

JOBS Act Gives Confidential Review Option for U.S. Emerging Growth Company IPOs

by Joseph J. Kaufman

New guidance outlines key rules for the new confidential review option for initial public offerings by emerging growth companies in the United States.

The Jumpstart Our Business Startups Act (also known as the JOBS Act) became a U.S. federal law on April 5, 2012 and immediately authorized a confidential submission option for registered securities offerings in the United States by emerging growth companies (EGCs). The U.S. Securities and Exchange Commission (SEC)'s Division of Corporation Finance staff promptly announced its procedure for accepting confidential draft registration statements using this option. The staff has also given written and oral guidance on a number of relevant frequently asked questions. This alert explains the background and expected benefits of the confidential submission option and reviews the SEC staff guidance.

Background

Previously, a company seeking to make an initial public offering (IPO) of its securities was generally required to file publicly an initial registration statement with the SEC through its electronic filing system. Once so filed, a registration statement is posted on the SEC's public website, and generally may not be removed. Under the U.S. Securities Act of 1933 (Securities Act) and its implementing rules, a registration statement must disclose comprehensive and often sensitive information about the company. The SEC may issue several rounds of comments on the registration statement, often requiring an amendment each time, which when filed may also be viewed immediately online. As such, traditionally most companies considering a U.S. IPO had to determine whether they were prepared for the public spotlight several months (or possibly even years given prolonged market volatility) before the marketing and closing of their offering might occur.

Now, under the JOBS Act, a company may confidentially submit a registration statement that will not become public unless it proceeds with its road show, and therefore eliminate or reduce premature negative publicity, if (1) it is an EGC and (2) the "initial public offering date" (IPO Date) has not yet occurred, i.e., the company has not yet sold common equity securities under an effective registration statement pursuant to the Securities Act. To be an EGC, a company must have total annual gross revenues of less than \$1 billion as of the end of its last fiscal year. It must also not have issued more than \$1 billion in non-convertible debt during a three-year period, or be a "large accelerated filer" (i.e., had a public float of at least \$700 million at the end of its most recent second fiscal quarter, filed at least one annual report and had been a public reporting company at least a year). There are other requirements for EGC status, but they are satisfied if the IPO Date has not occurred. Along with confidential IPO registration review, EGCs are eligible for scaled public disclosure and somewhat freer investor and analyst exposure under the JOBS Act's "IPO On-Ramp" provisions.¹

If an EGC uses the confidential submission option, the JOBS Act requires the initial confidential submission and all amendments to be publicly filed at least 21 days before the company conducts a "road show" as defined in Securities Act Rule 433(h)(4). As defined, a "road show" is "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."

SEC Staff Guidance

The SEC staff's guidance clarifies important issues, some of which are summarized below:

EGC eligibility. On an EGC's requirement to have "total annual gross revenues" of less than \$1 billion during the last fiscal year, this amount is total revenues on the annual income statement, calculated under U.S. GAAP (unless the company is an FPI, as discussed below). If a predecessor's income is included in the financial statements, that income is counted. The requirement that an EGC has issued \$1 billion or less in debt in the last three years is analyzed using a rolling three-year period ending on the date that the company tests EGC status. "Debt" here means all non-convertible debt securities issued in public or private offerings, even if not still outstanding, and appears to count refinancings.

EGC testing. EGC status must be tested at the time of each confidential submission, including each draft amendment, and at the time of public filing. For example, if a company qualifies as an EGC when it makes a confidential submission, but at the end of that year has \$1 billion or more of total annual gross revenues, if it is still in confidential review, it would need to publicly file the registration statement and the prior confidential submissions to continue the review process. The registration statement form and content, and the company generally, would also need to comply with the rules applicable to non-EGCs. However, if the company publicly files the registration statement (with the prior confidential submissions) while it is still an EGC, its registration statement may use EGC scaled disclosure even if it loses EGC status, though it may not use other EGC privileges such as the safe harbor for test-the-waters communications.

IPO Date. An IPO Date is triggered by any public sale of common equity pursuant to an effective registration statement. Therefore, if a company granted common stock to employees pursuant to an effective registration statement, or a stockholder sold common stock pursuant to an effective resale registration statement, either action would trigger an IPO Date. However, unregistered sales, and registered sales of anything other than common equity, such as debt or preferred stock, would not.

