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## Jumpstart Our Business Startups Act (JOBS Act) – Confidential Submission Process for Emerging Growth Companies

April 18, 2012

On March 8, 2012, the U.S. House of Representatives approved a package of six bills designed to boost access to private capital – the JOBS Act. The JOBS Act was passed by the Senate on March 22, 2012 with some revisions. The House approved the Senate version on March 27, 2012. President Obama signed the JOBS Act on April 5, 2012.

The JOBS Act provides that “emerging growth companies” will be exempt from certain financial disclosure and governance requirements for up to five years, eases restrictions on the sale of securities and increases the number of shareholders a company must have before becoming subject to the SEC’s reporting and disclosure rules. A memo discussing the JOBS Act may be found at <http://www.hinshawlaw.com/congress-passes-jobs-act-in-effort-to-make-raising-capital-easier-04-02-2012/>.

*Emerging Growth Companies.* Many companies are reluctant to undertake an initial public offering (an IPO) because in doing so they will become subject to various SEC rules and regulations thereafter.

The JOBS Act affords companies that file an IPO a temporary reprieve from certain SEC regulations by exempting an emerging growth company (an EGC) from these regulations for up to five-years. An EGC is defined as a company with gross revenues of less than \$1 billion in its most recently completed fiscal year. An EGC will retain such status until the earlier of: (1) the fifth anniversary of the date it first sold securities pursuant to an IPO registration statement; (2) the last day of the fiscal year in which it first exceeds \$1 billion in annual gross revenues; (3) the time it becomes a large accelerated filer (an SEC registered company with a public float of at least \$700 million); or (4) the date on which the EGC has, within the previous three years, issued \$1 billion of non-convertible debt.

*Confidential Submission of Draft Registration Statements.* New Section 6(e) of the Securities Act of 1933 (the 1933 Act) permits an EGC to submit its IPO registration statement and any amendments for confidential review and comment by the SEC prior to the EGC’s public filing of the registration statement. After the registration statement has been approved by the SEC, the EGC must file the initial draft registration statement, along with all amendments thereto, and its IPO registration statement at least 21 days prior to commencing a road show for the offering.

On April 10, 2012, the SEC’s Division of Corporation Finance issued a FAQ to provide guidance relating to the confidential submission of registration statements by an EGC for SEC review.

The SEC noted that the confidential submission of a draft registration statement under Section 6(e) is not deemed to be a filing of a registration statement. Therefore,



- the 1933 Act registration filing fee is due when the registration statement is first filed publicly on EDGAR and not when the draft is submitted to the SEC; and
- the filing of the draft registration statement does not constitute a filing of a registration statement for purposes of the prohibition in Section 5(c) of the 1933 Act against making offers of a security in advance of filing a registration statement.

Because the confidential submission process applies only to the 1933 Act registration process, it is not available for registrations under the Securities Exchange Act of 1934 (such as companies filing a Form 10 or Form 20-F).

*Timing For Submissions.* An EGC may submit a draft registration statement for confidential, non-public review as long as it is submitted prior to the EGC's IPO date.

The IPO date is the "date of the first sale of common equity securities of an [EGC] pursuant to an effective registration statement under" the 1933 Act.

The phrase "date of the first sale" in the definition of IPO date could be:

- the date of a company's initial primary offering of common equity securities for cash;
- 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.

A company that has had sales of securities registered under the 1933 Act, other than common equity securities, can qualify to use the confidential submission process as long as it otherwise qualifies as an EGC.

*Contents of a Draft Registration Statement.* Except as noted below, a draft registration statement should be substantially complete at the time of initial submission. It should include a signed audit report of the registered public accounting firm covering the fiscal years presented in the registration statement and exhibits. The SEC will defer review of any EGC draft registration statement that is materially deficient.

Section 6(e) does not provide any guidance as to what needs to be included in a "draft registration statement." Because the draft registration statement does not constitute a "filing" under the 1933 Act, it does not have to be signed or include the consent of auditors and other experts. An EGC may omit certain limited information 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.

