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Special Report

Guidance and Comments Inform JOBS Act Implementation

Highlights

- ✔ Guidance clarifies emerging growth company status
- ✔ SEC says crowdfunding must await rulemaking
- ✔ Foreign private issuers may provide scaled disclosure as EGCs
- ✔ Guidance explains 500-shareholder threshold
- ✔ Securities industry provides input on impending rules

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The Jumpstart Our Business Startups (JOBS) Act, enacted April 5, 2012, is designed to streamline or eliminate the regulatory and legal barriers preventing emerging businesses from reaching out to investors, accessing capital, and selling shares on the public market. Three main themes drove the passage of the JOBS Act: an effort to restart the U.S. initial public offerings market by creating an IPO "on-ramp," the desire to allow companies to raise capital over the Internet through crowdfunding, and the need to revise outdated SEC regulations.

The Act makes it possible for promising new businesses to go public and access financial opportunities previously limited to large corporations. The legislation also allows what is known as crowdfunding, which allows groups of investors to pool money, typically small individual investments, to support an effort such as growing a new company.

The SEC recently issued staff guidance on many aspects of the JOBS Act, particularly involving two new concepts codified in the Act: crowdfunding and emerging growth companies. In addition, the Commission is receiving thoughtful comments from industry groups and others as it begins the rulemaking process.

Emerging Growth Companies

Title I of the Act establishes an "on-ramp" to initial public offerings for a new category of issuers known as emerging growth companies. Designed to help more companies access capital markets by reducing the cost of going public for small and medium-sized businesses, Title I creates a new type of issuer, the emerging growth company, which would retain that status for five years or until it exceeds $1 billion in annual gross revenue or becomes a large accelerated filer.

The legislation also makes it easier for potential investors to access research and company information in advance of an IPO in order to make informed decisions about investing. This is critical for small and medium-sized companies that have less visibility in the marketplace and are trying to raise capital.

The Division of Corporation Finance recently issued guidance on the implementation and application of Title I, based on the staff's current understanding of the JOBS Act and in light of existing SEC rules, regulations and procedures. According to the staff, a company must qualify as an emerging growth company at the time of submission in order to submit a confidential draft registration statement, or any amendment thereto, under Securities Act Section 6(e). If a company ceases to qualify as an emerging growth company while undergoing the confidential review of its draft registration statement, it would have to file a registration statement and comply with current regulations applicable to companies that are not emerging growth companies to continue the review process. At that time, the prior confidential draft submissions would be filed as exhibits to the registration statement. [*Jumpstart Our Business Startups Act Frequently Asked Questions: Generally Applicable Questions on Title I of the JOBS Act* (April 6, 2012), Q (3).]

Securities Act Rule 401(a) provides that the form and content of a registration statement and prospectus must conform to the applicable rules and forms in effect on the initial filing date of the registration statement and prospectus. The SEC staff indicated that the date of the initial confidential draft submission is not the initial filing date for these purposes because the draft submission is not the filing of a registration statement.

Under Rule 401(a), a company's status at the time of the initial filing date of its registration statement will determine the requirements for the contents of that statement. If a company files its registration statement at a time when it qualifies as an emerging growth company, in accordance with Rule 401(a), the disclosure provisions for emerging growth companies would continue to apply through the effectiveness of the registration statement even if the company loses its emerging growth company status during registration. Conversely, if a company submits a draft registration statement for confidential review at a time when it qualifies as an emerging growth company, but files its initial registration statement at a time when it does not qualify as an emerging growth company, then the initial registration statement would need to comply with the requirements applicable to registration statements filed by companies that are not emerging growth companies.

The JOBS Act added Section 5(d) to the Securities Act to permit emerging growth companies to gauge the interest in potential IPOs by permitting greater pre-filing communications to institutional and qualified investors to determine whether an IPO is likely to succeed. For purposes of these test-the-waters communications, a company must determine whether it qualifies as an emerging growth company at the time it engages in communications in reliance on Section 5(d). For example, if a company made test-the-waters communications in reliance on Section 5(d) before filing a registration statement at a time when it qualified as an emerging growth company, but is no longer an emerging growth company when it files a registration statement, the SEC staff would not view the earlier communications as a Section 5 violation. Further test-the-waters communications in reliance on Section 5(d) would not be permitted if the company no longer qualified as an emerging growth company. The same approach would apply to the research reports described in amended Securities Act Section 2(a)(3). [*FAQ*, Q (3).]

Confidential Registration Statements

The JOBS Act added Section 6(e) to the Securities Act to permit emerging growth companies to pre-file confidential registration statements, thereby allowing them to begin the SEC review process without publicly revealing sensitive commercial and financial information to their competitors.

To identify itself as an emerging growth company in a draft registration statement submitted to the staff on a confidential basis under Section 6(e) and in the subsequent electronic filing of the registration statement on EDGAR, noted the staff, the issuer should disclose that it is an emerging growth company on the prospectus cover page. [*Jumpstart Our Business Startups Act Frequently Asked Questions: Generally Applicable Questions on Title I of the JOBS Act* (April 6, 2012), Q (4).]

The staff advised an emerging growth company to identify information for which it intends to seek confidential treatment when it submits its responses to staff comments on confidential draft registration statements. Although an emerging growth company need not seek confidential treatment for its response letters for information it does not want to be made public during the course of the confidential review, in its response letters the company should appropriately identify the information for which it intends to seek confidential treatment upon public filing to ensure that the staff does not include that information in its comment letters. When the company resubmits its responses to staff comments on the confidential draft registration statement on EDGAR, it should follow the Rule 83 procedures. Alternatively, the company could follow the Rule 83 procedures at the time it submits its response letters to the staff. [*FAQ*, Q (26).]

An emerging growth company may use the confidential submission process to submit a draft registration statement for an A/B debt exchange offer on Form S-4 or on Form F-4, said the staff, so long as its IPO date has not yet occurred. An emerging growth company must publicly file the Form S-4 or Form F-4 for its A/B debt exchange offer at least 21 days before its anticipated date of effectiveness. [*FAQ*, Q (31).]

An emerging growth company that submits a draft registration statement on a confidential basis, later discovers a material error in one or more of its financial statements, and restates and confidentially submits a draft amendment to the registration statement to correct the error and disclose the restatement would have to include the restatement disclosures in its financial statements until its financial statements are updated for the next annual period. [*FAQ*, Q (38).]

The SEC staff explained that FASB ASC 250-10-50 requires that, when prior-period adjustments are recorded, the resulting effect on the net income of prior periods must be disclosed in the annual report for the year in which the adjustments are made and in interim reports issued during that year subsequent to the date of recording the adjustments. ASC 250-10-50 further states that financial statements of subsequent periods must not repeat the restatement disclosures. [*FAQ*, Q (38).]

Pursuant to the JOBS Act, an emerging growth company whose common equity securities have not been previously sold pursuant to an effective registration statement under the Securities Act may submit to the Commission a draft registration statement for nonpublic review. In addition, the Division of Corporation Finance has in place a policy that permits certain foreign private issuers to submit draft registration statements for nonpublic review. The SEC has implemented a secure e-mail system that allows for the receipt of confidential submissions under the JOBS Act as well as nonpublic draft registration statements from foreign private issuers under the preexisting Division policy. This system will also allow SEC staff to securely correspond with companies regarding their draft registration statements.

