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Client Alert

Latham & Watkins Capital Markets Group

The JOBS Act After Two Weeks: The 50 Most Frequently Asked Questions

On April 5, 2012, President Obama signed the Jumpstart Our Business Startups Act into law, after both the Senate and House of Representatives approved the bill with broad, bipartisan support. Certain provisions of the JOBS Act are self-executing and became effective on April 5, 2012. Other provisions of the JOBS Act direct the Securities and Exchange Commission to amend or issue new rules within 90, 180 or 270 days.

In this *Client Alert*, we will provide you with answers to the most frequently asked questions raised by the JOBS Act. Our answers are based on the text of the JOBS Act, our understanding of the legislative history of the JOBS Act, guidance published by the SEC Division of Corporation Finance, public statements by SEC Staff members and our conversations with market participants and other law firms. In some cases, the answers remain open to interpretation and could change if the SEC or FINRA (or other regulatory authority) takes additional actions. We will post an updated version of this *Client Alert* on our website at www.lw.com if there are material pronouncements by the relevant regulatory authorities that impact our answers.

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As discussed in our prior *Client Alert*, Title I of the JOBS Act streamlines the IPO process for a new category of issuer called an emerging growth company, or EGC. Once public, EGCs also benefit from the IPO on-ramp, a temporary transition period of up to five years (in most cases), during which they are exempt from certain costly requirements of being a public company. Title I also makes several key changes with respect to research that are intended to increase the availability of analyst research coverage of EGCs.

The other Titles of the JOBS Act introduced a number of additional changes to the securities laws, including directing the SEC to amend Securities Act Rule 506 and Rule 144A. This *Client Alert* will focus only on the issues raised by Title I of the JOBS Act and the provisions of Title II relating to amendments to Rule 506 and Rule 144A.

Determining EGC Status — JOBS Act Section 101

1) Q: Do debt securities issued in an A/B exchange offer count towards the $1.0 billion threshold?

A: Yes. All debt securities will be counted toward the $1.0 billion threshold, whether or not issued for cash. The two open questions are (1) whether the

closing of the original private offering or the closing of the A/B exchange offer will be considered to be the issue date for purposes of the three-year window in Section 101 of the JOBS Act and (2) whether debt securities that are no longer outstanding will be counted. It would not be appropriate, in our view, if a $500 million Rule 144A offering with registration rights would cause an issuer to lose its EGC status upon completion of the A/B exchange offer. However, we think the market would welcome clarifying guidance on this point from the SEC Staff.

2) **Q: When will a debt-only issuer lose its EGC status?**

A: A debt-only issuer will typically become an SEC registrant by issuing debt securities in a Rule 144A offering with registration rights. An issuer that never issues equity securities publicly will remain an EGC until the end of the first year in which its revenue exceeds $1.0 billion or the first date on which it issues $1.0 billion of non-convertible debt securities during any three-year period. A debt-only issuer could remain an EGC indefinitely because the five-year period in Section 101 of the JOBS Act does not begin to run until "the first sale of common equity securities of the issuer pursuant to an effective registration statement."

3) **Q: If a private company had $800 million of revenue in its most recent fiscal year ending immediately prior to the filing of a registration statement for its IPO, but had more than $1.0 billion of revenue in one or more earlier fiscal years, can it qualify as an EGC?**

A: Yes. When determining EGC status for a private company, we believe you should look only to the prior fiscal year. It would not be appropriate to withhold the IPO on-ramp from private companies that no longer generate $1.0 billion or more of annual revenue just because there was a time in their possibly distant past when they did have revenue at that level. We think the market would welcome clarifying guidance on this point from the SEC Staff.

4) **Q: If an EGC generates in excess of $1.0 billion of revenue in the second fiscal year after its IPO but its revenue then falls to less than $1.0 billion for a subsequent fiscal year ending before the fifth anniversary of its IPO pricing date, does it regain its EGC status?**

A: No. The on-ramp is a one-way street. Once a public EGC goes above the $1.0 billion revenue threshold, it can never go back.

