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PUBLIC COMPANIES AND CAPITAL FORMATION GROUP


## JOBS ACT COVERAGE

APRIL 2012 NUMBER FOUR

### JOBS Act Provides IPO "On-Ramp" For Emerging Growth Companies

The new JOBS Act (Jumpstart Our Business Startups Act), a package of bills aimed at providing easier access to capital for new and emerging companies, was signed into law by President Obama. Although the "crowd-funding" provisions of the JOBS Act have been widely reported, one of the more helpful capital-raising provisions of the JOBS Act may prove to be the so-called "on-ramp" provisions designed to allow easier access to the IPO market for emerging growth companies (EGCs), private companies with total annual gross revenues of less than $1 billion in their last fiscal year. Title I of the JOBS Act, which is effective now, reduces the disclosure, reporting and regulatory burdens under federal securities that would otherwise apply to an EGC in the registration process and for a transition period of up to five years thereafter.

On April 16, 2012, the SEC published Jumpstart Our Business Startups Act Frequently Asked Questions to address issues arising under Title I.

The relaxed requirements applicable to EGCs under Title I include the following:

***"Test the Waters" Communications.*** EGCs may engage in "test the waters" communications, either before or after the filing of a registration statement, with qualified institutional buyers and accredited investors, as defined by the SEC, to determine whether such investors have an interest in a contemplated registered offering. Traditionally, such activities were prohibited as "gun-jumping" under federal securities laws.

***Confidential SEC Filing.*** An EGC may file the registration statement and amendments for its IPO on a confidential basis with the SEC, provided that the registration statement and all other submissions are publicly filed with the SEC at least 21 days before the start of the road show. This would allow an EGC to resolve any accounting or disclosure issues that arise in the SEC review process without public scrutiny.

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JOBS Act Provides IPO "On-Ramp" For Emerging Growth Companies (continued from page 1)

***Reduced Audited Financial Statement Requirements.*** Under Title I, as clarified by the FAQs:

- in an IPO registration statement, EGCs are permitted to provide only two years of audited financial statements (instead of three years which are now generally required) and to provide selected financial data only as far back as the earliest audited period presented (instead of five years); and
- in subsequent registration statements, EGCs would not be required to present full audited or selected financial statements for any period prior to the earliest period presented in the IPO registration statement.

***Compliance with New Accounting Pronouncements and Rules.*** EGCs may not be required to comply with any new or revised financial accounting standards until private (non-reporting) companies are required to comply. Further, any rules adopted in the future by the PCAOB requiring auditor rotation or an auditor's discussion and analysis would not apply to an EGC and any other new PCAOB rules would not apply unless the SEC determines that it is necessary or appropriate in the public interest, considering the protection of investors and whether the action will promote efficiency, competition and capital formation.

***No Internal Control Attestation by Auditor.*** EGCs are excused from having to provide the costly internal control attestation by the independent auditor required by Section 404(b) of the Sarbanes-Oxley Act.

***Reduced Executive Compensation Disclosures.*** EGCs are permitted to provide the same reduced executive compensation disclosures in their registration statements and proxy statements that smaller reporting companies are currently permitted to provide. Generally, this means that EGCs will not be required to provide the compensation discussion and analysis and will only be required to provide limited compensation data for three executive officers (instead of five) for two years (instead of three).

***No Say on Pay Votes.*** EGCs are excused from having to provide a "say on pay," "say on frequency" and "say on golden parachute" votes to their shareholders.

***Relaxation of Rules Applicable to Brokers.*** Title I permits brokers to publish research reports about an EGC during a proposed public offering, even if that broker is participating in the offering. Further, the law relaxes restrictions on communications involving securities analysts in the initial public offering of an EGC.

***EGC Status.*** The FAQs clarify that the $1 billion "total annual gross revenues" is based on the company's total revenues as presented on its income statement under GAAP (or IFRS if used by a foreign private issuer). A company that sold common equity under a registration statement on or prior to December 8, 2011 is not eligible for EGC status. The FAQs note that this includes primary sales of equity by the company as well as sales to employees on Form S-8 or sales by a selling shareholder under a resale registration statement.

