News Bulletin

October 9, 2012

More SEC Guidance on Title I of the JOBS Act

The Staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (the "SEC") recently updated its Frequently Asked Questions on Title I of the Jumpstart Our Business Startups Act ("JOBS Act") to address a number of issues regarding the applicability of the provisions in Title I to exchange offer, merger and spin-off transactions, as well as considerations for determining whether a company qualifies as an emerging growth company (an "EGC") and the financial information that an EGC includes in certain filings.[1] The SEC also recently implemented a process whereby an EGC can submit its draft registration statement for confidential review via the EDGAR system.[2] In this regard, the Staff has provided additional guidance as to how EGCs with pending submissions can transition to the new EDGAR filing process.[3]

Applicability of Title I Provisions to Merger and Exchange Offer Transactions

While Title I of the JOBS Act appears to be largely focused on capital-raising transactions, there is nothing in the JOBS Act or in the SEC's interpretations to date to suggest that the "IPO on-ramp" provisions in Title I would not also apply in the context of other transactions conducted by EGCs on a registered basis. In its latest Frequently Asked Questions, the Staff indicates that EGCs will be able to rely on certain of the disclosure, communications and confidential submission benefits in the context of merger and exchange offer transactions. An overriding principle of the Staff's guidance in the Frequently Asked Questions is that those EGCs who are avail themselves of the Title I provisions in the context of an exchange offer or a merger must comply with all of the pre-existing applicable rules for tender offers and proxy solicitations, which might, in some cases, conflict with the more liberal communications approach contemplated by Title I.

Availability of Test-the-Waters Communications for Mergers and Exchange Offers

Title I of the JOBS Act provides EGCs, or any other person authorized to act on their behalf, the flexibility to engage in oral or written communications with QIBs and institutional accredited investors in order to gauge their interest in a proposed offering, whether prior to or following the first filing of any registration statement, subject to the requirement that no security may be sold unless accompanied or preceded by a Section 10(a) prospectus. An EGC could utilize this test-the-waters provision, codified in Section 5(d) of the Securities Act, with respect to

[1] Frequently Asked Questions of General Applicability on Title I of the JOBS Act (Questions 42-54), published September 28, 2012, available at http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm#q42.
[2] Draft Registration Statements to be Submitted and Filed on EDGAR (September 26, 2012), available at http://www.sec.gov/divisions/corpfin/cfannouncements/drsfilingprocedures.htm.
[3] Sample Letter Explaining Transition to EDGAR Submission and Filing of Draft Registration Statements (October 3, 2012), available at http://www.sec.gov/divisions/corpfin/guidance/draftregstatementedgar1012.htm.

any registered offerings that it conducts while it qualifies for EGC status. There are no form or content restrictions on these communications, and there is no requirement to file written communications with the SEC.

In Question 42 of the Frequently Asked Questions, the Staff confirms that an EGC may use test-the-waters communications with QIBs and institutional accredited investors pursuant to Securities Act Section 5(d) in connection with an exchange offer or merger. In addition, the Staff notes that an EGC must make all required filings under the Exchange Act for any written communications made in connection with, or relating to, the exchange offer or merger. In this regard, the Staff noted that the JOBS Act did not amend the exchange offer or merger requirements under the Exchange Act, such as filings required under Exchange Act Rules 13e-4(c), 14a-12(b), and 14d-2(b), for pre-commencement tender offer communications and proxy soliciting materials in connection with a business combination transaction.

Confidential Draft Registration Statement Submissions for Mergers and Exchange Offers

Title I added paragraph (e) to Section 6 of the Securities Act to provide that the Staff must review all EGC initial public offering registration statements confidentially, if an EGC chooses to submit a draft registration statement to the Staff. An EGC may confidentially submit a draft registration statement for an initial public offering for nonpublic review, provided that the initial confidential submission and all amendments are publicly filed with the SEC no later than 21 days prior to the issuer's commencement of a "road show" (as defined in Securities Act Rule 433(h)(4)).

In Question 43 of the Frequently Asked Questions, the Staff confirms that an EGC may use the confidential submission process in Section 6(e) of the Securities Act to submit a draft registration statement for an exchange offer or a merger that constitutes its initial public offering of common equity securities. If an EGC company uses the confidential submission process to submit a draft registration statement for an exchange offer or merger that constitutes its initial public offering of common equity securities, Question 44 of the Frequently Asked Questions notes the following obligations under the Securities Act and Exchange Act with respect to the transaction:

- If an EGC does not commence its exchange offer before the effectiveness of the registration statement, the EGC must publicly file the registration statement (including the initial confidential submission and all amendments thereto) at least 21 days before the earlier of: the commencement date of the road show, if any, or the anticipated date of effectiveness of the registration statement. This applies in the case of all exchange offers that do not use early commencement, including those that do not qualify for early commencement under the provisions of Rules 13e-4(e)(2) and 14d-4(b) regarding going-private transactions and roll-up transactions.

