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Alerts & Publications

SEC Staff Publishes FAQs on the JOBS Act "IPO On-Ramp"

April 19, 2012

On April 16, 2012, the Staff of the Securities and Exchange Commission's Division of Corporation Finance released a third set of responses to "Frequently Asked Questions" regarding the JOBS Act. These responses address questions of general applicability under Title I of the JOBS Act, often referred to as the "IPO On-Ramp." The IPO On-Ramp creates a new category of issuers known as "Emerging Growth Companies" or "EGCs" and liberalizes the obligations of such issuers in going public. Title I is effective as of the date of its enactment and requires no SEC rulemaking. The full text of the FAQs is located **here**.

Title I amended the Securities Act of 1933 and the Securities Exchange Act of 1934 by introducing the concept of an EGC and by defining an EGC as an issuer that:

- had less than $1 billion in total annual gross revenues during its most recently completed fiscal year; and
- had the first sale of its common equity securities pursuant to an effective registration statement occur after December 8, 2011.

An issuer will cease to be an EGC upon the earliest of the following to occur:

- the last day of the fiscal year in which the issuer's total gross revenues exceed $1 billion;
- five years from the issuer's IPO (*i.e.*, the "first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933");
- the date on which the issuer has, during the previous 3-year period, issued more than $1 billion in non-convertible debt; or
- the date on which the issuer becomes a large accelerated filer (*i.e.*, an issuer with a public float of $700 million that has been reporting publicly for at least one year).

The Staff's FAQs provide guidance regarding a number of interpretive issues presented by the IPO On Ramp.

Qualifying as an Emerging Growth Company

- The phrase "total annual gross revenues" in the EGC definition refers to total annual gross revenues presented in accordance with the U.S. GAAP. For foreign private issuers, the issuer's income statement prepared in accordance with IFRS may be used. (Question 1)
- If an issuer's financial statements for the most recent year included in the registration statement are those of its predecessor, the predecessor's revenues should be used in determining if the issuer qualifies as an EGC. (Question 1)

- The phrase “first sale of common equity securities” in the EGC definition is not limited to IPOs of common equity securities for cash but could also include offerings of common equity pursuant to an employee benefit plan on a Form S-8 or a selling shareholder’s secondary offering on a resale registration statement. Further, even if an issuer had a registration statement declared effective on or before December 8, 2011, the issuer may still qualify as an EGC if the *first sale* of common equity securities occurs after December 8, 2011. (Question 2)
- Absent future rule changes, the Staff will apply the following principles regarding when the relevant EGC determinations should be made:
    - For purposes of confidential submissions of draft registration statements, an issuer must qualify as an EGC at the time of the confidential submission. If, during the confidential review process, the company ceases to qualify as an EGC, it will become subject to current rules and regulations applicable to non-EGCs and will need to file a registration statement on EDGAR to continue the review process. At that time, the prior confidential draft submissions would need to be filed as exhibits to the registration statement. (Questions 3)
    - Under Securities Act Rule 401(a), an issuer’s status at the time of the initial filing of its registration statement determines the applicable form and content requirements for the registration statement. The date of the confidential draft submission, however, is not the “initial filing date” under Rule 401(a), because a confidential draft submission is not a “filing.” In this situation, the “initial filing date” is the date of the first public filing of the registration statement on EDGAR. Therefore, if an issuer publicly files its registration statement at a time when it qualifies as an EGC, the disclosure provisions for EGCs would continue to apply through effectiveness of the registration statement even if the company loses its EGC status during registration. Conversely, if a company qualifies as an EGC at the time of its initial confidential submission of a draft registration statement but not at the time of the initial public filing of its registration statement, the initial publicly filed registration statement will need to comply with the requirements applicable to non-EGCs. (Question 3)
    - For purposes of Securities Act Section 5(d) “test-the-water” communications, the relevant time for determining the issuer’s EGC status is the time when the issuer engages in those test-the-water communications. If a company qualified as an EGC at the time it engaged in test-the-waters communications but was no longer an EGC at the time it publicly filed its registration statement, the Staff would not view the earlier communications as a violation of Section 5. However, further test-the-waters communications in reliance on Section 5(d) in that situation would not be permitted. The same approach would apply to provisions of Title I permitting the use of research reports in connection with public offerings by EGCs. (Question 3)
- In its initial confidential submission and in subsequent publicly filed versions of its registration statement, an issuer should identify itself as an EGC on the cover page of the prospectus. (Question 4)
- For purposes of triggering the disqualification event for EGCs relating to the issuance of non-convertible debt, the 3-year period during which an EGC has issued more than $1 billion in non-convertible debt is measured by any rolling 3-year period and is not limited to completed or fiscal years. That is, as of any date on which an EGC has issued more than $1 billion in

non-convertible debt over the three years prior to such date, the issuer will lose its EGC status . (Question 17)
- "Non-convertible debt" means any non-convertible security that constitutes indebtedness, whether issued in a registered offering or otherwise. (Question 17)

