No. 2012-17
17 May 2012

Technical Line
Financial reporting developments

Implementing the JOBS Act

In this issue:

Overview 1
Implementation 2
Emerging growth companies 2
Who can be an emerging growth company? 2
Confidential registration statement submission 4
EGC scaled disclosures during IPO on-ramp period 6
Auditing and accounting standards issued after the JOBS Act 7
Disclosure of EGC status 8
Loss of eligibility 9
Foreign private issuer considerations 10
Amendments to Exchange Act Section 12(g) 10
Crowdfunding 11
Other exempt offerings 12
What's next? 12

What you need to know

- The JOBS Act created a new category of issuer called an emerging growth company, for which certain SEC reporting requirements will be phased in over five years.
- Emerging growth companies can submit IPO registration statements and amendments to the SEC on a confidential basis.
- The SEC staff is issuing interpretive guidance to address implementation questions.
- The JOBS Act allows greater access to funding without triggering public registration requirements.

Overview

The Jumpstart Our Business Startups Act (JOBS Act or Act), enacted 5 April 2012, gives private companies greater access to capital and makes it easier for certain companies to go public.

Title I of the Act created a new category of issuer called an emerging growth company (EGC) to encourage initial public offerings. Certain regulatory requirements are phased in for EGCs during a five-year initial public offering (IPO) "on-ramp" period.

The JOBS Act also modified triggers for public registration and reporting by amending Section 12(g) of the Exchange Act to increase the number of record holders that trigger a company's obligation to register and report as a public company. In addition, the Act encourages capital formation through other provisions that require SEC rulemaking. These include (1) a new category of exempt offerings

of up to $50 million raised over a 12-month period and (2) allowing private companies to raise small amounts of capital from a large group of investors through a process called crowdfunding without adding to the record holder count that triggers Exchange Act registration.

Implementation

Disclosure provisions in Title I of the JOBS Act supersede conflicting SEC rules and regulations.

The provisions in Title I of the JOBS Act related to EGCs are effective immediately and do not require SEC rulemaking even though some conflict with existing SEC rules and regulations. For example, like other registrants, an EGC's chief executive and chief financial officers are required to sign Sarbanes-Oxley Act Section 906 certifications that the company's periodic report complies with Sections 13(a) or 15(d) of the Exchange Act. The SEC staff has indicated that an EGC complying with the scaled executive compensation disclosures and delayed auditor attestation of internal control over financial reporting as allowed by the JOBS Act is still complying with Sections 13(a) or 15(d) of the Exchange Act.

Given the self-executing nature of the EGC provisions, many questions have arisen. The staff of the SEC's Division of Corporation Finance issued a series of Frequently Asked Questions[1] on implementing the JOBS Act including (1) EGC eligibility and disclosure, (2) confidential submission of EGC registration statements and (3) the amended registration and deregistration record holder thresholds in Section 12(g) of the Exchange Act.

Other provisions of the JOBS Act require rulemaking by the SEC. As previously discussed, the SEC will need to adopt rules to implement the crowdfunding exemption and the new category of exempt offerings of up to $50 million over a 12-month period.

How we see it

- Although rulemaking may not be required for many of the EGC-related provisions, the SEC will probably adopt conforming changes to its existing rules to align them with the provisions that are already in effect.
- Many implementation questions have not yet been addressed and we expect the SEC staff to continue issuing interpretive guidance concerning implementation of the JOBS Act.

Emerging growth companies

Who can be an emerging growth company?

An EGC is defined as a company with total annual gross revenues of less than $1 billion in its most recently completed fiscal year, regardless of gross revenues in prior annual periods. The SEC staff has stated that "total annual gross revenues" means total revenues as presented on the income statement in accordance with US GAAP. If the financial statements for the most recent year are those of the predecessor of the issuer, the predecessor's revenues should be used.

Note: The SEC staff has not indicated how the revenue test should be performed (e.g., pro forma or combined revenue) in circumstances when the financial statements for the most recent fiscal year are comprised of both a predecessor and successor.

An issuer with EGC status loses its eligibility as an EGC five years after its common equity IPO or earlier if it meets any of the following criteria:

- Has annual revenues exceeding $1 billion[2]
- Issues more than $1 billion in nonconvertible debt securities over a rolling three-year period, including securities issued in registered or unregistered offerings
- Becomes a large accelerated filer (i.e., a seasoned issuer with public float of $700 million or more)

Once an issuer loses its EGC status following its IPO, it cannot reclaim EGC status (e.g., if its annual revenues fall below $1 billion again).

Assuming none of the criteria above have been met earlier, an issuer will lose its EGC status on the last day of the fiscal year that includes the fifth anniversary of the date of the first sale of common equity securities under an effective registration statement. For example, if the first sale of common equity securities (i.e., common equity IPO) for a calendar year-end company occurred in March 2012, the company would lose its EGC status on 31 December 2017.

The $1 billion in nonconvertible debt test is the only test that occurs on a rolling basis rather than at a point in time (i.e., it's performed continuously, not at the end of a quarter or at year-end). The test should consider nonconvertible debt securities "issued" during the rolling three-year period, even if not currently outstanding. The SEC staff has interpreted "issued more than $1 billion nonconvertible debt" specified in the Act to be limited to debt securities (e.g., borrowings from banks should be excluded). In addition, the SEC staff stated that it will not object if an EGC excludes debt securities issued in an A/B exchange offer (i.e., Form S-4 exchange offer of registered debt securities for 144A debt securities), because the debt securities issued in the registered exchange offer are identical to and replace securities that were issued in the nonpublic offering.

Effective date

The JOBS Act states explicitly that an issuer whose "first sale of common equity securities" under an effective registration statement (e.g., Forms S-1, S-8, S-11) occurred on or before 8 December 2011 cannot qualify as an EGC. Issuers that had registration statements declared effective on or before 8 December 2011 may qualify as EGCs if their first sale of common equity occurred after 8 December 2011. In addition, the SEC staff clarified that a company that has issued only debt securities pursuant to an effective registration statement on or before 8 December 2011 can qualify as an EGC so long as it doesn't meet any of the other disqualifying conditions.

Note: Unless the SEC staff provides further guidance to the contrary, debt-only issuers would not lose their EGC status solely due to the passage of time because the fifth anniversary criterion only refers to the date of the first sale of common equity securities.

However, the SEC staff also clarified that the phrase "first sale of common equity securities" in the JOBS Act is not limited to a company's initial primary offering of common equity securities for cash. It could also include, for example, offering common equity pursuant to an employee benefit plan on Form S-8, as well as a selling shareholder's secondary offering on a resale registration statement.

Eligibility of other issuers

The SEC staff clarified that business development companies, a category of closed-end investment companies that are not required to register under the Investment Company Act of 1940, are eligible to qualify as EGCs. However, issuers of asset-backed securities under Regulation AB and investment companies registered under the Investment Company Act of 1940 are not eligible to be an EGC.

The SEC staff stated that when a company completes a transaction that results in it becoming the successor to its predecessor's Exchange Act registration and reporting obligations, if the predecessor was not eligible to be an EGC because its first sale of common equity securities occurred before the effective date, the company (i.e., the successor) also is not eligible to be an EGC.

Confidential registration statement submission

In a major change from past practice, an EGC can submit its IPO registration statement and subsequent amendments to the SEC on a confidential basis. Through the confidential registration statement submission process, the SEC staff will be able to comment and the company will be able to respond confidentially before the company files publicly through the SEC's EDGAR system.

An EGC is required to publicly file its initial registration statement and all amendments previously submitted confidentially.

Even though the initial registration statement and subsequent amendments can be submitted on a confidential basis, an EGC is required to publicly file all prior confidential submissions in its initial "filed" registration statement as separate Exhibit 99s no later than 21 days before its road show. If an EGC does not conduct a traditional road show or engage in activities that would come within the definition of a road show, it is required to publicly file the same information (its registration statement with exhibits including its initial confidential submission and all amendments) at least 21 days before the anticipated effective date of the registration statement.

As it does with nonconfidential registration statements, the SEC staff will publicly release its comment letters and issuer responses on EDGAR no earlier than 20 business days after the effective date of the registration statement. Therefore, in its responses to the SEC staff on its confidential submission, an EGC should identify the information for which it intends to seek confidential treatment pursuant to Rule 83.

In addition to registration statements in connection with an IPO of common equity, the confidential draft registration process is available for registration statements before the "initial public offering date" of common equity. For example, an EGC may submit for confidential review pre-IPO offerings of debt securities (e.g., a draft registration statement for an A/B debt exchange offer on Form S-4).

The JOBS Act explicitly provided for the confidential review accommodation as part of an amendment to the Securities Act but did not make a corresponding change to the Exchange Act. Therefore, the confidential EGC submission process is not available for Exchange Act registration statements (i.e., Form 10).

How we see it

We expect most EGCs to take advantage of the confidential review accommodation. EGCs electing the confidential review process should carefully consider their timing in relation to the road show, since the SEC staff still may issue comments on the initial "public filing." An EGC electing to take advantage of the confidential review process also should keep its assigned SEC staff reviewers informed about its expected timeline.

Confidential submission requirements

A company must qualify as an EGC at the time it submits a confidential draft registration statement or any amendment to the draft registration statement. However, once an EGC files a registration statement, it is not required to continue to meet EGC status through the effective date or completion of the offering.

As with publicly filed registration statements, EGCs may omit certain limited information from their initial submissions to the SEC, such as the public offering price or other offering-related information. However, the SEC staff expects draft registration statements to be "substantially complete" at the time of submission, including a signed audit report and financial statement exhibits. As with filed registration statements, the confidential submission should include all required financial statements, including those to comply with Rules 3-05, *Financial statements of businesses acquired or to be acquired*, and 3-09, *Separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons*, of Regulation S-X.

The SEC staff expects the initial submission of draft registration statements to be "substantially complete."

If an EGC discovers a material error in the financial statements submitted in the confidential draft registration statement, it is required to include restatement disclosures until those financial statements are updated for the next annual period. This is similar to what happens with nonconfidential submissions.

The confidential submission of the draft registration statement does not constitute a "filing." As a result, the draft registration statement does not have to be signed on behalf of the company or include the consent of auditors and other experts.

Companies already in the IPO process as of 5 April 2012 that qualify as EGCs may switch to confidential submissions. The SEC staff has indicated that it will not object if a company switches to the confidential submission process for future amendments, rather than withdrawing the registration statement and submitting a new draft registration statement for confidential review. The SEC staff has advised companies to contact their SEC staff review team to coordinate the process if they would like to make this switch while in registration.

Confidential submission process

The SEC has implemented a secure e-mail system for confidential submissions. The SEC staff has released explicit instructions[3] on how to submit registration statements on a confidential basis under the JOBS Act. Submitted draft registration statements are required to be in text-searchable PDF format and should include a transmittal letter identifying the issuer and the type of submission.

An EGC will not need to submit its draft registration statement under cover of a Rule 83 request to preserve confidentiality. However, if the company proceeds with its offering, the previous confidential submission will need to be filed publicly at least 21 days before the company's road show.

How we see it

As with all companies contemplating an initial public offering, planning is critical. The separate disclosures and filing procedures related to EGC status should be considered in the IPO planning process.

EGC scaled disclosures during IPO on-ramp period

The JOBS Act exempts an EGC from certain requirements during the on-ramp period. These scaled disclosures generally allow for temporary, not permanent, relief. An EGC is not required to follow all of these scaled disclosure provisions. Other than the accounting standards provision discussed below, an EGC may take an "a la carte" approach and decide to comply with EGC scaled disclosures or full SEC disclosure requirements.

Number of audited financial statement periods

An EGC is not required to provide more than two years of audited financial statements in the registration statement for an IPO of its common equity securities. The SEC staff has said that it will not object if, in subsequent registration statements prior to an EGC's first annual report on Form 10-K, an EGC does not present audited financial statements for any period before the earliest audited period presented in its IPO registration statement. For example, if a calendar-year EGC filed a Form S-1 in September 2012 following its May 2012 common equity IPO, the SEC staff would require audited financial statements for only 2011 and 2010. However, EGCs should consider the following limitations on this relief:

- The two-year accommodation does not apply to registration statements filed before the company's IPO of common equity.
- In post-IPO annual reports, an EGC must include the same number of periods as non-EGC issuers (i.e., three years of audited financial statements unless the company is eligible for relief as a smaller reporting company).

EGCs also may limit their discussion under Item 303 of Regulation S-K, *Management Discussion and Analysis of financial condition and results of operations*, to include only periods presented in the audited financial statements.

An EGC is not exempt from complying with XBRL requirements,[4] which generally begin with its first Form 10-Q following its IPO.

Selected financial data (Item 301 of Regulation S-K)

An EGC is not required to present selected financial data in any registration statement or periodic report for any period before the earliest audited period presented in its IPO registration statement. That means the selected financial data will "build" in subsequent annual reports until the full five-year selected financial data is provided. The SEC staff has said that an EGC may present the ratio of earnings to fixed charges (Item 503(d) of Regulation S-K) for the same number of years for which it provides selected financial data.

Financial statement requirements of 'other entities'

In addition to presenting its own financial statements, an issuer may be required to present up to three years of financial statements of other entities in its registration statement (e.g., financial statements of acquired businesses and equity method investees under Rules 3-05 and 3-09 of Regulation S-X, respectively). If the significance test otherwise requires three years of audited financial statements for these other entities, an EGC that presents only two years of audited financial statements in its registration statement also is allowed to present only two years of audited financial statements for these entities. The SEC staff views this approach as similar to how smaller reporting companies report the financial statements of businesses acquired or to be acquired under Rule 8-04(c) of Regulation S-X.

Executive compensation disclosures

In its IPO registration statement and subsequent periodic reports, an EGC may provide executive compensation disclosures in a manner consistent with a smaller reporting company and is not required to include a Compensation Discussion and Analysis. As a result, the tabular executive compensation disclosure requirements are significantly reduced for EGCs.

EGCs also are not required to comply with the "say-on-pay" provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which require companies to hold a shareholder advisory vote on executive compensation and golden parachutes.

Compliance with auditor attestation of internal controls over financial reporting

The JOBS Act defers the requirement to have the independent auditor assess an EGC's internal controls over financial reporting (ICFR) under Section 404(b) of the Sarbanes-Oxley Act. However, an EGC still must comply with the Section 404(a) requirement that management assess its ICFR, generally beginning with its second annual report on Form 10-K. Only non-accelerated filers are permanently exempt from Section 404(b), and EGCs are not relieved of other reporting obligations, such as the requirement that the CEO and CFO provide a certification in the EGC's periodic reports under Sections 302 and 906 of the Sarbanes-Oxley Act.

How we see it

It's not clear how investors will react to a company's EGC status. The perception of an EGC will likely develop over time as more companies take advantage of the scaled disclosure provisions available to EGCs and investors have more time to assess the perceived risks associated with EGCs, their more limited disclosures and reduced compliance requirements.

Auditing and accounting standards issued after the JOBS Act

PCAOB auditing standards

The JOBS Act contains an explicit exemption that an EGC's independent auditor not be required to comply with future changes to PCAOB auditing standards related to mandatory audit firm rotation or an Auditors Discussion & Analysis (if adopted). An EGC's independent auditor also would not be subject to other new auditing standards issued by the PCAOB, unless the SEC decides that such standards should apply to EGCs, after considering the protection of investors and whether the action will promote efficiency, competition and capital formation.

Accounting standards

Section 107(b) of the JOBS Act exempts an EGC from adopting new or revised accounting standards effective for public companies if private companies have a delayed effective date. Instead, the effective date for private companies will apply to EGCs. However, an EGC can opt out of the extended private company transition period provided for complying with new or revised accounting standards (i.e., opt-in to the transition otherwise applicable to public companies). If initially an EGC decides to take advantage of the extended transition period, the SEC staff has indicated that it will not object if an EGC subsequently elects to follow the requirements for public companies. If an EGC decides to opt in to public company transition provisions, that election is irrevocable and applies to all new or revised accounting standards.

The accounting standards provision applies only to new or revised accounting standards issued after the JOBS Act was enacted.

The accounting standards provision applies only to new or revised accounting standards issued after the JOBS Act was enacted. For example, an EGC must comply as a public company with all accounting standards issued before 5 April 2012, even if the effective date of a particular standard is after 5 April 2012.

It is also important to highlight that the JOBS Act only addresses new or revised standards with different effective dates for public and private companies. That is, no accommodation is provided to EGCs for a new or revised accounting standard that applies only to public companies (e.g., if a revised standard on segment disclosures or earnings per share were to be issued).

Note: The SEC staff has not provided guidance about whether an EGC that elects to follow private company transition dates could selectively "early adopt" new Accounting Standards Updates that allow early adoption by private companies.

How we see it

Given the significance of the pending joint projects of the Financial Accounting Standards Board and the International Accounting Standards Board (IASB), it may be more appealing for an EGC initially to elect extended private company transition. This would give an EGC the flexibility to subsequently opt in and follow the transition dates for public companies to maintain comparability.

Disclosure of EGC status

An EGC should disclose its status on the cover page of the prospectus, both in a draft registration statement submitted to the SEC staff on a confidential basis and in the registration statement filed electronically on EDGAR.

EGCs that are currently in the registration process should disclose their EGC status and their choices for the related elections in their next amendment to the registration statement. The SEC staff has indicated that if such a company elects to take advantage of the scaled disclosures, the staff may seek disclosures about the removal of previously filed disclosures (for example, if an EGC removed its third year of audited financial statements that reported poor results).

Companies that are currently subject to Exchange Act reporting and qualify for EGC status also should disclose their EGC status in their next periodic report.

Recent SEC staff comment letters

The SEC staff has sent comment letters to companies that appear to qualify as EGCs, asking them to disclose on the cover page of their prospectus that they are EGCs and to revise their prospectuses to provide additional disclosures. The SEC staff expects EGCs to disclose how and when they may lose EGC status. In addition, EGCs should describe the exemptions that are available to EGCs, including those related to Section 404(b) auditor attestation on the effectiveness of ICFR.

As we previously noted, if an EGC chooses to opt in the public company transition provisions of new or revised accounting standards, that decision is irrevocable. The SEC staff expects EGCs that have opted in to make a statement that the election is irrevocable.

For an EGC electing to take advantage of the extended private company transition period for complying with new or revised accounting standards, the SEC staff expects additional risk factor disclosures. Such disclosures would explain that the election allows the company to delay adoption of new or revised accounting standards that have different transition dates for public and private companies. The risk factor disclosures also should state that, as a result, the company's financial statements may not be comparable to those of companies that comply with public company effective dates. A similar statement also should be included within the company's MD&A section on critical accounting policies and estimates.

Loss of eligibility

To qualify for relief, a company must qualify for EGC status when it submits its confidential registration statement and any related amendments, and when it files its initial public registration statement.

If a company loses its EGC eligibility at any time during the confidential review process (e.g., because, since the initial submission date, a fiscal year has been completed with revenues exceeding $1 billion), it must file a public registration statement to continue the registration process and must comply with requirements for non-EGCs. In that event, the confidential draft submissions would be filed as an exhibit to the initial public registration statement.

Under Securities Act Rule 401(a), a company's status at the time of the initial filing date of its registration statement determines the requirements for the content of that registration statement. Therefore, if a company loses its EGC eligibility after its initial public filing, it may continue to use the EGC disclosure provisions through effectiveness of the registration statement.

Issuers that lose their EGC status would not be able to regain that status.

How we see it

Companies will need to monitor their ongoing EGC eligibility. Changes in an EGC's business (such as unexpected increases in revenue or changes in public float) could lead to earlier-than-anticipated financial reporting obligations.

Foreign private issuer considerations

Foreign private issuers (FPIs) are eligible to qualify as an EGC. To determine an FPI's "total annual gross revenues," the SEC staff has indicated that total revenues under US GAAP should be used for FPIs that reconcile to US GAAP. For FPIs that present their financial statements under IFRS, as issued by the IASB, total revenue under IFRS should be used.

An FPI that qualifies as an EGC may comply with the scaled disclosure provisions available to EGCs, to the extent relevant to the form requirements for FPIs.

FPIs that meet the definition of an EGC may use the confidential EGC submission procedures. Historically, many FPIs have been provided a similar accommodation under the Division of Corporation Finance's policy on Nonpublic Submissions from Foreign Private Issuers (FPI Accommodation). However, the SEC staff in December 2011 limited eligibility for the FPI Accommodation,[5] such as when the FPI is not also listing on a foreign exchange. The confidential review procedures implemented by the SEC staff for EGCs under the JOBS Act are similar, but not identical, to the protocol under the FPI Accommodation.

How we see it

FPI EGCs that otherwise qualify for the FPI Accommodation should carefully evaluate their options. The SEC staff has said that if an FPI chooses to take advantage of any benefit available to EGCs, it will be treated as an EGC and will be required to follow the protocol for EGCs, and may not use the FPI Accommodation. If an FPI chooses not to take advantage of any EGC benefits, it may follow the FPI Accommodation, if it is eligible to do so. While similar, the FPI Accommodation does not require that all confidential submissions and related SEC staff comments and company responses be made public.

Amendments to Exchange Act Section 12(g)

The JOBS Act modified certain triggers for public registration and reporting by amending Exchange Act Section 12(g). It increased the number of record holders that triggers a company's obligation to register and report as a public company to 2,000 people (or 500 people who are not accredited investors) from 500 people. For a bank or bank holding company, the trigger is 2,000 people, even if none are accredited investors.

In addition, the JOBS Act excludes from the record holder definition (1) current or former employees who received securities through an employee stock compensation plan that is exempt from registration and (2) holders of securities issued through permitted crowdfunding.

The SEC staff has said the amendments to the Exchange Act registration threshold are immediately effective, even though the JOBS Act directs the SEC to adopt a "safe harbor" to exclude from the record holder count exempt securities received through employee compensation plans. For companies that have recently triggered a reporting obligation under Section 12(g), the SEC staff has clarified that the company is not required to register under the Exchange Act if it does not meet the higher threshold under the JOBS Act, even if the requirement to register was triggered before the legislation was enacted on 5 April 2012.

If a private company has filed an Exchange Act registration statement on the basis of the former thresholds and the registration statement is not yet effective, the company may withdraw the registration statement if it is no longer required to register under the JOBS Act. If the company has registered a class of equity securities under Section 12(g), it will have to maintain that registration unless it is eligible to deregister.

In addition, the JOBS Act amended Sections 12(g) and 15(d) of the Exchange Act of 1934 to raise the threshold below which a bank or bank holding company may terminate registration and suspend its reporting obligation to 1,200 record holders from 300. The current threshold of 300 record holders for non-banks and non-bank holding companies remains unchanged.

The JOBS Act requires the SEC to revise the definition of "held of record" to exclude persons who received securities under an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act. Although the SEC has not yet revised the definition of "held of record," the SEC staff has confirmed that as of the enactment date an issuer (including a bank holding company) may exclude persons who received securities pursuant to an employee compensation plan in Securities Act exempt transactions, regardless of whether the person remains an employee.

The use of crowdfunding is prohibited until the SEC adopts rules to implement the exemption.

As previously indicated, the record holder definition also excludes holders of securities issued through permitted crowdfunding. However, the crowdfunding exemption is not effective until the SEC issues final rules implementing the crowdfunding provisions of the JOBS Act.

How we see it

The JOBS Act gives private companies more flexibility to issue stock to employees as compensation because these shareholders would no longer be counted among record holders who could trigger public registration. Private companies may consider revising employee compensation plans to better align company objectives and compensation. The Act also allows private companies to raise capital from more accredited investors without triggering a public reporting obligation.

Crowdfunding

The JOBS Act allows private companies to raise small amounts of equity capital from a large pool of investors (e.g., through the internet), a process commonly referred to as "crowdfunding."

The SEC is required to adopt rules to implement the crowdfunding exemption within 270 days from enactment (i.e., by 31 December 2012). The SEC staff has reminded companies that, until then, use of the crowdfunding exemption is unlawful. The JOBS Act also includes certain limitations on the use of crowdfunding, including that no more than $1 million of securities can be sold in a rolling 12-month period and the aggregate amount sold to any one investor during that period is capped at a specified level based on the annual income or net worth of the investor. If an investor's annual income or net worth is less than $100,000, the aggregate amount sold to the investor cannot exceed the greater of $2,000 or 5% of the investor's net

worth or annual income. If an investor's annual income or net worth is $100,000 or more, the aggregate amount sold to the investor cannot exceed 10% of the investor's net worth or annual income, subject to an investment cap of $100,000.

Issuers relying on the crowdfunding exemption will be subject to certain informational and other requirements, including an obligation to file financial statements, which may require independent audit or review depending on the offering size.

Other exempt offerings

The JOBS Act also requires the SEC to adopt or amend SEC regulations to encourage capital formation without requiring an SEC registration statement. These amendments create a new category of public offerings exempt from SEC registration of up to $50 million, raised over a 12-month period through issuance of equity securities, debt securities or debt securities convertible or exchangeable to equity interests, including any guarantees of such securities. Regulation A currently provides a similar exemption for public offerings up to $5 million over 12 months.

The exemption includes investor protection provisions that require audited financial statements to be filed with the SEC on an annual basis and gives the SEC the ability to require periodic disclosures regarding the issuer, its business operations, its financial condition, use of proceeds and other appropriate disclosures for the protection of investors.

The JOBS Act also requires the SEC to lift the ban on general solicitation for certain offerings under Regulation D. Under the exemptions provided by Regulation D, securities may be sold in private offerings without registration under the Securities Act. Historically, issuers of such securities have been prohibited from using general solicitation or advertising to market the securities. The SEC is required to revise Rule 506 under Regulation D within 90 days after enactment to remove the prohibition against general solicitation or advertising in such offers and sales of securities, so long as all purchasers of the securities are accredited investors (for an offering under Rule 506) or persons reasonably believed to be Qualified Institutional Buyers (for resales exempt from registration under Rule 144A). These relaxed restrictions are not limited to offerings by EGCs.

What's next?

The JOBS Act requires the SEC to adopt rules to implement (1) the crowdfunding exemption, (2) the new Exchange Act registration thresholds (3) the new $50 million exemption threshold for public offerings and (4) lifting the ban on general solicitation and advertising in exempt offerings to accredited investors.

The SEC also will need to engage in certain studies as required by the JOBS Act, such as (1) simplifying the Regulation S-K nonfinancial disclosures for EGCs and (2) deciding whether to designate a minimum increment for trading and quoting EGC securities (e.g., $0.10 rather than $0.01).

The SEC is seeking public comment before proposing new rules or amendments required by the JOBS Act.

Endnotes:

[1] SEC staff guidance, including its FAQS about the JOBS Act, is available on the SEC's website at: http://www.sec.gov./divisions/corpfin/cfjobsact.shtml.

[2] The JOBS Act requires the SEC to adjust the $1 billion threshold every five years for inflation to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics.

[3] The SEC staff instructions on submitting draft registration statements for nonpublic review are available at: http://www.sec.gov/divisions/corpfin/cfannouncements/cfsecureemailinstructions.pdf.

[4] The XBRL rules require a computer-readable tag for each item of financial data in certain SEC filings and are intended to make it easier for investors to compare financial statements.

[5] The SEC staff announcement on nonpublic submissions by foreign private issuers is available at: http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm.

Ernst & Young

Assurance | Tax | Transactions | Advisory

© 2012 Ernst & Young LLP.

All Rights Reserved.

SCORE No. CC0348

About Ernst & Young

Ernst & Young is a global leader in assurance, tax, transaction and advisory services. Worldwide, our 152,000 people are united by our shared values and an unwavering commitment to quality. We make a difference by helping our people, our clients and our wider communities achieve their potential.

Ernst & Young refers to the global organization of member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit www.ey.com.

This publication has been carefully prepared but it necessarily contains information in summary form and is therefore intended for general guidance only; it is not intended to be a substitute for detailed research or the exercise of professional judgment. The information presented in this publication should not be construed as legal, tax, accounting, or any other professional advice or service. Ernst & Young LLP can accept no responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication. You should consult with Ernst & Young LLP or other professional advisors familiar with your particular factual situation for advice concerning specific audit, tax or other matters before making any decision.