- An EGC that commences its exchange offer before effectiveness of the registration statement pursuant to Securities Act Rule 162 must publicly file the registration statement (including the initial confidential submission and all amendments thereto) at least 21 days before the earlier of: the commencement date of the road show, if any, or the anticipated date of effectiveness of the registration statement, but no later than the date of commencement of the exchange offer in light of the filing requirement under Exchange Act Rules 13e-4(e)(2) and 14d-4(b).

- For the early commencement of exchange offers subject only to Regulation 14E, an EGC must file its registration statement at least 21 days before the earlier of: the commencement date of the road show, if any, or the anticipated date of effectiveness of the registration statement, but no later than the date of commencement of the exchange offer.

- An EGC must also make the required filings under Securities Act Rule 425 (unless it is relying on the Securities Act Section 5(d) provision for test-the-waters communications) and Exchange Act Rules 13e-4(c) and 14d-2(b) for pre-commencement tender offer communications. An EGC must also file the tender

offer statement on Schedule TO on the date of commencement of the exchange offer under Exchange Act Rules 13e-4(b) and 14d-3(a), as applicable.

- In a merger where the target company is subject to Regulation 14A or 14C and the registration statement of the EGC acquiror includes a prospectus that also serves as the target company's proxy or information statement, the acquiror must publicly file the registration statement (including the initial confidential submission and all amendments thereto) at least 21 days before the earlier of the date of commencement of the road show, if any, or the anticipated date of effectiveness of the registration statement. In addition, the acquiror must make the required filings under Securities Act Rule 425 (unless it is relying on the Securities Act Section 5(d) provision for test-the-waters communications) and Exchange Act Rule 14a-12(b) for any soliciting material, as applicable.

Financial Statement Considerations

An EGC is required to present only two years of audited financial statements in its initial public offering registration statement. An EGC may also limit its MD&A and address only those audited periods presented in its audited financial statements. The Staff has indicated in its Frequently Asked Questions that, notwithstanding the reference contained in Securities Act Section 7(a)(2)(A) to "any other" registration statement, the Staff will not object if an EGC presenting two years of audited financial statements limits the selected financial data included in its initial public offering registration statement to only two years. The Staff has further noted in its Frequently Asked Questions that it will not object if an issuer presents the ratio of earnings to fixed charges required by Item 503(d) of Regulation S-K for the same number of years for which it provides selected financial data. For financial statements required under Rules 3-05 and 3-09 of Regulation S-X, the Staff will not object if only two years of financial statements are provided in the registration statement, even if the significance tests result in a requirement to present three years of financial statements for entities other than the issuer.

In Question 45 of the Frequently Asked Questions, the Staff notes that if a target company that does not qualify as a "smaller reporting company" is to be acquired by an EGC that is not a shell company and that will present only two years of its financial statements in its registration statement for the exchange offer or merger, the Staff would not object if, in its registration statement, the EGC presents only two years of financial statements for the target company.

In Question 46 of the Frequently Asked Questions, the Staff addresses the specific issues with regard to providing acquisition financial statements. In the example provided by the Staff, a calendar year-end EGC has completed its initial public offering of common equity securities on June 30, 2012, and its registration statement for that offering included only two years of financial statements. In November 2012, the EGC is required to file a Form 8-K presenting the financial statements of a business acquired in a forward acquisition, pursuant to Items 2.01 and 9.01 of Form 8-K. Based on the significance of the acquired business, Regulation S-X would require three years of financial statements for the acquired business. Under these circumstances, if the EGC is not a shell company and presented only two years of financial statements in its registration statement for its initial public offering of common equity securities and has not yet filed three years of financial statements in a Form 10-K, the Staff would not object if the EGC presented only two years of financial statements for the acquired business in the Form 8-K.

In Question 48 of the Frequently Asked Questions, the Staff provides the example of an EGC which is required to register a class of equity securities under Section 12(g) of the Exchange Act because it has more than $10 million in assets and 2,000 or more holders of record as of the end of its most recent fiscal year; however, this company has not yet conducted an initial public offering of common equity securities. In the Exchange Act registration statement on Form 10 or Form 20-F that the EGC is required to file, the Staff notes that, unless it is a smaller reporting company, an EGC is required to present three years of financial statements in its registration statement on Form 10 or Form 20-F. This is because Section 7(a)(2)(A) of the Securities Act, which permits the presentation

of two years (instead of three years) of financial statements, applies only to registration statements for initial public offerings of common equity securities.

