SEC Guidance on JOBS Act Provisions

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In the three weeks since President Obama signed into law the Jumpstart Our Business Startups Act (the "JOBS Act"), the SEC has issued five sets of guidance, primarily in the form of Frequently Asked Questions (FAQs). A substantial majority of this guidance has related to emerging growth companies, a new category of issuer defined in the JOBS Act, and in particular to the ability of such companies to submit draft IPO registration statements for confidential review by the SEC Staff. The following memorandum summarizes some of the more interesting and important provisions of the Staff's guidance to date.

EMERGING GROWTH COMPANIES

Confidential Review of IPO Registration Statements

The JOBS Act provides that an emerging growth company whose common equity securities have not been previously sold pursuant to an effective registration statement under the Securities Act of 1933 may confidentially submit a registration statement and subsequent amendments to the SEC for confidential nonpublic review. A company that has sold registered securities other than common equity securities may use the confidential submission process so long as it otherwise qualifies as an emerging growth company. Conversely, a company that previously has offered common equity securities pursuant to an employee benefit plan registration statement or a company that previously has registered common equity securities for sale by selling stockholders in a secondary offering may not use this confidential process. The confidential submission process applies only to Securities Act registration statements and is not available for Forms 10 or 20F. A foreign private issuer that qualifies as an emerging growth company can use the confidential submission process to the same extent as a domestic company. A foreign private issuer that does not qualify as an emerging growth company may still qualify to submit a registration statement on a confidential basis if it meets the separate requirements for nonpublic submissions by foreign private issuers set forth in the SEC's policy on this matter.

Mechanics of Submission

A company making a confidential submission should send one copy of its draft registration statement to:

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

The draft registration statement and any subsequent confidential amendment submissions should be submitted in a text searchable PDF file on a CD/DVD or alternatively in paper form that is neither stapled nor bound. The registrant should include a transmittal letter in which it confirms its emerging growth company status and states to the SEC its intention regarding future compliance with new and revised accounting standards. No filing fee is required with any confidential draft submission, and the draft registration statement does not need to be submitted under cover of a Rule 83 request to preserve its confidentiality. The SEC will notify the company that it has received its submission and identify the office to which it has assigned the submission for review.

The draft registration statement must be substantially complete at the time of its initial submission and must include a signed audit report from a registered public accounting firm covering the fiscal years presented in the registration statement and exhibits. The SEC Staff can defer review of any draft registration statement submitted confidentially if the filing is materially deficient. The registration statement does not need to be signed by the company, its CEO and CFO or a majority of its directors and does not need to include signed consents from auditors or other experts. An emerging growth company must identify itself as such in its draft registration statement submitted to the SEC by disclosing on the cover page of its prospectus that it is an emerging growth company. It must also state in its prospectus its intention regarding future compliance with new and revised accounting standards, and if its

choice is to adopt new and revised standards on the same basis as non-emerging growth companies, the company should disclose that its choice is irrevocable.

Companies that have already filed electronically with the SEC may opt out of public review and into confidential review for future amendments; they should coordinate this shift with their existing review team at the SEC. An emerging growth company that is in the midst of the registration process may elect in a pre-effective amendment to scale back any and all disclosure that is permitted to be scaled back by emerging growth companies. In addition, an emerging growth company that completed its initial public offering after December 8, 2011 and prior to the enactment of the Act on April 5, 2012 may take advantage of any of the JOBS Act scaled-back disclosure provisions in its future periodic reports so long as it is continues to be an emerging growth company. The disclosure provisions of the JOBS Act supersede, in relevant part, existing SEC rules and regulations; any conflict between existing SEC rules and regulations such as Regulation S-X and S-K and the JOBS Act should be resolved in favor of the JOBS Act.

Confidential nonpublic review is conditioned upon the initial draft submission and all amendments thereto being publicly filed not later than 21 days before the date on which the issuer conducts a road show. If an emerging growth company does not conduct a traditional road show and does not engage in activities that would come within the definition of a road show, other than "test-the-waters" communications permitted by the JOBS Act, then the company should make its public EDGAR filing at least 21 days before the anticipated date of effectiveness of the registration statement. Current SEC rules do not provide for the filing of registration statements in draft form; so the initial confidential submission and all amendments submitted confidentially would need to be filed as exhibits to the first registration statement filed on EDGAR, with each confidential submission being included as a separate Exhibit 99. The registration statement first electronically filed under the Securities Act, which includes all of these exhibits, would need to be complete, including company signatures, signed audit reports and consents, exhibits and the filing fee.

Implications of a Confidential Filing

A confidential submission is not deemed to be the filing of a registration statement for purposes of Section 5(c) of the Securities Act. Thus, for example, a registrant could continue to avail itself of SEC Rule 163A, which allows communications more than 30 days prior to the date of the filing of a registration statement if the communication does not reference a registered public offering and if the company takes reasonable steps to prevent further distribution or publication of the communication once the 30-day period has begun. Conversely, the registrant may not issue a press release or other announcement under SEC Rule 134 since the rule by its terms permits a communication only after a filing with the SEC.