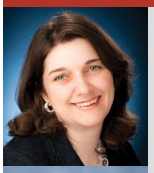
A company that is an EGC will retain that status until the earliest of:

- the last day of the fiscal year in which the company has annual gross revenues of $1 billion or more;
- the last day of the fiscal year following the fifth anniversary of the company's IPO;
- the date on which the company has issued more than $1 billion in non-convertible debt during the previous three-year period (the FAQs clarify that this is a rolling three year period and that "non-convertible debt" means any non-convertible security that constitutes indebtedness, whether issued in a registered offering or not); and
- the date that the company became a "large accelerated filer" with a public float of $700 million or more.

As noted above, Title I is effective now. The SEC will need to amend its rules and forms to reflect the changes effected by Title I; however, the FAQs note that the provisions of Title I supersede, in relevant part, conflicting rules and regulations.

The effect of Title I should be to make "going public" a more attractive option to entrepreneurs seeking to raise capital or obtain liquidity by reducing the costs, burdens and disclosures involved in the registration and reporting process. ■

**This newsletter was authored by:**

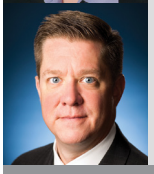


**Yelena M. Barychev**
215.569.5737
Barychev@BlankRome.com

**Christin R. Cerullo**
215.569.5744
Cerullo@BlankRome.com

**Francis E. Dehel**
215.569.5532
Dehel@BlankRome.com

**Melissa Palat Murawsky**
215.569.5732
Murawsky@BlankRome.com



**Michael E. Plunkett**
215.569.5471
Plunkett@BlankRome.com

The authors wish to acknowledge the assistance of Molly Crane, an associate of Blank Rome.

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## Confidential Submission of Draft Registration Statements

The SEC issued guidance on procedures for confidential submissions of draft registration statements under the JOBS Act on April 5, 2012, the same date on which the JOBS Act was enacted. On April 10, 2012, the SEC issued Frequently Asked Questions regarding Confidential Submission Process for Emerging Growth Companies providing additional guidance on issues related to the confidential submission of registration statements for review pursuant to the JOBS Act.

Section 106(a) of the JOBS Act, effective upon signing, provides that an EGC, "prior to its initial public offering date, may confidentially submit to the Commission a draft registration statement, for confidential non-public review by the staff, … provided that the initial confidential submission and all amendments thereto shall be publicly filed with the Commission not later than 21 days before the date on which the issuer conducts a road show[1]."

***What Constitutes the Initial Public Offering Date?*** Section 101(c) of the JOBS Act defines the term "initial public offering date" as the "date of the first sale of common equity securities of an issuer pursuant to an effective registration statement under the Securities Act of 1933." The phrase "date of the first sale" covers not only the date of a company's initial primary offering of common equity securities for cash, but also other offerings of common stock (for example, an offering of common equity pursuant to an employee benefit plan registered on a Form S-8 as well as a selling shareholder's secondary offering registered on a resale registration statement). In addition, a company that has registered sales of securities other than common equity under the Securities Act can also qualify to use the confidential submission process as long as it otherwise qualifies as an EGC.

***What Should Be Included in the Draft Registration Statement?*** A draft registration statement need not be signed or include the consent of auditors and other experts. In addition, as in publicly filed registration statements, an EGC may omit certain limited information from its initial submissions, such as the public offering price or other offering-related information. However, the SEC expects draft registration statements to be substantially complete at the time of initial submission, including a signed audit report of the registered public accounting firm covering the fiscal years presented in the registration statement and exhibits. The staff will defer review of any draft registration statement that is materially deficient when confidentially submitted.

***When Should the Registration Fee Be Paid?*** The filing fee is due when the registration statement is first filed publicly on EDGAR, not with the submission of a confidential draft registration statement.