5) **Q: Are there any circumstances under which a company should be able to reset its status and qualify as an EGC, even if it has completed an IPO prior to the EGC cut-off date of December 9, 2011? For example, should a company that is emerging from bankruptcy or that was once public but has since been taken private be able to qualify as an EGC?**

A: In our view, yes. A formerly public company that has undergone a fundamental corporate change, such as bankruptcy or a delisting in connection with a going private transaction, should be eligible to take advantage of the on-ramp. The policy underlying the JOBS Act would support facilitating the transition of these private companies to public company status by making the on-ramp available to them. However, the JOBS Act does not explicitly address the point. We think the market would welcome clarifying guidance from the SEC Staff.

6) **Q: Can an issuer whose initial filing is on an Exchange Act registration statement still be eligible for EGC status?**

A: Yes. For example, a company that is created in a spin-off transaction can avoid Securities Act registration by registering its securities under the Exchange

Act on Form 10 or Form 20-F.[1] *If that company qualifies as an EGC, it will be entitled to the benefits of the on-ramp for as long as it remains an EGC.*

A company that becomes an Exchange Act registrant but never sells common equity securities publicly (including pursuant to a registration statement on Form S-8) could maintain its EGC status indefinitely, provided that its annual revenue never exceeds $1.0 billion, it does not issue more than $1.0 billion in non-convertible debt over the course of any three-year period and it does not become a large accelerated filer. The five-year period does not begin to run until the date of the first sale of equity securities of the issuer pursuant to an effective Securities Act registration statement.

Testing the Waters — JOBS Act Section 105(c)

7) Q: Is the prohibition on gun-jumping dead?

A: No. Section 105(c) of the JOBS Act authorizes EGCs to engage in water testing with QIBs and IAIs only. It is still possible to gun-jump with respect to retail investors.

8) Q: Which prospective investors are permitted to attend pre-launch meetings?

A: Only QIBs and IAIs may attend pre-launch meetings. Unlike Rule 144A, which permits an issuer to rely on that rule if it "reasonably believes" that the persons to which it offers or sells securities are QIBs, Section 105(c) of the JOBS Act does not contain a reasonable belief safe harbor. However, we do not expect issuers to have much difficulty in satisfying themselves that all parties with whom they communicate in reliance on Section 105(c) are QIBs or IAIs.

9) Q: What kind of investor communications will now take place in the IPO context before the distribution of a price range prospectus?

A: We expect the IPO playbook to change. Meetings with and presentations to QIBs and IAIs by issuers and their investment bankers before distribution of a price range prospectus will become more common. These pre-launch meetings will allow the investment banks and the issuer to learn about potential investor appetite before having to fix a price range in the official preliminary prospectus. We expect that issuers will want to introduce themselves to key institutional accounts in these meetings by using a slide deck or similar presentation. Because Securities Act Section 12(a)(2) and Exchange Act Section 10(b) may be deemed to apply to the content of these presentations, we expect that the presentation materials will be carefully reviewed by the deal team in advance and that no hard copies will be left behind.

10) Q: Does a potential underwriter need a written authorization from an EGC to be a "person authorized to act on behalf of an EGC" under Section 105(c) of the JOBS Act?

A: No. Issuers will likely want to review and discuss a potential underwriter's water-testing activities, but we believe that a verbal confirmation of the arrangement is sufficient to confirm "authorization" for purposes of Section 105(c).

11) Q: Will underwriters require issuers to inform them about their pre-launch water-testing meetings?

A: It's too soon to tell. We expect that water-testing activities in reasonable proximity to the launch of a deal will be the subject of underwriter due diligence. We will not be surprised if underwriters request representations in the underwriting agreement as to the timing and extent of any pre-launch water-testing activities, at least for IPO candidates and newly public companies.