All issuers submitting draft registration statements confidentially pursuant to the JOBS Act or for nonpublic review under the Division policy must follow instructions on how to use the secure e-mail system. All draft submissions must be in text searchable PDF format and should include a transmittal letter identifying the issuer and the type of submission. Emerging growth companies should confirm their status as such in their transmittal letters. [Division of Corporation Finance Announcement (May 15, 2012).].

Foreign Private Issuers

A foreign private issuer that qualifies as an emerging growth company may comply with the scaled disclosure provisions available to emerging growth companies to the extent relevant, even though the JOBS Act refers only to Regulation S-K and not to the corresponding items in Form 20-F. The SEC staff will not object if a foreign private issuer that qualifies as an emerging growth company complies with the scaled disclosure provisions available to emerging growth companies to the extent relevant to the form requirements for foreign private issuers. [*FAQ*, Q (8).]

Questions have arisen regarding a foreign private issuer that qualifies as an emerging growth company and is also entitled to submit its draft registration statement on a nonpublic basis pursuant to the Division of Corporation Finance's policy on nonpublic submissions from foreign private issuers. In this situation, the staff has addressed the issue of whether the foreign private issuer would have to publicly file its confidential submissions at least 21 days before the road show. The staff said that, if the foreign private issuer chooses to take advantage of any benefit available to emerging growth companies, then it will be treated as an emerging growth company and must publicly file its confidential submissions at least 21 days before the road show. However, if the foreign private issuer chooses not to take advantage of any emerging growth company benefit, then it may follow the Division's policy. [*FAQ*, Q (9).]

A Canadian issuer filing under the Multi-Jurisdictional Disclosure System may qualify as an emerging growth company if it satisfies the requirements of the definition of "emerging growth company." Although the disclosure requirements for this Canadian issuer would continue to be established under its home country standards in accordance with the MJDS, other provisions of Title I, such as the test-the-waters provision in Securities Act Section 5(d) and the deferral of compliance with the auditor attestation requirements of Sarbanes-Oxley Act Section 404(b), would be available to an MJDS filer that qualifies as an emerging growth company. [*FAQ*, Q (10).]

If it qualifies as an emerging growth company, a foreign private issuer that reconciles its home country GAAP financial statements to U.S. GAAP may take advantage of the extended transition period provided in Securities Act Section 7(a)(2)(B) for complying with new or revised financial accounting standards in its U.S. GAAP reconciliation. [*FAQ*, Q (34).]

Some non-U.S. jurisdictions have a separate set of financial accounting standards for nonpublic entities. If a foreign private issuer qualifies as an emerging growth company and has chosen to take advantage of the extended transition period provided in Securities Act Section 7(a)(2)(B) for complying with new or revised financial accounting standards in its U.S. GAAP reconciliation, it may not apply the set of standards for nonpublic entities. The staff explained that Section 7(a)(2)(B) only provides an accommodation with respect to the effective dates of new or revised financial accounting standards, and only applies if those standards apply to companies that are not issuers. It does not allow an emerging growth company to apply financial accounting standards as if it were a nonpublic entity. Thus, emerging growth companies may not report under a separate set of standards for nonpublic entities. Similarly, emerging growth companies that are foreign private issuers may not report under IFRS for small and medium-sized entities. [*FAQ*, Q (36).]

A foreign private issuer that is an emerging growth company and is either a first-time adopter of IFRS or required by IFRS to provide three statements of financial position may not include only two statements of financial position in a registration statement for its initial public offering of common equity securities. Notwithstanding Section 7(a)(2)(A), noted the SEC staff, in order for this foreign private issuer to assert that its financial statements are prepared in compliance with IFRS as issued by the IASB, it must include three statements of financial position. [*FAQ*, Q (39).]

Financial Statements

Securities Act Section 7(a)(2)(A), as added by the JOBS Act, provides that an emerging growth company need not present more than two years of audited financial statements in a registration statement for an IPO of its common equity securities. The statute also provides that, in any other registration statement to be filed with the SEC, an emerging growth company need not present selected financial data in accordance with Regulation S-K Item 301 for any period prior to the earliest audited period presented in connection with its IPO. Although Section 7(a)(2)(A) refers to "any other" registration statement, the SEC staff would not object if an emerging growth company presenting two years of audited financial statements in its IPO registration statement in accordance with Section 7(a)(2)(A) limited the selected financial data under Item 301 to two years as well. [*FAQ*, Q (11).]

Although the Section 7(a)(2)(A) provision allowing the filing of only two years of audited financial statements is limited to the registration statement for the emerging growth company's IPO of common equity securities, the SEC staff would not object if, in other registration statements, the company did not present audited financial statements for any period prior to the earliest audited period presented in connection with its IPO of common equity securities. [*FAQ*, Q (12).]

An emerging growth company that is not also a smaller reporting company cannot comply with the smaller reporting company version of Regulation S-K Item 303. Although JOBS Act Section 102(c) permits an emerging growth company to comply with the smaller reporting company version of Regulation S-K Item 402, explained the SEC staff, the statute does not permit an emerging growth company to comply with the smaller reporting company provisions of Item 303. Instead, Section 102(c) permits an emerging growth company, in its MD&A, to discuss only those audited periods presented in its audited financial statements. Therefore, if in the registration statement for its initial public offering of common equity securities, an emerging growth company's audited financial statements cover only two years, as permitted by Securities Act Section 7(a), then the company can limit its MD&A to those two years. [*FAQ*, Q (41).]

In addition to presenting its own financial statements, an issuer may have to present up to three years of financial statements of other entities in its registration statement, based on the significance of those entities, such as the financial statements of acquired businesses and equity method investees under Regulation S-X Rules 3-05 and 3-09, respectively. If the significance test results in a requirement to present three years of financial statements for these other entities, the SEC staff would not object if the emerging growth company presented only two years of financial statements for these other entities in its registration statement. This approach is similar to how smaller reporting companies report the financial statements of businesses acquired or to be acquired pursuant to Regulation S-X Rule 8-04(c). [*FAQ*, Q (16).]

An emerging growth company that is not a smaller reporting company must include three years of audited financial statements in its Form 10-K or Form 20-F. The provision in Securities Act Section 7(a)(2)(A) permitting emerging growth companies to file only two years of audited financial statements is limited to the registration statement for the emerging growth company's initial public offering of common equity securities. The SEC staff noted that, as a practical matter, an emerging growth company need not include, in its first annual report on Form 10-K or on Form 20-F, audited financial statements for any period prior to the earliest audited period presented in connection with its initial public offering of common equity securities. For example, if an emerging growth company with a December 31 fiscal-year end has a registration statement for its initial public offering of common equity securities declared effective during the third quarter of 2012, the registration statement would include audited financial statements for 2011 and 2010. The registrant's first annual report, which would be for the fiscal year ending December

31, 2012, and would be filed in 2013, would include audited financial statements covering 2012, 2011 and 2010. [*FAQ*, Q (30).]