***How to Calculate 21 Days Before the Road Show?*** In a traditional underwritten public offering, the road show would usually start when the EGC and underwriters begin actively marketing the offering. In that case, the company should estimate when it expects to begin the road show and publicly file its confidential submissions at least 21 days before that date. The SEC indicated that it would be helpful if the company kept the SEC staff informed about the company's expected road show schedule.

If the company engages in test-the-waters communications[2] before a registration statement is filed, the SEC will not object if an EGC does not treat such test-the-waters communications as a road show for purposes of calculating the 21 day period. If the EGC does not conduct a traditional road show and does not engage in activities that would come within the definition of road show, other than test-the-waters communications, then its registration statement and confidential submissions should be filed publicly on EDGAR no later than 21 days before the anticipated date of effectiveness of the registration statement. If the EGC does not conduct a traditional road show, but will have communications that would come within the definition of road show and do not meet the conditions for test-the-waters communications (for example, the company holds an investor meeting to market the offering that is not limited to QIBs or institutional accredited investors), then the registration statement would need to be filed at least 21 days before those communications.

***How to File Information Previously Submitted Confidentially on EDGAR?*** For now, previously submitted confidential draft registration statements should be filed as exhibits to the first registration statement filed on EDGAR, with each confidential submission filed as a separate Exhibit 99. The first filed registration statement should be complete, including signatures, signed audit reports, consents, exhibits and filing fees.

***Emerging Growth Company—Transition Issues.*** If an EGC is eligible to submit its registration statement on a confidential basis, the SEC will not object if a company that was in registration at the time of enactment of the JOBS Act switches to the confidential submission process for future amendments rather than withdrawing the registration statement and confidentially submitting a new draft registration statement for confidential review. A company should contact its review team to coordinate the process if it would like to make this switch.

***Submissions by Foreign Private Issuers.*** Foreign private issuers eligible to submit draft registration statements as EGCs or eligible to follow the Division of Corporation Finance policy on Non-Public Submissions from Foreign Private Issuers must submit their draft registration statements in the same format and to the same address as EGCs (see Procedures for Confidential Submissions below). The e-mail address previously available for confidential registration statement submis-

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## JOBS ACT COVERAGE

Confidential Submission of Draft Registration Statements (continued from page 3)

sions by foreign private issuers is no longer active. In December 2011, the Division revised its policy with respect to the non-public submission of initial registration statements by foreign private issuers by making such non-public submissions available only to a limited number of issuers.[3] The JOBS Act has significantly expanded the ability of foreign private issuers to submit their initial registration statements on a confidential basis by extending this benefit to foreign private issuers that qualify as an EGC.

***Procedures for Confidential Submissions.*** The SEC is in the process of implementing a system that provides for electronic transmission and receipt of confidential submissions. In the meantime, draft registration statements should be submitted in a text searchable PDF file on a CD/DVD. Alternatively, registration statements may be submitted in paper (not stapled or bound). The registration statement should be accompanied by a transmittal letter in which the company should confirm its EGC status. A copy of the confidential draft registration statement should be sent to:

Draft Registration Statement
U.S. Securities and Exchange SEC
100 F Street, N.E.
Washington, D.C. 20549

Questions about the draft registration statement submission and review process should be directed to (202) 551-5867. If a company submits a draft registration statement, the SEC will contact it to confirm receipt and advise the company of the office to which the registration statement is assigned for review. ■

### SEC Issues FAQs on Exchange Act Registration and Deregistration

The JOBS Act amends Sections 12(g) and 15(d) of the Exchange Act to increase the record holder threshold at which issuers must register under the Exchange Act from 500 persons, (i) to 2,000 persons, or 500 persons who are not accredited investors, for any company other than a bank or a bank holding company and, (ii) to 2,000 persons for a bank or bank holding company. On April 11, 2012, the Division of Corporation Finance issued Frequently Asked Questions Regarding Changes to the Requirements for Exchange Act Registration and Deregistration which address questions related to the changes imposed by the JOBS Act.

