Corporate Finance Alert

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April 2012

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'Jumpstart Our Business Startups Act' Signed Into Law

On April 5, 2012, President Obama signed into law the "Jumpstart Our Business Startups Act" (the JOBS Act), which previously was approved overwhelmingly by Congress. The JOBS Act consists of a package of bills intended to make it easier for smaller companies to raise public and private capital in the U.S. financial markets. Among the most significant provisions in the JOBS Act is the creation of a new category of issuers called "emerging growth companies" that would be exempt from, or subjected to reduced, regulatory requirements for a limited period of time in an effort to encourage them to go public in the United States. The JOBS Act also includes other measures intended to ease significantly private capital formation and reduce public reporting requirements for small and emerging businesses. The versions of the JOBS Act initially approved by each of the House of Representatives and Senate were nearly identical, other than with respect to certain crowdfunding provisions. The House of Representatives subsequently approved the Senate version of the JOBS Act. A summary of the JOBS Act follows.

Title I – Reopening American Capital Markets to Emerging Growth Companies

Title I of the JOBS Act, the so-called "IPO On-Ramp" provisions, establishes a new category of issuers called "emerging growth companies" (EGCs) under the U.S. securities laws. An EGC is defined as an issuer that had total annual gross revenues of less than $1 billion during its most recently completed fiscal year. An issuer that is an EGC would continue to be considered an EGC until the earliest of:

- the last day of the fiscal year during which it had total annual gross revenues of at least $1 billion;
- the last day of the fiscal year following the fifth anniversary of the initial public offering of its equity (IPO);
- the date on which it has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or
- the date on which it is considered to be a "large accelerated filer" under the Exchange Act.[1]

An issuer does not qualify as an EGC if its IPO occurred on or before December 8, 2011.

Under Title I, as described in the narrative discussion and illustrative tables below, EGCs are exempt from, or subject to reduced, compliance with various regulatory requirements.

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- **Reduced financial information in SEC filings**. Title I amends:
  - the Securities Act to provide that an EGC need not present more than two years of audited financial statements in its IPO registration statement, and in any other registration statement, an EGC need not present selected financial data for any period prior to the earliest audited period presented in connection with its IPO; and
  - the Exchange Act to make conforming changes in respect of selected financial data contained in EGC filings.
- **Confidential submissions of draft IPO registration statements**. Title I amends the Securities Act to permit an EGC to submit a draft IPO registration statement for confidential review by SEC staff prior to its public filing, provided that the initial confidential submission and all amendments are publicly filed with the SEC not later than 21 days before the EGC conducts a "road show."
- **Increased communications with QIBs and accredited investors**. Title I expands permissible communications during a securities offering by amending the Securities Act to permit an EGC, or any person authorized to act on behalf of an EGC, either before or after the filing a registration statement, to "test the waters" by engaging in oral or written communications with potential investors that are qualified institutional buyers (QIBs) or institutions that are accredited investors to determine whether such investors might have an interest in a contemplated securities offering.
- **Increased flexibility to issue research reports**. Title I amends:
  - the Securities Act to provide that the publication or distribution by a broker or dealer of any research report about an EGC the common equity securities of which are the subject of a proposed public offering pursuant to a registration statement that the EGC proposes to file, has filed or that is effective will be deemed not to constitute a regulated offer, even if the broker or dealer is participating or will participate in the registered offering of the securities of the EGC; and
  - the Exchange Act to prohibit the SEC and any registered national securities association from adopting or maintaining any rule or regulation prohibiting any broker, dealer or member of a national securities association from publishing or distributing any research report or making a public appearance with respect to the securities of an EGC during post-IPO quiet and lock-up periods.
- **Relax restrictions on securities analyst communications**. Title I amends the Exchange Act to prohibit the SEC and any registered national securities association from imposing any rule or regulation in connection with an EGC's IPO that restricts:
  - which associated persons of a broker, dealer or member of a national securities association may arrange for communications between a securities analyst and a potential investor; or
  - a securities analyst from participating in any communications with the management of an EGC that is also attended by any other associated person of a broker, dealer or member of a national securities association whose functional role is other than as a securities analyst.
- **Auditor attestation regarding assessment of internal controls**. Title I amends Section 404(b) of SOX to exempt a registered public accounting firm that prepares or issues an audit report for an EGC from the requirement that it provide an attestation report on the EGC's internal controls. This exemption would be available for so long as the issuer is deemed an EGC.
- **Accounting standards**. Title I amends the Securities Act and Exchange Act such that an EGC would not be required to comply with any new or revised financial accounting standard until such standard applies to companies that are not subject to Exchange Act public company reporting.