An emerging growth company that takes advantage of the extended transition period provided in Section 7(a)(2)(B) for complying with new or revised financial accounting standards can later decide to opt in and comply with the financial accounting standard effective dates applicable to non–emerging growth companies. The SEC staff would not object if the company later decided to opt in, so long as it complied with the requirements in JOBS Act Sections 107(b)(2) and (3), which means that it could not select some standards to comply with and not others. Importantly, the decision to opt in should be prominently disclosed in the first periodic report or registration statement following the company's decision and is irrevocable. [*FAQ*, Q (37).]

The SEC staff has indicated that an emerging growth company must comply with XBRL requirements in its filings. [*FAQ*, Q (28).]

In response to the provision, the NYSE has proposed to allow the listing of companies on the basis of two years of reported financial data. Specifically, the NYSE proposes to amend the initial financial listing standards in Sections 102.01C and 103.01B of the Listed Company Manual to permit an emerging growth company to meet the applicable standard on the basis of the two years of audited financial data actually reported, rather than the three years of financial data that would otherwise be required. The proposed amendment would only be applicable to emerging growth companies that actually avail themselves of their ability to report only two years of audited financial information. Under the proposed amendments, emerging growth companies would still be required to meet the same aggregate financial requirements, but would be required to do so over a two-year period rather than a three-year period, if they have availed themselves of the JOBS Act provision allowing emerging growth companies to file only two years of audited financial statements.

Accounting Standards

If an emerging growth company chooses not to take advantage of the extended transition period provided in Securities Act Section 7(a)(2)(B) for complying with new or revised accounting standards, the company must make this choice when it is first required to file a registration statement, periodic report or other report with the SEC and notify the Commission of its choice. Although emerging growth companies that are submitting their draft registration statements on a confidential basis will not have to file a registration statement until at least 21 days before the road show, they should notify the review staff of their choice in their initial confidential submission, as that choice will inform the staff's review of the financial statements in the draft registration statement. Emerging growth companies that currently are in registration or are subject to Exchange Act reporting should make and disclose their choice in their next amendment to the registration statement or in their next periodic report. [*FAQ*, Q (13).]

In addition, for each recently issued accounting standard that will apply to its financial statements, an emerging growth company that chooses to take advantage of the extended transition periods should disclose the date on which adoption is required for non–emerging growth companies and the date on which the emerging growth company will adopt the recently issued accounting standard, assuming it remains an emerging growth company as of that date. [*FAQ*, Q (14).]

According to the staff, the term "new or revised" financial accounting standard refers to any update issued by the FASB to its Accounting Standards Codification after April 5, 2012, the date of the enactment of the JOBS Act. [*FAQ*, Q (33).]

Some financial accounting standards, such as segment disclosures under ASC 280-10-15-3 and earnings per share computation, presentation and disclosures under ASC 260-10-5-1, exclude from their scope nonpublic entities. Emerging growth companies that have chosen to take advantage of the extended transition period provided in Section 7(a)(2)(B) for complying with new or revised financial accounting standards must comply with these financial accounting standards. The staff explained that Section 7(a)(2)(B) only provides an accommodation with respect to the effective dates of new or revised financial accounting standards, and only applies if those standards apply to companies that are not issuers. [*FAQ*, Q (35).]

Disclosure

According to the SEC staff, the disclosure provisions in Title I supersede, in relevant part, existing rules and regulations. Thus an emerging growth company may comply with Title I's disclosure provisions in its registration statements, periodic reports and proxy statements, even if doing so would be inconsistent with existing rules and regulations. For example, the staff noted that JOBS Act Section 102(c), which was not enacted as part of the Exchange Act, provides that an emerging growth company may comply with Regulation S-K Item 402 by providing only the information required of a smaller reporting company, even if it does not qualify as a smaller reporting company. In addition, JOBS Act Section 103, which also was not enacted as part of the Exchange Act, provides that an emerging growth company is not required to comply with the auditor attestation requirements of Sarbanes-Oxley Section 404(b). [*FAQ*, Q (15).]

An emerging growth company's CEO and CFO must certify in their Sarbanes-Oxley Act Section 906 certifications that the company's periodic report fully complies with the requirements of Exchange Act Section 13(a) or 15(d). The SEC staff views compliance with JOBS Act Sections 102(c) and 103 as being consistent with full compliance with the requirements of Exchange Act Section 13(a) or 15(d). [*FAQ*, Q (15).]

For certain offerings, Regulation S-K Item 503(d) requires an issuer that is not a smaller reporting company to present its ratio of earnings to fixed charges for each of the last five fiscal years and the latest interim period for which financial statements are presented in the registration statement. Although the JOBS Act does not include any provision addressing the existing requirement to disclose the ratio of earnings to fixed charges, the Commission staff recognized that requiring the ratio to be disclosed for periods prior to those included in the financial statements or selected financial data could impose burdens inconsistent with the Act's provisions. Consequently, the staff would not object if an emerging growth company presented in a registration statement its ratio of earnings to fixed charges for the same number of years for which it provided selected financial data disclosures in accordance with the JOBS Act. [*FAQ*, Q (27).]

Gaining Emerging Growth Company Status

The definition of "emerging growth company" focuses on the total annual gross revenues for the most recently completed fiscal year. Therefore, a company that had more than $1 billion in total annual gross revenues two years ago, but for its most recently completed fiscal year had total annual gross revenues of less than $1 billion, would satisfy the total annual gross revenues test for an emerging growth company. [*FAQ*, Q (22).]

The definition does not include different standards for calculating revenues for different types of issuers. However, for purposes of calculating revenues to determine smaller reporting company status under Exchange Act Rule 12b-2, the SEC staff has developed a specific approach for financial institutions. The staff believes it would be appropriate for a financial institution to use the same approach in determining its total annual gross revenues for purposes of determining emerging growth company status. Specifically, under the approach used for smaller reporting company determinations, a financial institution must include all gross revenues from traditional banking activities. Banking activity revenues include interest on loans and investments, dividends on investments, fees from loan origination, fees from trust and investment services, commissions, brokerage fees, mortgage servicing revenues and any other fees or income from banking or related services. Revenues do not include gains and losses on dispositions of investment portfolio securities, said the SEC staff, although they may include gains on trading account activity if that is a regular part of the institution's activities. [*FAQ*, Q (23).].

An issuer may conduct a transaction resulting in the issuer becoming the successor to its predecessor's Exchange Act registration and reporting obligations. However, if the predecessor was not eligible to be an emerging growth company because its first sale of common equity securities pursuant to an effective registration statement occurred on or before December 8, 2011, the staff said that its successor cannot qualify as an emerging growth company. [*FAQ*, Q (24).]

Loss of Status

An issuer may lose its emerging growth company status on the date on which it has during the previous three-year period issued more than $1 billion in non-convertible debt. The SEC staff indicated that the three-year period covers any rolling three-year period. It is not limited to completed calendar or fiscal years. Non-convertible debt means any non-convertible security that constitutes indebtedness, said the staff, whether issued in a registered offering or not. [*FAQ*, Q (17).].

