

Securities Law

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

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The Jumpstart Our Business Startups Act (the JOBS Act), enacted on April 5, 2012, changes and liberalizes the regulatory landscape for both public and private companies seeking to raise capital. The Staff of the Division of Corporation Finance of the Securities and Exchange Commission recently issued additional guidance on the implementation and application of certain provisions of the JOBS Act. Below is a summary of certain aspects of this 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 Definition

The JOBS Act creates regulatory relief for a new type of issuer – the so-called “emerging growth company.” An emerging growth company is defined as any issuer with gross revenues of less than \$1 billion during the prior fiscal year and that has gone public after December 8, 2011. According to the FAQs recently released by the Staff regarding the definition of emerging growth company under Title I of the JOBS Act:

- A company that had more than \$1 billion in total annual gross revenues two years ago but in its most recently completed fiscal year had annual gross revenues of less than \$1 billion might nevertheless still qualify as an emerging growth company. The definition of emerging growth company focuses on the total annual gross revenues for the *most recently completed* fiscal year.
- With regard to financial institutions, for purposes of determining emerging growth company status it would be appropriate for a financial institution to calculate annual gross revenues using the same approach financial institutions use in determining smaller reporting company status. Specifically, a financial institution must include all gross revenues from traditional banking activities, and not gains and losses on dispositions of investment portfolio securities.
- A company that has only issued debt securities pursuant to an effective registration statement on or before December 8, 2011, may still qualify as an emerging growth company because the definition of emerging growth company focuses only on the date of the first sale of common *equity* securities.
- If a reporting company has its first sale of common equity securities before December 8, 2011, and is therefore not eligible to qualify as an emerging growth company, any successor to such company, through a merger or other transaction, would also not be eligible to

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qualify as an emerging growth company.

- Issuers of asset-backed securities and investment companies registered under the Investment Company Act do not qualify as emerging growth companies because both are subject to different regulatory regimes than are other reporting companies.
- Business development companies, a category of closed-end investment companies that invest in startup and emerging growth companies and are not required to register under the Investment Company Act, may, on the other hand, qualify as emerging growth companies.

Disclosure Requirements for Emerging Growth Companies

The JOBS Act exempts emerging growth companies from many of the disclosure requirements applicable to publicly traded companies.

According to the FAQs recently released by the Staff regarding scaled disclosure requirements for emerging growth companies under Title I of the JOBS Act:

- An emerging growth company that is not a smaller reporting company must include three years of audited financial statements in its Form 10-K or Form 20-F (as opposed to two years of statements required in a registration statement). However, as a practical matter, no emerging growth company is required to include, in its first annual report, audited financial statements for any period prior to the earliest audited period presented in connection with the IPO.
- Emerging growth companies are not exempt from XBRL requirements.

Confidential Submission of IPO Registration Statements

The JOBS Act allows emerging growth companies to confidentially submit to the Staff a draft registration statement for confidential nonpublic review, as long as such filings are made no longer than 21 days prior to the emerging growth company's first road show.

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

- The Staff will publicly release its comment letters and issuer responses to Staff comment letters on confidential draft submissions on EDGAR no earlier than 20 business days following the effective date of a registration statement (the same time frame for the public release of Staff comment letters and issuer responses with respect to filings that are not submitted confidentially).
- In its responses to Staff comments on confidential draft registration statements, an emerging growth company should identify information for which it intends to seek confidential treatment to ensure the Staff does not include that information in its comment letters.

The JOBS Act and prior SEC guidance were covered in two previous Manatt newsletters (April 5, 2012, available [here](#), and April 23, 2012, available [here](#)).

The complete text of the Division's FAQs and answers with respect to the JOBS Act 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.

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