***Effect on Obligation of Issuers to Register.*** If the issuer (other than a bank holding company) triggered a Section 12(g) reporting obligation for a class of securities as of a fiscal year-end prior to April 5, 2012, but would not trigger such obligation under the amended rule, and the issuer has not yet registered that security under Section 12(g), then the issuer would no longer be subject to the registration obligation with respect to that security. If the issuer (other than a bank holding company) has not filed an Exchange Act registration statement, it is no longer required to do so.

A bank holding company will have a Section 12(g) 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. Therefore, the SEC considers the effect of this amended 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.

If the issuer (including a bank holding company) 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 (including a bank holding company) has already registered a class of equity securities under Section 12(g), it would need to continue that registration unless it is eligible to deregister under Section 12(g) or current rules.

***Termination of Registration under Section 12(g) of a Class of Equity Securities of a Bank Holding Company.*** If a class of equity security is held of record by less than 1,200 persons, the 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 new rules. Therefore, the issuer should include an explanatory note in its Form 15 which explains that it is relying on Section 12(g)(4) to terminate its duty to file reports with respect to that security. Until the registration is terminated 90 days after filing of the Form 15,

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## SEC NEWS

### SEC Issues Guidance on MD&A and Accounting Policy Disclosure of Smaller Financial Institutions

On April 20, 2012, the SEC issued CF Disclosure Guidance: Topic No. 5, providing examples of comments it may issue to smaller financial institutions on Management's Discussion and Analysis and accounting policy disclosures related to asset quality and loan accounting issues (for example, allowance for loan losses, charge-off and nonaccrual policies, commercial real estate loans, loans measured for impairment based on collateral value, credit risk concentrations, troubled debt restructurings and modifications, and other real estate owned). In addition, the SEC provided examples of comments that may be issued to companies that acquired material assets in FDIC – Assisted Transactions. ■

### SEC Starts Posting Its Orders Revoking Exchange Act Registration and Stop Orders on EDGAR

On April 19, 2012, the SEC began to republish through the EDGAR system its orders revoking a company's Exchange Act registration pursuant to Exchange Act Section 12(j) and SEC stop orders pursuant to Securities Act Section 8. Previously, such orders were posted on the SEC web site, but they were not part of the EDGAR database. The SEC began republishing most recently issued orders first going back to orders


issued in 2004, and will be publishing new orders as they are issued. The order revoking Exchange Act registration appear as the document type "REVOKED," and stop orders appear as the document type

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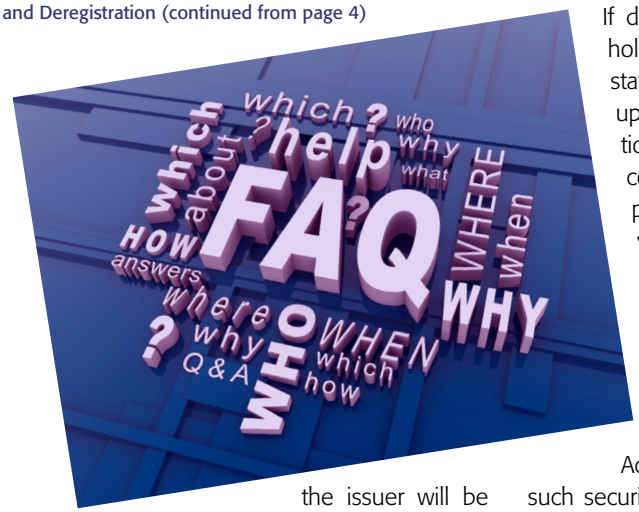
## JOBS ACT COVERAGE

SEC Issues FAQs on Exchange Act Registration and Deregistration (continued from page 4)




the issuer will be required to file all reports under Sections 13(a), 14, and 16 of the Exchange Act. A bank holding company may apply for immediate suspension of its Section 13(a) reporting obligations, effective upon the filing of a Form 15, if it meets all the requirements of Rule 12g-4. Rule 12g-4 has not yet been amended to incorporate the new 1,200 holder deregistration threshold.