In Question 49 of the Frequently Asked Questions, the Staff notes that an EGC cannot rely on Section 7(a)(2)(A) of the Securities Act to provide only two years of audited financial statements in the registration statement for an offering of debt securities that is the company's initial public offering, because Section 7(a)(2)(A) applies only to initial public offerings of common equity securities. However, if the EGC conducts a registered offering of debt securities after its initial public offering of common equity securities, the Staff would not object if the EGC does not present audited financial statements for any period prior to the earliest audited period presented in connection with its initial public offering of common equity securities.

In Question 50 of the Frequently Asked Questions, the Staff provides that the Staff would not object if an issuer that has lost its EGC status does not present, in subsequently filed registration statements and periodic reports, selected financial data or a ratio of earnings to fixed charges for periods prior to the earliest audited period presented in its initial Securities Act or Exchange Act registration statement

Determining EGC Status

An EGC is defined as an issuer (including a foreign private issuer) with total annual gross revenues of less than $1 billion (subject to inflationary adjustment by the SEC every five years) during its most recently completed fiscal year. An issuer can qualify as an EGC if it first sold its common stock in a registered offering on or after December 9, 2011. Under the Staff's interpretations, asset-backed securities issuers and registered investment companies do not qualify as EGCs; however, business development companies may qualify as EGCs. The Staff has noted in its Frequently Asked Questions that an issuer that succeeds to a predecessor's Exchange Act registration or reporting obligations under Rules 12g-3 and 15d-5 will not qualify for EGC status if the predecessor's first sale of common equity securities occurred on or before December 8, 2011, because the predecessor was not eligible for EGC status.

Status as an EGC is maintained until the earliest of:

- The last day of the fiscal year in which the issuer's total annual gross revenues are $1 billion or more;
- The last day of the issuer's fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act (for an debt-only issuer that never sold its common equity pursuant to an Exchange Act registration statement, this five-year period will not run);
- Any date on which the issuer has, during the prior three-year period, issued more than $1 billion in non-convertible debt; or
- The date on which the issuer becomes a "Large Accelerated Filer," as defined in the SEC's rules.

Once an EGC loses its status, it cannot be regained.

Timing of Revenue Determination

In Question 51 of the Frequently Asked Questions, the Staff provides that, in applying the revenue test for determining EGC status, a calendar year-end issuer that would like to file a registration statement for an initial public offering of common equity securities in January 2013 (which would present financial statements for 2011 and 2010 and the nine months ended September 30, 2012 and 2011) should look to its most recently completed fiscal year, which would be the most recent annual period completed, regardless of whether financial statements

for the period are presented in the registration statement. In this example, the most recent annual period completed would be 2012.

Spin-Offs

In Question 53 of the Frequently Asked Questions, the Staff addresses EGC status in the context of spin-offs. The Staff addresses the situation where a parent decides either to spin-off a wholly owned subsidiary, register an offer and sale of the wholly .owned subsidiary's common stock for an initial public offering or transfer a business into a newly-formed subsidiary for purposes of undertaking an initial public offering of that subsidiary's common stock. In each such case, the subsidiary's total annual gross revenues for its most recently completed fiscal year are less than $1 billion, the subsidiary would not trigger any of the disqualification provisions in Sections 2(a)(19)(A)-(D) of the Securities Act, and the parent does not qualify as an EGC because its first sale of common equity securities occurred on or before December 8, 2011. The Staff notes that the subsidiary would qualify as an EGC, based on an analysis which focuses on whether the issuer, and not its parent, meets the EGC requirements. The Staff notes that, based on the particular facts and circumstances, the EGC status of an issuer may be questioned if it appears that the issuer or its parent is engaging in a transaction for the purpose of converting a non-EGC into an EGC, or for the purpose of obtaining the benefits of EGC status indirectly when it is not entitled to do so directly. The Staff recommends that issuers with questions relating to these issues should contact the Division's Office of the Chief Counsel.