12) Q: Will issuers present projections at pre-launch meetings?

A: Given that the JOBS Act does not exempt the content of pre-launch presentations by issuers from the anti-fraud provisions of the securities laws (including Section 12(a)(2) and Section 10(b)), we do not expect to see projections provided to investors by issuers or their investment bankers at pre-launch meetings. There is no reason that current practice regarding issuer projections should change.

13) Q: Can the banking team solicit non-binding indications of interest at a pre-launch meeting?

*A: In our view, yes. JOBS Act Section 105(c) expressly authorizes EGCs and their agents to engage in communications with "potential investors" that are QIBs or IAIs either before or after the filing date of a registration statement to determine whether "such **investors** might have an **interest** in a contemplated securities offering" (emphasis added). This provision, which was intended to permit EGCs and their bankers to engage in price discovery with institutional investors, necessarily permits discussion of both price and quantity. In our view, Section 105(c) permits EGCs and their bankers to solicit preliminary non-binding indications of interest from institutional investors at any point in the IPO process, before or after the filing of a registration statement and before or after the availability of a price-range prospectus. We do not believe that this capability conflicts with Exchange Act Rule 15c2-8(e), which simply requires that, after filing a registration statement with respect to a distribution of securities, participating broker-dealers must take reasonable steps to make available a copy of the preliminary prospectus relating to the securities to each associated person who is expected to solicit customers' orders before the effective date of the offering.*

14) Q: May research analysts participate in pre-launch meetings?

A: No. Given continuing FINRA restrictions under Rule 2711 on the ability of analysts to engage in communications with prospective investors in the presence of investment banking personnel or company management, analysts may not participate in these pre-launch meetings. However, we expect that research analysts will hold separate investor education meetings and calls with key institutional investors outside the presence of banking and company management, as they do today. These meetings will likely continue to include discussions regarding the analyst's earnings model. The JOBS Act does not interfere with the ability of analysts to communicate back to the deal team information obtained from investors regarding the investors' views as to pricing and structuring to the extent permitted by existing FINRA rules and (where applicable to particular firms) the Global Settlement.

15) Q: Are pre-launch meetings permitted in debt offerings by EGCs?

A: Yes. The water-testing provisions of Section 105(c) of the JOBS Act are available for any EGC wishing "to determine whether [QIBs and IAIs] might have an interest in a contemplated securities offering." The safe harbor is available for offerings by an EGC of any kind of security. Of course, there may be Regulation FD or selective disclosure issues to consider if the issuer already has securities outstanding. The deal team should consider whether wall-crossing the investors approached for water testing is appropriate.

16) Q: Can an EGC take advantage of water testing in a follow-on offering after its initial registration statement?

A: Yes. The JOBS Act's water-testing provisions are not limited to an EGC's IPO. But don't forget to consider Regulation FD.

17) **Q: Must pre-filing written communications made in reliance on Section 105(c) of the JOBS Act be filed as free-writing prospectuses?**

A: No. The JOBS Act does not require that these communications be filed as free-writing prospectuses and they are not subject to Securities Act Rule 164 or Rule 433 relating to free-writing prospectuses.

18) **Q: Do water-testing activities in connection with an EGC IPO benefit from NSMIA's preemption of certain state blue sky requirements?**

A: Yes. Securities Act Section 18(a)(1)(B) preempts certain state blue sky requirements in connection with a security that will be a covered security upon completion of a transaction. A covered security includes a security listed on NYSE, AMEX or Nasdaq. Accordingly, we believe that water-testing activities in connection with EGC IPOs will benefit from NSMIA preemption of state blue sky laws, including water testing prior to confidential submission or public filing of the EGC IPO registration statement.

Impact on Research — JOBS Act Section 105(a)

19) **Q: What is a "research report"?**

A: Section 105(a) of the JOBS Act defines a "research report" as "a written, electronic, or oral communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision." Accordingly, the definition of research report for purposes of the JOBS Act would encompass nearly any written or oral communication relating to an EGC issuer or its securities made by a broker-dealer.

