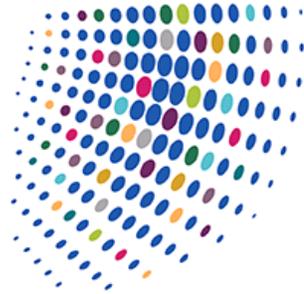


# Alerts & Publications



## SEC Staff Publishes FAQs on JOBS Act Implementation

April 10, 2012

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The Staff of the Securities and Exchange Commission's Division of Corporation Finance today released responses to "Frequently Asked Questions" regarding the JOBS Act. The responses focus on the confidential submission of registration statements under new Section 6(e) of the Securities Act of 1933. Section 6(e) permits an "emerging growth company" to submit a draft registration statement to the SEC for confidential, non-public review prior to the public filing. The initial confidential submission and all amendments, however, must be filed publicly no later than 21 days before the date on which the issuer conducts a road show. The term "road show" is defined in Securities Act Rule 433(h)(4) as "an offer ... that contains a presentation regarding an offering by one or more members of the issuer's management ... and includes discussion of one or more of the issuer, such management, and the securities being offered." The full text of the FAQs is located [here](#).

Key pronouncements by the Staff include:

- The Staff will not object if an emerging growth company does not treat "test-the-waters" communications conducted in reliance on Section 5(d) as a road show for purposes of Section 6(e). Section 5(d) test-the-waters communications are limited to communications with qualified institutional buyers ("QIBs") and institutional accredited investors.
- An issuer currently in registration at the time of enactment of the JOBS Act that qualifies as an emerging growth company may switch to the confidential submission process for future amendments.
- A foreign private issuer that qualifies as an emerging growth company may use the confidential submission process to the same extent as a domestic company.
- Draft registration statements submitted confidentiality must be "substantially complete," including a signed audit report of the registered public accounting firm and exhibits consistent with the existing requirements for non-public submissions by foreign private issuers.

A more complete discussion of the FAQs is provided below.

### **Eligible Registration Statements and Mechanics**

- Because Section 101(c) of the JOBS Act defines the term "initial public offering date" as the "date of the first sale of common equity securities of an issuer pursuant to an effective registration statement under the Securities Act of 1933," the Staff made clear that the term "date of the first sale" in the definition of initial public offering date is not limited to the date of a company's initial primary offering of common equity securities for cash and provided the following guidance:

- an emerging growth company's initial public offering date could include the date of an offering of common equity pursuant to an employee benefit plan registered on a Form S-8 or a selling shareholder's secondary offering registered on a resale registration statement; and
- an issuer that has had Securities Act-registered sales of securities other than common equity securities can qualify to use the confidential submission process as long as it otherwise qualifies as an emerging growth company. (Question 1)
- The confidential submission process applies only to Securities Act registration statements; it is not available for Exchange Act-only registration (*i.e.*, registration statements on Form 10 or Form 20-F). (Question 2)
- The confidential review process for the initial public offerings of emerging growth companies is created by Section 6(e) of the Securities Act. Therefore, an emerging growth company need not submit its draft registration statement under cover of a Rule 83 request to preserve confidentiality. (Question 4)
- The confidential submission of a draft registration statement under Section 6(e) is not a "filing" of a registration statement – Section 6(b) of the Securities Act does not apply at that time and no filing fee is due at the time of the confidential submission or any confidentially submitted amendments. Rather, the filing fee is due when the registration statement is first filed publicly on EDGAR. (Question 5)
- The confidential submission of a draft registration statement under Section 6(e) is not the "filing" of a registration statement for purposes of Section 5(c) and the prohibition against the making of offers in advance of the public filing of the registration statement would continue to apply (subject to the operation of new Section 5(d)). (Question 6)
- With regard to the content of a draft registration statement at the time it is confidentially submitted:
  - Section 6(e) does not specify what needs to be included in a "draft registration statement";
  - as the confidential submission of the draft registration statement does not constitute a "filing" for purposes of Securities Act Sections 5(c) and 6(a), it is not required to be signed or to include the consent of auditors and other experts;
  - as is the case with publicly filed registration statements, emerging growth companies may omit certain limited information from their initial submissions in reliance on existing rules and regulations relating to the content of filed registration statements, such as the public offering price or other offering-related information;
  - the Staff expects draft registration statements to be substantially complete at the time of initial submission, including a signed audit report of the registered public accounting firm covering the fiscal years presented in the registration statement and exhibits (which is the same requirement for non-public submissions by foreign private issuers); and
  - the Staff will defer review of any draft registration statement submitted under Section 6(e) that is materially deficient. (Question 7)
- If an emerging growth company is eligible to submit its registration statement on a confidential basis, the Staff will not object if a company that was in registration at the time of enactment of the JOBS Act switches to the confidential submission process for future amendments rather than withdrawing the registration statement and submitting a new draft registration statement

for confidential, non-public review. The Staff advised any such emerging growth company to contact its review team to coordinate this process. (Question 11)