***Suspension of Reporting Obligations under Section 15(d) by Bank Holding Companies.*** For the current fiscal year, a bank holding company can suspend its obligation to file reports under Section 15(d) with respect to a class of securities that was sold pursuant to a Securities Act registration statement and that was held of record by less than 1,200 persons as of the first day of the current fiscal year. Such suspension would be deemed to have occurred as of the beginning of the fiscal year. 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 such bank holding company will have a Section 15(d) reporting obligation for the current fiscal year. However, if the bank holding company (i) has a security held of record by less than 1,200 persons as of the first day of the current fiscal year, (ii) has a registration statement that is updated pursuant to Section 10(a)(3) of the Securities Act, and (iii) did not make any sales of such security under such registration statement during the current fiscal year, then the bank holding company may be eligible to seek no-action relief to suspend its Section 15(d) reporting obligations. Such issuers should contact the Office of Chief Counsel for the Division of Corporation Finance for further information.

***"Held of Record" Definition.*** Section 503 of the JOBS Act requires the SEC to revise the definition of "held of record" to exclude, from the holder of record calculation, persons who received the securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act. The FAQs provide that as of April 5, 2012, issuers, including bank holding companies, may exclude such persons, whether or not the person is a current employee of the issuer, from its holder of record calculation. ■

## INVESTMENT ADVISER REGULATION

### SEC Staff Denies No-Action Request Related to the Family Office Exemption

The Staff of the SEC's Division of Investment Management recently issued a no-action letter related to the family office exemption from registration under the Investment Advisers Act of 1940. Under the Advisers Act, family offices need not register so long as the family office (i) gives investment advice only to "family clients;" (ii) is wholly-owned by family clients and exclusively controlled by family members and/or family entities; and (iii) does not hold itself out to the public as an investment adviser.

In the no-action letter, Peter Adamson III proposed to provide investment advisory services as a key employee, director, partner, manager or trustee in up to ten family offices, each representing a separate and distinct family. Mr. Adamson's no-action request stated that nothing in the rule exempting family offices suggests that an adviser in a family office must act exclusively for only one family office. Mr. Adamson requested confirmation that the Staff would not recommend any enforcement action against Mr. Adamson if he provided investment advisory services to family clients of multiple family offices.

The Staff denied Mr. Adamson's request and explained that Mr. Adamson had failed to demonstrate or explain how the proposed arrangement does not create a multi-family office, which, according to the adopting release establishing the family office exemption, could not rely on the family office exemption. Specifically, the Staff cited footnote 114 of the adopting release which provided "if several unrelated families established separate family offices staffed with the same or substantially the same employees, such employees would be managing a de facto multifamily office, such that the family offices could not rely on the exclusion." ■

## SEC NEWS

SEC Starts Posting Its Orders Revoking Exchange Act Registration and Stop Orders on EDGAR (continued from page 4)

"STOP ORDER," in the company's filing history. In addition, when the SEC republishes its order revoking Exchange Act registration on EDGAR, it will also modify the company information at the top of a company's EDGAR search results to include the phrase "This company's Exchange Act registration has been revoked." As a result of this change, information about the status of the company's Exchange Act registration or existence of stop orders suspending the effectiveness of a Securities Act registration statement will be much more transparent and easier to search. ■