An EGC may choose to comply with accounting standards to the same extent that a non-EGC is required to comply with such standards. However, should an EGC choose to comply with non-EGC accounting standards, it will not be able to select some accounting standards to comply with and not others, but must then comply with all non-EGC accounting standards.

- **Auditor rotation and other PCAOB rules**. Title I amends SOX so that any rules of the Public Company Accounting Oversight Board (PCAOB) requiring mandatory audit firm rotation or a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the financial statements of the issuer will not apply to an audit of an EGC. Further, any additional rules adopted by the PCAOB after the date of enactment of the JOBS Act will not apply to an audit of any EGC unless the SEC determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition and capital formation.

- **Executive compensation disclosure**. Title I:

  - permits an EGC to comply with executive compensation disclosure requirements by complying with the reduced disclosure requirements generally available to smaller reporting companies; and

  - amends the Dodd-Frank Act to exclude EGCs from the provision that requires issuers to calculate and disclose the ratio of the CEO's compensation to the median compensation of all other employees.

- **Say on pay**. Title I amends the Exchange Act to exempt an EGC from the requirement to provide shareholders a separate, non-binding advisory vote on executive compensation, including golden parachute compensation, until one to three years after it no longer qualifies as an EGC.

- **Opt-in right for EGCs**. Title I permits an EGC to choose to forego an exemption and, instead, comply with the requirement that applies to a company that is not an EGC (except that if an EGC chooses to comply with non-EGC accounting standards, it cannot pick and choose which accounting standards would apply to it as described above in "accounting standards").

- **SEC review of Regulation S-K**. Title I mandates that the SEC conduct a review of Regulation S-K with a view to modernizing and simplifying the registration process and reducing the costs and other burdens for EGCs.

The table on the following pages reflects regulatory requirements prior to the enactment of the JOBS Act with respect to the foregoing matters for issuers, including EGCs, and what those requirements are for EGCs after enactment of the JOBS Act.

	PRIOR TO THE JOBS ACT	UNDER THE JOBS ACT
Financial Information in SEC Filings	• 3 years of audited financial statements • 2 years of audited financial statements for smaller reporting companies • Selected financial data for each of 5 years (or for life of issuer, if shorter) and any interim period included in the financial statements	• 2 years of audited financial statements • Not required to present selected financial data for any period prior to the earliest audited period presented in connection with an IPO • Within 1 year of IPO, EGC would report 3 years of audited financial statements
Confidential Submissions of Draft IPO Registration Statements	• Historically only foreign issuers were permitted to submit confidential draft registration statements with the SEC • In December 2011, the SEC announced that, effective immediately, it would only review submissions by foreign private issuers on a confidential basis in specified circumstances; as a result, many non-U.S. companies submitting their initial registration statement to the SEC in connection with a U.S. IPO or listing will have to do so via a public filing	• An EGC is permitted to submit to the SEC a draft IPO registration statement for confidential review prior to public filing, provided that such submission and any amendments are publicly filed with the SEC not later than 21 days before the EGC conducts a "road show"
Communications Before and During the Offering Process	• Limited ability to "test the waters"	• Expand permissible communications to allow EGCs, either prior to or after filing a registration statement, to "test the waters" by engaging in oral or written communications with QIBs and institutional accredited investors to determine interest in an offering