- If an emerging growth company that initially files its IPO registration statement on EDGAR and then switches to the confidential submission process for subsequent amendments, the initial public filing that preceded the confidential submissions will not satisfy the requirement to publicly file the registration statement not later than 21 days before the road show. Instead, as required by Section 6(e), all confidential submissions must be filed on EDGAR at least 21 days before the road show. (Question 12)

### **Availability to Foreign Private Issuers**

- As discussed in our prior [alert](#), foreign private issuers that come within the definition of “emerging growth company” can use the confidential submission procedure to the same extent as a domestic company. In addition, a foreign private issuer that is not an emerging growth company may qualify to submit a draft registration statement on a non-public basis for review, if it meets the requirements for non-public submissions as set forth in the Staff’s policy on [Non-Public Submissions from Foreign Private Issuers](#). (Question 3)

### **Filing Before a Road Show and “Test-the-Waters” Communications**

- Under new Securities Act Section 6(e), confidential submissions are required to be publicly filed at least 21 days before the issuer conducts a “road show” as defined in Rule 433(h)(4). That rule defines “road show” as “an offer...that contains a presentation regarding an offering by one or more members of the issuer’s management...and includes discussion of one or more of the issuer, such management, and the securities being offered.” The Staff provided the following guidance regarding the interaction of this requirement with other communications, such as the test-the-waters communications permitted under new Securities Act Section 5(d):
  - “In a traditional underwritten public offering that does not include communications made in reliance upon new Section 5(d), the road show should be easy to identify – it would be those meetings traditionally viewed as the road show when the emerging growth company and underwriters begin actively marketing the offering. In that case, the company should estimate when it expects to begin the road show and publicly file its confidential submissions at least 21 days before that date.”
  - “It is possible that there may be meetings with potential investors under the new test-the-waters communications provisions that could also be viewed as coming within the Rule 433(h)(4) definition of road show, which could theoretically trigger a requirement to file the registration statement 21 days before those meetings. New Section 5(d), however, specifically contemplates that test-the-waters communications may take place before filing a registration statement.”
  - “In order to read these various provisions in a consistent fashion so as to allow test-the-waters communications before a registration statement is filed and have the registration statement publicly filed at least 21 days before the commencement of the road show, we will not object if an emerging growth company does not treat test-the-waters communications conducted in reliance on new Section 5(d) as a road show for purposes

- of Section 6(e). Please note that Section 5(d) test-the-waters communications are limited to communications with QIBs and institutional accredited investors.”
- The Staff also requested that, as is the case with publicly filed registration statements, “it is helpful if the company keeps the staff that is reviewing the registration statement informed about the company’s expected schedule.” (Question 8)
  - With regard to the application of the 21-day public availability period in connection with emerging growth companies that do not conduct a traditional road show, the Staff stated:
    - “If the emerging growth company does not conduct a traditional road show and does not engage in activities that would come within the definition of road show, other than test-the-waters communications that comply with Section 5(d), then its registration statement and confidential submissions should be filed publicly on EDGAR no later than 21 days before the anticipated date of effectiveness of the registration statement.”
    - “If the emerging growth company does not conduct a traditional road show, but will have communications that would come within the definition of road show and do not meet the conditions for test-the-waters communications in Section 5(d) – for example, the company holds an investor meeting to market the offering that is not limited to QIBs or institutional accredited investors – then the registration statement would need to be filed at least 21 days before those communications.” (Question 9)
  - As neither the Commission’s rules nor the EDGAR filing system provide for the filing of registration statements in draft form, an emerging growth company should use the following procedures when publicly filing its initial confidential submission and all amendments no later than 21 days before it conducts its road show:
    - file the initial submission and all amendments as exhibits to the first registration statement filed on EDGAR, with each confidential submission filed as a separate Exhibit 99; and
    - the first filed registration statement should be complete, including signatures, signed audit reports, consents, exhibits and filing fees. (Question 10)
  - The Rule 134 safe harbor is not available until the issuer files a registration statement that satisfies the requirements of Rule 134 – an emerging growth company that submits its draft registration statement on a confidential basis may not make a public communication about its offering in reliance on the Securities Act Rule 134 safe harbor until it publicly files the registration statement on EDGAR. (Question 13)

\* \* \* Additional information regarding the JOBS Act is available in the following publications:

[JOBS Act Approved by the US Congress \(March 28, 2012\)](#)

[SEC Staff Announces Process for Confidential Review of Registration Statements under the JOBS Act \(April 6, 2012\)](#)

[JOBS Act Removes Restrictions on Public Offerings of Hedge and Private Equity Funds \(April 6, 2012\)](#)

[Guidance Regarding Rule 506 Offerings Prior to the SEC Adopting Rules Implementing the JOBS Act \(April 9, 2012\)](#)



For more information regarding these FAQs, please contact your regular O'Melveny & Myers LLP attorney.