### SEC Forms Investment Advisory Committee

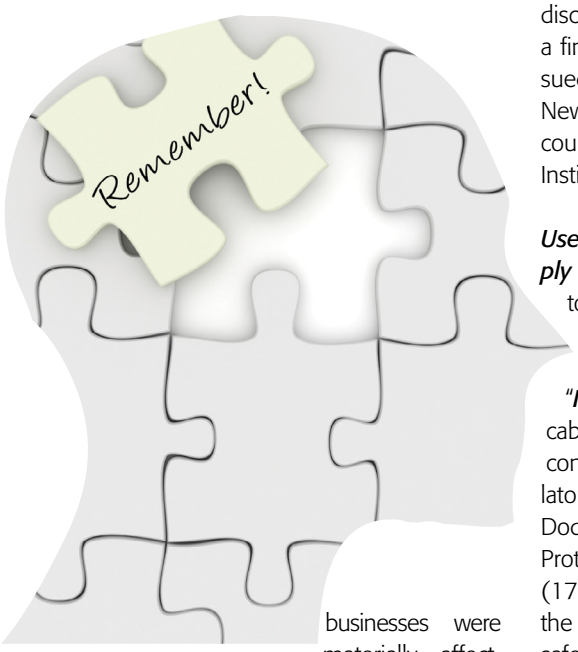
As required under the Dodd–Frank Wall Street Reform and Consumer Protection Act on April 9, 2012, the SEC formed a new investment advisory committee consisting of 21 members. This committee will advise the SEC on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, and on initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace. The committee will submit its findings and make recommendations for review and consideration by the SEC.

Members of the committee were nominated by all five sitting Commissioners of the SEC and represent a wide variety of interests, including senior citizens and other individual investors, mutual funds, pension funds, and state securities regulators. ■

## PRACTICE TIPS

### Quarterly Report on Form 10-Q—a Few Reminders

***Review SEC Guidelines for Form 10-Q Disclosures.*** Previously, the SEC issued two disclosure guidelines affecting companies' Form 10-Q disclosures: guidance on cybersecurity risks and exposures to European sovereign debt. Recently, public companies evaluated whether their




businesses were materially affected by cybersecurity risks or exposure to European debt in connection with the preparation of Form 10-K. However, these issues should be reevaluated in connection with the Form 10-Q filing because they can affect a company's disclosures in its Form 10-Q "Risk Factors" and "Management's Discussion and Analysis of Financial Condition and Results of Operations" sections, as well as its notes to financial statements and disclosure controls and procedures. In addition, a financial company needs to review recently issued Disclosure Guidance: Topic No. 5. See "SEC News—SEC Issues Guidance on MD&A and Accounting Policy Disclosure of Smaller Financial Institutions."

***Use Correct Headings in Form 10-Q and Comply with Mine Safety Disclosure Rules.*** Similar to Form 10-K, Form 10-Q now includes a new Item 4 in Part II:

"***Item 4. Mine Safety Disclosures.*** If applicable, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Item 104 of Regulation S-K (17 CFR 229.104) is included in exhibit 95 to the quarterly report." Although the new mine safety disclosure applies only to a "registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine" and may not apply to your company, check the table of contents of Form 10-Q to make sure that Item 4 of Part II states "Mine Safety Disclosures," not "(Removed and Reserved)."

***Evaluate Whether New Risk Factor Disclosure Is Necessary.*** Companies need to review risk factors included in Form 10-K and evaluate whether any material changes to previously disclosed risk factors are necessary due to new developments in the company's business or otherwise. Companies should also evaluate whether they face new material risks that did not exist at the time of filing Form 10-K and that should be disclosed in Form 10-Q (smaller reporting companies are not required to provide risk factor disclosure in Form 10-Q or 10-K).

***Count Shares Withheld to Pay Taxes Due Upon Vesting of Restricted Stock as Stock Repurchases.*** The SEC takes the position that withholding shares by the company in order to pay taxes due upon vesting of restricted stock should be disclosed under Item 703 "Purchases of Equity Securities by the Issuer and Affiliated Purchasers" of Regulation S-K because it involves delivery of already outstanding shares in payment of a tax obligation. Check whether shares were withheld in connection with the vesting of restricted stock granted under equity plans or otherwise to make sure that tabular disclosure required under Item 703 is included in Form 10-Q. ■

## SEC COMMENT LETTER TRENDS

### Management's Discussion and Analysis—Critical Accounting Policies

In a number of recent comment letters, the SEC has focused on companies' discussions of their critical accounting policies in Management's Discussion and Analysis of Financial Conditions and Results of Operations.

