SEC Staff Issues FAQs on JOBS Act Research Provisions

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On August 22, 2012, the SEC staff released **Frequently Asked Questions** ("FAQs") about certain **JOBS Act** provisions that address the conduct of research analysts and the publication of research reports with respect to emerging growth companies ("EGCs"). Generally, the FAQs are consistent with positions announced by the staff at various conferences, but do contain some new information, and provide a helpful written statement of SEC staff positions on several important matters. Set out below is a summary of the key items covered in the FAQs:

- ***Global Research Settlement Restrictions Unaffected***. As expected, the FAQs emphasize that the JOBS Act does not amend or modify the Global Research Settlement—a legal settlement with virtually all the major Wall Street banks that sets out detailed rules on research. Therefore, the settling firms remain subject to all restrictions in the Global Research Settlement. (Question 2)

- ***Testing the Waters and Rule 15c2-8.*** Section 105(c) of the JOBS Act permits an EGC and its underwriters to engage in "testing-the-waters" discussions to gauge investor interest in an EGC's offering both prior to and following the filing of a registration statement. Rule 15c2-8(e) under the Exchange Act, however, which was not changed by the JOBS Act, requires broker-dealers to make a preliminary prospectus available to any associated persons that will "solicit customers' order[s]" before such solicitation occurs. Construing testing-the-waters discussions broadly as "solicitations" under Rule 15c2-8(e) would seriously undermine the utility of the JOBS Act testing-the-waters provisions, as no prospectus will be available at such time.

  The FAQs provide assurance that the staff will take a more pragmatic view by making it clear that, as part of testing-the-waters discussions, an underwriter may request a non-binding indication of interest from a customer. This non-binding indication of interest may include the amount of shares the customer might purchase in the potential offering at particular price levels without being deemed to be "soliciting" that customer's order thereby triggering Rule 15c2-8(e)'s prospectus delivery requirement. The staff expressly noted that their position was not based on any change to Rule 15c2-8(e). Accordingly, underwriters should also be able to solicit non-binding indications of interest in offerings by non-EGCs (post filing of the registration statement) without being deemed to be "soliciting" customer orders under Rule 15c2-8(e). This should greatly facilitate testing-the-waters discussions.

  The FAQs also say that Rule 15c2-8(e) does not apply until an EGC has filed a registration statement. A confidential submission of a draft registration statement will not be considered the filing of a registration statement invoking this rule. (Question 1)

- ***Arranging Communications with Research Analysts***. Section 105(b) of the JOBS Act prohibits the SEC and the SROs from restricting investment banking personnel from "arrang[ing] for communications between a securities analyst and a potential investor." While the SEC and the SROs do not currently have rules that expressly prohibit "arranging" such communications, certain activities of this nature, although permitted by the JOBS Act, could be seen as directing analysts to engage in marketing which is directly prohibited under the SRO rules. The FAQs alleviate some of this uncertainty by clarifying that an investment banker may provide an analyst with a list of clients for the analyst to contact at his or her own discretion and with appropriate controls, or arrange calls between analysts and clients—so long as the investment banker does not participate in the calls. An analyst could also forward a list of potential clients it intends to communicate with to investment banking as a means to facilitate scheduling. (Question 3)

- ***Attending Joint Meetings***. Section 105(b) of the JOBS Act, with respect to IPOs of EGCs, prohibits the SROs from restricting analyst participation in communications with management when investment banking personnel are also present. In the FAQs, the staff expresses the belief that Congress intended for this section to presumably allow analysts and investment bankers to attend joint EGC management presentations in order to alleviate the "ministerial burdens" of management being required to make separate and duplicative presentations to analysts and investment bankers.

  The FAQs stress, however, that this provision in the JOBS Act does not remove or impact provisions in the SRO rules and the Global Research Settlement intended to address conflicts of interest between investment banking personnel and research analysts. The FAQs specifically point out that the Global Research Settlement continues to require firewalls between investment banking and research analysts reasonably designed to prohibit communications between the two except as expressly permitted by the Global Research Settlement (such as in chaperoned or widely attended meetings). The FAQs also note that the SRO rules bar analysts from engaging in efforts to solicit investment banking business or giving "tacit acquiescence" to overtures from company management that they expect favorable research in exchange for investment banking business. Therefore, while the FAQs suggest that analysts from firms that are not party to the Global Research Settlement may even attend "pitch" meetings with investment bankers, restrictions under the SRO rules, such as those prohibiting analysts from soliciting investment banking business, would limit the research analysts' involvement in these meetings.

  In light of the remaining prohibitions, we do not expect broker-dealers to significantly change their current practices for conducting and arranging joint management meetings and we expect broker-dealers to be very cautious about permitting analysts to attend pitch meetings. (Questions 4 & 5)

- ***Quiet Periods***. Section 105(d) of the JOBS Act forbids the SROs from restricting the publication of research or research analyst public appearances related to an EGC following an EGC's IPO or before the expiration of a lock-up entered into in connection with the EGC's IPO. The JOBS Act does not, however, expressly address current SRO rules that impose similar quiet periods:
  - following secondary offerings, or
  - after the expiration, waiver or termination of a lock-up.

  The staff states in the FAQs that it believes that the policy underlying the JOBS Act's elimination of quiet periods after IPOs and before the expiration of an IPO lock-up applies equally to similar quiet periods applicable to secondary offerings and after the expiration, termination or waiver of a lock-up. The FAQs explain that FINRA is considering filing modifications to its rules which the staff believes would eliminate these remaining quiet periods. (Question 10)

- ***Regulation AC and other unaffected rules***. As anticipated, the FAQs verify that the JOBS Act does not modify:
  - what constitutes a "research report" for purposes of Regulation AC or any other aspect of Regulation AC or
  - current SRO rules regarding:
    - the supervision, compensation or evaluation of research analysts;
    - pre-publication review of research reports by non-research personnel; or
    - the content, filing and approval requirements for research communications with the public. (Questions 7, 8, 11, 12 and 13).

Impact on Market Practice. While these FAQs provide helpful guidance, as they are generally consistent with prior expectations, we do not expect market practice in this area to change meaningfully in

the near term. We urge you to continue to reach out to us as implementation issues arise and market practice evolves.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Joseph A. Hall	**212 450 4565**	joseph.hall@davispolk.com
Michael Kaplan	**212 450 4111**	michael.kaplan@davispolk.com
Richard J. Sandler	**212 450 4224**	richard.sandler@davispolk.com
Lanny A. Schwartz	**212 450 4174**	lanny.schwartz@davispolk.com
Richard D. Truesdell, Jr.	**212 450 4674**	richard.truesdell@davispolk.com
Janice Brunner	**212 450 4211**	janice.brunner@davispolk.com
Zachary J. Zweihorn	**202 962 7136**	zachary.zweihorn@davispolk.com