JONES&KELLER

ATTORNEYS AT LAW

MEMORANDUM

To: Clients and Friends of the Firm

From: Reid A. Godbolt, Esq.

Cyrus Rajabi, Esq.

Date: April 11, 2012

Re: **The Jumpstart Our Business Startups ("JOBS") Act**

During the past 12 months, various legislative proposals have been introduced in Congress seeking to ease the federal regulatory burdens on smaller companies and facilitate capital formation. On April 5, 2012, President Obama signed the Jumpstart Our Business Startups Act (the "Act"). The Act makes wide-ranging changes to the federal securities laws and rules governing the U.S. capital formation process.

The Act is intended to increase jobs in the U.S. by easing access to public capital markets for a new category of issuer created by the Act – the "emerging growth company." Since the Sarbanes-Oxley Act became effective in 2002, many in the business community have concluded that unduly restrictive and excessive regulatory requirements have made the U.S. public capital markets less attractive to smaller companies.

The Act includes several new measures including a transitional "on-ramp" for emerging growth companies to facilitate initial public offerings by phasing in post offering compliance measures.

The Act also amends the Securities Act of 1933 (the "Securities Act"), to permit issuers to raise up to $50 million through a "mini-registration" offering process similar to the SEC's Regulation A.

Further, the Act provides more significant triggers for SEC reporting obligations under the Securities Exchange Act of 1934, (the "Exchange Act"). For many years, an issuer was required to become an SEC reporting company once it had 500 or more shareholders of record and the company has total assets in excess of $10

million. The Act significantly increases the number of record holders for issuers before they must register under the Exchange Act.

The Act also relaxes the prohibition against "general solicitation and general advising" in connection with private placements.

In what has infuriated regulators and investor advocates, the Act includes an exemption under the Securities Act for limited-size offerings to be sold in small amounts to a large number of investors (e.g., over the internet), commonly referred to as "Crowdfunding" offerings that also preempt state registration requirements.

Set forth below are summaries of the key elements of the Act.

I. EMERGING GROWTH COMPANIES

Section 101 of the Act establishes for a new category of issuer – the "emerging growth company" ("EGC") –defined as an issuer with annual gross revenue of less than $1 billion. The exemption provisions associated with EGCs are immediately effective and are not dependent on the SEC adopting implementing rules. An issuer that qualifies as an EGC will continue to be eligible to treat itself as an EGC until the earliest of:

- The first fiscal year after it has annual revenue in excess of $1 billion (subject to inflationary adjustment by the SEC every five years);
- The beginning of the sixth fiscal year after the first registered sale of its common equity securities in an IPO;
- The date upon which it has issued more than $1 billion of non-convertible debt during a previous three-year period; or
- The date on which it would be deemed to be a "large accelerated filer" under the Exchange Act, which the SEC generally defines as a company that has a public float of $700 million or more of common equity securities and has been filing SEC reports for at least one year.

The Act also provides that an issuer shall not be an EGC for purposes of the Securities Act and the Exchange Act if the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act occurred on or before December 8, 2011. Thus, almost all SEC filers are precluded from availing themselves of the new EGC provisions.

A. IPO Process – Emerging Growth Companies and Disclosure Requirements

Financial. An EGC will be required to present only two years of audited financial statements in connection with its IPO registration statement, and in any other registration statement or periodic report, an EGC need not include financial information within its selected financial data or in its MD&A disclosure for periods prior to those presented in its IPO registration statement [Section 102].

Also, an EGC may comply with the condensed executive compensation disclosures applicable to a smaller reporting company [Section 103(c)]. Generally, these disclosures apply to the top three compensated executives of an issuer and a "compensation discussion and analysis" is not required. A "smaller reporting company" is generally defined, for the purposes of initial determination, as an issuer that has a public float of less than $75 million or, in the case of an issuer that has no public float (*e.g.,* an IPO registration) has annual revenues of less than $50 million. Under Section 102 of the Act, an EGC is not required to comply with any new or revised financial accounting standard until the time that such standard applies to private companies.

Confidential Review. Section 106(a) of the Act allows an EGC to submit its IPO registration statement confidentially in draft form for the SEC staff review. Note also, however, that Section 106 also requires that such the EGC must publicly file the initial confidential submission and all amendments at least 21 days prior to its first road show for the IPO.

"Test the Waters". Section 105(c) of the Act permits EGCs to engage in oral or written communications with qualified institutional buyers, or QIBs, and institutional accredited investors (as defined in Rule 501 of the Securities Act) in order to gauge interest in a proposed IPO either prior to or following the first filing of the IPO registration statement. This would permit the issuer to communicate either orally or in writing with QIBs and institutional accredited investors both before and after filing the registration statement. No filing of written "test the waters" materials is required. This will allow for much freer dialogue and perhaps save issuer costs related to aborted offerings.

Research Reports. Under Section 105(a) of the Act, a broker-dealer is permitted to publish or distribute a research report about an EGC that proposes to register or is

in registration, and the research report will not be deemed an "offer" under the Securities Act even if the broker-dealer will participate or is participating in the offering. Also, no SRO or the SEC may adopt any rule or regulation prohibiting a broker-dealer from publishing or distributing a research report or meeting publicly with respect to the securities of an EGC. This does away with the transitional post-IPO "quiet period" for an EGC, but it does not eliminate the quiet periods for "lockups." This provision creates a safe harbor for the issuance of research reports in advance of and during the registration period for such offerings, when such reports would previously have created a risk of an illegal offer ("gun-jumping") or non-conforming prospectus. Note, however, that these new statutory provisions do not affect current rules and regulations relating to research analyst conflicts of interest.

B. Phase-in Reporting Requirements

The Act allows an EGC to make scaled disclosures and have other relief from certain disclosure requirements during a five-year period following its IPO (except as noted below).

Specifically, an EGC is not required to:

- hold a shareholder vote on executive compensation, including "say-on-pay" votes and votes on golden parachute compensation for at least three years following its IPO [Section 102(a)];
- provide selected financial data for any period prior to the earliest audited period presented in connection with its IPO registration statement [Section 102];
- obtain auditor attestation of internal controls pursuant to Section 404(b) of the Sarbanes-Oxley Act; however, it will be subject to the requirement that management establish, maintain, and assess internal controls over financial reporting [Section 103]. Note, however, that the CEO and CFO of an EGC will be required to provide Sarbanes-Oxley compliant certifications;
- comply with any new or revised financial accounting standard until the time that such standard applies to private companies [Section 102];
- provide "management's discussion and analysis of financial condition and results of operations" disclosures beyond the periods presented in the financial statements required for an EGC [Section 103];

- comply with any Public Company Accounting Oversight Board ("PCAOB") rules requiring mandatory audit firm rotation or an auditor discussion and analysis" [Section 104];
- comply with any additional rules adopted by the PCAOB after the enactment of the Act unless the SEC determines that the application of such additional rules is "necessary or appropriate in the public interest" [Section 104]; or
- disclose certain executive compensation information that will otherwise be required under the Dodd-Frank Act, including a comparison of executive compensation to performance and median compensation [Section 103(c)].

II. SEC STUDIES

Section 108 of the Act requires the SEC to conduct a review of Regulation S-K analyzing the current registration requirements and determine how they can be updated to simplify the registration process and reduce the costs and other burdens associated with these requirements, all as applied to EGC's. The SEC will report to Congress within 180 days of enactment of the Act. The Act also requires that the SEC within 90 days of enactment of the Act present to Congress the findings of a study that examines that impact of decimalization on IPOs and the impact of this change on liquidity for small- and mid-cap securities. If the SEC determines that securities of EGC's should be quoted or traded using a minimum increment higher than $0.01, the SEC may, by rule, not later than 180 days following the enactment of the Act, designate a higher minimum increment between $0.01 and $0.10 [Section 106(b)].

III. GENERAL SOLICITATION IN PRIVATE PLACEMENTS

Title II of the Act, titled "Access to Capital for Job Creators," requires that the SEC undertake rulemaking to revise the prohibition against general solicitation. Section 201(a) of the Act requires the SEC, within 90 days, to revise two aspects of its rules relating to non-public offerings. Under Section 201(a) of the Act, the SEC is required to revise Rule 506 of Regulation D to provide that offers and sales of securities thereunder may be made through the use of general solicitation or advertising provided that all purchasers of the securities are "accredited investors." Section 201 also requires the SEC to adopt rules requiring an issuer to take "reasonable steps to verify" whether investors are accredited investors and to set forth the methods that would satisfy this standard of verification. Also within the

same time period, the SEC must revise Rule 144A(d)(1) to permit the use of general solicitation or general advertising.

Rule 506 Matchmakers. The Act also clarifies that certain online platforms to conduct Rule 506 offerings that will use general advertising or general solicitation will not be required to register as a broker or a dealer pursuant to Section 15 of the Exchange Act, provided that certain specified conditions are satisfied [Section 201(c)]. These matching platforms must not receive transaction-based compensation. A platform also cannot take possession of customer funds or securities.

IV. CROWDFUNDING

Title III of the Act adds a new section to the Securities Act to allow a company to offer and sell $1 million of securities over a 12-month period without registration under the Securities Act, known as "Crowdfunding". The objective of Crowdfunding is to use the internet to raise capital from a large number of people in relatively small amounts which will enable small startup businesses to access capital beyond "family and friends." Now, Crowdfunding is permissible. However, due to fraud concerns, Congress included significant restrictions and reporting requirements that make complying with the Crowdfunding exemption an expensive and time consuming process, albeit possibly less expensive and time consuming than other alternatives. Issuers will need to weigh the costs of complying with the exemption and the limitations on the amount that can be raised against the possible benefits of Crowdfunding.

The Act adds a new Section 4A of the Securities Act summarized below.

A. Conditions on Issuers Engaging in Crowdfunding.

Exchange Act reporting companies, companies organized outside of the United States and investment companies are precluded from relying on the Crowdfunding exemption. State registration, documentation and offering requirements that would otherwise apply to Crowdfunding are preempted by the Act. Note - these offerings will remain subject to state enforcement actions for fraud, deceit or similar unlawful conduct. Further, the Act does not affect the application of anti-fraud provisions of the federal securities laws to Rule 506 or Rule 144A transactions.

B. Conditions on Amounts Raised.

The aggregate amount sold to any one investor in a 12-month period cannot exceed:

- the greater of $2,000 or 5% of the annual income or net worth, as applicable, for an investor who has an annual income or a net worth less than $100,000, and
- 10% of the annual income or net worth, as applicable, for an investor who has an annual income or net worth of $100,000 or more, but not to exceed $100,000.

C. Conditions on Conduct of Crowdfunding Offerings.

Issuers engaging in Crowdfunding under the Act must comply with many requirements, including:

Conduct Offerings Through Registered Brokers or Registered Funding Portals. Crowdfunding offerings must be conducted through either a registered broker or a funding portal that is registered with the SEC. A broker that is registered with the SEC need not also register as a funding portal.

The intermediary must also:

- Register with any applicable self-regulatory authority;
- Provide disclosures to investors, as well as questionnaires, regarding the level of risk involved with an offering;
- Take measures, including obtaining background checks and other actions that the SEC may specify, of officers, directors, and significant shareholders;
- Ensure that all offering proceeds are only provided to issuers when the amount equals or exceeds the target offering amount, and allows for cancellation of commitments to purchase in the offering;
- Ensure that no investor in a 12-month period has investment in excess of the limits described above in all issuers conducting exempt Crowdfunding offerings;
- Take steps to protect privacy of information;
- Not compensate promoters, finders, or lead generators for providing personal identifying information of personal investors;

- Prohibit insiders from having any financial interest in an issuer using that intermediary's services; and
- Meet any other requirements that the SEC may prescribe.

Provide Limited Disclosures to Investors. An issuer engaging in a Crowdfunding must provide limited disclosures about itself and the offering to the SEC, the broker or portal and made available to investors, the following:

- information about the company, its officers, directors and 20% shareholders;
- description of the company's business and anticipated business plan;
- limited financial information about the company ranging, depending on the size of the offering, from income tax returns and financial statements certified by the CEO to audited financial statements;
- description of the use of the proceeds from the offering;
- target offering amount, price of the securities and method by which the price was determined;
- description of the company's ownership and capital structure;
- risk factors;
- offering time period;
- updates; and
- such other information as may be required by the SEC.

Restricted Advertisements. A company engaging in a Crowdfunding may not advertise the terms of the offering except for notices that direct investors to the broker or funding portal. A company engaging in a Crowdfunding may not compensate brokers or funding portals unless it follows steps to be determined by SEC rulemaking.

SEC Reports. Issuers relying on the exemption would need to file with the SEC and provide to investors, no less than annually, reports of the results of operations and financial statements of the issuers as the SEC may determine is appropriate. The SEC may also impose other requirements that it determines to be appropriate. A purchaser in a Crowdfunding offering could bring an action against an issuer for

rescission in accordance with Section 12(b) and Section 13 of the Securities Act, as if liability were created under Section 12(a)(2) of the Securities Act, in the event that there are material misstatements or omissions in connection with the offering. The SEC must issue rules to carry out these measures not later than 270 days following enactment including rules necessary to implement certain requirements with respect to intermediaries in Crowdfunding transactions, as well as rules or regulations to establish disqualification provisions under which an issuer would not be eligible to utilize the Crowdfunding exemption to registration based on disciplinary history. The dollar thresholds applicable under the exemption are subject to adjustment by the SEC at least once every five years.

Transfer Restrictions. Shares sold through a Crowdfunding will be subject to a one year transfer restriction unless such shares are resold to the issuer, an accredited investor, a family member or as part of a registered offering.

Liability. Section 302(c) of the Act provides a private right of action against a company engaging in a Crowdfunding based on material written or oral misstatements or omissions in connection with Crowdfunding offering. The legislation provides that any liability under this section will be "as if the liability were created under section 12(a)(2)" of the Securities Act.

V. EXPANSION OF REGULATION A

Title IV of the Act requires the SEC to amend the registration exemption in Regulation A under the Securities Act to increase the amount of securities that can be issued over a 12-month period under Regulation A from $5 million to $50 million. The issuer may offer equity securities, debt securities, and debt securities convertible or exchangeable for equity interests, including any guarantees of such securities. The securities sold pursuant to the exemption will be offered and sold publicly (without restrictions on the use of general solicitation or general advertising) and will not be considered "restricted securities." An offering document to be filed with the SEC, but the information requirements are somewhat simpler than those required in registered offerings, although the issuer must describe "corporate governance principles" and other appropriate matters as the SEC may determine "necessary in the public interest and for the protection of investors.". Also, the issuer may "test the waters" for interest in its offering before it incurs the expense of the Regulation A offering document. Regulation A exempt offerings are not limited to particular types of investors, although there are "bad

actor" disqualifications for offering participants, and the securities purchased are not transfer-restricted under the Securities Act.

However, the securities will be considered "covered securities" for NSMIA purposes (and not subject to state securities review) if:

(i) the securities are offered and sold on a national securities exchange, or the securities are offered or

(ii) sold to a "qualified purchaser" as defined under the Act.

Below is a chart comparing the current Regulation A requirements and the new Section 3(b)(2) exemptions.

	Regulation A Exempt Public Offering	**Section 3(b)(2) Exempt Public Offering**
Offering Limit	Up to $5 million within the prior 12-month period.	Up to $50 million within the prior 12-month period.
SEC Filing Requirements	A Form 1-A, which is reviewed by the SEC staff.	File with the SEC and distribute to investors an offering statement, which will likely be reviewed by the SEC staff.
Blue Sky Requirements	Blue sky law compliance is required.	Blue sky law compliance is required, except when the securities are offered and sold on a national securities exchange, or the securities are offered or sold to a qualified purchaser.
Limitations on Investors	None, except to the extent imposed under state laws.	None, except to the extent imposed under state laws.
Restrictions on Resale of Securities	None, except for securities held by affiliates.	None, except for securities held by affiliates.
Offering	An issuer may "test the waters" to determine if there is	An issuer may "test the waters" to determine if there is

Communications	an interest in a proposed offering prior to filing the Form 1-A.	interest in a proposed offering prior to filing an offering statement.
Financial Statement Requirements	A current balance sheet, as well as income statements for a period of two years, as well as any interim period. Financial statements must be prepared in accordance with GAAP but do not have to conform to Regulation S-X and, in most cases, do not have to be audited.	Audited financial statements must be included in the offering statement, as determined by the SEC.
Bad Actors	Felons and bad actors disqualified from the offering in accordance with Securities Act Rule 262.	Felons and bad actors disqualified from the offering in accordance with rules adopted under Section 926 of the Dodd-Frank Act.
Periodic Reporting	None except disclosures regarding the use of proceeds.	Audited financial statements must be filed and provided to investors annually. The SEC may require other periodic disclosures.

VI. THRESHOLDS FOR PUBLIC COMPANY REPORTING

Section 12(g) of the Exchange Act requires issuers to register a class of equity securities with the SEC if, on the last day of the issuer's fiscal year, such class of securities is held of record by 500 or more record holders and the company has total assets of more than $10 million. The Act amends the thresholds that trigger registration of classes of securities and resulting periodic and other reporting obligations under the Exchange Act. Specifically, the Act significantly increases the record holder threshold in Section 12(g) of the Exchange Act. The changes to the public company reporting triggers are detailed in the following table:

	Post-Act
Registration and Reporting Triggers	Total assets exceeding $10 million *and* a class of equity securities held of record by either 2,000 or more persons or 500 or more persons who are not accredited investors. • "Held of record" excludes shareholders who received securities under an employee compensation plan in transactions exempted from Securities Act registration • For bank and bank holding companies the 2,000 shareholders trigger does not include a limit on shareholders who are not accredited investors
Registration and Reporting Termination	Registration can be terminated upon certification that the number of holders of record is reduced to less than 300 persons, or in the case of a bank or bank holding company, 1,200 persons.

Note: The "held of record" definition in Section 12(g)(5) is amended and will not include securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from the Section 5 registration requirements. The SEC is required to revise the "held of record" definition. There is no specified time period for the SEC's rulemaking. Securities sold in exempt Crowdfunding offerings under Title III of the Act would also be excluded from the determination of record holders pursuant to the rules to be adopted by the SEC within 270 days from enactment.

Observations

While several of the provisions of the Act are effective immediately, many provisions require the SEC to issue, or amend, implementing significant rules or regulations. In addition, the Act requires the SEC to conduct several studies examining particular issues before taking additional actions. The full impact of the Act will not be known for some time.

Companies going public will have fewer reporting obligations both before and after going public, which should also lessen the cost of an IPO and the on-going expenses of being a public company. Whether this will increase the number of IPOs each year remains to be seen, particularly since the Act expands other methods of raising capital that do not involve going public offerings.

Note that the Act does not, by its terms, apply to private placements conducted under Section 4(2) or Section "4(1½)" of the Securities Act, other than those conducted in reliance on the safe harbors provided by Rule 506 and Rule 144A. It is an unresolved question whether the Act and related rulemaking will influence the judicial and SEC positions on general solicitation in these contexts. In addition, historically, Rule 506 has been considered a non-exclusive safe harbor, meaning that the Section 4(2) exemption might still be available even if a placement fails to comply with the technical requirements of the rule. It is unclear whether this will remain an option for placements under the revised Rule 506 that use general solicitation.

We see the EGC provisions as applying to a very broad category of issuers. Perhaps the smaller broker-dealers will again be in the fore of small company IPO activity. However, with the heavy regulatory board of FINRA that is also an open question.

Postscript

In early April the SEC began soliciting comments on the Act and its required rulemaking and studies in advance of any SEC releases on the objects. The SEC did this in connection with the Dodd-Frank Act. Persons who wish to submit official comments on particular rule making proposals can do so after the SEC proposes the rules.

Also, the Division of Corporate Finance announced procedures for submitting draft registration statements on a confidential basis and posted answers to frequently asked questions.

Of particular note is that a "draft regulation statement" is not a "filing" so it is not required to be signed or include the consents of auditors or other experts. However, the Division expects the draft registration statement to be substantially complete at the time of initial submission, including a signed audit report of independent auditors. Note- the staff will defer review of any draft registration statement that is materially deficient. Also, the original draft submission and all amendments must be filed in EDGAR in the event the EGC proceeds with its public offering.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our securities practice group:

Samuel E. Wing	303-785-1648	sewing@joneskeller.com
Reid A. Godbolt	303-573-6767	rgodbolt@joneskeller.com
Robert H. Davenport	303-573-1600	bdavenport@joneskeller.com
Brad H. Hamilton	303-785-1615	bhamilton@joneskeller.com
David A. Thayer	303-785-1623	dthayer@joneskeller.com
Zsolt K. Besskó	303-376-8422	zbessko@joneskeller.com
Cyrus Rajabi	303-785-1625	crajabi@joneskeller.com
Adam J. Fogoros	303-785-1618	adamf@joneskeller.com
Glen A. Payne	303-573-1600	gpayne@joneskeller.com