20) **Q: Who can issue a research report?**

A: The safe harbor for research reports provided by Section 105(a)of the JOBS Act is only available for a research report that is issued by a broker-dealer, but does not require that the research report be prepared by someone functioning as a "research analyst." The safe harbor for research reports, however, is not available to an issuer.

21) **Q: What is the difference between testing the waters prior to the official launch of an offering and distributing research reports during that time frame?**

A: Section 105(a) of the JOBS Act provides that a research report published by a broker-dealer about an EGC that is planning a public offering of common stock will not be considered to be an offer for purposes of Section 2(a)(10) (which defines the term "prospectus") and Section 5(c) of the Securities Act. As a result, the issuance of a written research report by a broker-dealer will not trigger a Section 5 violation and would not constitute a written offer "by means of a prospectus" for purposes of Section 12(a)(2). The water-testing provision of JOBS Act Section 105(c), on the other hand, does not provide an exemption from Section 12(a)(2) liability — that provision only provides an exemption from Section 5. So any written communication that constitutes a broker-dealer research report gets more favorable treatment under the JOBS Act than water-testing activities.

Whether an oral research report may be subject to Section 12(a)(2) liability is more complicated. The JOBS Act does not provide a safe harbor under Section 12(a)(2) with respect to oral research reports. Consequently, an oral research report could still result in Section 12(a)(2) liability if it is deemed to constitute the "offer" of a security.

22) Q: Does the JOBS Act exempt research from potential Exchange Act Rule 10b-5 liability and potential liability under state anti-fraud laws?

A: No. The JOBS Act has no impact on Rule 10b-5 or state anti-fraud laws.

23) Q: Will firms subject to the Global Settlement be permitted to take advantage of the JOBS Act's relaxation of restrictions on interactions between analysts and investment banking personnel?

A: No. The JOBS Act leaves the Global Settlement fully intact. Firms subject to the Global Settlement (and other firms that agreed to abide by the provisions of the Global Settlement under state investor protection principles) must still comply with the restrictions set forth in the Global Settlement with respect to interactions between analysts and investment banking personnel. This means, for example, that Global Settlement firms cannot allow investment banking personnel to arrange meetings between analysts and investors as permitted by JOBS Act Section 105(b). In addition, although JOBS Act Section 105(b) now permits investment banking personnel to attend meetings between analysts and EGC management, Global Settlement firms may only engage in such "three-way meetings" in connection with an investment banking transaction if the meeting is for due diligence purposes and is properly chaperoned by legal or compliance personnel. The terms of the Global Settlement may only be modified by court order or by the adoption of an SEC or FINRA rule or interpretation that expressly supersedes particular provisions of the Settlement.

24) Q: Does the JOBS Act impact any of FINRA's requirements under Rule 2210 relating to the preparation, review and approval of research reports?

A: No. The requirements set forth in Rule 2210, which addresses a member firm's communications with the public, continue to apply. These requirements include detailed content standards that are intended to ensure that research reports and other communications with the public are based on principles of fair dealing and good faith, are fair and balanced, and are not misleading.

25) Q: Does the JOBS Act impact any of FINRA's requirements under Rule 2711 relating to the supervision, compensation or evaluation of research analysts?

A: No. The prohibitions set forth in Rule 2711 with respect to the supervision and control of research analysts by investment banking personnel and the restrictions on the ability of investment banking personnel to be involved in or to influence the compensatory evaluation of research analysts remain in place. In addition, Rule 2711 still prohibits broker-dealers from compensating research analysts on the basis of specific investment banking transactions.

26) Q: Does the JOBS Act's relaxation of restrictions on analyst communications mean that an analyst can solicit or pitch for investment banking business, participate in investment banking roadshows or promise favorable research coverage in respect of EGCs?