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	PRIOR TO THE JOBS ACT	UNDER THE JOBS ACT
Research Reports	• Generally, managing underwriters of an IPO are prohibited from publishing research on the issuer until 40 days after the IPO	• Permits publication and distribution by brokers or dealers of research reports about an EGC that is the subject of a public offering, even if the brokers or dealers are participating or will participate in the offering • Investor protections such as those in Section 501 of SOX re: potential conflicts of interest remain in effect
Securities Analyst Communications	• Communications by analysts with companies and potential IPO investors are subject to a number of conflicts of interest and other restrictions	• Removes restrictions on who may arrange for communications among securities analysts and investors in connection with an IPO and allows securities analysts to participate in communications with management of an EGC, along with other representatives of a broker or dealer
Auditor Attestation on Internal Controls	• Auditor attestation on effectiveness of internal controls over financial reporting required in second annual report after IPO • Non-accelerated filers not required to comply	• Transition period for compliance up to 5 years (i.e., for so long as the issuer is deemed to be an EGC)
Accounting Standards	• Must comply with applicable new or revised financial accounting standards	• Not required to comply with any new or revised financial accounting standard until such standard applies to companies that are not subject to Exchange Act public company reporting • EGCs may choose to comply with non-EGC accounting standards but may not selectively comply

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	PRIOR TO THE JOBS ACT	UNDER THE JOBS ACT
Auditor Rotation and Other PCAOB Rules	• Mandatory audit partner rotation every 5 years • The PCAOB is considering a mandatory audit firm rotation requirement and has issued a concept release on the matter	• Mandatory audit partner rotation requirement unchanged • Exempt from any PCAOB mandatory audit firm rotation requirements and PCAOB rules relating to supplements to the auditor's report • PCAOB rules adopted after the date of enactment of the JOBS Act will not apply to an audit of an EGC unless the SEC determines otherwise
Executive Compensation Disclosure	• Must comply with executive compensation disclosure requirements, unless a smaller reporting company (which is subject to reduced disclosure requirements) • Upon adoption of SEC rules under Dodd-Frank will be required to calculate and disclose the median compensation of all employees compared to the CEO	• May comply with executive compensation disclosure requirements by complying with the reduced disclosure requirements generally available to smaller reporting companies • Exempt from requirement to calculate and disclose the median compensation of all employees compared to the CEO
Say on Pay	• Must hold non-binding advisory shareholder votes on executive compensation arrangements • Smaller reporting companies are currently exempt from say on pay until 2013	• Exempt from requirement to hold non-binding advisory shareholder votes on executive compensation arrangements for 1 to 3 years after no longer an EGC

Title II – Access to Capital for Job Creators

Title II of the JOBS Act directs the SEC to revise Rule 506 of Regulation D to eliminate the ban on general solicitation and advertising in connection with private offerings made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors and the issuer took reasonable steps to verify that all purchasers of the securities are accredited investors. In addition, Title II of the JOBS Act directs the SEC to revise Rule 144A to provide that securities sold under the revised exemption may be offered to persons other than QIBs, including by means of general solicitation or general advertising, provided that securities are resold only to persons that the seller and any person acting on behalf of the seller reasonably believe are QIBs.

Title II of the JOBS Act also amends the Securities Act to provide that persons who maintain a "platform or mechanism" that facilitates offerings under Rule 506 and engage in general solicitiation and advertising, co-invest in securities or provide certain "ancillary services" would not be subject to broker-dealer registration under the Exchange Act, provided that certain conditions are met, including no compensation in connection with the purchase or sale of securities and no possession of customer funds or securities in connection with the purchase or sale of securities.

Title III – The Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012 or the 'CROWDFUND Act'

Title III of the JOBS Act exempts from the Securities Act registration requirements certain "crowdfunding" transactions. "Crowdfunding" describes a capital-raising strategy whereby groups of people pool money, composed of small individual contributions, to support accomplishment of a particular goal. Today, there is increasing interest in crowdfunding as a means of offering investors an ownership interest in an early-stage or small company.