Filing before road show. The requirement to file publicly a registration statement at least 21 days before the road show means either 21 days before any communications that may constitute a "road show" as defined, or if there is no road show, before the anticipated date that the SEC will declare the registration statement effective. A traditional road show should be easily identified, as where the issuer and underwriters have discussions with investors. Test-the-waters communications with only qualified institutional buyers or institutional accredited investors would not be treated as a road show. Any other communications, such as with retail investors (accredited or not), would be treated as a road show. Also, the public filing does not end the SEC's review, especially if material new facts come to light. Companies should allow sufficient time in advance of the 21-day limit if significant SEC comments or issues remain unresolved.

Form and content of confidential submission. A confidentially submitted registration statement's form and content should be substantially the same as one that is publicly filed, except that it does not need the company's signatures or an auditor consent. The registration statement must include a signed audit report and all other exhibits that would be required if publicly filed. We presume that for any exhibit that has portions that the company seeks to keep confidential if the registration statement is ultimately filed publicly, a confidential treatment request must be submitted with the confidential submission that satisfies the conditions for such requests in the context of a public filing, including a redacted version of the exhibit. Likewise, offering price and other offering-related information may be omitted to the same extent as in a public filing. The initial submission should indicate how the EGC is using its irrevocable option to comply

with new or revised accounting standards that apply to both public and private companies only when they take effect as to private companies. If the submission is materially deficient, the staff will defer review. When the registration statement is publicly filed, it must include all required signatures, signed audit reports, consents, exhibits, and filing fees. It must also include as exhibits all of the confidential submissions and amendments, and all of their exhibits, presumably including any redacted exhibits subject to a confidential treatment request. We note that a FINRA filing would still be due within one day following the confidential submission.

Registrations in progress. If an EGC is already in public registration but otherwise qualifies, it may switch to confidential submissions and scaled disclosure (unless moving to scaled disclosure would be materially misleading). It should coordinate the transition with its reviewing staff. However, the registration statement (with all confidential submissions, amendments and their exhibits) must be filed publicly again at least 21 days before the road show (or before effectiveness, if there is no road show).

Confidentiality, fee and offers. A confidential treatment request is not required to preserve the confidentiality of a submission prior to its public filing. The registration fee will not be due until the company publicly files its registration statement because confidential submission is not considered a "filing." Likewise, prior to the public filing, public communications about an offering in the United States are still generally prohibited, other than pre-filing public notices conforming to strict form and content limits.

Alternative submissions. The SEC guidance appears to support use of the EGC confidential submission process for shareholder and shelf offerings and other non-traditional IPO equity registrations. It also appears to be available for non-common equity offerings. One open question in this context is whether a road show for an offering requires a public filing for just that offering or all offerings; if only for the related offering, an EGC could confidentially submit unlimited non-common equity offerings before its IPO Date.²

FPI submissions. Certain FPIs may also avail themselves of the certain provisions of the JOBS Act. For purposes of the EGC total annual gross revenues test, an FPI that reports under IFRS may use IFRS-based total revenues. FPIs that use a non-U.S. currency in their financial statements should use the exchange rate as of the end of the last fiscal year. In addition, a relatively narrow set of FPIs may also qualify to use an alternative confidential submission process.³ The alternative FPI process does not currently require the registration statement to be publicly filed at least 21 days before the road show. If an FPI EGC qualifies and opts to use that process, it must disclose this choice in the initial submission. FPIs using that process may not take advantage of any EGC benefit. Once an FPI makes a confidential submission, it must comply with its chosen process and may not switch to the other process.

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work or the author below:

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¹ See "JOBS Act Targets Smaller Business Capital Raising" at pillsburylaw.com/index.cfm?pageid=34&itemid=40497.

² The SEC staff's guidance does not explain the extent to which any confidential submissions for a pending or abandoned registered offering must be publicly filed to proceed with a different registered offering, or whether or how a company should withdraw a confidential submission if it decides to abandon the related offering.

³ For a discussion of that process, see "Confidentiality No Longer Available for Many Foreign Issuer Registration Statements," available at <http://www.pillsburylaw.com/siteFiles/Publications/CSChinaSecuritiesAlert12152011.pdf>

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