News Bulletin

April 12, 2012

SEC Staff Releases Further Guidance on Confidential IPO Submissions of Emerging Growth Companies under the JOBS Act

One of the principal advantages under the Jumpstart Our Business Startups Act (the "JOBS Act") 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 non-public review prior to 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.[1]

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 operate.[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 either as a text-searchable PDF file supplied on a CD/DVD, or on paper. The Staff would prefer to receive an electronic version of the document in the form of a PDF file.

On April 10, 2012, the SEC Staff published *Jumpstart Our Business Startups Act Frequently Asked Questions: Confidential Submission Process for Emerging Growth Companies*.[3] This document provides further guidance on how the confidential review process contemplated by Section 6(e) will operate, and how it will interact with other provisions of the JOBS Act and other provisions of the federal securities laws.

Registration Statements Submitted under Securities Act Section 6(e)

Section 6(e) provides that any emerging growth company, "prior to its initial public offering date," may confidentially submit a draft registration statement for confidential, non-public review. In the Frequently Asked Questions ("FAQs"), the Staff notes that the term "initial public offering date" is defined in Section 101(c) of the

[1] 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: (1) the last day of the fiscal year during which the issuer has total annual gross revenues in excess of a $1 billion (subject to inflationary indexing); (2) 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"); (3) the date on which such issuer has, during the prior three-year period, issued more than $1 billion in non-convertible debt; or (4) 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.

[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. Our news bulletin regarding the confidential submission process is available at: http://www.mofo.com/files/Uploads/Images/120406-Confidential-Registration-Statement-Submissions.pdf.

[3] The Staff's Frequently Asked Questions are available at: http://www.sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm.

JOBS Act as the "date of the first sale of common equity securities of an issuer pursuant to an effective registration statement under the Securities Act of 1933." For this reason, an emerging growth company can confidentially submit a registration statement to the SEC only as long as its initial public offering date has not occurred. The Staff notes that because the phrase "date of the first sale" in the definition of initial public offering date is not limited to the date of an emerging growth company's initial primary offering of common equity securities for cash, the date of first sale could also occur with respect to 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. The Staff further notes that an emerging company that has registered the sales of securities other than common equity securities under the Securities Act can qualify to use the confidential submission process.

The Staff notes in the FAQs that the confidential submission process is only available for Securities Act registration statements, therefore it would not apply to registration statements under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), such as registration statements on Form 10 or Form 20-F.

A draft registration statement submitted pursuant to Section 6(e) does not need to be submitted pursuant to a Rule 83 confidential treatment request as a means to preserve the confidential treatment of the materials, because the Staff will preserve the confidentiality in accordance with the provisions of Section 6(e).

If an emerging growth company is already on file publicly with a registration statement and is now eligible to submit its registration statement on a confidential basis, the Staff will not object if the emerging growth company switches to the confidential submission process for future amendments. However, the prior public filings will not count toward the requirement to publicly file the registration statement not later than 21 days before the road show. The Staff notes that the emerging growth company should contact its review team to coordinate the process for making the switch to a confidential filing.

Availability of the Confidential Submission Process for Foreign Private Issuers

The Staff notes in the FAQs that if a foreign private issuer qualifies as an emerging growth company, it may use the confidential submission procedure contemplated by Section 6(e) to the same extent as an emerging growth company that is not a foreign private issuer. Alternatively, a foreign private issuer that does not meet the definition of an emerging growth company may be able to submit a draft registration statement on a non-public basis for staff review, if it meets the requirements for non-public submissions as set forth in the Division's policy on Non-Public Submissions from Foreign Private Issuers.[4] In either case, a foreign private issuer must submit their draft registration statements in the same manner and to the same address as domestic companies that are emerging growth companies, as specified in the Division's April 5th guidance on confidential submissions.

Filing Fees

The filing fee is not due when the draft registration statement is submitted to the Staff for review; rather, the filing fee would need to be paid when the registration statement is first filed publicly on EDGAR. The Staff notes that the statutory provision requiring payment of a registration fee under the Securities Act, Section 6(b), applies at the "time of filing a registration statement," and because the confidential submission of a draft registration statement under Section 6(e) is not a "filing" of a registration statement, the fee is not due to be paid at that earlier time.