A: No. Although Section 105(b) of the JOBS Act provides that the SEC and FINRA are not permitted to adopt or maintain any rule that restricts, in connection with the EGC's IPO, a securities analyst from participating in "any communications" with EGC management even if non-research personnel (including investment bankers) are present, we do not believe that this provision supersedes current FINRA restrictions (set forth in Rule 2711(c) and (e)) on the ability of research analysts to solicit or pitch for investment banking business, to participate in investment banking road shows or to promise favorable research coverage in respect of EGCs.

27) Q: Does the JOBS Act permit analysts to engage in communications with prospective investors regarding an EGC offering in the presence of investment banking personnel or company management?

A: No. The JOBS Act does not modify the provisions of Rule 2711(c)(5), which prohibits research analysts from engaging in communications about an investment banking transaction with prospective investors in the presence of investment banking personnel or company management.

28) Q: Does the JOBS Act's relaxation of restrictions on the ability of investment banking personnel to "arrange for communications" between an analyst and a prospective investor mean that an investment banker can require an analyst to engage in those investor communications?

A: No. Rule 2711(c)(6) continues to prohibit investment banking personnel from directing (directly or indirectly) a research analyst to engage in sales or marketing efforts, or in any communications with prospective investors, regarding an investment banking transaction. The JOBS Act will facilitate the scheduling of meetings between research analysts and investors, but analysts are not permitted to become marketers.

29) Q: Does the JOBS Act modify any of the requirements imposed on research analysts under SEC Regulation AC?

A: No. Regulation AC continues to require, among other things, that research analysts certify that the views expressed in their research reports accurately reflect their personal views about the subject securities or issuers and to disclose in the reports whether they were compensated in connection with the specific recommendations or views expressed in the reports.

30) Q: What is the impact of the JOBS Act on NYSE Rule 472, which contains provisions with respect to analyst activities that essentially mirror those in Rule 2711?

A: Sections 105(b) and (d) of the JOBS Act prohibit the SEC and any "national securities association" registered under Exchange Act Section 15A from adopting or maintaining restrictions on specified analyst-related activities. Since FINRA is currently the only national securities association that is registered under Section 15A, the JOBS Act does not technically prohibit the NYSE (or any other self-regulatory organization other than FINRA) from adopting or maintaining such restrictions. Nonetheless, since NYSE Rule 472 was incorporated by FINRA in connection with the consolidation of the former NASD and certain functions of the NYSE and is now "maintained" and administered by FINRA, we believe that NYSE Rule 472 will be effectively modified to the same extent as Rule 2711. Moreover, we think it unlikely that any other self-regulatory organization would seek to impose through new rulemaking restrictions that the JOBS Act intended to eliminate (particularly given that the SEC would need to approve any such proposed rule).

31) Q: Does the JOBS Act supersede FINRA restrictions that prohibit analysts from previewing pre-deal research with an EGC issuer in advance of publication or distribution?

A: No. If the pre-deal research satisfies the definition of "research report" under Rule 2711,[2] Rule 2711(c)(2) only permits issuer review of specified statements or sections of the report (not including the research summary, research rating or price target) to verify their factual accuracy.

32) Q: Does the JOBS Act safe harbor for research reports published by brokers or dealers apply to an EGC who is considering a registered offering of debt securities?

A: No. The safe harbor is only available in connection with a public offering of common equity securities. However, since most debt securities are currently issued in Rule 144A offerings, this limitation is not likely to have major practical consequences. Given that the water-testing provisions of JOBS Act Section 105(c) apply to all offerings and in light of the roll back of the restrictions on general solicitation contemplated by Title II of the JOBS Act, research reports should no longer present Section 5 issues in a private offering effected pursuant to Rule 144A or Regulation D.

33) Q: How does the JOBS Act affect FINRA's rules about publication of research immediately following the effective date of an IPO and before and after the expiration, termination or waiver of a company or shareholder lock-up agreement?

