

ALERTS

Corporate and Securities Update

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JUMPSTART OUR BUSINESS STARTUPS ACT

Executive Summary

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act (the "JOBS Act"), which should reduce the regulatory burden of raising capital in the public and private capital markets for certain companies. Private companies seeking access to private capital markets or considering an initial public offering may be significantly affected by the JOBS Act. This client update provides a summary of the following key provisions of the JOBS Act:

- The creation of a new class of securities issuer known as an "emerging growth company" (an "EGC") which will have lessened regulatory requirements for an initial public offering;
- The removal, under certain circumstances, of the prohibition on general solicitation for Rule 506 of Regulation D and Rule 144A offerings;
- The creation of a new exemption from the registration requirements of the Securities Act of 1933 (the "Securities Act") for offerings conducted under a new "crowdfunding" provision;
- Increasing the amount of securities that may be sold under the "small offerings" exemption of the Securities Act pursuant to Regulation A, and exempting such offerings from state securities laws; and
- Raising the threshold number of record securities holders that would require a company to register under the Securities Exchange Act of 1934 (the "Exchange Act") from 500 to 2,000.

While the JOBS Act makes some significant changes to federal securities laws, we expect minimal impact on the majority of current public companies. However, the JOBS Act would apply to newly public EGCs if the public offering occurred after December 8, 2011. The JOBS Act also requires the Securities and Exchange Commission (the "SEC") to conduct a comprehensive analysis of Regulation S-K and it is possible the SEC may make other amendments to Regulation S-K or other regulations in light of this review. Companies should monitor any proposed SEC rulemakings and consult with their legal counsel to ensure that any rule changes do not impact their operations.

I. Creation of the “Emerging Growth Company”

The JOBS Act creates a new class of issuer, the EGC, which is a company with annual gross revenues of less than \$1 billion. An EGC will cease to be classified as an EGC on the earlier of:

- the last day of the fiscal year in which the company has annual revenues in excess of \$1 billion;
- the last day of the fiscal year following the fifth anniversary of the company going public;
- the date on which the company has, during a 3 year period, issued more than \$1 billion in non-convertible debt; or
- the date the company is deemed to be a large accelerated filer[1].

The benefits of being an EGC are essentially a simplified IPO registration process and reduced reporting requirements once the company becomes public for as long as it remains an EGC. In particular the JOBS Act provides that:

PUBLIC OFFERING BENEFITS

- An EGC will only need two years of audited financial statements before going public.
- An EGC may submit a draft registration statement to the SEC confidentially for review and comment by the SEC staff.
- EGCs may communicate more freely with qualified institutional buyers and accredited investors before or after a registration statement is filed with the SEC to “test the waters” of a potential public offering.
- Certain research reports about EGCs during an offering will be permitted and will not be deemed to be offers.

ONGOING REPORTING BENEFITS

Reduced Executive Compensation Regulation

- Exemption from Dodd-Frank “Say on Pay”, “Pay Versus Performance” and “Golden Parachute” provisions.
- Exemption from proxy disclosure of CEO pay ratio (compared to the median pay of all other employees).
- In addition, EGCs may comply with the executive compensation disclosures of Regulation S-K by providing the same information as “smaller reporting companies”, which will allow EGCs to forego a “Compensation Discussion and Analysis”, report on fewer executives, provide fewer years of information and provide fewer compensation tables.

Exemption from Audit and Attestation Requirement of Sarbanes-Oxley. EGCs are exempt from the requirement in Section 404(b) of the Sarbanes-Oxley Act of 2002 to retain an auditor to attest to the company's internal control over financial reporting.

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No auditor rotation requirement. Exemption from Section 103(a)(3) of the Sarbanes-Oxley Act of 2002. EGCs are exempt from the proposed Public Company Accounting Oversight Board rules that, if adopted, would require auditor rotation or a supplement to the auditor's report (auditor discussion and analysis).

Exempt from new or revised accounting standards. EGCs are exempt from any new or revised financial accounting standard under both the Securities Act and the Exchange Act until such standard or revision is applicable to private companies.

In addition, at any time, EGCs may choose to opt-in to any requirement to which they are given an exemption under the JOBS Act. However, if an EGC chooses to opt-in, it must comply with the requirement for the entirety of the time it is an EGC. Additionally, EGCs opting to have accounting standards apply to them that are applicable to other public companies must opt in to all such accounting standards and may not pick and choose which standards will or will not apply.

II. Removal of Prohibition on General Solicitation for Regulation D and Rule 144A Offerings

The JOBS Act provides that within 90 days of enactment, the SEC is to revise its rules in Regulation D to provide that offerings made pursuant to Rule 506 of Regulation D shall not be deemed to be public offerings as a result of general advertising or general solicitation, provided that all purchasers of the securities are accredited investors.

Rule 144A is also amended by the JOBS Act to provide that within 90 days of enactment, the SEC shall revise its rules to allow for general advertising and solicitation in Rule 144A offerings, including to persons who are not qualified institutional buyers, provided that the securities are sold only to persons that the seller reasonably believes are qualified institutional buyers.