[4] *See* our news bulletin 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.

Applicability of Section 5 of the Securities Act

The Staff indicates that the confidential submission of the draft registration statement does not constitute a filing for purposes of the prohibition in Section 5(c) against making offers of a security in advance of filing a registration statement.

The Staff also notes in the FAQs that the Rule 134 safe harbor for communications about the offering is not available until the issuer files a registration statement that satisfies the requirements of Rule 134. The confidential submission of a draft registration statement does not constitute the filing of a registration statement for this purpose.

Requirements for Draft Registration Statements

The Staff notes that Section 6(e) does not specify what needs to be included in a "draft registration statement," and that because the confidential submission of the draft registration statement does not constitute a "filing" for purposes of Securities Act Sections 5(c) and 6(a), the registration statement is not required to be signed or to include the consent of auditors and other experts.

The Staff further notes in the FAQs that, as with a publicly filed registration statement, an emerging growth company may omit certain limited information from their initial submissions 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.

The Staff does expect draft registration statements to be substantially complete at the time of initial submission, including a signed audit report of the registered public accounting firm covering the fiscal years presented in the registration statement and exhibits. The Staff has indicated that it will defer review of, or "bedbug," any draft registration statement submitted under Section 6(e) that is materially deficient. For this reason, emerging growth companies should prepare draft registration statements in the same manner as they would a registration statement that is being publicly filed.

The Content of the Filing Required at Least 21 Days Before the Road Show

Section 6(e) provides that confidential submissions must be publicly filed with the SEC at least 21 days before the issuer conducts a road show. The SEC's rules and the EDGAR system do not currently provide a means for filing registration statements in draft form. Therefore the Staff will require that the draft submission materials be filed as exhibits to the first registration statement filed on EDGAR, with each confidential submission filed as a separate "Exhibit 99." The Staff notes that the first registration statement filed under the Securities Act should be complete, including signatures, signed audit reports, consents, exhibits and filing fees.

The Requirement to File the Registration Statement and All Confidential Submissions 21 Days Before the Road Show

Section 6(e) provides that confidential submissions must be publicly filed with the SEC at least 21 days before the issuer conducts a "road show," as that term is defined in Rule 433(h)(4) of Regulation C. Rule 433(h)(4) broadly defines a roadshow as:

> [A]n offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such

terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and includes discussion of one or more of the issuer, such management, and the securities being offered.

The Staff notes that in a "traditional" underwritten public offering where "test-the-waters" communications contemplated by Securities Act Section 5(d) were not used, the road show could be easily identified as "those meetings traditionally viewed as the road show when the emerging growth company and underwriters begin actively marketing the offering."[5] Under these circumstances, the emerging growth company would be able to estimate when it expects to begin that road show, and then publicly file the registration statement and all of the confidential submissions at least 21 days prior to that date.

With the advent of the new test-the-waters communications provisions contemplated by Section 5(d), the Staff acknowledges in the FAQs that it is possible that there may be meetings with potential investors which could be viewed as coming within the Rule 433(h)(4) definition of road show, which could "theoretically" trigger the requirement in Section 6(e) to file the registration statement and all confidential submissions 21 days prior to those meetings.

Because Section 5(d) specifically contemplates that test-the-waters communications may take place before filing a registration statement and, in the interest of reading these provisions in a consistent fashion, the Staff states in the FAQs that it will not object if an emerging growth company does not treat test-the-waters communications conducted in reliance on new Section 5(d) as a "road show" for purposes of Section 6(e). However, if an issuer were to have meetings or other communications that meet the definition of "road show" and which do not fall within the test-the-waters communications contemplated by Section 5(d) (*e.g.*, because the communications were not limited to QIBs and institutional accredited investors), then the 21 day filing requirement would be triggered based on the timing of such meetings.

If the emerging growth company does not conduct a "traditional" road show and does not engage in activities that would come within the definition of road show, other than test-the-waters communications that comply with Section 5(d), then 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.

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

[5] The test-the-waters communications contemplated by Section 5(d) are limited to communications with qualified institutional buyers ("QIBs") and institutional accredited investors.