



SEC Staff Guidance on Confidential Registration Statement Submissions under the JOBS Act

On April 5, 2012, President Obama signed the Jumpstart Our Business Startups Act (the “JOBS Act”), easing some significant regulatory restraints on capital formation.¹ The JOBS Act creates a new regulatory “on-ramp” for “emerging growth companies” going public, with confidential SEC staff review of draft IPO registration statements, scaled disclosure requirements, and fewer restrictions on “test the waters” and research communications around the time of securities offerings. In addition, the JOBS Act directs the SEC to amend its rules to: (1) repeal the ban on general solicitation and general advertising in Rule 506 offerings when sales are only to accredited investors; (2) establish a small offering exemption for crowdfunding; and (3) create a new public offering exemption for offerings up to \$50 million. The JOBS Act also includes provisions to raise the “holder of record” threshold for mandatory registration under the Securities Exchange Act of 1934, as amended.

Title I of the JOBS Act, “Reopening American Capital Markets to Emerging Growth Companies,” is immediately effective and establishes a new category of issuer, referred to as an “emerging growth company.” An emerging growth company is defined as:

- An issuer with total gross revenues of less than \$1 billion (subject to inflationary adjustment by the SEC every five years) during its most recently completed fiscal year.
- A company remains an “emerging growth company” until the earliest of:
 - the last day of the fiscal year during which the issuer has total annual gross revenues in excess of \$1 billion (subject to inflationary indexing);
 - the last day of the issuer’s fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933, as amended (the “Securities Act”);
 - the date on which such issuer has, during the prior three-year period, issued more than \$1 billion in non-convertible debt; or
 - the date on which the issuer is deemed a “large accelerated filer.”
- An issuer will not be able to qualify as an emerging growth company if it first sold its common stock in an IPO pursuant to an effective registration statement prior to December 8, 2011.

One of the principal advantages for an emerging growth company conducting an IPO is that an emerging growth company may now submit a draft registration statement to the SEC for confidential nonpublic review prior to

¹ See our client alert on the JOBS Act, available at <http://www.mofo.com/files/Uploads/Images/120326-The-JOBS-Act.pdf>.

public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed with the SEC no later than 21 days prior to the commencement of the issuer's road show.

On April 5, 2012, the SEC's Division of Corporation Finance issued a statement explaining how the confidential review process for emerging growth companies will work.² The Division noted that, until a system is fully implemented for the purpose of facilitating the electronic transmission and receipt of confidential registration statement submissions, the Division will accept draft registration statements in a text-searchable PDF file supplied on a CD/DVD. In the alternative, an emerging growth company may submit a draft registration statement on paper, provided that the submission is not stapled or bound. The Division requests that the draft registration statement be accompanied by a transmittal letter in which the issuer confirms its status as an emerging growth company.

Foreign private issuers that are either eligible to submit draft registration statements as emerging growth companies or pursuant to the Division's policy on draft submissions by foreign private issuers must now submit draft registration statements in the same format and to the same address specified below.³ The e-mail address that the Division had provided for the receipt of submissions by foreign private issuers is no longer active.

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

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

Following the submission of a draft registration statement, the Staff of the Division will contact the emerging growth company to confirm receipt of the submission, and to advise as to which office will review the submission. No registration fee is required to be provided with a confidential draft registration statement.

The Division notes that the draft registration statement submission is not a public filing, and that a registration statement submitted through this process is not considered filed for purposes of Section 5 of the Securities Act.

The Division states that questions about the draft registration statement submission and review process may be directed to (202) 551-5867.

Go to www.mofo.com/jumpstart for the latest developments regarding the JOBS Act.

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² Division announcement regarding confidential submission of draft registration statements under the Jumpstart Our Business Startups Act, available at <http://www.sec.gov/divisions/corpfin/cfannouncements/draftregstatements.htm>.

³ See our client alert entitled *All Good Things Must Come to an End: The SEC Limits Confidential Submissions by Foreign Private Issuers*, available at <http://www.mofo.com/files/Uploads/Images/111209-SEC-Limits-Confidential-Submissions.pdf>.

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