For example, in a comment letter addressed to an internet-based marketing services provider, the SEC staff noted that the company's discussion of critical accounting policies appeared to be an almost verbatim copy of the accounting policies disclosed in the notes to financial statements and that the discussion in the MD&A should "supplement, not duplicate," the descriptions in the notes. The SEC directed that the disclosures regarding critical accounting policies in the MD&A provide, "as necessary," greater insight into the quality and variability of information in the consolidated financial statements; address specifically why the accounting estimates or assumptions may change; and analyze the factors relating to how the company arrived at its estimates; and provide a sensitivity analysis. Given the SEC's comments, it may be prudent for companies to review their discussion of critical accounting policies in the MD&A to determine whether additional disclosure is warranted.

The SEC also continues to focus on revenue recognition policies. Recent comment letters included questions related to recognition of revenue on the percentage-of-completion basis and in connection with contracts where there are both goods and services delivered. In addition, the SEC also questioned a company about its policy of recognizing revenue with respect to "new" products only when the product is formally accepted by the customer and with respect to "established" products upon delivery of the product. The company explained that a new product becomes an established product if the installation process and the post-delivery acceptance provisions have become routine, and there is a demonstrated history of the product meeting specifications.

### SEC Continues to Question Fracking

The SEC continues to question oil and gas companies' disclosures about the risks involved with hydraulic fracturing[4] Most recently, the SEC's comments have focused on what it perceives as potential operational and financial risks, such as possible underground migration or surface spillage. The SEC has also continued to seek additional disclosure regarding insurance coverage for accidents and environmental liabilities associated with hydraulic fracturing. In responding to the SEC comments, issuers tend to assert that they are not subject to material risks with respect to their hydraulic fracturing activities, but, nonetheless, agree to enhance disclosures in later filings.

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## SEC COMMENT LETTER TRENDS (continued)

### Earnings Conference Calls and Press Releases

From time to time, the SEC will tie comments to a company's SEC filings to information disclosed in the company's quarterly earnings conference calls or press releases. To the extent that a company's earnings conference calls or press releases disclose information that *may* be material, but that is not included in its periodic reports, it may receive an SEC comment asking why the information was not included in the 10-K or 10-Q. For example, in a recent comment letter, the SEC noted that an issuer discussed its decision to exit a particular line of business in its earnings call, but did not mention that decision in its most recent filing with the SEC. In practice, companies should ensure that material information they intend to disclose via a press release or conference call is appropriately reflected in the periodic report. ■

## LEGISLATIVE CORNER

### STOCK Act Signed into Law

On April 4, 2012, President Obama signed the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act) into law. While the STOCK Act's provisions aimed at precluding members of Congress and other government officials from trading on the basis of material non-public information derived from their government positions or from the performance of their official responsibilities have received the most attention, the STOCK Act is much broader in scope.

- Section 12 of the STOCK Act, which adds new subsection (i) to Section 12A of the Exchange Act, prohibits individuals subject to the Ethics in Government Act of 1978 (Ethics Act) from purchasing securities that are the subject of an initial public offering in any manner other than is available to members of the public generally. "Available to members of the public generally" is not defined. As it is often very difficult for members of the general public to obtain shares in "hot" IPOs (such as the anticipated Facebook IPO), it will be interesting to see how availability to the general public is interpreted.
- Section 13 of the STOCK Act revised Section 102(a)(4)(A) of the Ethics Act to require certain members of the federal government, including the President, Vice President, members of Congress and, subject to a host of exceptions, persons who have been nominated for appointment as an officer or employee of the executive branch, to report mortgage debt on personal residences.
- Section 17 of the STOCK Act provides that all individuals subject to the reporting obligation of the Ethics Act are prohibited form directly negotiating or having any agreement of future employment of compensation, unless the individual files with the appropriate supervising government ethics office a statement regarding such negotiations or agreement within three days after the commencement of the agreement or negotiations. The statement must include the name(s) of the other party or parties involved.

