SEC Staff Issues Additional 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 objectives, the JOBS Act provides certain small-scale businesses known as "emerging growth companies" ("EGCs") with an "on-ramp" to the initial public offering ("IPO") process by easing compliance with certain requirements of the federal securities laws, reducing public disclosure requirements and establishing a confidential submission process for draft registration statements. As defined in the Act, EGCs are companies with less than $1 billion in "total annual gross revenues" and an IPO registration statement effective after December 8, 2011 (the "effective date").[2]

On May 3, 2012, the Division of Corporation Finance (the "Division") of the Securities and Exchange Commission (the "SEC") issued additional guidance in the form of eighteen new "Frequently Asked Questions" regarding the requirements to achieve EGC status and comply with EGC-specific rules.[3]

I. Achieving and Maintaining EGC Status

An "EGC" is defined generally 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.[4] An issuer that meets the revenue requirement will continue to be deemed an EGC until the earliest of: (i) the last day of the fiscal year in which the issuer's annual gross revenues reach or exceed $1 billion; (ii) the last day of the fiscal year following the fifth anniversary of the date of the issuer's first sale of common equity securities pursuant to an effective registration statement; (iii) the date on which such issuer has, during a three-year period, issued more than $1 billion in non-convertible debt; or (iv) the date on which such issuer is deemed to be a "large accelerated filer" as defined in section 240.12b–2 of Title 17 of the Code of Federal Regulations.

The Act's provisions do not detail different standards for calculating the "total annual gross revenues" of different types of issuers. The SEC staff notes, however, that for purposes of determining whether a financial institution has revenues of less than $1 billion, it is appropriate for the financial institution to use the same approach to calculating revenue that is used when determining whether an issuer has smaller reporting company status under Rule 12b-2 of the Securities Exchange Act of 1934 (the "Exchange Act").[5] Under that approach, a financial institution must include all gross revenues from traditional banking activities, including interest on loans and investments, dividends on investments, fees from loan origination, fees from trust and investment services, commissions, brokerage fees, mortgage servicing revenues, and any other fees or income from banking or related services. Revenue calculations need not include gains and losses on dispositions of investment portfolio securities, although gains on trading account activity may be included if they are part of the institution's regular activities.[6]

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[1] Jumpstart Our Business Startups Act, H.R. 3606, 112th Cong. (2012), a*vailable at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf. Additional information about the JOBS Act is available at *The Jumpstart Our Business Startups Act (the "JOBS Act")*, CAHILL GORDON & REINDEL LLP (Apr. 3, 2012), http://www.cahill.com/news/memoranda/1012952 and at *SEC Staff Issues Guidance of the JOBS Act*, CAHILL GORDON & REINDEL LLP (Apr. 19, 2012), http://www.cahill.com/news/memoranda/1012954.

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

[3] *Available at*: http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm#18.

[4] Section 101(a).

[5] *See* Section 5110.2(c) of the Division's Financial Reporting Manual. Answer to Question 23 (May 3, 2012 FAQs).

[6] Answer to Question 23 (May 3, 2012 FAQs).

With respect to the $1 billion debt limit, all non-convertible debt securities issued over the prior three-year period, whether currently outstanding or not, should be counted against the $1 billion debt cap.[7] Thus, debt that has been repaid during that three-year period should be counted towards the debt cap. The SEC will not object, however, if a company does not include debt securities issued pursuant to an exchange offer following a private placement in the calculation of the company's non-convertible debt, as such debt securities are identical to, and replace those issued in, the non-public offering.[8] Furthermore, the effective date for the definition of an EGC focuses only on whether the first sale of *common equity securities* pursuant to an effective registration statement occurred on or before December 8, 2011.[9] As a result, a company that has issued only *debt* securities pursuant to an effective registration statement on or before December 8, 2011 may still qualify as an EGC if none of the other disqualifying conditions have been triggered.[10]

Asset-backed securities ("ABS") issuers and investment companies registered under the Investment Company Act of 1940[11] may not qualify for EGC status.[12] The SEC considers these companies to be beyond the scope of the Act because these companies are subject to separate regulatory disclosure and reporting regimes. Consequently, the Act provides exemptions to requirements to which registered investment companies and ABS issuers are not normally subject, such as disclosures regarding executive compensation and say-on-pay voting requirements.