In general, all non-convertible debt securities issued over the prior three-year period, whether outstanding or not, must be counted against the $1 billion debt limit. The SEC staff would not object, however, if a company did not count debt securities issued in an A/B exchange offer, as these debt securities are identical to (other than the fact that they are not restricted securities) and replace those issued in the nonpublic offering and the staff views the A/B exchange offer as, in effect, the completion of the capital-raising transaction. [*FAQ*, Q (18).]

An issuer that conducted its first sale of common equity securities pursuant to an effective registration statement as an emerging growth company cannot regain its status as an emerging growth company after losing that status pursuant to the disqualification provisions. There are no provisions allowing an issuer to regain emerging growth company status in this situation. [*FAQ*, Q (32).]

The JOBS Act provides that an issuer will lose its emerging growth company status on the last day of the issuer's fiscal year following the fifth anniversary of the date of the first sale of common equity securities pursuant to an effective registration statement, provided that none of the other disqualifying conditions have previously been triggered. According to the SEC staff, this date is determined by looking to the fiscal year during which the fifth anniversary occurs. The last day of this fiscal year will be the first day that the issuer is a non–emerging growth company, provided that none of the other disqualifying conditions have been triggered. For example, if an issuer with a December 31 fiscal-year end first sold common equity securities pursuant to an effective registration statement on May 2, 2012, it would cease to be an emerging growth company no later than December 31, 2017. [*FAQ*, Q (40).]

Investment Companies

Given the existing regulatory regime for registered investment companies and the context of the JOBS Act and its definition of "emerging growth company," an investment company registered under the Investment Company Act may not qualify as an emerging growth company. In the view of the SEC staff, registered investment companies are externally managed pooled investment vehicles that are subject to an entirely separate disclosure and reporting regime designed to address their particular structure and operations. Many of the specific exemptions contained in Title I for emerging growth companies are exemptions to requirements from which registered investment companies already are excused. [*FAQ*, Q (20).]

For example, registered investment companies do not have to provide executive compensation disclosure or an MD&A, comply with Sarbanes-Oxley Act Section 404(b), or conduct a say-on-pay vote. Further, registered investment companies typically include only a seed capital balance sheet in their initial registration statement and, going forward, must include only a balance sheet and statement of operations for the last fiscal year and a statement of changes in net assets for two fiscal years. Thus, the limited audited financial statements provision of the JOBS Act is not implicated. Moreover, compliance with the registration and disclosure regime for registered investment companies fulfills their obligations under the Investment Company Act, from which Title I provides no exemption. [*FAQ*, Q (20).]

However, business development companies, a category of closed-end investment companies that do not have to register under the Investment Company Act, but are regulated pursuant to Sections 55 through 65 of that Act, may qualify as emerging growth companies. Business development companies invest in startup and emerging growth companies to which they make available significant managerial experience, noted the SEC staff, and are subject to many of the disclosure and other requirements from which Title I provides exemptions, including executive compensation disclosure, say-on-pay votes, MD&A and Sarbanes-Oxley Act Section 404(b). [*FAQ*, Q (21).]

Industry Comment

In a letter to the SEC, the Securities Industry and Financial Markets Association (SIFMA) posited that whether or not a subsidiary of a private company contemplating an IPO has previously issued debt or equity should not affect its ability to enjoy the benefits of the JOBS Act. Thus, SIFMA believes that the definition of "issuer" for purposes of determining emerging growth company status should be limited to the legal entity that is the issuer of the securities in the proposed or completed offering. For example, the issuance of debt or a registered sale of common equity by a subsidiary should not disqualify an issuer from being an emerging growth company.

SIFMA supports the SEC staff guidance regarding the time of determination of emerging growth status, namely, that for conduct the status should be tested as of the time of the conduct, but for any registration statement it should be determined as of the time of the first filing thereof as provided in Securities Act Rule 401(a). However, there remain other ambiguities regarding the timing of determination of emerging growth company status. In particular, noted SIFMA, the interplay between qualifying as an emerging growth company "as of the first day of that fiscal year" and loss of that status on the "earliest of" leaves unresolved whether an issuer who qualified as an emerging growth company and thereafter lost that status can ever regain the status.

SIFMA believes the answer should depend on whether the issuer is a reporting company at the time of determination. An issuer that at the relevant time of determination is not a reporting company should not be disqualified as an emerging growth company by the fact that in the past it had qualified and thereafter ceased to qualify as such.

For example, a non-reporting issuer that issued $1 billion of debt ten years ago should not be disqualified even if immediately prior to the issuance it was an emerging growth company and the issuance caused it to lose that status. Similarly, an issuer that lost emerging growth company status because it became a large accelerated filer should not be disqualified if it went private or otherwise ceased to be a reporting company and seeks to go public again.

A company that ceases to be a reporting company should be able to reset its status and not be disqualified from emerging growth company status by revenues of greater than $1 billion in a fiscal year prior to its most recently completed fiscal year, prior issuances of equity securities in a registered offering or prior status as a large accelerated filer. Conversely, once an emerging growth company becomes a reporting company, noted SIFMA, and loses its status as an emerging growth company, it should no longer be eligible to qualify as an emerging growth company for so long as it is a reporting company.

Whether an issuer previously qualified and then ceased to qualify as an emerging growth company should not be relevant to whether it is entitled to the flexibilities of the JOBS Act at the time it pursues an initial public offering. On the other hand, there is no need to provide that a reporting company that ceases to qualify, for example by having revenues in excess of $1 billion, can thereafter requalify when it is still a reporting company, for example by having revenues of less than $1 billion in a subsequent year.

Under the JOBS Act, an issuer loses status as an emerging growth company if it has issued more than $1 billion of non-convertible debt during the previous three-year period. Noting that including all debt issued regardless of whether it was issued in exchange for other debt or still remains outstanding can lead to incongruous results, SIFMA urged that only debt that remains outstanding at the time of determination be taken into account. Including all debt issued, reasoned SIFMA, would mean that debt issued with traditional registration rights requiring a registered exchange offer would be double-counted. Similarly, commercial paper or other debt that is rolled over or refinanced could be counted multiple times, resulting in an issuer losing emerging growth company status even though the actual capital raised might have only been a fraction of the $1 billion threshold.

SIFMA urged the SEC staff to reconsider its interpretive guidance that the first sale of common equity securities pursuant to a registration statement could also include an offering of common equity pursuant to an employee benefit plan registered on Form S-8. The exclusion in the JOBS Act of issuers that had completed their first sale of common equity securities prior to December 8, 2011, reasoned SIFMA, was intended to exclude issuers that had gone public prior to December 8, 2011, and therefore did not need the benefits of the provisions. The provision was not intended to exclude issuers that may have technically issued some common equity under a registration statement pursuant to compensation plans but for all practical purposes are still private companies.

SIFMA asked the Commission to adopt a grace period for loss of emerging growth company status. Although certain disqualifying events will be readily ascertainable and within the issuer's control, such as issuing more than $1 billion of debt, said the association, other events, such as achieving $1 billion of revenues or qualifying as a large accelerated filer, may not be immediately ascertainable or within the issuer's control. This is especially problematic with respect to long-term items such as compliance with Sarbanes-Oxley Act Section 404(b), with respect to which issuers typically begin preparing more than a year in advance. The SEC staff has recognized the long lead time required for compliance by providing a phase-in for newly public companies, effectively not requiring 404(b) compliance until the issuer's second annual report on form 10-K after going public. A similar grace period should be afforded to emerging growth companies. To provide otherwise would effectively require many emerging growth companies to undertake the burden of Section 404(b) compliance whether or not they are entitled to relief under the JOBS Act. If the SEC staff is unwilling to treat emerging growth companies like new reporting companies for 404(b) purposes, continued SIFMA, the staff should, at a minimum, consider providing a determination date for 404(b) purposes as of the end of the issuer's second fiscal quarter, similar to the test for large accelerated filers.

