process specific to such submissions under the JOBS Act to maintain confidentiality.
- The Staff will expect a draft registration statement to be substantially complete at the time of submission and may defer review of materially deficient submissions. The draft registration statement will not be required to be signed or include a consent of auditors or other experts. Importantly, if the issuer ultimately proceeds with a public filing, the original confidential submission and all amendments are required to be filed.
- Filing fees for the registration statement are not due until the public filing of the statement on EDGAR.
- New "test-the-waters" communications with QIBs and institutional investors permitted under Section 5(c) can occur without constituting a road show requiring a public filing of the registration statement 21 days prior to the communication.
- Companies currently in the registration process that qualify as emerging growth companies may switch to the confidential submission process for amendments going forward.

The complete text of the Division's FAQs and answers (including additional FAQs) with respect to the filing of registration statements on a confidential basis can be found here.

Exchange Act Registration and Deregistration

According to the FAQs recently released by the Staff regarding Exchange Act matters:

- Issuers who had a registration pending but not yet effective under Section 12(g) of the Exchange Act are provided with certain relief from registration as a public company following the enactment of the JOBS Act.
- A bank holding company with less than 1,200 holders of record can terminate its registration under Section 12(g), which will be effective 90 days following the filing or immediately effective in certain circumstances, but will also need to address its compliance obligations with Section 15(d).
- In the context of the Commission working on a new "safe harbor" as part of the JOBS Act implementation, issuers (including bank holding companies) may proceed immediately, and prior to the adoption of such safe harbor, with excluding persons (whether or not currently an employee) who received the securities under an employee compensation plan in a transaction exempt from the registration requirements under the Securities Act, for purposes of recalculating the number of holders of record for Section 12(g)(1) purposes.

The complete text of the Division's FAQs and answers (including additional FAQs) with respect to Exchange Act Registration and Deregistration can be found here.

Please contact any of the listed authors or your regular Manatt contact if you have any questions on the JOBS Act generally or the content of this newsletter.