Disclosure Obligations of EGCs

- An issuer that qualifies as an EGC and filed its registration statement prior to April 5, 2012 (the effective date of the JOBS Act) may provide the scaled disclosure available to EGCs in a pre-effective amendment to a pending registration statement or in a post-effective amendment to an effective registration statement. (Question 5)
- An EGC that completed its IPO after December 8, 2011 and before April 5, 2012 may file its next periodic report using the scaled disclosure requirements applicable to ECGs. (Question 6)
- Pursuant to Securities Act Section 7(a)(2)(A), an EGC need not present more than two years of audited financial statements in its IPO registration statement. For purposes of presenting selected financial data in accordance with Item 301 of Regulation S-K in the registration statement, the EGC may limit the number of years of such selected financial data in its IPO registration statement to two years as well. Further, the Staff will not object if, in its other registration statements, an EGC does not present audited financial statements for any period prior to the earliest audited period presented in connection with its IPO. (Questions 11 and 12)
- With the exception of the accounting standards addressed in Securities Act Section 7(a)(2)(B) and Section 107(b) of the JOBS Act (governing the extended transition period for complying with new or revised accounting standards), an EGC may elect to follow only some of the scaled disclosure provisions for EGCs. (An EGC must elect to either follow all or none of the accounting standard transition periods.) (Question 7)
- An EGC must notify the Commission of its choice not to take advantage of the extended transition period provided in Securities Act Section 7(a)(2)(B) regarding compliance with new or revised accounting standards in its initial confidential submission. This is true even though Section 107(b)(1) of the JOBS Act provides that an EGC "must make such a choice at the time the company is first required to file a registration statement, periodic report, or other report with the Commission" and an EGC is not "required" to file a registration statement until at least 21 days before the road show. Pursuant to Section 107(b)(2), the opt-out decision is irrevocable. EGCs that are currently in registration or are subject to Exchange Act reporting should disclose their choice in the next amendment to the registration statement or next periodic report, respectively. (Question 13)
- If an EGC chooses to take advantage of the extended transition period for complying with new or revised accounting standards, for each recently issued accounting standard that will apply to its registration statements, the EGC should disclose the date on which adoption is required for non-EGCs and the date on which the EGC will adopt the new standard, assuming it remains an EGC as of such date. (Question 14)
- While the SEC may, in the future, amend disclosure and financial requirements to conform with the EGC disclosure provisions of the JOBS Act, the disclosure provisions in Title I supersede, in relevant part, existing rules and regulation. For example, Title I allows an EGC to comply with Item 402 of Regulation S-K by providing only the information required of a

smaller reporting company (even if the EGC does not qualify as a smaller reporting company) and exempts an EGC from compliance with Section 404(b) of the Sarbanes-Oxley Act. An EGC's compliance with these JOBS Act provisions will not invalidate the CEO and CFO Sarbanes-Oxley certifications that the EGC's periodic report fully complies with the requirements of Sections 13(a) or 15(d) of the Exchange Act. (Question 15)

- The Staff will not object if an EGC presenting two years of its audited financial statements pursuant to Securities Act Section 7(a)(2) presents only two years of the audited financial statements of the other entities it is required to report in its registration statement (*e.g.*, financial statements of acquired businesses and equity method investees under Rules 3-05 and 3-09 of Regulation S-X, respectively), even if the significance test for such entities under Regulation S-X mandates presentation of three years of financial statements for these entities. (Question 16)

Foreign Private Issuers:

- A foreign private issuer may use total revenues as presented on the issuer's income statements prepared in accordance with IFRS standards issued by the IASB for purposes of calculating its "total annual gross revenues" in determining its qualification as an EGC. If a foreign private issuer's financial statements are presented in a foreign currency, total annual gross revenues for purposes of the EGC test must be calculated in U.S. dollars using the exchange rate as of the last day of the most recent fiscal year. (Question 1)
- Even though the JOBS Act refers only to Regulation S-K, and does not refer to the corresponding items in Form 20-F, a foreign private issuer which qualifies as an EGC may rely on the scaled disclosure provisions for EGCs to the extent relevant to the foreign private issuer form requirements. (Question 8)
- A foreign private issuer that qualifies as an EGC and chooses to take advantage of any benefit available to EGCs will be treated as an EGC and will be required to publicly file its confidential submissions at least 21 days before the road show. If the foreign private issuer chooses not to take advantage of any EGC benefit, it may continue following the **Division's Policy on Non-Public Submissions from Foreign Private Issuers**. (Question 9)
- A Canadian issuer filing under the Multi-Jurisdictional Disclosure System ("MJDS") that qualifies as an EGC would be subject to the Canadian disclosure requirements in accordance with the MJDS, but may take advantage of other provisions of Title I, such as the Securities Act Section 5(d) test-the-waters provisions and the deferral of compliance with Section 404(b) of the Sarbanes-Oxley Act. (Question 10)

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For more information regarding these FAQs, please contact your regular O'Melveny & Myers LLP attorney. Additional information regarding the JOBS Act is on the **JOBS Act** portion of our website.

Click here to view a PDF of the alert.