CLEARY GOTTLIEB

Alert Memo

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No Unpleasant Surprises as Trading and Markets Issues Guidance on JOBS Act

On August 22, 2012, the SEC Division of Trading and Markets (the "Staff") published answers to 14 frequently asked questions ("FAQs") relating to certain provisions of Title I of the Jumpstart Our Business Startups Act, signed into law on April 5, 2012 (the "JOBS Act"), affecting research analyst and investment banking personnel conduct in connection with emerging growth companies ("EGCs").

The most noteworthy guidance, in our view, relates to the following:

- "Testing the Waters" and Rule 15c2-8(e): In FAQ 1, the Staff addressed the question whether, in the course of "testing the waters," prospective investors in EGC securities can be asked for non-binding indications of interest ("IOIs") before a preliminary prospectus has been made available to the broker-dealer personnel soliciting the non-binding IOIs. The question arises because Rule 15c2-8(e) of the Exchange Act prohibits solicitation of customer orders after a registration statement has been filed, unless a preliminary prospectus is made available to the broker-dealer personnel soliciting the orders. The Staff drew a distinction in FAQ 1 between solicitation of customer orders, which the Staff explained involves soliciting a commitment, and solicitation of non-binding IOIs. For example, investment banking personnel can ask a potential customer how many shares the customer may be willing to purchase at a specific offering price, provided the potential customer is not then committed to purchase the securities. FAQ 1 thus confirms that investment banking personnel may "test the waters" before a related preliminary prospectus is available without violating Rule 15c2-8(e) as long as those activities seek information and not binding commitments to purchase securities.

- Analyst Participation in Pitches: In FAQ 4, the Staff addressed the question whether allowing research analysts to attend IPO pitches for EGCs would violate existing FINRA/NASD rules, including rules prohibiting analysts from soliciting investment banking business or promising favorable research as an inducement to secure such business. The Staff concluded that research analyst participation in IPO pitches is permissible if the analyst's participation is limited to, for example, a general description of the research program and the factors taken into account when analyzing a company. Research analysts employed by investment banks subject to the Global Research Settlement (described below) cannot take advantage of this liberalization, however, as their participation remains prohibited by the terms of the settlement.

FAQ 4 also provides a detailed, though not exhaustive, list of research analyst conduct that is impermissible during an IPO pitch for an EGC, as well as a stern reminder that investment banks must develop and enforce controls to ensure an analyst's participation in a pitch remains within bounds. In light of the Staff's obvious concern in this area, it would be prudent to develop detailed compliance procedures to help ensure that research analyst participation in IPO pitches to EGCs is appropriately limited.

- Research "Quiet Periods": The Staff in FAQ 10 addressed whether Congress intended the JOBS Act to terminate all research "quiet periods" currently imposed on EGCs by FINRA/NASD rules or only those "quiet periods" explicitly eliminated by the JOBS Act. According to the Staff, a research report or public appearance by a research analyst on the securities of an EGC should be permitted at any time, including the periods after an IPO, prior to or after the expiration, termination or waiver of a lock-up agreement, and after a secondary offering. While the JOBS Act itself rendered the "quiet periods" after an IPO and prior to the end of a lock-up agreement inapplicable to research on an EGC, the Staff expects FINRA to file a rule proposal eliminating all other "quiet periods" currently applicable to EGCs.

Other topics addressed in the FAQs include the following:

- Global Research Settlement: The Staff confirmed in FAQ 2 that the JOBS Act does not amend or modify the Global Research Settlement entered into by 12 investment banks and the SEC in 2003 and 2004. Thus, any investment bank currently subject to the Global Research Settlement cannot take advantage of any relevant JOBS Act provision without first seeking amendment or modification of the settlement from the court. The SEC could support or oppose such requested modification. While FAQ 2 mentioned that the Global Research Settlement may also be modified through an SEC, FINRA or NYSE rule that specifically states an intent to supersede the Global Research Settlement, there was no indication that such future rulemaking is likely.

- "Arranging" versus "Directing": In FAQ 3, the Staff addressed the difference between investment banking personnel "arranging" for communication between research analysts and investors – conduct permitted by the JOBS Act in connection with an EGC IPO – and "directing" research analysts to communicate with prospective clients or engage in other sales efforts – conduct prohibited by existing FINRA/NASD and NYSE rules. Permissible "arranging" includes an investment banker sending an analyst a list of clients to contact, provided the analyst retains the discretion to decide whether to do so, and an investment banker arranging a call between an analyst and a client, provided the investment banker does not participate in such call.

- Analyst Participation in Roadshows: FAQ 5 states that the JOBS Act does not relax current FINRA/NASD or NYSE prohibitions against joint communication with prospective investors by company management, research analysts and investment banking personnel in EGC roadshows and similar investor presentations.

The full text of the FAQs can be accessed using the following link:

http://www.sec.gov/divisions/marketreg/tmjobsact-researchanalystsfaq.htm

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Please contact any of our partners and counsel listed under “Capital Markets” in the “Practices” section of our website (www.cgsh.com) or any of your other regular contacts at the firm for further information about the matters discussed above.

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