*Switching To Confidential Filings.* If an EGC is eligible to submit its registration statement on a confidential basis, and the EGC was in registration at the time of enactment of the JOBS Act, the EGC may switch to the confidential submission process for future amendments. In this case, the company does not have to withdraw the registration statement and submit a new draft registration statement for confidential, non-public review. A company should contact its SEC review team to coordinate the process.



If an EGC initially files its IPO registration statement on EDGAR, and then switches to the confidential submission process for subsequent amendments, all confidential submissions must be filed on EDGAR at least 21 days before the road show commences.

*Public Announcement of Filing.* Rule 134 under the 1933 Act allows a company to make a public announcement when it files a registration statement. However, as indicated above, the confidential submission of a draft registration statement by an EGC does not constitute the filing of a registration statement. As a consequence, an EGC that submits a draft registration statement on a confidential basis may not make a public communication about its offering in reliance on the Rule 134 safe harbor. The safe harbor is not available until the EGC files a registration statement that satisfies the requirements of Rule 134.

*Procedures to Submit Draft Registration Statement.* Until the SEC implements a system that provides for electronic transmission and receipt of confidential submissions, draft registration statements must be submitted in a text searchable PDF file on a CD/DVD. They may also be submitted on paper; they should not be stapled or bound. The EGC should include a transmittal letter in which it confirms its EGC status.

One copy of the confidential draft registration statement should be sent to:

Draft Registration Statement  
U.S. Securities and Exchange Commission  
100 F. Street, N.E.  
Washington, D.C. 20549

Prior to the adoption of the JOBS Act, the SEC allowed a company (under Rule 83) to request confidential treatment for portions of a written response to an SEC staff comment letter. An EGC does not have to submit its draft registration statement under cover of a Rule 83 request to preserve confidentiality.

*When to Publicly File.* Once the confidential process has been completed, an EGC would normally commence its road show to start selling the shares. Before it can do this, however, the confidential submissions have to be publicly filed. The statute requires that this filing must occur at least 21 days before the EGC conducts a “road show.”

A “road show” is defined in Rule 433(h)(4) as “an offer...that contains a presentation regarding an offering by one or more members of the [EGC’s] management...and includes discussion of one or more of the [EGC], such management, and the securities being offered.”

New Section 5(d) allows communications which are only made with qualified institutional buyers (large institutional investors with more than \$100 million in investments – QIBs) and institutional accredited investors. These “test-the-waters” communications may take place before the public filing of the registration statement.

Test-the-waters communications conducted in reliance on Section 5(d) are not deemed to be a road show for purposes of Section 6(e) and, as a consequence, do not fall under Rule 433(h)(4).



When the underwritten public offering does not include communications made in reliance upon new Section 5(d), the road show would be deemed to begin when the EGC and underwriters begin actively marketing the offering. In that case, the EGC should publicly file its confidential submissions at least 21 days before it commences its marketing effort. The EGC should advise the SEC staff that is reviewing the draft registration statement of the EGC's anticipated schedule.

If the EGC does not conduct a traditional road show and does not engage in activities that would come within the definition of road show, other than exempted test-the-waters communications 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 EGC does not conduct a traditional road show, but will have communications that do not meet the conditions for test-the-waters communications but would be considered part of a road show – for example, the EGC 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 these communications occur.

*Procedures for Public Filing of Confidential Submissions.* The EGC has to publicly file the initial confidential submission and all amendments thereto not later than 21 days before its road show commences. The SEC rules and EDGAR do not allow companies to file registration statements in draft form. Until revisions are implemented, these materials should be filed as exhibits to the first registration statement filed on EDGAR. Each confidential submission must be filed as a separate Exhibit 99. The first filed registration statement should be complete, including signatures, signed audit reports, consents, exhibits and filing fees.

*Foreign Private Issuers.* If a foreign private issuer comes within the definition of an EGC, it may use the confidential submission procedure to the same extent as a domestic EGC. Qualifying foreign private issuers must submit the draft registration statement in the same manner and to the same address as domestic EGCs.

For further information, please contact [Tim M. Sullivan](#), [Michael D. Morehead](#) or your regular [Hinshaw attorney](#).

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