Definition of Emerging Growth Company and Timing of Determination

The term "emerging growth company" is defined in the JOBS Act as an issuer with total annual gross revenues of less than $1 billion during its most recently completed fiscal year. The SEC has interpreted "total annual gross revenues" to mean total revenues as presented on the company's income statement under U.S. GAAP (or IFRS as issued by the IASB if IFRS is used as the basis of reporting by a foreign private issuer). If the financial statements of a foreign private issuer are presented in a currency other than U.S. dollars, total annual gross revenues for purposes of this test should be calculated in U.S. dollars using the exchange rate as of the last day of the issuer's most recently completed fiscal year.

The definition of emerging growth company has retroactive effect but only to the extent that a company made its first sale of common equity securities pursuant to an effective registration statement after December 8, 2011. Even if the issuer had a registration statement declared effective on or before December 8, 2011, so long as its first sale occurred or occurs after December 8, the issuer will qualify assuming the other requirements to be an emerging growth company are met. A company must qualify as an emerging growth company at the time of submission in order to submit either a draft registration statement or amendment confidentially. If the confidential review process continues through the end of a company's fiscal year and a company ceases to qualify as an emerging growth company at the end of that year, it would need to publicly file a registration statement on EDGAR to

continue the review process and in that filing would need to comply with the current rules and regulations applicable to companies that are not emerging growth companies. However, if a company formally files its registration statement at a time when it still has the status of an emerging growth company, pursuant to SEC Rule 401(a), scaled-back disclosure provisions for emerging growth companies would continue to apply through effectiveness of a registration statement even if the company loses its emerging growth company status during the registration process.

"Test-the-waters" communications are permitted where the company qualifies as an emerging growth company at the time of the communication. The fact that it later ceases to be an emerging growth company does not invalidate the exemption for the earlier communications. However, when a company ceases to be an emerging growth company, it may no longer make "test-the-water" communications.

Required Financial Statements and Selected Financial Data

The JOBS Act provides that an emerging growth company need not present more than two years of audited financial statements in a registration statement for an IPO of its common equity securities. The SEC has indicated that, notwithstanding the JOBS Act limitation of this provision to an IPO registration statement, it will not object if, in subsequent registration statements, an emerging growth company 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. Thus, a company that does a follow-on offering shortly after its IPO and within the same fiscal year would not be required to include in the registration statement for that offering an additional year of financial statements that were not included in the IPO registration statement.

The SEC has also indicated that it will not object if an emerging growth company that presents only two years of audited financial statements in its IPO registration statement limits the number of years of selected financial data presented in that registration statement under Item 301 of Regulation S-K (Selected Financial Data) to two years as well.

Current SEC rules require an issuer, under certain circumstances, to present in its registration statement up to three years of financial statements of entities that it has acquired based on the significance of those entities. However, the SEC has indicated that it would not object to an emerging growth company presenting only two years of financial statements for these other entities in its registration statement, consistent with the number of years of its own financial statements that it is presenting.

Adoption of Revised Accounting Standards

The JOBS Act relieves an emerging growth company from the requirement to comply with any new or revised accounting standard until the date that a company that is a private company is required to comply with such new or revised accounting standard if such standard does not apply to private companies. The SEC's guidance requires an emerging growth company to make an irrevocable (and almost immediate) decision regarding whether it will or will not avail itself of this exemption. Emerging growth companies that currently are in registration or are subject to Exchange Act reporting should make this choice and disclose it in their next amendment to the registration statement or in their next periodic report, respectively. If an emerging growth company chooses to take advantage of the extended transition period for which the JOBS Act provides, it needs to provide disclosure to that effect in accordance with SAB Topic 11M.

SECTION 12(G) REGISTRATION OF A CLASS OF EQUITY SECURITIES

As of April 5, 2012, an issuer may exclude persons who received securities pursuant to an employee compensation plan in Securities Act-exempt transactions whether or not they are current employees of the issuer. Although Section 503 of the JOBS Act directs the SEC to adopt "safe harbor provisions that issuers can follow when determining whether holders of their securities received the securities pursuant to an employee compensation plan in transactions that were exempt from the registration requirements of Section 5 of the Securities Act of 1933," the lack of a safe harbor does not affect the application of Exchange Act Section 12(g)(5).

If an issuer that is not a bank holding company triggered a Section 12(g) registration obligation with respect to a class of equity security as of a fiscal year-end before April 5, 2012 but would not trigger such obligation under the amended holders of record threshold contained in the JOBS Act, and the issuer has not yet registered that class of equity security under Section 12(g), then the issuer is no longer subject to a Section 12(g) registration obligation with respect to that class. Therefore, if the issuer has not filed an Exchange Act registration statement, it is no longer required to do so. If the issuer has filed an Exchange Act registration statement and the registration statement is not yet effective, then the issuer may withdraw the registration statement. If the issuer has registered a class of equity security under Section 12(g), it would need to continue that registration unless it is eligible to deregister under Section 12(g) or current rules.

CROWDFUNDING

Because the JOBS Act requires the SEC to adopt rules to implement a new exemption that will allow crowdfunding, prior to the adoption of such rules any offers or sales of securities purporting to rely on the crowdfunding exemption would be unlawful under the federal securities laws.

For more information on this, or related matters, you may wish to contact Laird H. Simons III at 650.335.7251 or lsimons@fenwick.com.