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April 2012

Jumpstart Our Business Startups (JOBS) Act

Congress Passes JOBS Act to Expand Access to Capital Markets

In order to spur job creation and economic growth, Congress recently passed legislation that fundamentally reforms the requirements for accessing capital markets in the United States. On April 5, 2012, President Obama signed the Jumpstart Our Business Startups (JOBS) Act, which Congress passed with broad bipartisan support. This legislation seeks to expand access to capital markets by making initial public offerings more attractive to “emerging growth companies” and expanding the ability of companies to raise capital in private and limited public offerings without registration with the Securities and Exchange Commission (SEC).

Encouraging Emerging Growth Companies to Access Public Capital Markets

The JOBS Act reforms the initial public offering (IPO) process for “emerging growth companies,” which the Act broadly defines as any issuer that had less than $1 billion in revenues in its last fiscal year. Companies that completed an IPO on or before December 8, 2011 would not qualify as an emerging growth company. The JOBS Act eases the regulatory burdens of the IPO process for an emerging growth company by:

- requiring disclosure of two, rather than three, years of audited financial statements and selected financial data in the registration statement for the IPO;
- allowing the company to request a confidential, nonpublic review of its registration statement by the SEC prior to public disclosure;
- permitting the company to gauge interest in its offering by expanding its ability to communicate with certain institutional investors prior to and during the offering process; and
- reducing restrictions on the publication of analyst reports about the company.

Additionally, the JOBS Act makes an IPO more attractive to an emerging growth company by creating a transition period of up to five years during which the company does not have to comply with certain ongoing disclosure and reporting obligations under the securities laws. The reduced ongoing compliance obligations during the transition period would include:

- exemption from the requirement under the Sarbanes-Oxley Act to have an independent auditor attest the company’s internal controls and procedures;
- reduced disclosure requirements regarding executive compensation;
- exemption from requirements to hold shareholder votes on executive compensation and golden parachutes; and
- relief from complying with financial accounting standards that are not generally applicable to private companies.

These reduced compliance obligations for an emerging growth company would continue until the earliest of:

- the last day of the fiscal year of the company during which it had total annual gross revenues of $1 billion or more;
- the last day of the fiscal year of the company following the fifth anniversary of its IPO;
- the date on which the company has issued more than $1 billion in non-convertible debt in a three-year period; or
- the date the company becomes a “large accelerated filer” as determined under the SEC’s regulations (generally defined as an issuer that has been publicly reporting with the SEC for at least 12 months and has a public float of $700 million or more).

Expanding Opportunities to Raise Capital

The JOBS Act also includes a number of reforms intended to expand opportunities for companies to raise capital in private or small public offerings.

- *General Solicitations* – The Act directs the SEC to revise its rules to permit a company to engage in general solicitations or general advertising in certain private offerings of securities as long as the company takes reasonable steps to ensure that all of the purchasers of securities in such offerings are “accredited investors” or “qualified institutional investors,” as such terms are defined under the securities laws.

- *Crowdfunding* – Crowdfunding is a capital-raising strategy pursuant to which a company raises capital from a large pool of small investors. The JOBS Act would permit a non-public company to raise up to $1 million within any 12-month period in this type of offering without registration under federal or state securities laws. If the investor’s annual income or net worth is less than $100,000, investors would be limited to investing the greater of $2,000 or 5% of the investor’s annual income or net worth within any 12-month period. If the investor’s annual income or net worth is equal to or more than $100,000, investors would be limited to investing 10% of the investor’s annual income or net worth, not to exceed a maximum amount of $100,000. Additionally, the company would need to comply with certain disclosure, operational and filing requirements, including a requirement to provide audited financial statements in connection with offerings exceeding $500,000.
- *Expansion of Regulation A Offerings* – Regulation A under the Securities Act of 1933, as amended, provides an exemption from the registration requirements of the Securities Act for offerings of up to $5 million in any 12-month period by non-public companies. The JOBS Act would increase this amount to $50 million. Companies that take advantage of this exemption would be required to file audited financial statements with the SEC annually and also would be subject to other periodic disclosure requirements.
- *Shareholder Threshold for Public Reporting* – Currently, a company is required to register and file reports with the SEC if it has more than $10 million in assets and 500 or more shareholders of record. The JOBS Act increases the shareholder of record threshold from 500 to 2,000, so long as not more than 499 of the shareholders are non-accredited investors. Additionally, shareholders who received their shares pursuant to exempt transactions under an employee compensation plan would not be counted toward the new shareholder threshold.

The JOBS Act has the potential to facilitate access to capital markets for a broad range of growth-oriented companies. Please contact a member of the **Corporate Finance and Securities Group** if you have any questions about this alert.