

LEGAL UPDATES

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Draft Registration Statements Under the JOBS Act: How to Get Them Done

The JOBS Act permits an emerging growth company to confidentially submit a draft registration statement to the Security and Exchange Commission (SEC) for preliminary review if the company's common equity securities have not previously been sold pursuant to an effective registration statement under the Securities Act of 1933. Based on the SEC's just-released guidelines, we offer important observations about this new process. As highlighted in our April 5, 2012, legal alert, the Jumpstart Our Business Startups Act of 2012 (JOBS Act) allows an SEC nonpublic review for an issuer with less than \$1 billion in total annual gross revenue during its most recently completed fiscal year (also known as an emerging growth company or EGC).

Several important distinctions concerning the scope of the new process are noteworthy. For instance, the requirement that the offering covered by the confidential submission is associated with the company's first sale of common equity securities is not limited to an initial primary offering of common equity securities for cash but could also include an offering of common equity pursuant to an employee benefit plan registered on Form S-8 or selling shareholder's secondary offering registered on a resale registration statement. Additionally, a company that has registered sales of securities *other than* common equity securities can qualify to use the confidential submission process as long as the company otherwise qualifies as an EGC. However, the confidential review process is limited to the Securities Act registration process and is not available for other registrations such as Form 10 or Form 20-F.

Procedure

A company does not need to send its draft registration statements for preliminary review under cover of a Rule 83 request to preserve confidentiality. However, the SEC requests that EGCs identify the information in their submissions for which they will seek confidential treatment when the

registration statement is publicly filed on EDGAR. We recommend that an EGC make a Rule 83 request upon publicly filing the registration statement on EDGAR to ensure that the SEC will not post confidential information in its comments.

The SEC requires EGCs to use its secure email system to submit confidential draft registration statements in order to correspond with the issuer securely and maintain confidentiality during the initial review process. Instructions for this process are posted to the SEC website. First, an issuer must create an account on or login to the secure email system. To submit a transmittal letter and draft registration statement, the issuer must compose a new email containing one file with a copy of its draft registration statement; a separate file containing the transmittal letter that identifies the issuer, the type of submission and confirming the company's status as an EGC; and a third file that includes any exhibits to the registration statement. All files must be formatted in text-searchable PDF. A filing fee is not required with a confidential draft registration statement.

Content, Signature and Timing Requirements

The SEC will not review a draft registration statement unless it is substantially complete at the time of initial submission to the same degree as a publicly filed registration statement but which may omit the public offering price and other offering-related information. Although the draft must include a signed audit report and exhibits, it does not need to be signed by officers and directors or include the consent of auditors and other experts.

If the issuer decides to proceed with its offering, the issuer must publicly file the initial confidential submission and all amendments at least 21 days before engaging in any communications that fall within the definition of a road show or 21 days before the anticipated effective date of the registration statement if there is no road show. Each confidential submission should be included as a separate Exhibit 99 to the first registration statement filed publicly on EDGAR.

Communications

Issuers cannot avail themselves of protection under the Rule 134 safe harbor while a draft registration statement is under confidential review because the submission is not considered "filed" for purposes of the safe harbor. Therefore, an EGC cannot make any public communication about its offering until after the company publicly files the registration statement.

Communications made before the registration statement is filed publicly are subject to the Section 5(c) prohibition against making offers of a security in advance of filing a registration statement. On a related note, the SEC cautions that EGCs cannot conduct a road show for the offering until at least 21 days after the registration statement is publicly filed. Rule 433(h)(4) defines a 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.”

Interplay with EGCs Who Are “Testing the Waters”:

The JOBS Act allows EGCs to communicate with qualified institutional buyers (QIBs) and institutional accredited investors to “test the waters” in order to gauge interest in a proposed offering. If such communications between issuers and QIBs and institutional accredited investors occur prior to the public filing of a registration statement, they could be viewed as coming within the definition of a road show, requiring the public filing of the registration statement 21 days prior to such communications. However, the test the waters provision specifically contemplates that such communications may take place before and after filing a registration statement. The SEC’s guidance notes that it will not object if an EGC does not treat test the waters communications as a road show for purposes of the confidential draft registration statement review process, and thus an EGC is not required to publicly file its registration statement 21 days prior to “test the waters” communications.

The SEC staff has not, however, provided any guidance to date on how to determine whether a prospective investor qualifies as a QIB or an institutional accredited investor. Without such guidance, we expect issuers and their underwriters to use current market practices in Rule 144A and Rule 506 offerings.

It remains to be seen whether underwriters will insist on using the draft registration statements to test the waters for antifraud liability purposes. In addition, underwriting agreements will likely evolve to include representations related to testing the waters similar to the road show materials. Finally, we would not be surprised if the staff decides to request the testing the waters materials during its review.

Contact Info

If you have any questions concerning these issues or other questions concerning securities laws, including public offerings and corporate governance, please contact your Husch Blackwell attorney.

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