However, business development companies ("BDCs"), which are subject to certain provisions of the Investment Company Act, may qualify as EGCs.[13] Unlike registered investment companies, BDCs are subject to many of the disclosure and reporting requirements from which the Act provides exemptions, including executive compensation disclosure, say-on-pay votes, MD&A and Section 404(b) of the Sarbanes-Oxley Act.

An issuer that loses its EGC status by triggering any of the disqualifying conditions may not regain EGC status at a later date.[14] Similarly, if an issuer completes a transaction that results in the issuer becoming the successor to its predecessor's Exchange Act registration and reporting, and if the predecessor was not eligible for EGC status because its first public sale of common equity securities occurred on or before December 8, 2011, then its successor is also not eligible for EGC status.[15]

II. The Confidential Draft Submission Process and Public Release of SEC Comments

EGCs may submit a confidential, draft registration statement to the SEC for the SEC to review and comment upon.[16] When submitting a confidential draft, an EGC must clearly note its EGC status on the cover

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[7] The 3-year period covers any rolling 3-year period and is not limited to completed calendar or fiscal years. Answer to Question 17 (April 16, 2012 FAQs).

[8] Answer to Question 18 (May 3, 2012 FAQs).

[9] Having a registration statement going effective on or before December 8, 2011 is not alone sufficient to disqualify a company from EGC status.. To be disqualified from EGC status must have actually sold common equity securities off the registration statement on or before that date. *See The New World of IPOs: Dissecting the JOBS Act*. (May 2, 2012).

[10] Answer to Question 29 (May 3, 2012 FAQs).

[11] Investment Company Act of 1940, *available at* http://www.sec.gov/about/laws/ica40.pdf.

[12] Answers to Questions 19 and 20, respectively (May 3, 2012 FAQs).

[13] Answer to Question 21 (May 3, 2012 FAQs).

[14] Answer to Question 32 (May 3, 2012 FAQs).

[15] Answer to Question 24 (May 3, 2012 FAQs).

[16] Confidential submission is not available, however, for Exchange Act registration. EGCs cannot confidentially submit a

page of the submission. Because the confidential submission is not considered a "filing," the EGC is not considered to be an "issuer" and is not required to pay a filing fee. Currently, an EGC must submit any draft registration statements, amendments, transmittal letters and exhibits as PDFs via the SEC's secured email system. EGCs will be notified via email when the SEC responds to the submission. In the near future, however, the SEC intends to allow EGCs to submit draft submissions via EDGAR.[17]

An EGC may also use the confidential submission process to submit a draft registration statement for a debt exchange offer on Form S-4 or on Form F-4, so long as its IPO date has not yet occurred.[18] Although the registration statement and the correspondence between an EGC and the SEC are initially confidential, the SEC staff will, no earlier than 20 business days following the effective date of a filed registration statement, publicly release on EDGAR its comment letters and the ECG's responses to staff comment letters.[19] To facilitate this process, the SEC staff will ask EGCs to resubmit, on EDGAR, all response letters to staff comment letters on confidential draft registration statements, using the submission type "CORRESP," when the EGC first files its registration statements on EDGAR.

Pursuant to Rule 83 (17 CFR 200.83), EGCs (like non-EGCs) may still request that certain information submitted in a response letter be withheld when requested under the Freedom of Information Act ("FOIA"). When seeking confidential treatment under FOIA, an EGC should appropriately identify the information for which it intends to seek confidential treatment upon public filing, and follow the other Rule 83 procedures, to ensure that the SEC staff does not include that information in its comment letters.[20] When the EGC resubmits its responses to staff comments on the confidential draft registration statement on EDGAR, it should also follow the Rule 83 procedures.

