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Re: Jumpstart Our Business Startups Act (the "JOBS Act")

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Dear Ms. Murphy:

We appreciate the opportunity to comment in advance of the Securities and Exchange Commission's promulgation of rules (the "Rules") under the JOBS Act. We have limited our comments in this letter to Title I of the JOBS Act.

Emerging Growth Company Status

Below we address issues related to (i) determining and losing emerging growth company ("EGC") status, (ii) the need for a transitional period after exiting EGC status prior to compliance with certain requirements under the Sarbanes-Oxley Act of 2002 ("SOX") and (iii) treatment of a foreign private issuer ("FPI") that also qualifies as an EGC. We would appreciate the Commission and its staff (the "Staff") clarifying these issues in the Rules.

Determining EGC Status

We agree with the Staff's guidance to date as to when a company would determine whether it is an EGC, e.g., in the case of expanded oral or written communications with certain investors ("testing-the-waters communications") pursuant to Section 105(c) of the JOBS Act, at the time of those communications, and in the case of disclosure requirements for a registration statement, at the time of the initial filing of that registration statement.

Ambiguity remains, however, as to whether a company that once qualified as an EGC and subsequently lost its EGC status, in each case prior to passage of the JOBS Act, is now able to effectively "re-qualify" as an EGC. In particular, ambiguity is created by Section 101(d), which provides that an issuer is not an EGC "if the first sale of common equity securities of such issuer pursuant to an effective registration statement under the Securities Act of 1933 occurred on or before December 8, 2011." We believe the proper reading of this section is that if a company

became public prior to December 8, 2011 (i.e., became subject to the ongoing reporting requirements of Section 13(a) or 15 of the Exchange Act and also had declared effective a registration statement under the Securities Act covering the initial public offering of its common equity securities), *and remains a reporting company subject to Section 13(a) or 15 of the Exchange Act* at the time of determining whether it is entitled to any benefits under the JOBS Act, it will not qualify as an EGC regardless of whether it has total annual gross revenues of less than $1 billion during its most recently completed fiscal year. Conversely, even if a company became public prior to December 8, 2011, if that company is no longer a reporting company subject to Section 13(a) or 15 of the Exchange Act at the time of determining whether it is entitled to any benefits under the JOBS Act, it should be able to qualify as an EGC. This interpretation is consistent with the policy of the JOBS Act to encourage private companies to become public companies, thereby stimulating job growth, rather than providing already public companies with reduced disclosure benefits. The Staff should clarify that Section 101(d) only applies to a company that issued common equity securities prior to December 8, 2011, and remains a reporting company at the time of determining whether it is entitled to the benefits of the JOBS Act.[1]

Losing EGC Status Based on $1 Billion of Issued Debt

The JOBS Act provides that an issuer loses its EGC status as of "the date on which such issuer has, during the previous 3-year period, issued more than $1,000,000,000 in non-convertible debt." *Section 101(a), amending Section 2(a) of the Securities Act.* We agree with the Staff's position that, in making this determination, a company does not need to count debt issued in an A/B exchange offer. *JOBS Act Frequently Asked Questions, Question 18.* We also believe though that the Staff should further clarify that refinanced debt need not be counted as part of the debt issued in the 3-year period. If a company issues $550 million of debt, and then issues another $550 million of debt two years later for the express purpose of refinancing the original issuance of debt, that company should not lose its EGC status as a result of technically "issuing" more than $1 billion of debt during the previous 3-year period. Similar to an A/B exchange offer, upon completion of the debt refinancing, other than likely maturing two years later, the latter issued debt is effectively identical to and replaces the debt originally issued. Accordingly, the issuer should be permitted to count only the $550 million of debt that remains outstanding after the subsequent issuance.

SOX Transition Period

Section 103 of the JOBS Act exempts EGCs from the requirement pursuant to SOX Section 404(b) to provide a registered public accounting firm's attestation report on the EGC's internal control over financial reporting. There is, however, nothing in the JOBS Act that provides a

[1] We note that the ambiguity created by Section 101(d) only requires clarification where the issuer that was public prior to December 8, 2011, and became a private company again prior to that date, remains the same company at the time of determining its EGC status. Stated differently, if the previously public company was taken private again through an acquisition by, for example, a newly created holding company, then that new holding company is able to avail itself of the benefits of being an EGC (assuming it has less than $1 billion of total revenues during its most recently completed fiscal year) under the unambiguous language of the statute because it never sold common equity securities pursuant to an effective registration statement under the Securities Act on or before December 8, 2011. Accordingly, the Staff should clarify that a company that was public and becomes private again without interposing a holding company is entitled to the same benefits under the JOBS Act as a company that is taken private through such a holding company acquisition.

transition period for such a company to comply with this requirement after it loses EGC status. However, the Commission has the authority to establish such a transition period (*see Exchange Act Sections 23(a) and 36(a)*), which it did several times in the years after SOX Section 404(b) was passed in July 2002.

Many companies begin the work necessary to prepare management and auditor reports on internal controls up to one year in advance of filing an annual report that is required to comply with SOX Section 404(b). In addition to the significant time commitment, there is a corresponding significant cost associated with preparing these reports. In recognition of these facts, the Commission already provides a transition period for newly public companies under Regulation S-K Item 308, which permits such companies to file both management and auditor attestation reports as part of their second filed annual report.

The concern for EGCs is the same. In some circumstances, a company may not know it is losing its EGC status until near the end of, or even after, its fiscal year, at which point it would potentially be required to obtain an auditor attestation report within a few weeks. For example, an EGC may have revenues of $750 million through three quarters of its current fiscal year, in which case a strong or weak fourth quarter would determine whether it is able to maintain EGC status. Assuming a strong fourth quarter with revenues of greater than $250 million, which may not be known with certainty until after the end of the fiscal year, an EGC could be in a position of needing to file an auditor attestation report as part of its annual report for that fiscal year just ended. To avoid imposing undue burden and cost on an EGC that would be created by this uncertainty, both of which are policy considerations behind many of the provisions of the JOBS Act, the Commission should provide in the Rules the same transition period that is currently available to newly public companies in Regulation S-K Item 308. Accordingly, a company that loses EGC status would be permitted to file an auditor attestation report as part of its second annual report filed after losing that status.

Foreign Private Issuers that are also EGCs

The Staff should reconsider its position that an FPI, which also qualifies as an EGC, may not take advantage of *any* EGC benefit if the FPI chooses to confidentially submit its draft registration statement for a U.S. initial public offering ("IPO") pursuant to the Staff's policy on "Non-Public Submissions from Foreign Private Issuers." Section 107(a) provides that an EGC may choose to forgo any exemption provided under the JOBS Act and instead comply with the requirements that apply to an issuer that is not an EGC, e.g., an FPI. It does not, however, state that forgoing one exemption precludes taking advantage of any other exemption or benefit, except as provided in Section 107(b), which relates solely to compliance with new or revised financial accounting standards. The Staff has recognized this in stating that other than these accounting standards, "an emerging growth company may decide to follow only some of the scaled disclosure provisions for emerging growth companies." *JOBS Act Frequently Asked Questions, Question 7.*

In particular, it is unclear why an FPI should be precluded from taking advantage of the deferral of SOX Section 404(b) compliance provided for in Section 103 of the JOBS Act based on the FPI's choice to submit its registration statement confidentially until launching its road show, rather than filing publicly at least 21 days prior to its road show as required for EGCs. There is no discernible connection between the filing of a Securities Act registration statement in connection with an IPO (and the rules governing such a filing) and the filing of an auditor

attestation report that is not required until the second filed annual report even under existing Commission rules. This is also true for other JOBS Act benefits, including the expansion of permissible communications under Section 105(c) – there is no obvious policy rationale for precluding an FPI that also qualifies as an EGC from engaging in testing-the-waters communications simply because the FPI chooses to submit its registration statement confidentially until the launch of its IPO road show. Accordingly, the Staff should clarify that an FPI, which also qualifies as an EGC, may submit draft registration statements confidentially pursuant to the policy on "Non-Public Submissions from Foreign Private Issuers," and still take advantage of the other benefits provided to EGCs under the JOBS Act, including, among other things, deferral of SOX Section 404(b) compliance and participation in testing-the-waters communications.

Impact of JOBS Act on Research and Permissible Communications

FINRA Rules and NYSE Rule 472

Section 105 of the JOBS Act includes several provisions related to the scope of research and communications permitted with respect to EGCs. However, these provisions amend only the relevant sections of the Securities Act and the Exchange Act, and specify certain limits imposed on the Commission and any national securities association as to their ability to adopt or maintain certain rules related to research and permissible communications without clearly delineating the impact on various rules. The Commission and its Staff should coordinate with the Financial Industry Regulatory Authority ("FINRA") to determine which Commission and FINRA rules continue to apply, which no longer apply and which will need to be amended or revised, respectively, in response to the JOBS Act. Moreover, although Sections 105(b) and 105(d) refer only to "national securities associations" such as FINRA, the Commission and its Staff should make clear that any similar self regulatory organization ("SRO") rules such as New York Stock Exchange Rule 472 are equally impacted by the JOBS Act and should be amended or revised simultaneously with any affected Commission and FINRA rules.

Effect on Global Research Settlement

Similar to above, several provisions of the JOBS Act have implications for the Global Research Settlement ("GRS") reached in 2003. Again, however, the JOBS Act only specifies that the Commission and any national securities association shall be limited in their ability to adopt or maintain certain rules regarding research and other communications with respect to EGCs. However, the GRS expressly permits the Commission to adopt its own rules or approve SRO rules with the stated intent to supersede any provisions of the GRS. Accordingly, the Commission should engage in rulemaking as part of the Rules to supersede those portions of the GRS that are inconsistent with the provisions of the JOBS Act. For example, the GRS permits communications with both research analysts and investment bankers present in certain limited circumstances such as due diligence, and those sessions must be chaperoned. Pursuant to Section 105(b) of the JOBS Act, however, no rule or regulation in connection with an IPO of common equity of an EGC should be adopted or maintained that restricts a securities analyst from participating in any communications with the management of an EGC that is also attended by investment bankers. The Commission should reconcile this and any additional inconsistencies between the JOBS Act and the GRS as part of the Rules.

Reasonable Belief Standard for Permissible Communications

Section 105(c) of the JOBS Act permits EGCs to engage in testing-the-waters communications with potential investors that are qualified institutional buyers ("QIBs") or that are institutions that are accredited investors ("IAIs"). This provision, however, does not provide for a reasonable belief standard regarding the status of such investors, which standard is found in Rule 144A and Regulation D. We believe that the Commission should clarify in the Rules that the exemption created by Section 105(c) is also based on a similar reasonable belief standard. In the case of EGCs engaging in testing-the-waters communications with QIBs and IAIs regarding its securities, such securities will ultimately be sold in a registered offering. We therefore see no policy basis for imposing a higher standard in connection with a registered offering than what would be required in an unregistered offering.

Research Permitted After Expiration of Lock-up Agreements

Section 105(d) of the JOBS Act provides that no rule or regulation may prohibit any broker, dealer or member of FINRA from publishing a research report with respect to the securities of an EGC either within any period of time post-IPO or within any period of time *prior* to the expiration date of any agreement that restricts the sale of securities held by the EGC or its shareholders post-IPO, i.e., a lock-up agreement. But the JOBS Act does not specifically provide that no rule or regulation may prohibit publication of a research report with respect to the securities of an EGC within any period of time *after* the expiration date of a lock-up agreement. These blackout periods, whether pre- or post-expiration of a lock-up agreement, are generally in place to prevent research analysts from issuing unduly positive research to offset any selling pressure created by the anticipated, or actual, expiration of a lock-up period. Because there is no apparent policy basis to distinguish between publication of research pre- versus post-lock-up period, particularly where the JOBS Act expressly permits publication of a research report within any period of time post-IPO, the Staff should clarify that Section 105(d) also permits publication of research within any period of time after the expiration date of a lock-up agreement.

Review of Regulation S-K

Pursuant to Section 108 of the JOBS Act, in addition to the Commission's review of Regulation S-K to address any inconsistencies between the current regulations and the changes implemented as part of the JOBS Act, the Commission should use this review opportunity to harmonize Regulation S-K with the various Staff Compliance and Disclosure Interpretations ("C&DIs"). Such an effort would not only help "to modernize and simplify the registration process and reduce the costs and other burdens associated with [Regulation S-K's] requirements" for EGCs (*JOBS Act, Section 108*), but it would also help to reduce the costs and burdens for all registrants. Under the current registration process, registrants must consult a myriad of sources, including, among others, a variety of Commission forms for differing circumstances, Regulations S-K and S-X and Staff interpretations of those regulations pursuant to C&DIs and the Staff's Financial Reporting Manual. A review and harmonization of, at a minimum, Regulation S-K and existing C&DIs would serve to reduce some of the complexity registrants face as part of the Commission's registration process.

We appreciate this opportunity to comment in advance of the proposed rulemaking pursuant to the JOBS Act, and we would be happy to discuss any questions the Commission or its Staff may have with respect to this letter. Questions may be directed to Richard J. Sandler (212-450-4224), Richard D. Truesdell, Jr. (212-450-4674), Joseph A. Hall (212-450-4565), Michael Kaplan (212-450-4111) or Jonathan C. Pentzien (212-450-4205).

Very truly yours,

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