ALERT

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The JOBS Act: Emerging Growth Companies and the IPO On-Ramp

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act (the "**Act**"), a wide-ranging legislative response to the private sector which repeatedly voiced concerns regarding the existence of substantial burdens on the ability of issuers to engage in capital formation activities. As expected, the Act will have a significant impact upon federal securities laws and is intended, among other things, to provide increased access to debt and equity capital for issuers generally and "Emerging Growth Companies" specifically.

This Alert primarily addresses the Act's (i) facilitation of initial public offerings ("**IPOs**") and relaxation of reporting requirements for Emerging Growth Companies and (ii) impact upon research analysts, investment banks and self-regulatory organizations. For additional information regarding the Act, please refer to The JOBS Act: General Solicitation and Advertising in Certain Private Placements and Exempt Offerings, The JOBS Act: Increase and Division of Section 12(g) Registration Requirement, The JOBS Act: Crowdfunding and The JOBS Act Quick Reference Chart.

What Is An Emerging Growth Company?

According to the Act, an "Emerging Growth Company" is an issuer that has total gross revenues of less than $1 billion in its most recently completed fiscal year. An issuer will remain as an "Emerging Growth Company" until the occurrence of the earliest of:

- The last day of the fiscal year during which the issuer has total gross revenues equal to or in excess of $1 billion;
- The last day of the issuer's fiscal year following the 5th anniversary of the issuer's IPO;
- The date on which the issuer has, during the prior 3-year period, issued more than $1 billion in non-convertible debt; or
- The date on which this issuer becomes a "large accelerated filer" (i.e., a public float of $750 million).

If, however, an issuer has, on or prior to December 8, 2011, sold common equity securities pursuant to an effective

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registration statement under the Securities Act of 1933, as amended, the issuer cannot be an Emerging Growth Company.

Does The Act Facilitate The IPO Process For Emerging Growth Companies?

Yes, significantly. The Act provides that, during the first 5 years following its IPO, an Emerging Growth Company would not be required to:

- provide an auditor's attestation report regarding internal control over financial reporting as mandated by Section 404(b) of Sarbanes Oxley although its management must establish, maintain and assess such internal controls;
- comply with certain executive compensation-related provisions of the Dodd-Frank Act including, but not limited to, the shareholder advisory say-on-pay vote;
- to comply with new GAAP pronouncements which are applicable to public companies until the pronouncements are also applicable to private companies; and
- to comply with any new or revised PCAOB rules mandating audit firm rotation or requiring a supplement to the auditor's report regarding additional information about the audit and the financial statements.

Does The Act Affect Research Related To Emerging Growth Companies And Their IPOs?

Yes. Pursuant to NASD Rule 2711, research analysts of investment banks who participate in an IPO syndicate (i) may not publish research and may not make a public appearance regarding an issuer (a) prior to its IPO, (b) until 40 days after the date of the IPO and (c) within 15 days before and after the expiration of the applicable lock-up period and (ii) may not participate in meetings with their investment banker colleagues.

The Act, however, provides that:

- research analysts of IPO syndicate members may publish research reports prior to an Emerging Growth Company's IPO without the reports constituting impermissible offers of securities; and
- the SEC and national securities associations, such as FINRA, may not adopt or maintain any rule, such as NASD Rule 2711, which restricts research analysts (i) from participating in meetings with the management of an Emerging Growth Company that is also attended by investment banking personnel and (ii) from issuing a research report or making a public appearance regarding the Emerging Growth Company or its securities after the date of an Emerging Growth Company's IPO or the expiration of any applicable lock-up period.

Did The Emerging Growth Company And IPO On-Rap Provisions Of The Act Become Effective Immediately?

Yes. The Emerging Growth Company and research analyst provisions of the Act became effective April 5, 2012.

Has The SEC Issued Guidance Regarding Emerging Growth Companies?

Yes. The SEC issued the Jumpstart Our Business Startups Act Frequently Asked Questions on April 16, 2011 to provide guidance regarding Emerging Growth Companies and the IPO On-Ramp.

Are There Any Potential Consequences?

Yes. An Emerging Growth Company will now be able to:

- receive valuable insight and feedback from and commence building a book comprised of key institutional investors (which may constitute a considerable percentage of the book) well in advance of its road show; and
- provide scaled disclosure in its registration statements and Exchange Act reports though an Emerging Growth Company should (i) consult with its investment bankers to ensure that, among other things, multi-year business trends and other pertinent information are fully and accurately reflected, and (ii) apprise itself of its competitors reporting practices so as not to be an outlier in its peer group.

Investment banks should:

- consult with their internal and external counsel to review their forms of underwriting agreements to address information shared by Emerging Growth Companies with QIBs and institutional accredited investors during the IPO process and their Chinese wall mechanisms or chaperoning programs in respect of the relaxation regarding the ability of research analysts to participate in the solicitation of investment banking business.

FINRA must:

- reconsider the viability of certain portions of NASD Rule 2711 while simultaneously being mindful that certain portions of NASD Rule 2711, such as the prohibition against the solicitation of investment banking business by research analysts, remain unaffected by the Act.

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