III. Content of the Registration Statement: Compliance with Scaled-Back Disclosure and Accounting Requirements

As a general rule, an EGC that is not a smaller reporting company must include three years of audited financial statements in its annual report on Form 10-K or Form 20-F. However, an EGC will not be required to include, in its first annual Form 10-K or Form 20-F, audited financial statements for any period prior to the earliest audited period presented in connection with its IPO of common equity securities. Thus, if an EGC with a December 31 fiscal year-end has a registration statement for its IPO of common equity securities declared effective during the third quarter of 2012, the EGC may include only two years of audited financial statements (2010 and 2011) in its registration statement. In such an instance, the EGC's first annual report should include audited financial statements covering 2012, 2011 and 2010.[21] EGCs must also comply with XBRL requirements.[22]

Form 10 or a Form 20-F to register under the Exchange Act. Confidential submission is available only for the initial public offering under the Securities Act.

[17] http://www.sec.gov/divisions/corpfin/cfannouncements/cfsecureemailinstructions.pdf.

[18] Answer to Question 31 (May 3, 2012 FAQs).

[19] Answer to Question 25 (May 3, 2012 FAQs).

[20] Answer to Question 26 (May 3, 2012 FAQs).

[21] Answer to Question 30 (May 3, 2012 FAQs).

[22] Answer to Question 28 (May 3, 2012 FAQs).

Although Item 503(d) of Regulation S-K requires an issuer that is not a smaller reporting company to present its ratio of earnings to fixed charges for each of the last five fiscal years for certain offerings, the SEC will not object if an EGC presents in a registration statement its ratio of earnings to fixed charges for the same number of years for which it provides selected financial data disclosures in accordance with the JOBS Act.[23]

Under Section 7(a)(2)(B) of the Securities Act, EGCs are exempt from any "new or revised" U.S. GAAP accounting pronouncements applicable to public companies and any future Public Company Accounting Oversight Board ("PCAOB") rules, until such pronouncements are extended to private companies. Any update issued by the Financial Accounting Standards Board to its Accounting Standards Codification after April 5, 2012 (the date of the JOBS Act's enactment) is considered to be a "new or revised" accounting standard.[24] The SEC will not object if an EGC that initially decides to take advantage of the extended transition period later decides to "opt-in" and comply with new financial accounting standards, so long as the EGC complies with the requirements in Sections 107(b)(2) and (3) of the JOBS Act,[25] and so long as this change is prominently disclosed in the first periodic report or registration statement following the EGC's decision (which is then irrevocable).[26]

However, Section 7(a)(2)(B) only provides an accommodation with respect to the effective dates of new or revised financial accounting standards and only applies to accounting standards applicable to companies that are not issuers, as defined in Section 2(a) of the Sarbanes-Oxley Act. Thus, EGCs may be subject to certain new or revised financial accounting standards (*e.g.,* segment disclosures under ASC 280-10-15-3) that are applicable to nonpublic entities and to companies that are not "issuers."[27] Additionally, an EGC may not apply financial accounting standards as if it were a nonpublic entity, nor may an EGC report under a separate set of standards for nonpublic entities.[28]

A foreign private issuer that qualifies for EGC status and that reconciles its home country GAAP financial statements to U.S. GAAP may also take advantage of the extended transition for complying with "new or revised" financial accounting standards in its U.S. GAAP reconciliation.[29] EGCs that are foreign private issuers may not, however, report under IFRS for Small and Medium-sized Entities.[30]

IV. Conclusion

The SEC'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.[31]

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[23] Answer to Question 27 (May 3, 2012 FAQs).

[24] Answer to Question 33 (May 3, 2012 FAQs).

[25] Sections 107(b)(2) and (3) of the Act state that if an EGC choose to comply with applicable, accounting standards to the same extent that a non-EGC is required to comply with such standards, the EGC must continue to comply with *all* such standards for as long as the company remains an EGC. After opting-in, the EGC may not elect to comply with some standards but not others. Sections 107(b)(2) and (3).

[26] Answer to Question 37 (May 3, 2012 FAQs).

[27] Answer to Question 35 (May 3, 2012 FAQs).

[28] Answer to Question 36 (May 3, 2012 FAQs).

[29] Answer to Question 34 (May 3, 2012 FAQs).

[30] Answer to Question 36 (May 3, 2012 FAQs).

[31] The full text of the "Frequently Asked Questions" is available at: http://sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm and at:

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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.

http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm.