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Client Alert

The JOBS Act bill is intended to stimulate economic growth by improving access to the capital markets for emerging growth companies

JOBS Act Makes Major Revisions to Securities Laws; Eases Capital-Raising for Smaller Companies

On March 27, 2012, the U.S. House of Representatives passed the Jumpstart Our Business Startups Act (the JOBS Act), following with strong bipartisan support the U.S. Senate's March 22, 2012, passage of the JOBS Act. It is widely expected that President Obama will sign the act into law later this week.

The JOBS Act is intended to stimulate job creation and economic growth by improving access to the capital markets for emerging growth companies.

The JOBS Act contains a number of provisions designed to ease capital-raising for private companies, including:

Allows equity-based crowdfunding

- "Crowdfunding" activities are permitted, so that issuers may raise up to $1 million from a large pool of small investors, subject to limitations based on investor income levels. Issuers will be allowed to rely on investor certifications of income.
- An investor with an annual income or net worth of less than $100,000 may invest no more than the greater of $2,000 or 5% of his or her annual income or net worth in any 12-month period in a given company, and an investor with an annual income or net worth of more than $100,000 may invest up to 10% of his or her annual income or net worth annually (with a cap of $100,000 per investor, per company annually).
- Companies relying on these provisions must satisfy the following financial statement requirements:
  - Raising amounts up to $100,000 annually requires the certification of the principal financial officer that the financial statements are true and correct;

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    - Amounts between $100,000 and $500,000 annually will require review by an independent public accountant; and
    - Amounts above $500,000 annually will require audited financial statements.
- Offerings will have to be conducted through a broker or a "funding portal."
    - Issuers may not advertise the terms of the offering other than to direct investors, brokers or funding portals.
    - Issuers will be required to file with the SEC and provide to investors and intermediaries a range of information regarding the offering and the issuer (at least 21 days prior to the first sale to any investor and not less than annually thereafter).
- Securities issued will be "covered securities" and exempt from state Blue-Sky registration.
- Securities issued will be subject to transfer restrictions (with limited exceptions) for one year.

Removes the prohibitions on general solicitation or general advertising when conducting private placements under Rule 506 of Regulation D

- The SEC must remove the prohibition on general solicitation or general advertising when conducting private placements under Rule 506 of Regulation D, thus allowing companies to advertise broadly when conducting private placements.

Increases threshold for Regulation A "mini public offerings"

- The JOBS Act raises the limit for offerings under Regulation A (the little used small offerings exemption) from $5 million to $50 million and exempts Reg A offerings from state securities laws, so long as the securities are:
    - Offered or sold over a national securities exchange, or
    - Sold to "qualified purchasers" – a term that will need to be defined by SEC rulemaking.
- The revised Regulation A will require issuers to file audited financial statements annually with the SEC, and the JOBS Act directs the SEC to develop rules relating to periodic disclosure by Regulation A issuers and to develop rules requiring an issuer to file and distribute to prospective investors an offering statement containing specified disclosures.

Initial Public Offering "On-Ramp"

- The JOBS Act creates a category of issuer called an "emerging growth company," which is defined as a company with under $1 billion in annual revenue.
- A company will remain an emerging growth company until the earliest of:
    - Five years after the company's initial public offering (IPO);
    - When the company becomes a "large accelerated filer," defined as an issuer

    with in excess of $700 million in unaffiliated public float;
    - When the company has issued $1.0 billion or more of non-convertible debt in the previous three years, or
    - When the company reaches $1 billion or more in annual revenue.
- Under the JOBS Act, emerging growth companies:
    - Will be permitted to include only two years of audited financial statements (and two years of Management Discussion & Analysis and selected financial information) in its IPO registration statement, and future filings would not need to go back any earlier
    - Will not be required to provide an auditor attestation of management's assessment of internal controls for financial reporting created under Sarbanes Oxley
    - Will be exempt from certain accounting requirements, including the audit firm rotation and the supplemental information by audit firm requirements
    - Will be exempt from shareholder approval requirements of executive compensation (“Say on Pay”)
- Research reports relating to emerging growth companies and research communications with investors and management will be made easier:
    - Investment banks will be permitted to publish research during the pendency of a public offering, even if they are the company's underwriters.
    - The research analyst conflict of interest rules related to marketing of IPOs and “three-way” communication between research, investment banking and management will not apply.
    - There will be no post pricing quiet period or booster shot restrictions on research reports or other communications.
    - Emerging growth companies and their authorized representatives will be permitted to communicate orally or in writing with Qualified Institutional Buyers and Institutional Accredited Investors to determine interest in a potential offering whether before or after the filing of a registration statement for the offering.
- The SEC will permit IPO filings by emerging growth companies to be made confidentially.
- A company may only qualify as an emerging growth company if its first sale of common equity pursuant to an effective registration statement occurred after December 8, 2011.

Increases the number of record shareholders that require an issuer to become an SEC-reporting company

- The maximum number of shareholders of record that a private company can have before it must register with the SEC as a public company has been increased from 500 to

2,000, so long as fewer than 500 are non-accredited investors, and excluding shareholders who received employee compensation plan securities and "crowdfunding" investors.

When will these changes take effect?

- The timing relating to these provisions varies:
  - Changes to the number of shareholders of record requiring an issuer to become an SEC reporting company will be effective upon enactment;
  - The SEC must make the changes to Rule 506 regarding general solicitation within 90 days;
  - The SEC must enact rules facilitating the crowdsourcing provisions within 270 days; and
  - Changes to Regulation A will require SEC rulemaking, but no time limit is set by the JOBS Act.

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