SIFMA asked the staff to confirm that the date for determination of whether a financial accounting standard is "new or revised" for purposes of JOBS Act Section 102 is the date of adoption of the JOBS Act. Providing for an issuer-specific date, said the industry group, such as the initial filing date of the registration statement for its initial public offering, could create countless versions of GAAP that would lead to confusing incomparability for investors.

SIFMA believes that an issuer that ceases to be a reporting company should get to reset the clock for purposes of the definition of "initial public offering date" just as it should for purposes of the definition of "emerging growth company." An issuer that is no longer a reporting company should not be precluded from making a confidential submission of a registration statement as contemplated by JOBS Act Section 106 even if the submission is technically after its initial public offering date. Finding no policy reason to distinguish between issuers that once were public and those that never were, SIFMA said that the benefit of the IPO on-ramp should be available to all private companies.

SIFMA urged the SEC staff to reconsider its guidance that registration statements on Form 10 will not be eligible for the confidential submission process. Whether a company goes public using a registration statement on Form 10 or Form S-1 is a purely a function of whether it happens to be raising capital at the same time. The content of the two documents is substantially the same. In addition to facilitating capital creation, the JOBS Act was also designed to make it easier for emerging growth companies to go public and to reduce the burdens on them as public companies. These latter two objectives are unaffected by whether an emerging growth company is raising capital at the time it becomes a public company. Limiting the confidential submission process to registration statements under the Securities Act serves no public policy, posited SIFMA, and will only incentivize issuers to include a concurrent nominal capital raise so that they can file a registration statement on Form S-1 or F-l as opposed to Form 10.

The JOBS Act requires that the initial confidential submission and all amendments thereto be publicly filed not later than 21 days before the road show. The JOBS Act does not require, and SIFMA asked the SEC staff to confirm that it will not require, that any correspondence related thereto, such as comment letters and responses, be publicly filed. In SIFMA's view, the congressional intent that this correspondence need not be filed is clear based on the explicit reference in the JOBS Act to the initial submission and each amendment thereto and the absence of any reference to correspondence.

The JOBS Act permits emerging growth companies to engage in oral or written communications with potential investors that are qualified institutional buyers or that are institutions that are accredited investors. Unlike Rule 144A or Regulation D, however, it does not provide for any reasonable belief standard regarding the status of these investors. SIMA believes that the JOBS Act exemption should be based on a reasonable belief standard similar to that in Rule 144A and Rule 506. Any securities sold to these investors will ultimately be sold in a registered offering, reasoned SIFMA, and therefore no policy reason exists to impose a higher standard than that which would apply if the transaction were not registered. To provide otherwise would expose issuers and underwriters to a potential put right where they reasonably believed that the investor was a qualified institutional buyer or an accredited investor.

Although the SEC and national securities associations cannot adopt or maintain regulations regarding research, many broker-dealers are subject to similar restrictions as a result of the Global Research Settlement. Thus, in order to create a level playing field, SIFMA asked that the Commission adopt regulations superseding the portions of the Global Research Settlement that are inconsistent with the spirit of the JOBS Act.

Crowdfunding

Title III of the JOBS Act added a crowdfunding exemption from the Securities Act allowing companies to finance new businesses by pooling investments of up to $1 million collected over the Internet, subject to certain conditions. One condition is that issuers must use the services of an intermediary that is either an SEC-registered broker or an SEC-registered funding portal, a new entity created by the Act. The JOBS Act directs the Commission to adopt regulations implementing the crowdfunding provisions within 270 days of enactment.

Until the SEC adopts regulations implementing a new exemption that will allow crowdfunding, the Commission reminded issuers that any offers or sales of securities purporting to rely on the Act's crowdfunding exemption would be unlawful under the federal securities laws.

Similarly, no person, not even an SEC-registered broker, can act as a crowdfunding intermediary pursuant to the JOBS Act until the SEC adopts implementing regulations, said the Division of Trading and Markets in a recent FAQ. The Division also detailed the duties of crowdfunding intermediaries, as well as the restrictions on them.

The Commission must adopt regulations governing funding portals before permitting anyone to register with the SEC as a funding portal. The regulations will address the form and process needed to register with the SEC as a funding portal. Funding portals also must become members of a national securities association that is registered under Exchange Act Section 15A. Today, FINRA is the only such association. [*Jumpstart Our Business Startups Act Frequently Asked Questions About*

Crowdfunding Intermediaries, Division of Trading and Markets (May 7, 2012), Q 1–3.]

The JOBS Act imposes several restrictions on the activities of a registered funding portal. The SEC staff noted that a funding portal cannot: provide investment advice or make recommendations; solicit purchases, sales or offers to buy the securities offered or displayed on its website or portal; compensate employees or agents for the solicitation or based on the sale of securities displayed or referenced on its website or portal; hold or manage investor funds or securities; or engage in any other activities the Commission determines to prohibit in its crowdfunding regulations. [*FAQ*, Q 4.]

In addition, funding portals and crowdfunding brokers cannot compensate promoters, finders or lead generators for providing the intermediary with the personal identifying information of any potential investor. Nor can a portal allow its directors, officers or partners to have a financial interest in any issuer using the services of the intermediary. [FAQ, Q 4.]

The Division emphasized that there are many considerations in determining whether to operate a crowdfunding intermediary. At a minimum, persons and entities should understand the legal obligations that the JOBS Act assigns to crowdfunding intermediaries. For example, crowdfunding brokers and funding portals have significant duties under the JOBS Act to provide information to investors and reduce the risk of fraud. [*FAQ*, Q 5.]

Crowdfunding intermediaries must provide disclosures that the SEC determines appropriate by rule, including disclosing the risks of the transaction. They must also provide investor educational materials and ensure that each investor review the educational materials and positively affirm the investor's understanding that the investor is risking the loss of the entire investment and could bear such a loss. The crowdfunding intermediaries must also ensure that each investor answer questions demonstrating that the investor understands the level of risk generally applicable to investments in startups, emerging businesses, and small issuers and the risk of illiquidity. [*FAQ*, Q 5.]

Further, crowdfunding intermediaries must protect the privacy of information collected from investors. Importantly, they must also take measures to reduce the risk of fraud with respect to crowdfunding transactions, as established by the SEC, including obtaining a background and securities enforcement regulatory history check on each officer, director and person holding more than 20 percent of the outstanding equity of every issuer whose securities are offered by that person. They must make available to investors and the SEC, at least 21 days before any sale, any disclosures provided by the issuer. [*FAQ*, Q 5.]

Crowdfunding intermediaries must ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount, and allow all investors to cancel their commitments to invest. They must make efforts to ensure that no investor in a 12-month period has purchased crowdfunded securities that, in the aggregate, from all issuers, exceed the investment limits set forth in the JOBS Act. Finally, as a catch-all, crowdfunding intermediaries must comply with any other requirements that the SEC deems appropriate. [FAQ, Q 5.]

Comment of State Regulator

The chief securities regulator for Massachusetts, William Galvin, has expressed a strong interest in consulting and collaborating with the Commission on the rulemaking for crowdfunding. In a letter to the Commission, he noted that, because crowdfunding presents opportunities for issuers to use innovative technologies and techniques to raise capital, state regulators expect that the rulemaking will break new ground in securities regulation. They are in full accord with, and wish to emphasize, the statutory requirement that the Commission's rules for crowdfunding must protect investors in these offerings.

The letter notes that the JOBS Act requires that state crowdfunding regulations be consistent with SEC regulations. Mr. Galvin emphasized that good forward-looking regulations will allow the Commission and the states to effectively use scarce regulatory resources both to protect investors and to help the crowdfunding initiative accomplish its goal of helping small issuers raise capital.

Regulation D

Title II of the JOBS Act would allow small companies offering securities under Regulation D to use advertisements or solicitation to reach investors and obtain capital. Title II removes the prohibition against general solicitation or advertising on sales of non-publicly traded securities, provided that all purchasers of the securities are accredited investors.

Industry Comment

In a letter to the SEC, SIFMA noted that the JOBS Act provides that in revising the prohibition on general solicitation and general advertising in Rule 502(c), the new regulations should require issuers to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission. SIFMA does not believe that this should impose a higher burden than the reasonable-belief standard currently contained in Rule 506, namely, that an issuer will be viewed as having taken reasonable steps if the issuer reasonably believes that the offeree is an eligible offeree. In addition, SIFMA noted that it is generally accepted that certification by an offeree as to its status as an accredited investor or qualified institutional buyer provides a basis for a reasonable belief. This certification, according to SIFMA, should constitute reasonable steps for purposes of JOBS Act Section 201(a).

To permit all issuers to realize the benefits of the change in general solicitation and general advertising for Rule 144A offerings, SIFMA urged the SEC to preempt blue sky laws for offerings under Rule 144A, which would align them with the existing preemption for offerings under Rule 506. Securities Act Section 18 preempts blue sky laws with respect to offerings of covered securities.

Offerings pursuant to Rule 506 are exempt from blue sky requirements because they are pursuant to an SEC rule issued under Securities Act Section 4(2) and therefore constitute covered securities. Because Rule 144A was created under Section 4(1), reasoned SIFMA, offerings pursuant to Rule 144A do not necessarily constitute offerings of covered securities and thus blue sky requirements, including prohibitions on general solicitation and general advertising, cannot be preempted. For example, in offerings of debt securities with subsidiary guarantees, the subsidiary guarantors are typically not reporting companies, nor do they have any listed securities. Accordingly, the subsidiary guarantees are not covered securities and blue sky laws are not preempted with respect to the offering. SIFMA noted that Section 18 authorizes the SEC to preempt blue sky laws for Rule 144A offerings by providing that purchasers in Rule 144A offerings are qualified purchasers for purposes of the definition of "covered security." SIFMA cautioned that the failure to preempt blue sky laws will limit the ability of certain issuers in Rule 144A offerings to realize the benefits of the rule changes relating to general solicitation and general advertising.

In a letter to the SEC, the Federal Regulation of Securities subcommittee of the American Bar Association urged the Commission to expand the number of accredited investors and qualified institutional buyers who may learn about, and participate in, Regulation D offerings as the ban on general solicitation is lifted by the JOBS Act. The existing restrictions limiting sales to purchasers reasonably believed to be accredited investors and qualified institutional buyers would continue under the framework of Section 201 of the JOBS Act and thus provide investor protection for these exempt offerings.

JOBS Act Section 201(a)(1) instructs the SEC to revise Rule 506 of Regulation D to eliminate the prohibition against general solicitation or general advertising for offers and sales of securities, provided that all purchasers are accredited investors. An issuer relying on revised Rule 506 must take reasonable steps to verify that purchasers are accredited investors.

In the letter, the bar group also suggested that the SEC regulations implementing the Act reflect the existing definition of "accredited investor" that includes a reasonable belief standard. Moreover, in setting forth the reasonable steps to be taken to verify that purchasers of the securities offered by means of general solicitation or general advertisement in Rule 506 offerings are accredited investors, the regulations should reflect current custom and practice.

In the group's view, the regulations or the accompanying release should make clear that general solicitation or general advertising employed in a Rule 144A transaction does not impair a Section 4(a)(2) transaction immediately preceding the Rule 144A offering. The SEC should also clarify certain issues relating to the integration of Rule 506 and Rule 144A offerings that use general solicitation or general advertising with other public or private offerings conducted by the same issuer.

The bar group also asked the Commission to confirm that the use by an issuer of general solicitation or general advertising in connection with a Rule 506 or Rule 144A offering would not be deemed to constitute directed selling efforts by that issuer in connection with a contemporaneous offering pursuant to Regulation S under the Securities Act. The subcommittee also asks that regulations provide that the use of general solicitation or general advertising in connection with a Rule 506 or Rule 144A offering will not adversely affect the availability of any exemptions under the Investment Company Act.

The JOBS Act provides that the general solicitation and general offering restrictions do not apply if all purchasers are accredited investors. The ABA group reads this provision as referring to an "accredited investor" as defined in Rule 501, that is, a person who is within one of the specific categories or who the issuer reasonably believes is within one of the categories. The reasonable-belief prong would be consistent with JOBS Act Section 201(a)(2), with respect to Rule 144A, which applies if the securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are qualified institutional buyers. The subcommittee asked that that the regulations confirm this point.

Unlike a Rule 506 transaction, which is an issuer transaction, a Rule 144A transaction is a resale transaction. Often in a Rule 144A transaction, noted the bar group, an initial purchaser acquires securities from an issuer in a Section 4(a)(2) transaction and resells the securities pursuant to Rule 144A. The ABA group believes that it would undermine legislative intent to permit general solicitation and general advertising in connection with a Rule 144A transaction if that same solicitation or advertising would deny an issuer the ability to rely on Section 4(a)(2) in connection with its sale to the initial purchaser. The group thus recommends that the Commission clarify that general solicitation or general advertising in connection with a Rule 144A offering will not impair the Section 4(a)(2) exempt transaction related to the Rule 144A transaction.

In the past, noted the subcommittee, most side-by-side offerings involving reliance on Rule 506 or Rule 144A in the United States, and Regulation S outside the United States, did not pose concerns regarding directed selling efforts. Issuers have therefore been confident in proceeding with contemporaneous offerings in which the offshore component was conducted in accordance with Regulation S. The group cited Release No. 33-6863 (April 24, 1990), adopting Regulation S, providing that permissible activities in connection with registered or exempt offerings in the United States do not constitute directed selling efforts in a contemporaneous Regulation S offering. The bar group urged the SEC to clarify that this guiding principle remains controlling and therefore that permissible activities in an exempt Rule 506 or 144A offering, including general solicitation and general advertising after the adoption of the new rules, do not constitute directed selling efforts in a contemporaneous Regulation S offering.

Although JOBS Act Section 201(b) provides that offerings complying with amended Rule 506 must not be deemed public offerings under the federal securities laws as a result of general advertising or general solicitation, there is no comparable reference to a Rule 144A offering. For this reason, the group suggested that SEC rules clearly provide that an offering of fund shares pursuant to Rule 506 or Rule 144A utilizing general solicitation or general advertising will not be a public offering for the purposes of Investment Company Act Section 3(c)(1) or 3(c)(7).

In a letter to the SEC, the hedge fund industry urged the Commission to align the advertising regulations in the Investment Advisers Act with the JOBS Act and ensure that private fund managers have greater clarity as to the types of information that they can provide to existing or potential investors. In the JOBS Act, Congress eliminated the general advertising and general solicitation restrictions of Regulation D, noted the Managed Funds Association, and expressed an intention to permit greater visibility of and transparency into entities, including hedge funds and other private funds, which offer and sell securities pursuant to revised Rule 506. The MFA also asked the SEC to extend the definition of "accredited investor" to knowledgeable employees of an investment company for purposes of the general solicitation provisions of Regulation D.

JOBS Act Section 201(a)(1) instructs the SEC to revise Rule 506 to eliminate the prohibition against general solicitation or general advertising for offers and sales of securities, provided that all purchasers are accredited investors. An issuer relying on revised Rule 506 must take reasonable steps to verify that purchasers are accredited investors. In addition, Securities Act Section 201(b) amends Section 4 to provide that offers and sales exempt under revised Rule 506 will not be deemed public offerings under the federal securities laws as a result of general advertising or solicitation.

In light of the elimination of the ban on general advertising for offers and sales made pursuant to revised Rule 506, the MFA believes that greater guidance and flexibility are necessary as to the types of information that registered or exempt private fund managers can provide in advertisements to investors. Although the SEC and its staff have provided guidance on various advertising limitations in Advisers Act Section 206 and Rule 206(4)-1, uncertainty remains as to the scope and application of these limitations to hedge fund advisers.

Moreover, because the intent of these restrictions was to address investor protection concerns related to adviser advertisements provided to retail investors, the MFA argued that in the context of hedge and private fund advisers providing their advertisements solely to sophisticated investors, the current SEC no-action letter and legal guidance is counterproductive to this investor protection goal in that it makes it harder for private fund advisers to communicate effectively with their investors. Therefore, the MFA believes it is consistent with congressional intent and the protection of private fund investors to permit greater disclosure of information related to registered or exempt private fund managers in advertising materials, provided that the information remains subject to the anti-fraud provisions.

Knowledgeable Employees of Private Funds

The JOBS Act is designed to permit general solicitation and advertising in connection with offers and sales under Rule 506 as long as all purchasers are sophisticated investors. In light of this policy objective, the MFA urged the SEC to adopt regulations that include in the definition of "accredited investor" an additional category of investor, a knowledgeable employee under the Investment Company Act, that Congress determined has the requisite knowledge and sophistication to purchase interests in private funds.

In the National Securities Markets Improvement Act, Congress directed the SEC to adopt rules to permit the ownership of securities by knowledgeable employees of a 3(c)(1) fund or 3(c)(7) fund. A fund may rely on Investment Company Act Section 3(c)(1) if its outstanding securities are beneficially owned by not more than 100 persons and it is not making and does not propose to make a public offering of its securities. A fund may rely on Section 3(c)(7) if its outstanding securities are owned exclusively by qualified purchasers and it is not making and does not propose to make a public offering.

In 1997, the SEC adopted Investment Company Act Rule 3c-5 to define the term "knowledgeable employee" to include two categories of employees of a private fund or its affiliated investment manager: (i) any person who is an executive officer, director, trustee, general partner, advisory board member or person serving in a similar capacity; and (ii) employees who, in connection with their regular duties, participate in the investment activities of the 3(c)(1) or 3(c)(7) fund, other private funds or certain other investment companies.

Pursuant to Rule 3c-5 and interpretive guidance issued by the SEC staff, many employees of hedge fund managers who are knowledgeable employees own interests in a 3(c)(1) or 3(c)(7) fund for which they perform investment functions. In the case of a 3(c)(7) fund, these employees may invest in the fund notwithstanding the wealth requirement in the definition of "qualified purchaser," which is substantially higher than the comparable requirement in the definition of "accredited investor." Some of these knowledgeable employees, such as those who have been recently hired by a fund manager, do not qualify as accredited investors.

In the MFA's view, it would be inconsistent to effectively prohibit these employees from investing in private funds as a result of the accredited investor standard when Congress has explicitly determined that they may invest in private funds available only to investors that meet the higher qualified purchaser standard. The hedge fund group emphasized that this long-standing policy of permitting knowledgeable employees of an investment manager to invest in a private fund is critical to meeting the demands of institutional investors, which seek to have their interests aligned with the interests of the fund's principals and the employees of the fund's manager. A primary method of achieving this alignment of interests is by permitting investment manager employees to make investments in funds they advise along with the investors. The MFA said it would be disruptive to private funds and their investors if a manager were no longer able to permit certain of its employees who participate in the investment activities of the fund to own interests in the fund.

Because knowledgeable employees of a private fund manager have an equivalent level of sophistication and financial wherewithal as accredited investors, and are therefore of the type that Congress intends to be eligible to purchase interests in offerings conducted pursuant to revised Rule 506, the MFA urged the SEC to amend the definition of "accredited investor" to include those individuals who meet the definition of "knowledgeable employee" in Investment Company Act Rule 3c-5. In that regard, the MFA noted that Dodd-Frank Act Section 413 authorized the Commission to amend the definition of accredited investor, other than the net-worth threshold.

500-Shareholder Threshold

Title V of the JOBS Act increases the shareholder threshold for registration. An issuer must register if it has 2,000 or more shareholders, or 500 or more shareholders that are non-accredited investors.

Section 503 requires the Commission to revise the definition of "held of record" to exclude, from the Section 12(g)(1) holder of record calculation, persons who received the securities pursuant to an employee compensation plan in a transaction exempted from the registration requirements of Securities Act Section 5. In the SEC staff's view, as of April 5, 2012, the date of enactment, an issuer (including a bank holding company covered under Title VI) may exclude persons who received securities pursuant to an employee compensation plan in Securities Act–exempt transactions whether or not the person is a current employee of the issuer. Although Section 503 directs the Commission to adopt safe-harbor provisions that issuers can follow when determining whether holders of their securities received the securities pursuant to an employee compensation plan in transactions that were exempt from the registration requirements, the lack of a safe harbor does not affect the application of Exchange Act Section 12(g)(5). [*Jumpstart Our Business Startups Act Frequently Asked Questions: Changes to the Requirements for Exchange Act Registration and Deregistration* (April 11, 2012), Q. (5).]