Specifically, Title III of the JOBS Act:

- creates a new exemption that would permit non-reporting issuers to raise up to $1 million in reliance on the exemption within any 12-month period, with a maximum investment per investor of:
  - the greater of $2,000 or 5 percent of the investor's annual income or net worth within any 12-month period (if either the investor's annual income or net worth is less than $100,000); and
  - 10 percent of the investor's annual income or net worth, not to exceed a maximum amount of $100,000 (if either the investor's annual income or net worth is equal to or more than $100,000);
- requires that a transaction be conducted through a broker or "funding portal" (defined as any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others pursuant to this exemption that meets certain conditions (including not offering investment advice or recommendations, not soliciting purchases, sales or offers to buy securities offered or displayed on its website or portal and not compensating employees and others for such solicitation or based on the sale of securities));
- does not permit an issuer to advertise the terms of the offering, except for notices that direct investors to the broker or funding portal;
- requires an issuer to file with SEC and provide to investors and the intermediary specified information:
  - about the issuer, including a description of the issuer's business, anticipated business plan and financial condition, which would include audited financial statements (if the offering, together with all other offerings of the issuer pursuant to this exemption within the preceding 12-month period have, in the aggregate, target offering amounts of more than $500,000, or such other amount as the SEC may establish by rule);
  - about the transaction, including the target offering amount, the deadline to reach the target amount, the price, the use of proceeds and risks to purchasers;

- provides for a civil liability provision for material misstatements in, or material omissions from, an offering document or oral communications involved in the offer or sale of securities;

- requires an issuer to file with the SEC, not less than annually, and provide to investors reports of the issuer's results of operations and financial statements (as determined appropriate by the SEC);

- treats securities offered as "covered securities," thereby pre-empting registration under state blue sky laws;

- requires the SEC, by rule, to exempt, conditionally or unconditionally, securities acquired pursuant to this exemption from the provisions of Exchange Act Section 12(g);

- requires a person acting as a broker or funding portal intermediary to take certain actions, including to:

    - register with the SEC as a broker or funding portal and register with any applicable self regulatory organization;

    - provide such disclosures, including those related to risks and other investor education materials, as the SEC by rule will determine appropriate, and ensure that investors review such disclosures, affirm risk of loss and answer various questions;

    - take such measures to reduce risk of fraud, as will be established by the SEC, including background and regulatory checks on directors, officers and significant shareholders of issuers;

    - make available to the SEC and to potential investors any information provided by the issuer to investors and intermediaries, not later than 21 days prior to the first day on which securities are sold to any investor; and

    - make such efforts as the SEC determines appropriate by rule to ensure that no investor in a 12-month period has purchased securities offered pursuant to this exemption that, in the aggregate, from all issuers, exceed the investment limits set forth above;

- requires the SEC, by rule, to exempt, conditionally or unconditionally, a funding portal that is a member of a national securities association registered under Exchange Act Section 15A from the requirement to register as a broker or dealer under Exchange Act Section 15(a)(1);

- restricts transfer of securities issued and sold under such exemption for one year (unless the securities are resold to the issuer, an accredited investor, as part of a registered offering or to a family member of the purchaser under limited circumstances); and

- requires the dollar amounts in such exemption, as well as those that govern the type of financial information to be provided to investors and intermediaries, to be adjusted by the SEC not less frequently than once every five years.

The foregoing summary of the crowdfunding provisions, which are set forth in the version of the the JOBS Act that became law, differ significantly from the crowdfunding provisions set forth in the original House version of the JOBS Act approved on March 8, 2012. For example, in the House version, an issuer would have been able to raise up to $2 million within any 12-month period, so long as it had audited financial statements, and the maximum investment per investor would have been the lesser of $10,000 or 10 percent of the investor's annual income within any 12-month period (without regard to annual income or net worth thresholds).

Title IV – Small Company Capital Formation

Title IV of the JOBS Act requires the SEC to amend Regulation A under the Securities Act or to create a new exemption from registration, similar to Regulation A, but with an increased offering amount and additional conditions. Regulation A provides an exemption from the registration requirements for offerings of up to $5 million per year by non-reporting issuers.