A: The JOBS Act prohibits the SEC and FINRA from adopting or maintaining rules that impose research quiet periods immediately following an EGC's IPO date or during the period prior to the expiration of a lockup agreement. This means that FINRA's post-IPO 40-day and 25-day research quiet periods, and its 15-day research quiet period prior to the expiration of a company or shareholder lock-up agreement, will no longer apply in respect of EGCs. However, the JOBS Act does not, by its terms, restrict FINRA from continuing to impose research blackouts after the expiration of, or before or after a "waiver" or "termination" of, a lock-up agreement. Nonetheless, since FINRA has previously proposed to remove the lock-up related research quiet periods in connection with proposed rule changes in 2007 and 2008, we would not be surprised to see the lock-up quiet periods completely eliminated (for EGCs and non-EGCs) in future rulemaking.

34) Q: Will there be major changes in practice with respect to the timing of EGC research reports?

A: We do not expect to see major changes with respect to the timing of EGC research reports. Given the continuing restrictions and requirements with respect to the preparation and issuance of research reports under FINRA rules, Regulation AC and the Global Settlement as described above, as well as potential liability concerns under the anti-fraud provisions of federal and state securities laws, we do not expect that practices with respect to the issuance of research reports (as more narrowly defined under Rule 2711) will change materially, at least in the near term.

Confidential Submissions — JOBS Act Section 106(a)

35) Q: If an EGC chooses to submit confidentially, when does the 30-day period in Rule 163A commence to run?

A: When the registration statement is filed. A confidential submission is not a "filing."[3] *Rule 163A provides an exemption from Section 5(c) of the Securities Act for certain communications made by or on behalf an issuer more than 30 days before a registration statement is filed. Communications made more than 30 days prior to public filing (as opposed to confidential submission pursuant to Section 106(a)) of a registration statement should benefit from the Rule 163A safe harbor.*

36) Q: Can an EGC that is currently in registration but has not yet completed its IPO convert its public filing into a confidential submission?

A: Yes. The SEC Staff will not object if an issuer that is already on file switches to confidential submissions for future amendments.[4]

37) Q: May an EGC that submits confidentially announce to investors that it has done so?

A: An EGC may inform QIBs and IAIs that it has made a confidential submission pursuant to Section 105(c). A public announcement, however, would not qualify for the Section 105(c) safe harbor and the SEC Staff has made clear that the Rule 134 safe harbor is not available because a confidential submission is not a filing.[5] *The Rule 135 safe harbor continues to be available for an issuer who wants to publicly announce its intention to engage in a public offering.*

38) Q: Will the confidential submissions to the SEC by an EGC trigger FINRA's filing requirements under Rule 5110?

A: Yes. FINRA Regulatory Notice 04-13 makes clear that offerings submitted to the SEC for review on a confidential basis will be considered filed with the SEC as of the date of the confidential submission. Accordingly, filing with FINRA (at least to the extent FINRA members have been engaged to participate) would be required no later than one business day after the confidential submission to the SEC.

Financial Statement and Other Disclosure Requirements — JOBS Act Section 102(b)

39) Q: Will offerings by an EGC that are not registered in reliance on Rule 144A also require only two years of audited financial statements?

A: Rule 144A requires only two years of financial statements (and they need to be audited only to the extent reasonably available). Market custom in Rule 144A offerings, however, is to follow in all material respects the requirements that would apply to a registered offering. As a result, we would expect EGCs conducting Rule 144A offerings to use the two years of financial statements (plus any applicable interim periods) that they would be required to provide in a registered offering if the Rule 144A offering occurs within the first year after the EGC's IPO. Similarly, we would not expect EGCs to provide more than two years of audited "target" financial statements in acquisition financings. Note, however, that three years of audited issuer financial statements will be required in an EGC's A/B exchange offer registration statement if the A/B exchange offer represents the EGC's first registered offering because the two-year rule applies only to an EGC's IPO of common equity securities.

40) Q: Will the JOBS Act affect market practice with respect to financial statements provided in Rule 144A deals for issuers that are not EGCs?

A: Probably. We expect to see more 144A offerings done with only two years of audited issuer financial statements, even where the issuer is a larger company that does not qualify as an EGC, in situations where three years of audited financials are not readily available. We do not expect to see three years of audited "target" financial statements in acquisition financings unless those financial statements are easily obtained. There is a significant body of precedent for this outcome already, and the JOBS Act lends support for the view that two years of audited financials can be sufficient to fully inform investors. Obviously, the question whether two years of audited financial statements is sufficient in any particular case will depend on all of the facts and circumstances of that case.

41) Q: Does the JOBS Act's requirement of two years of financial statements apply to registration statements and periodic reports filed by an EGC pursuant to the Securities Exchange Act of 1934?

A: Yes. Section 102(b)(2) amends Section 13(a) of the Exchange Act to clarify that an EGC does not need to provide selected financial data in accordance with Item 301 of Regulation S-K "for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under [the JOBS Act] or the Securities Act of 1933." This change also applies to financial statements of acquired businesses provided by EGCs pursuant to Rule 3-05 of Regulation S-X.[6] Note that an EGC that became a public company pursuant to an Exchange Act registration statement rather than a Securities Act registration, such as a company created in a corporate spin-off, will not immediately benefit from this provision.

42) Q: Will an EGC that either priced its IPO after December 8, 2011 or is currently in registration be permitted to provide scaled disclosure afforded by the JOBS Act in its future filings, even if it did not previously take advantage of the scaled disclosure?

A: Yes. Despite prior filings that provide full disclosure, an EGC will be permitted to provide scaled disclosure in future pre- or post-effective amendments to its registration statement or in its future proxy statements, Form 10-Ks and Form 10-Qs.[7] In fact, other than with respect to certain accounting standards, an EGC may choose to take advantage of some scaled disclosure provisions and not others in any given filing.[8] However, particularly for a company that is already public, other considerations might weigh in favor of retaining long-form disclosure.

General Solicitation and Advertising — JOBS Act Section 201(a)

43) Q: Section 201(a) of the JOBS Act requires the SEC to amend both Rule 506 and Rule 144A not later than 90 days after enactment of the JOBS Act. Do the current versions of Rule 506 and Rule 144A remain in effect until the SEC amends these rules (the interim period)?

A: Yes. The JOBS Act directs the SEC to amend Rule 506 and Rule 144A within 90 days, but does not modify the current text of these rules.

44) Q: Should market practices in connection with private offerings relying on the Rule 506 and 144A safe harbors change during the interim period?

A: No. We anticipate that market participants relying on the Rule 506 and Rule 144A safe harbors will generally continue to implement customary procedures for these offerings until the SEC revises Rule 506 and Rule 144A. For more discussion on this topic, see "The JOBS Act and General Solicitation: Impact on Private Offerings During the Period Prior to SEC Rulemaking – 14 Law Firm Consensus Report" (April 5, 2012), available at: http://www.lw.com/thoughtLeadership/JOBS-Act-and-General-Solicitation--Impact-on-Private-Offerings.

45) Q: Will the elimination of the ban on general solicitation ultimately impact the way in which private offerings are conducted?

A: Yes. We do not expect a sea change in this area in the near term. However, once the interim period is over certain public statements by issuers and their executives during private offerings that in the past were the subject of in-depth analysis by securities lawyers will no longer be considered to be troubling. For

example, an inadvertent quotation by an executive officer in a news report or attendance at an industry conference will no longer be considered to be general solicitation that would make the Regulation D safe harbor unavailable for the ongoing private placement. Over time, it is possible that Title II of the JOBS Act will result in open public advertising of private placement opportunities that are only available to be sold to QIBs and accredited investors, but we do not expect to see that happen in the near term.