If an issuer that is not a bank holding company triggered a Section 12(g) registration obligation with respect to a class of equity security as of a fiscal-year end before April 5, 2012, but would not trigger this obligation under the amended holders-of-record threshold contained in the JOBS Act, and the issuer has not yet registered that class of equity security under Section 12(g), then the issuer is no longer subject to a Section 12(g) registration obligation with respect to that class. Therefore, said the SEC staff, if the issuer has not filed an Exchange Act registration statement, it is no longer required to do so. If the issuer has filed an Exchange Act registration statement and the registration statement is not yet effective, then the issuer may withdraw the registration statement. If the issuer has registered a class of equity security under Section 12(g), it would need to continue that registration unless it is eligible to deregister under Section 12(g) or current rules. [*FAQ*, Q. (1).]

Title VI of the JOBS Act raises the registration threshold for a bank from 500 shareholders to 2,000. Thus, the legislation updates the federal securities laws to ensure that smaller community banks do not have to register with the SEC and comply with burdensome reporting requirements that are intended for larger corporations.

According to the SEC staff, under Exchange Act Section 12(g)(1)(B), a bank holding company will have a registration obligation if, as of any fiscal-year end after April 5, 2012, it has total assets of more than $10 million and a class of equity security held of record by 2,000 or more persons. The staff considers that the effect of this provision is to eliminate, for bank holding companies, any Section 12(g) registration obligation with respect to a class of equity security as of a fiscal-year end on or before April 5, 2012. Therefore, if a bank holding company has filed an Exchange Act registration statement and the registration statement is not yet effective, it may withdraw the registration statement. If a bank holding company has registered a class of equity security under Section 12(g), it would need to continue that registration unless it is eligible to deregister under Section 12(g) or current rules. [*FAQ*, Q. (2).]

If the class of equity security is held of record by fewer than 1,200 persons, a bank holding company may file a Form 15 to terminate the Section 12(g) registration of that class. Form 15 has not yet been amended to reflect the change to Exchange Act Section 12(g)(4). Therefore, a bank holding company should include an explanatory note in its Form 15 indicating that it is relying on Exchange Act Section 12(g)(4) to terminate its duty to file reports with respect to that class of equity security. [*FAQ*, Q. (3).]

Pursuant to Section 12(g)(4), as amended by the JOBS Act, the Section 12(g) registration will be terminated 90 days after the bank holding company files the Form 15. Until that date of termination, the bank holding company must file all reports required by Exchange Act Sections 13(a), 14 and 16. [*FAQ*, Q. (3).]

Alternatively, said the SEC staff, a bank holding company could rely on Exchange Act Rule 12g-4, which permits the immediate suspension of Section 13(a) reporting obligations upon filing a Form 15, if it meets the requirements of that rule. Rule 12g-4 has not yet been amended to incorporate the new deregistration threshold. [*FAQ*, Q. (3).]

In general, the Section 15(d) reporting obligation is suspended if, and for so long as, the issuer has a class of security registered under Section 12. When an issuer terminates Section 12 registration, it must address any Section 15(d) obligation that would apply once the Section 15(d) suspension is lifted. [*FAQ*, Q. (4).].

For the current fiscal year, advised the staff, a bank holding company can suspend its obligation to file reports under Section 15(d) with respect to a class of security that was sold pursuant to a Securities Act registration statement and that was held of record by fewer than 1,200 persons as of the first day of the current fiscal year. The suspension would be deemed to have occurred as of the beginning of the fiscal year in accordance with Section 15(d) (as amended by the JOBS Act). If, during the current fiscal year, a bank holding company has a registration statement that becomes effective or is updated pursuant to Securities Act Section 10(a)(3), then it will have a Section 15(d) reporting obligation for the current fiscal year. [*FAQ*, Q. (4).]

If a bank holding company with a class of security held of record by fewer than 1,200 persons as of the first day of the current fiscal year has a registration statement that is updated during the current fiscal year pursuant to Securities Act Section 10(a)(3), but under which no sales have been made during the current fiscal year, the bank holding company may be eligible to seek no-action relief to suspend its reporting obligation. [*FAQ*, Q. (4).]

Industry Comment

The Independent Community Bankers of America group has urged the SEC to issue guidance indicating that thrifts and thrift holding companies will be considered banks and bank holding companies for purposes of JOBS Act Section 601, which raises the shareholder threshold for SEC reporting from 500 shareholders to 2,000. In a letter to the Commission, the industry group said that it was an oversight that community thrifts and thrift holding companies with fewer than 2,000 shareholders were not included in the legislation, particularly because there is no compelling reason to treat them differently from banks and bank holding companies under the law.

Thrifts and thrift holding companies are really banking institutions, reasoned the industry group, because they make loans, gather deposits, and are considered insured depository institutions under the Federal Deposit Insurance Act. Further, thrifts are subject to the same oversight as banks and are overseen by bank regulators. The group emphasized that there is no compelling reason to treat thrifts differently from banks under Section 601.

A second issue deals with the timing of future SEC rulemaking. The Commission's guidance earlier in April indicated that even though a bank holding company can immediately terminate its Section 12(g) registration of a class of equity securities, its duties to file periodic reports would not be suspended until 90 days after the holding company files its Form 15. Until that date of termination, the bank holding company must file all reports required by Exchange Act Sections 13(a), 14 and 16.

Alternatively, a bank holding company could rely on Exchange Act Rule 12g-4, which permits the immediate suspension of Section 13(a) reporting obligations upon a filing of a Form 15, but because that rule has not been amended to incorporate the new deregistration threshold, bank holding companies cannot take advantage of the rule. Thus, the industry group urged the Commission to adopt changes to Rule 12g-4 as soon as possible so that bank holding companies that have a class of equity securities held of record by fewer than 1,200 persons can terminate their Section 13(a) responsibilities immediately upon the filing of a Form 15. ❒

About the Author

James Hamilton is a Principal Analyst at Wolters Kluwer Law & Business, a leading provider of corporate and securities information and a prolific blogger (Jim Hamilton's World of Securities Regulation, at http://jimhamiltonblog.blogspot.com). Hamilton has been tracking, analyzing and explaining securities law and regulation for over 30 years as an analyst for Wolters Kluwer Law & Business. He has written and spoken extensively on federal securities law and is cited as an authority in the Senate Banking Committee Report (S. 111-176) of the Dodd-Frank Act. His analysis of that legislation, the *Dodd-Frank Wall Street Reform and Consumer Protection Act: Law, Explanation and Analysis*, is widely read. Hamilton's most recent book, *Jumpstart Our Business Startups Act: Law, Explanation and Analysis*, explains the each provision of the JOBS Act and the relevant legislative history. His other works include the popular guidebook *Responsibilities of Corporate Officers and Directors under Federal Securities Law*, the *Guide to Internal Controls*, and the monthly newsletter *Hedge Funds and Private Equity: Regulatory and Risk Management Update*. In addition to his many books and articles, Hamilton serves as a leading contributor to the industry-standard publication, the *Federal Securities Law Reporter*. Hamilton received an LL.M. from New York University School of Law.

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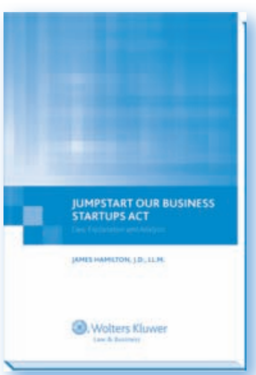

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