

SEC Staff Updates Guidance on JOBS Act

The SEC staff has issued [frequently asked questions](#) on the JOBS Act. Below are new FAQs that are most likely to be of interest to capital markets participants. We will continue to provide JOBS Act updates and encourage you to contact us as JOBS Act interpretive issues arise.

Qualifying as an EGC and Exiting EGC Status

The JOBS Act defines an emerging growth company ("EGC") as a company that conducts an IPO after December 8, 2011 and had annual gross revenues of less than \$1 billion during its most recent fiscal year. A company will retain EGC status until the earliest of:

- the first fiscal year after its annual gross revenues reach \$1 billion;
- the last day of the fiscal year of the issuer following the fifth anniversary of its IPO;
- the date on which the company has, during the previous three-year period, issued more than \$1 billion in non-convertible debt; and
- the date on which the company becomes a "large accelerated filer."

The FAQs further clarify how these EGC entry and exit tests work.

- If a company preparing for its IPO had more than \$1 billion of revenues two years ago but less than \$1 billion of revenues in its most recent fiscal year, it may qualify as an EGC because the entry determination does not look beyond the company's revenues in the most recent fiscal year. (Question 22)
- If a company completes a transaction that results in it becoming a successor to another company's Exchange Act reporting obligations, the company will not qualify as an EGC if its predecessor did not qualify because the predecessor's IPO occurred prior to December 8, 2011. (Question 24)
- A company that has issued registered debt but not equity securities may qualify as an EGC if its annual gross revenues in its most recent fiscal year were less than \$1 billion and none of the other exit conditions have been met. (Question 29)
- A company that conducts an IPO as an EGC can't regain EGC status after losing it. (Question 32). This question does not appear to address whether an EGC that reports under the Exchange Act voluntarily or due to its issuance of non-equity securities may regain EGC status after losing it.
- When determining whether a company will exit EGC status based on its issuance of \$1 billion of non-convertible debt over the past three years, all non-convertible debt securities issued in the past three years should be counted towards the \$1 billion threshold, regardless of whether the securities are still outstanding. The staff will not, however, require issuers to double count debt securities issued in an A/B exchange offer to register debt previously issued on a private basis. (Question 18)
- For a company that loses its EGC status based on the exit test triggered by the fifth anniversary of its IPO, the last day of the fifth anniversary year will be the first day that the issuer is a considered a non-EGC. For example, if an issuer with a December 31 fiscal year-end first sold registered common stock on May 2, 2012, it would cease to be an emerging growth company no later than December 31, 2017. (Question 40) This company would be required to include a Section 404 auditor attestation report on its internal controls and provide more extensive

executive compensation disclosures, among other things, in its Form 10-K or Form 20-F for the year ended December 31, 2017, the fiscal year in which the fifth anniversary of its IPO occurs.

EGC Disclosure

As has been widely discussed, the JOBS Act relaxes the disclosure requirements for EGCs by allowing an EGC to limit the audited financial statements in its IPO registration statement to two years instead of three and to provide MD&A and selected financial data only for those years covered by audited financial statements. Subsequent registration statements are not required to include audited financial statements for any period prior to those periods presented in an EGC's IPO registration statement. An EGC may also provide reduced executive compensation disclosure.

The FAQs address certain ambiguities regarding the breadth of these streamlined disclosure requirements.

- An EGC that is required to disclose a ratio of earnings to fixed charges, generally necessary for the most recent five years and interim periods in debt registration statements, must only provide the ratio for those years that it provides selected financial data. (Question 27)
- An EGC must comply with XBRL requirements just like a non-EGC. (Question 28)
- Although the JOBS Act otherwise permits an EGC to present two years of audited financial statements in its IPO registration statement, a foreign private issuer that is filing its IPO registration as an EGC and is either: (1) a first-time adopter of IFRS or (2) required by paragraph 10(f) of IAS 1 to provide three statements of financial position due to a retrospective adjustment or a reclassification, must include three statements of financial position as required by IFRS under these circumstances. (Question 39)

Deferral of Compliance with New or Revised GAAP Accounting Pronouncements

The JOBS Act allows an EGC to defer compliance with "new or revised" GAAP accounting pronouncements applicable to public companies until the pronouncements are also applicable to private companies. Unlike other provisions of the JOBS Act, this deferral option is an all-or-nothing proposition, meaning an EGC must elect to defer compliance with all new or revised GAAP accounting pronouncements, or none. An EGC must disclose this election to the SEC staff in its first confidential submission or, if already filing publicly, in its next periodic report or registration statement.

In its most recent FAQs the staff further clarifies the parameters of this deferral option.

- For purposes of these deferral provisions, "new or revised" accounting standards refer 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. (Question 33)
- If an EGC initially decides not to defer compliance with new or revised accounting standards, or to "opt-in" to the new or revised standards, this decision is irrevocable. An EGC's initial decision to take advantage of the transition period, however, and defer compliance with all new or revised accounting standards, is revocable. If an EGC subsequently reverses course and elects to comply with all new or revised standards, this decision is irrevocable and must be disclosed in the EGC's next periodic report or registration statement filing. (Question 37)
- A foreign private issuer EGC that prepares its financial statements in its home country GAAP and provides a U.S. GAAP reconciliation may, for purposes of preparing its U.S. GAAP reconciliation, elect to defer compliance with new or revised U.S. GAAP accounting standards until they are also applicable to private companies. Like domestic EGCs, a foreign private issuer EGC's decision to forego this deferral period is irrevocable. (Question 34)

Confidential Submissions

The JOBS Act allows an EGC to submit its IPO registration statement confidentially, provided that the confidential submissions and related amendments are filed publicly at least 21 days before the EGC conducts a road show. The SEC staff has previously issued instructions and FAQs on confidential submissions. [Please follow this link](#) for the instructions. [Please follow this link](#) for the FAQs.

The staff has provided additional direction relating to the confidential submission process in its most recent FAQs.

- The staff confirms that comment and response letters exchanged between the staff and an EGC during the confidential submission process will be publicly released via EDGAR no earlier than 20 business days after the effectiveness of the related registration statement, as is standard for correspondence related to non-confidential submissions. An EGC that plans to seek permanent confidential treatment, through a Rule 83 request, of information contained in its confidential submissions must identify to the staff during the confidential submission process the information it intends to remain permanently confidential. This will allow the staff to take precautions when preparing comments that will eventually be made public. (Questions 25 & 26)
- The staff indicates that if an EGC discovers a material error in financial statements which it has submitted confidentially, and subsequently files an amendment to correct the error and disclose the restatement, the EGC must include the restatement disclosures in its financial statements until its financial statements are updated for the next annual period. This is consistent with the treatment of restatement disclosures in publicly filed financial statements. (Question 38)
- The staff acknowledges that an EGC that has not yet conducted an IPO 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. (Question 31)

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