The amendments to Regulation D and Rule 144A will only be effective upon an SEC rulemaking. Due to these changes, companies should consult with their legal counsel to ensure that any advertisements or solicitations will not create additional liability and, even more than before, employ appropriate procedures to ensure that buyers are accredited investors or qualified institutional buyers.

III. Crowdfunding

The JOBS Act allows a new type of securities offering commonly referred to as "crowdfunding." In a very short period of time, the concept of crowdfunding has become an increasingly popular way for a large number of people to pool their resources to execute a common project or donate money to a common charitable cause. Crowdfunding would typically occur through an internet service that would match donors and projects. Sometimes crowdfunders would receive some item of value, such as an invitation to the event being funded or a small item in exchange for their donation. However, in the past, the sale of an equity stake in a business through crowdfunding was prohibited under federal securities laws.

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The JOBS Act creates a new section of the Securities Act to allow certain issuers to sell equity in a business through crowdfunding without registering the securities under the Securities Act. In addition, the JOBS Act provides that such crowdfunding offerings will be exempt from state blue sky laws. The securities purchased in a crowdfunding offering will have certain restrictions on their transfer for one year after purchase. The crowdfunding exemption from registration is not available to “bad actors”, in the same way that Regulation D exemptions prohibit felons and others from using such exemptions. Additionally, issuers may be liable to investors for material misstatements or omissions in connection with the sale of the securities. For an issuer to sell equity through the new crowdfunding provision, the following requirements must be met:

CAPS ON AGGREGATE AND INDIVIDUAL AMOUNTS RAISED

- The aggregate amount of securities sold to all investors by the issuer during any 12 month period is not more than \$1,000,000; and
- The aggregate amount of securities sold to any single investor does not exceed:
 - the greater of \$2,000 or 5% of the annual income or net worth, as applicable, of an investor whose annual income or net worth is less than \$100,000; or
 - 10% of the investor’s annual income or net worth, as applicable, not to exceed a maximum aggregate amount sold of \$100,000, if either the investor’s annual income or net worth is \$100,000 or more.

USE OF A BROKER OR FUNDING PORTAL

The JOBS Act requires issuers to use an intermediary that is registered with the SEC to conduct a crowdfunding securities offering. The intermediary may either be a traditional registered broker or a funding portal. Funding portals are a new category of intermediary created by the JOBS Act solely for the purpose of selling securities under the crowdfunding provision of the JOBS Act. Persons serving as funding portals will need to register with the SEC and abide by certain restrictions related to the sale of securities sold under the crowdfunding provisions.

PROVIDE A DISCLOSURE DOCUMENT

Issuers must provide a disclosure document to the SEC, investors, and the broker or funding portal disclosing information about the company, risks, the management of the company, company finances, the intended use of the proceeds of the offering, the target offering amount, the structure of the ownership and capital structure of the company, and any other information the SEC may require by rule.

PROHIBITION ON ADVERTISING AND COMPENSATION OF PROMOTERS

Issuers may not advertise the terms of the offering. However, issuers may provide notices which direct investors to the funding portal or broker. Additionally, the JOBS Act prohibits the issuer from compensating any person to promote the offering without complying with SEC rules requiring such persons to disclose all such compensation.

ANNUALLY REPORT TO THE SEC AND INVESTORS

Issuers must file with the SEC and provide investors with reports of the results of operations and financial statements of the company no less than annually. The SEC may by rule determine what information must be included in such reports.

IV. Regulation A Offerings (Small Offerings Exemption)

The JOBS Act amends Regulation A in two key ways. First, the JOBS Act increases the aggregate offering price of securities that may be issued under Regulation A from \$5 million to \$50 million. Secondly, the JOBS Act exempts Regulation A offerings from state blue sky laws. The SEC is required to adopt rules to implement these changes.

V. Threshold for Registration Under Exchange Act is Raised

The JOBS Act also amends when a company must register under the Exchange Act. The JOBS Act provides that a company will need to register within 120 days after the last day of its first fiscal year ended on which the issuer has total assets exceeding \$10 million and a class of equity security held of record by either (i) 2,000 persons; or (ii) 500 persons who are not accredited investors.

The JOBS Act increases the threshold for registration to 2,000 investors from the previous threshold of 500 investors and also provides that persons holding securities received from an equity compensation plan pursuant to transactions exempted from the registration requirements of the Securities Act are not counted. The SEC is directed to adopt rules to implement a safe harbor for when such transactions will be deemed to be exempted from registration under the Securities Act.

In addition, the JOBS Act provides that the threshold for registration by banks and bank holding companies is increased to 2,000 holders of record and that if a bank or bank holding company has its shareholders of record fall below 1,200 holders of record, the bank will cease to be a reporting company.

CONTACT US FOR MORE INFORMATION

If you have questions regarding the aforesaid information, or would like assistance regarding provisions of the JOBS Act, please contact a member of the Moore & Van Allen Securities & Capital Markets group.

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