

Memorandum

SEC Adopts Technical Amendments to Conform Rules to JOBS Act Provisions and Inflation-Adjusted Thresholds for Emerging Growth Companies and Regulation Crowdfunding

April 21, 2017

On March 31, 2017, the Securities and Exchange Commission (“SEC”) adopted technical amendments to conform certain rules and forms to modifications made by the Jumpstart Our Business Startups Act (“JOBS Act”) to the Securities Act of 1933 (“Securities Act”) and the Securities Exchange Act of 1934 (“Exchange Act”). In addition, the SEC adopted amendments, to adjust for inflation (1) the annual gross revenue amount used to determine “emerging growth company” (“EGC”) status and (2) the amounts and thresholds included in Regulation Crowdfunding.¹ These amendments took effect on April 12, 2017.

The SEC’s technical amendments impact even those issuers that are not EGCs, as they require modifications to the cover pages of Securities Act registration statements and Exchange Act periodic reports filed by all issuers.

I. Technical Amendments to Align Rules with JOBS Act Provisions

Title I of the JOBS Act “amended the Securities Act and the Exchange Act to provide several exemptions from a number of shareholder voting, disclosure and other regulatory requirements for an issuer that qualifies as” an EGC. While these amendments were self-executing and went into effect as soon as the JOBS Act was signed into law, some of the SEC’s rules and forms for registration under the Securities Act and the Exchange Act, along with Exchange Act periodic and current reports, Regulation S-K and Regulation S-X, did not reflect these JOBS Act provisions. The SEC’s technical amendments are designed to correct these discrepancies.

¹ See [Inflation Adjustments and Other Technical Amendments Under Title I and III of the JOBS Act](#), Release No. 33-10332, 34-80355; File No. S7-09-16 (Mar. 31, 2017).

The below chart summarizes the technical amendments adopted by the SEC.

Topic	JOBS Act Accomodation for EGCs	SEC’s Technical Amendment(s)
Scaled Disclosure Requirements for EGCs’ Financial Disclosures – Securities Act Registration Statements	<p>The JOBS Act amended Section 7(a) of the Securities Act to provide that:</p> <ul style="list-style-type: none"> • an EGC may present only two years of audited financial statements in its IPO registration statement; and • in “any Securities Act registration statement other than its IPO registration statement, an EGC need not present selected financial data under Item 301 of Regulation S-K for any period prior to the earliest audited period presented in its IPO registration statement.” 	<p>The SEC adopted amendments to:</p> <ul style="list-style-type: none"> • Rule 3-02 of Regulation S-X and Form 20-F to conform them to amended Section 7(a) of the Securities Act; and • Item 301 of Regulation S-K to reflect the SEC’s interpretation that the phrase “any other registration statement” in amended Section 7(a) means that an EGC “need not present selected financial data for any period prior to the earliest audited period presented in its IPO registration statement.”
Scaled Disclosure Requirements for EGCs’ Financial Disclosures – Exchange Act Registration Statements and Periodic Reports	<p>The JOBS Act amended Section 13(a) of the Exchange Act to provide that “an EGC need not present selected financial data in an Exchange Act registration statement or periodic report for any period prior to the earliest audited period presented in the EGC’s first effective registration statement under either the Exchange Act or Securities Act.”</p>	<p>The SEC adopted amendments to Item 301 of Regulation S-K to conform with amended Section 13(a).</p>
Scaled Disclosure Requirements for EGCs’ Financial Disclosures – Management Discussion and Analysis (“MD&A”) Disclosure	<p>Under the JOBS Act, “an EGC is permitted to comply with the MD&A requirements of Item 303(a) of Regulation S-K by providing disclosure covering only the audited financial statements for each period that Section 7(a) of the Securities Act requires to be presented in its IPO registration statement.”</p>	<p>The SEC adopted amendments to Instruction 1 to Item 303(a) of Regulation S-K to specify that “if an EGC, pursuant to Section 7(a) of the Securities Act, provides audited financial statements for two years in a Securities Act registration statement for the initial public offering of its common equity securities, it may provide the discussion required by Item 303(a) for its two most recent fiscal years.”</p>

Topic	JOBS Act Accomodation for EGCs	SEC’s Technical Amendment(s)
Auditor Attestation of Management’s Report on Internal Control Over Financial Reporting (“ICFR”)	While an EGC is required to establish and maintain ICFR and, when applicable, to include management’s report on ICFR in its annual report, under the JOBS Act, the auditor of an EGC need not attest to and report on management’s effectiveness of the company’s ICFR.	The SEC adopted amendments to Article 2-02 of Regulation S-X , Item 308 of Regulation S-K , and Forms 20-F and 40-F to specify that the auditor of an EGC is not required to attest to and report on management’s report on ICFR, nor does management need to include an auditor’s attestation report on ICFR in its annual report.
Executive Compensation Disclosure	The JOBS Act allows EGCs to provide executive compensation disclosure pursuant to Item 402 of Regulation S-K to the same extent as a smaller reporting company. Under Item 402(l) of Regulation S-K, a smaller reporting company may provide the scaled executive compensation disclosures provided in Items 402(m)-(r) of Regulation S-K.	The SEC amended Item 402(l) of Regulation S-K to state that EGCs may provide the scaled executive compensation disclosure in Items 402(m)-(r) of Regulation S-K.
Shareholder Advisory Votes on Executive Compensation	The JOBS Act amended Section 14A of the Exchange Act to: <ul style="list-style-type: none"> • exempt EGCs from say-on-pay, say-on-frequency and golden parachute compensation votes, as well as related disclosure requirements; and • provide for a transition period when an EGC exits EGC status before it must seek an advisory say-on-pay vote from shareholders. 	The SEC: <ul style="list-style-type: none"> • amended Exchange Act Rule 14a-21 and Item 402(t) and Instruction 1 to Item 1011(b) of Regulation S-K to indicate that “an EGC is not required to conduct shareholder advisory votes on say-on-pay, say-on-frequency, and golden parachute compensation, or provide the related disclosures”; and • added “a new instruction to Rule 14a-21 to reflect the transition period set forth in the JOBS Act.”

