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## JOBS ACT HAS IMPLICATIONS FOR PRIVATE COMPANY D&O LIABILITY INSURANCE

### About the JOBS Act

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act (commonly referred to as the "JOBS Act"), which was designed to promote job creation by small companies and start-ups through the relaxation of the regulatory burdens of raising capital. The JOBS Act will, *inter alia*, relax restrictions on private fundraising and expressly allow companies to "crowdfund" up to \$1 million in capital over a 12-month period from a large number of small investors online. In this vein, the JOBS Act directs the Securities and Exchange Commission (SEC) to adopt rules within 270 days to implement a new exemption to allow crowdfunding. The SEC has announced that, until the rules are adopted, any offers or sales of securities purporting to rely on the crowdfunding exemption will be unlawful under the federal securities laws.

While the JOBS Act will help smaller companies raise capital, it also opens the door to potential civil actions that may not be covered by the typical private company D&O insurance policy. This alert describes the potential D&O insurance implications of the JOBS Act for companies that choose to participate in crowdfunding.

### A New Exemption and a New Cause of Action

Section 302 of the JOBS Act provides a new exemption from registration under the Securities Act of 1933 for private companies using crowdfunding to sell no more than \$1 million of securities within any 12-month period, as long as the amount sold to any one investor does not exceed specified per-investor annual income levels and net-worth limitations. Significantly, the JOBS Act also

authorizes a purchaser in a crowdfunding offering to bring a civil action against an issuer for rescission or rescissionary damages in the event that there are material misstatements or omissions in connection with the offering.

### Implications for Private Company D&O Liability Insurance

#### *Securities Exclusions and Crowdfunding Claims*

Claims filed by purchasers who participate in crowdfunding may not be covered by the typical private company D&O insurance policy. In particular, these claims could be excluded by a policy's securities exclusion, which generally bars coverage for claims based upon or arising from a public or private offering, solicitation, sale, distribution, or issuance of securities. Because crowdfunding activities that comply with the conditions set forth in Section 302 of the JOBS Act will be exempt from registration under the Securities Act, a securities exclusion that includes a carveback or exception for transactions that are exempt from registration under the Securities Act should provide insurance coverage for claims arising from crowdfunding.

#### *Insurability of Loss from Claims Arising from Crowdfunding*

Additionally, because the remedy in the event of liability for crowdfunding is restitutionary in nature, private companies that may engage in crowdfunding should make certain that settlements or judgments from claims brought under the JOBS Act are deemed covered "loss" within the meaning of their policies. In the context of public company D&O insurance, courts have held that loss

resulting from claims under Sections 11 and 12 of the Securities Act is restitutionary in nature and, as such, may not be insurable. In response to these holdings, many public company D&O carriers now offer language in their policies expressly confirming that their policies will cover loss arising from claims under Sections 11 and 12. Companies considering crowdfunding should include similar language in their private D&O policies. Such companies also should insure that the personal profit exclusions in their policies will not bar coverage for a claim brought under the JOBS Act.

For more information regarding the JOBS Act or any other related matter, please contact your regular Wilson Sonsini Goodrich & Rosati attorney.



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