46) Q: Will the elimination of the ban on general solicitation apply to "Section 4(1½)" transactions?

A: Yes. The policy underlying the so-called Section 4(1½) exemption is that a holder of a restricted security can resell it privately in the same manner that the issuer could issue it in the first instance. Although the JOBS Act does not explicitly address 4(1½) transactions, we believe that general solicitation will be permitted in 4(1½) transactions once the SEC amends Rule 506 and Rule 144A.

47) Q: Will a fund that has not registered as an investment company in reliance on the exemptions provided by Section 3(c)(1) or 3(c)(7) of the Investment Company Act be able to engage in general solicitation or advertising in reliance on the JOBS Act without engaging in a "public offering" for the purposes of the Investment Company Act?

A: "Public offering," as used in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act, has historically been interpreted by reference to transactions falling under Section 4(2) of the Securities Act. As a result, subject to other applicable laws and final guidance from the SEC, Section 3(c)(1) and Section 3(c)(7) funds should be able to engage in general solicitation and advertising in reliance on revised Rule 506 (when adopted by the SEC) without being deemed to have made a "public offering."

48) Q: After the interim period, will an EGC conducting an IPO be able to engage in general solicitation in connection with a private offering conducted concurrently with its IPO?

A: Yes, as long as the securities sold in the concurrent private offering are sold only to QIBs and AIs.

Special Considerations for Non-US Issuers

49) Q: Can a non-US issuer that is currently public outside of the United States be an EGC?

A: Yes, if it otherwise qualifies and has not priced a US IPO before December 9, 2011.

50) Q: Can a foreign private issuer that satisfies the EGC criteria rely on the scaled disclosure provisions of the JOBS Act?

A: Yes. A foreign private issuer that is an EGC can follow the JOBS Act's scaled disclosure provisions rather than the provisions of the relevant registration form otherwise applicable to the foreign private issuer.[9]

Endnotes

[1] *See* Staff Legal Bulletin No. 4.

[2] The definition of "research report" under Rule 2711 is much narrower than the definition set forth in Section 105(a) of the JOBS Act. Most significantly, a Rule 2711 research report must be in writing and contain information "reasonably sufficient upon which to base an investment decision."

[3] *Cf.* SEC Division of Corporation Finance, "Jumpstart Our Business Startups Act Frequently Asked Questions: Generally Applicable Questions on Title I of the JOBS Act," Question 3 (April 16, 2012), available at http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm (hereinafter "Division of Corporation Finance April 16 FAQs"). ("The date of the initial confidential draft submission is not the 'initial filing date'. . . since it is not the filing of a registration statement.")

[4] *See* SEC Division of Corporation Finance, "Jumpstart Our Business Startups Act Frequently Asked Questions: Confidential Submission Process for Emerging Growth Companies," Question 11 (April 10, 2012), available at http://www.sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm.

[5] *See id.*, Question 13.

[6] Division of Corporation Finance April 16 FAQs, Question 16.

[7] *See* Division of Corporation Finance April 16 FAQs, Questions 5 and 6.

[8] *See* Division of Corporation Finance April 16 FAQs, Question 7.

[9] Division of Corporation Finance April 16 FAQs, Question 8.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

Alexander F. Cohen
+1.202.637.2284
alexander.cohen@lw.com
Washington, D.C.

Kirk A. Davenport II
+1.212.906.1284
kirk.davenport@lw.com
New York

Dana G. Fleischman
+1.212.906.1220
dana.fleischman@lw.com
New York

John S. Kim
+1.202.637.3332
john.kim@lw.com
Washington, D.C.

Jessica R. Munitz
+1.202.637.3337
jessica.munitz@lw.com
Washington, D.C.

Joel H. Trotter
+1.202.637.2165
joel.trotter@lw.com
Washington, D.C.
