

Merging onto the IPO On-Ramp

May 5, 2012

Title I to the JOBS Act has created a new category of issuers known as “emerging growth companies”. The category is introduced in a series of measures that are designed to reduce the regulatory burden on companies that wish to go public by making certain disclosure and other requirements inapplicable to them in the initial public offering process and for a limited period thereafter.

Emerging Growth Company

An “emerging growth company” is an issuer that has total annual gross revenues of less than \$1,000,000,000 during its most recently completed fiscal year.

An issuer loses its status as an emerging growth company on the last day of the fiscal year during which it had total annual gross revenues of \$1,000,000,000 or more or, if earlier, the last day of the fiscal year of the issuer following the fifth anniversary of the issuer’s initial public offering, the date on which the issuer has, during the previous three year period, issued more than \$1,000,000,000 in non-convertible debt, or the date on which the issuer is deemed to be a “large accelerated filer”.¹

Confidential Filing of Registration Statement

Any emerging growth company may submit a draft registration statement to the SEC for confidential review by the staff prior to public filing. The initial confidential submission and all amendments must be publicly filed with the SEC not later than 21 days before the date on which the issuer conducts a road show.

Testing the Waters

An emerging growth company may communicate with potential investors that are qualified institutional buyers or institutions that are accredited investors to gauge their interest in the contemplated offering, both prior to and following the date of filing of its registration statement with the SEC.

¹ A company that had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of its most recently completed second fiscal quarter.

Research Analyst Reports

Research reports published or distributed by brokers and dealers about an emerging growth company are exempted from the definition of an “offer” of securities under the Securities Act, even if the broker or dealer is participating in the offering. Rules that restrict brokers and dealers from publishing or distributing research reports during the post-IPO quiet periods and lock-up windows do not apply.

Financial Disclosures

An emerging growth company is required to present only two years (rather than three) of audited financial statements in its initial public offering prospectus.

An emerging growth company is not required;

- to present in any registration statement or report selected financial data for any period prior to the earliest audited period presented in connection with its initial public offering;
- to comply with any new or revised accounting standards until those standards are applicable to private companies; or
- to comply with the requirement to retain an outside auditor to attest to the company's internal control over financial reporting.

Scaled Back Executive Compensation Disclosures

An emerging growth company is exempt for a limited period after its initial public offering from certain of the executive compensation disclosure rules that require:

- ‘say-on-pay” votes on executive compensation and golden parachute compensation and
- disclosure of pay-for-performance information and the ratio of CEO compensation to median employee compensation

An emerging growth company may comply with the smaller reporting company executive compensation disclosure rules that do not require the inclusion of a Compensation Discussion and Analysis section and certain compensation tables in the proxy statement.



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