In addition, the STOCK Act may expose those interacting with governmental officials to potential liability for insider trading. The STOCK Act provides that specified members and employees of the federal government owe an affirmative duty of trust and confidence to U.S. citizens, among others, regarding material non-public information derived from the performance of their official responsibilities. As such, if a person receives any material information from a member or employee of the federal government subject to the STOCK Act on a confidential basis, that information may not be used to trade in securities until the information is public or no longer material. As such, trading on the basis of any information gained from any member or employee of the federal government, unless it has been publicly disclosed or is clearly not material, potentially gives rise to liability. ■

## ENDNOTES

1. Securities Act Rule 433(h)(4) defines the term "road show" as "an offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the issuer's management … and includes discussion of one or more of the issuer, such management, and the securities being offered.
2. Test-the-waters communications are limited to communications with QIBs and institutional accredited investors.
3. Non-public submissions by a foreign private issuer that is not an EGC are available only to: (1) a foreign government registering its debt securities; (2) a foreign private issuer that is listed or is concurrently listing its securities on a non-U.S. securities exchange; (3) a foreign private issuer that is being privatized by a foreign government; or (4) a foreign private issuer that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.
4. In our September, 2011 issue we reported that the SEC decided to become involved in the public debate about hydraulic fracturing (also known as fracking) through the comment letter process. Hydraulic fracturing is a technique that has been used in the oil and gas industry for decades. Recently, oil and gas companies have been using the technique more extensively in connection with horizontal drilling to allow the extraction of natural gas from the Marcellus Shale and other shale formations in the United States.


QUESTIONS: If you have a question regarding the issues raised in this newsletter, you may obtain additional guidance from the authors and other members of our Public Companies Group.

PHILADELPHIA

Yelena Barychev
215.569.5737 • Barychev@BlankRome.com

Christin R. Cerullo
215.569.5744 • Cerullo@BlankRome.com

Frank E. Dehel
215.569.5532 • Dehel@BlankRome.com

Barry H. Genkin
215.569.5514 • Genkin@BlankRome.com

Timothy French
215.569.5394 • French-T@BlankRome.com

Alan H. Lieblich
215.569.5693 • Lieblich@BlankRome.com

Frederick D. Lipman
215.569.5518 • Lipman@BlankRome.com

Richard J. McMahon
215.569.5554 • McMahon@BlankRome.com

Arthur H. Miller
215.569.5544 • AMiller@BlankRome.com

Melissa Palat Murawsky
215.569.5732 • Murawsky@BlankRome.com

Michael E. Plunkett
215.569.5471 • Plunkett@BlankRome.com

Mary Stokes
215.569.5530 • Stokes@BlankRome.com

Josh Strober
215.569.5491 • Strober@BlankRome.com

Larry R. Wiseman
215.569.5549 • Wiseman@blankrome.com

NEW YORK

Kathleen A. Cunningham
212.885.5175 • KCunningham@BlankRome.com

Richard DiStefano
212.885.5372 • RDistefano@BlankRome.com

Pamela E. Flaherty
212.885.5174 • PFlaherty@BlankRome.com

Eliezer M. Helfgott
212.885.5431 • EHelfgott@BlankRome.com

Robert J. Mittman
212.885.5555 • RMittman@BlankRome.com

Brad L. Shiffman
212.885.5442 • BShiffman@BlankRome.com

Jeffrey N. Siegel
212.885.5173 • JSiegel@BlankRome.com

Kristina Trauger
212.885.5339 • KTrauger@BlankRome.com

Thomas R. Westle
212.885.5239 • TWestle@BlankRome.com

WASHINGTON, D.C.

Dawn M. Bernd-Schulz
202.772.5946 • DBernd.Schulz@BlankRome.com

Edward L. Lublin
202.772.5933 • Lublin@BlankRome.com

LOS ANGELES

Dennis P. Codon
424.239.3441 • Codon@BlankRome.com

SHANGHAI

Scott C. Klein
+86.21.2089.3203 • SKlein@BlankRome.com

Jeffrey A. Rinde
+86.21.2089.3206 • JRinde@BlankRome.com