EGC Status of Previously Public Issuers

In Question 54 of the Frequently Asked Questions, the Staff addresses the EGC status of an issuer that was once an Exchange Act reporting company but is not currently required to file Exchange Act reports. The Staff notes that such an issuer can take advantage of the benefits of EGC status, even though its initial public offering of common equity securities occurred on or before December 8, 2011. In this regard, the Staff notes that if an issuer would otherwise qualify as an EGC but for the fact that its initial public offering of common equity securities occurred on or before December 8, 2011, and such issuer was once an Exchange Act reporting company but is not currently required to file Exchange Act reports, then the Staff would not object if such issuer takes advantage of all of the benefits of EGC status for its next registered offering and thereafter, until it triggers one of the disqualification provisions in Sections 2(a)(19)(A)-(D) of the Securities Act. This position is not available to an issuer that has had the registration of a class of its securities revoked pursuant to Exchange Act Section 12(j). The Staff goes on to note that, based on the particular facts and circumstances, the EGC status of an issuer may be questioned if it appears that the issuer ceased to be a reporting company for the purpose of conducting a registered offering as an EGC. The Staff recommends that issuers with questions relating to these issues should contact the Division's Office of the Chief Counsel.

Determining Disqualifications from EGC Status

In Question 47 of the Frequently Asked Questions, the Staff addresses two specific examples and how the EGC status of the issuer would be determined under those examples.

- In Example 1, Company A acquires Company B for cash or stock, in a forward acquisition. Company A is both the legal acquiror and the accounting acquiror.

- In Example 2, Company C undertakes a reverse merger with Company D, an operating company. Company D is presented as the predecessor in the post-transaction financial statements.

In each example, the companies' fiscal year is the calendar year; the transactions occur on September 30, 2012; and Frequently Asked Question 24, which relates to succession of Exchange Act obligations, is not implicated. In

determining whether Company A and Company C trigger any of the disqualifications from the definition of EGC in Section 2(a)(19)(A), (B), (C) or (D) (referenced above), the Staff notes the following framework:

	Example 1: Forward Acquisition	**Example 2: Reverse Merger**
$1B annual revenues test	In 2012, look to Company A's revenues for 2011. In 2013, look to Company A's revenues for 2012, which will include Company B's revenues from Oct. 1, 2012.	In 2012, look to Company D's revenues for 2011. In 2013, look to Company D's revenues for 2012, which will include Company C's revenues from Oct. 1, 2012.
Five-year anniversary test	Look to Company A's date of first sale.	Look to Company C's date of first sale.
$1B issued debt during previous three years test	Look to Company A's debt issuances, which will include Company B's debt issuances from Oct. 1, 2012.	Look to Company D's debt issuances, which will include Company C's debt issuances from Oct. 1, 2012.
Large accelerated filer test	At Dec. 31, 2012, look to Company A's market value at June 30, 2012. At Dec. 31, 2013, look to Company A's market value (which will include Company B's) at June 30, 2013.	At Dec. 31, 2012, look to Company C's market value at June 30, 2012. At Dec. 31, 2013, look to Company C's market value (which will include Company D's) at June 30, 2013.

Confidential Submissions of Draft Registration Statements--Signatures

Question 52 of the Staff's Frequently Asked Questions provides that a confidential submission of a draft registration statement is not required to be signed by the registrant or by any of its officers or directors, nor is it required to include the consent of auditors and other experts, as it is not filed with the SEC, while Section 6(e)(1) of the Securities Act requires that the initial confidential submission and all amendments thereto be "publicly filed" with the SEC not later than 21 days before the date on which the issuer commences a road show. The Staff notes that upon public filing, the previous confidential submissions are not required to be signed and do not require consents.

EDGAR Submission of Draft Registration Statements

Recently, the SEC adopted a new EDGAR Filer Manual, which provides for confidential EDGAR submissions of draft registration statements.[4] As of October 1, 2012, draft registration statements and amendments to draft registration statements may be submitted via EDGAR using submission form types DRS and DRS/A, respectively. The Staff has provided instructions on transitioning from the secure email system submissions to EDGAR for those EGCs that have submissions pending. These instructions noted that companies with pending draft

[4] Release No. 33-9353 (August 30, 2012).

registration statements already have a Central Index Key, or CIK number, assigned to them. In order to initiate the EDGAR submission process, it is necessary to:

- Submit a request to the SEC asking that the company's EDGAR status be converted to an electronic filer;
- Request the access codes and passwords necessary to submit the registration statement on the EDGAR system; and
- Make any necessary changes to the company's contact information and business and mailing addresses in the EDGAR system prior to making an initial filing, and include the secure email address where the Staff should send comment letters.

The Staff provides that the first EDGAR draft submission of an EGC should be made as a new draft registration statement, even if it is an amendment to a previously submitted version. The first EDGAR submission should also include each previously submitted draft registration statement (including exhibits) as a separate Exhibit 99 document. No marked submissions should be provided. Each item of correspondence also must be provided with the initial EDGAR submission as a separate "COVER" document within the submission. The Staff also reminds companies to properly mark confidential information if they intend to use Rule 83 to request confidential treatment for correspondence submitted via EDGAR.

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