Topic	JOBS Act Accomodation for EGCs	SEC’s Technical Amendment(s)
Foreign Private Issuers	<p>The JOBS Act’s definition of “emerging growth company” applies regardless of “the jurisdiction of incorporation or organization, the holders of the issuer’s voting securities or that of its executive officers or directors, assets or business operations.” Thus, foreign private issuers that meet the relevant criteria can qualify as EGCs. Sections 102 and 103 of the JOBS Act, which provide the scaled disclosure requirements for EGCs discussed above, however, “refer to Regulation S-K provisions that apply to domestic issuers, whereas the corresponding disclosure requirements for foreign private issuers are applied through the disclosure content of” Form 20-F or Form 40-F.</p>	<p>The SEC amended:</p> <ul style="list-style-type: none"> • Form 20-F to add instructions to Items 8.A. and 3.A. “to reflect the availability of the scaled financial disclosure requirements under Sections 102 and 103 of the JOBS Act to a foreign private issuer that is an EGC”; and • Form 40-F “to reflect the availability of the scaled financial disclosure requirements under Section 103 of the JOBS Act to a foreign private issuer that is an EGC.”
Compliance with New or Revised Accounting Standards	<p>The JOBS Act amended Section 7(a)(2)(B) of the Securities Act and Section 13(a) of the Exchange Act to provide that an EGC is not required to comply with any new or revised financial accounting standard until such standard becomes applicable, if at all, to companies that are not “issuers” under the Sarbanes-Oxley Act. Under the JOBS Act, EGCs may elect, irrevocably, to opt out of the extended transition period for complying with new or revised accounting standards but “must do so at the time it is ‘first required to file a registration statement, periodic report, or other report with the Commission under Section 13’” of the Exchange Act and notify the SEC of its choice.</p>	<p>The SEC adopted “minor revisions” to Securities Act Forms S-1, S-3, S-4, S-8, S-11, F-1, F-3 and F-4 and Exchange Act Forms 10, 8-K, 10-Q, 10-K, 20-F and 40-F. Specifically, the SEC modified the cover page of each of these forms “to include two check boxes for an issuer to indicate whether, at the time of the filing, the issuer is an EGC and whether it has elected not to use the extended transition period for complying with any new or revised financial accounting standards.”</p>

II. Amendments Reflecting Inflation Adjustments

A. Definition of “Emerging Growth Company”

Under the JOBS Act, “emerging growth company” is defined as an issuer with “total annual gross revenues of less than \$1 billion, as such amount is indexed for inflation every five years” by the SEC. To fulfill its statutory mandate, the SEC calculated the inflation-adjusted EGC gross revenue threshold, rounded to the nearest \$1 million, to be \$1.07 billion. The SEC’s amendments reflect this adjusted threshold in the definition of “emerging growth company” in Securities Act Rule 405 and Exchange Act Rule 12b-2.

B. Regulation Crowdfunding Thresholds

The JOBS Act added Section 4(a)(6) to the Securities Act to provide an exemption from the registration requirements of Securities Act Section 5 for certain crowdfunding transactions. The SEC promulgated Regulation Crowdfunding to implement this exemption.

“Sections 4(a)(6) and 4A of the Securities Act set forth dollar amounts used in connection with the crowdfunding exemption, and Section 4A(h)(1) states that those dollar amounts shall be adjusted” for inflation by the SEC at least once every five years. Pursuant to such directive, the SEC amended Rules 100 and 201(t) of Regulation Crowdfunding and Securities Act Form C to adjust for inflation the dollar amounts therein.

The inflation-adjusted amounts in Rule 100 of Regulation Crowdfunding (Offering Maximum and Investment Limits) are as follows:

Regulation Crowdfunding Rule	Original Amount	Rounded Inflation-Adjusted Amount
Maximum aggregate amount an issuer can sell under Regulation Crowdfunding in a 12-month period (Rule 100(a)(1))	\$1,000,000	\$1,070,000
Threshold for assessing investor’s annual income or net worth to determine investment limits (Rule 100(a)(2)(i) and (ii))	\$100,000	\$107,000

Regulation Crowdfunding Rule	Original Amount	Rounded Inflation-Adjusted Amount
Lower threshold of Regulation Crowdfunding securities permitted to be sold to an investor if annual income or net worth is less than \$107,000 (Rule 100(a)(2)(i))	\$2,000	\$2,200
Maximum amount that can be sold to an investor under Regulation Crowdfunding in a 12-month period (Rule 100(a)(2)(ii))	\$100,000	\$107,000 ²

The inflation-adjusted amounts in Rule 201(t) of Regulation Crowdfunding (Financial Statement Requirements) are as follows:

Regulation Crowdfunding Rule	Original Offering Threshold Amount	Rounded Inflation-Adjusted Amount
Rule 201(t)(1)	\$100,000	\$107,000
Rule 201(t)(2)	\$500,000	\$535,000
Rule 201(t)(3)	\$1,000,000	\$1,070,000 ³

² *Id.* at 16.

³ *Id.* at 17.

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm's Public Company Advisory Practice.

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.



UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000