Specifically, Title IV of the JOBS Act:

- raises the cap in the exemption for small public issuances of unrestricted debt, equity or convertible securities to $50 million from $5 million in any 12-month period;
- adds a civil liability provision (Section 12(a)(2) of the Securities Act for false or misleading statements or omissions set forth in an offering document or oral communications involved in the offer or sale of securities);
- mandates that the SEC require the issuer to file audited financial statements with the SEC annually;
- authorizes the SEC (i) to require an issuer that has availed itself of the exemption to make periodic non-financial disclosures available to investors regarding the issuer, its business operations, its financial condition, its corporate governance principles and its use of investor funds; and (ii) to provide conditions for the suspension and termination of such a requirement with respect to that issuer;[2]
- authorizes the SEC to require an issuer to file and distribute to prospective investors an offering statement containing specified disclosures; and
- requires the SEC (i) to review and increase biennially such offering amount limitation, as appropriate, and (ii) to report to certain congressional committees on its reasons for not increasing the amount if it determines not to do so.

Unlike offerings made pursuant to the crowdfunding exemption described above, unless the securities offered pursuant to this new exemption are offered or sold on a national securities exchange or to qualified purchasers, offerings of such securities will be subject to state blue sky securities laws.

Shareholder Threshold for Public Reporting:

Title V – Private Company Flexibility and Growth
Title VI – Capital Expansion

Exchange Act Section 12(g) and its related rules require a company with more than $10 million in assets to register any class of its equity securities that, as of the end of a company's fiscal year, is "held of record" by 500 or more persons. Deregistration of a class of equity securities under Section 12(g) is permissible when such class of equity securities is held of record by fewer than 300 persons or, under limited circumstances, by fewer than 500 persons. For most publicly traded companies, many shareholders are not individually counted under the definition of "held of record" because they hold their shares in "street name," and SEC rules do not look through the financial intermediary to the beneficial owner. However, shareholders of most private companies usually hold their shares directly and, therefore, are counted as "holders of record."

Title V of the JOBS Act:

- raises the current 500-shareholder threshold to 2,000 shareholders, so long as not more than 499 shareholders are not accredited investors;[3] and

- excludes shareholders who received their shares pursuant to exempt transactions under an employee compensation plan from counting toward the new shareholder threshold.

The legislation also requires that the SEC adopt safe harbor provisions that issuers could use to determine whether holders of their securities received the securities pursuant to an employee compensation plan in a qualifying exempt transaction.

Title VI of the JOBS Act:

- raises the current 500-shareholder threshold for banks and bank holding companies to 2,000 shareholders;[4] and

- permits the termination and suspension of the registration and reporting obligations, respectively, by a bank or bank holding company if the number of shareholders of record is reduced to fewer than 1,200.

The table below reflects the shareholder thresholds that trigger, and permit termination and suspension of, public company Exchange Act registration and reporting prior to enactment of the JOBS Act and what those thresholds are after enactment of the JOBS Act.

SHAREHOLDER THRESHOLDS	PRIOR TO THE JOBS ACT	UNDER THE JOBS ACT
To trigger registration and reporting by companies other than banks and bank holding companies	• 500 shareholders of record	• 2,000 shareholders of record, so long as not more than 499 shareholders are not accredited investors • Persons who received their shares pursuant to exempt transactions under an employee compensation plan would not count toward the new shareholder threshold • Upon adoption of SEC rules, holders of crowdfunded securities excluded from calculation
To trigger registration and reporting by banks and bank holding companies	• 500 shareholders of record	• 2,000 shareholders of record • Persons who received their shares pursuant to exempt transactions under an employee compensation plan would not count toward the new shareholder threshold • Upon adoption of SEC rules, holders of crowdfunded securities excluded from calculation

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SHAREHOLDER THRESHOLDS	PRIOR TO THE JOBS ACT	UNDER THE JOBS ACT
To permit termination and suspension of registration and reporting by companies other than banks and bank holding companies	• Fewer than 300 shareholders of record • Fewer than 500 shareholders of record under limited circumstances	• Statutory shareholder thresholds unchanged • Persons who received their shares pursuant to exempt transactions under an employee compensation plan would not count toward the shareholder threshold • Upon adoption of SEC rules, holders of crowdfunded securities excluded from calculation
To permit termination and suspension of registration and reporting by banks and bank holding companies	• Fewer than 300 shareholders of record • Fewer than 500 shareholders of record under limited circumstances	• Statutory shareholder threshold reduced to fewer than 1,200 shareholders of record • Persons who received their shares pursuant to exempt transactions under an employee compensation plan would not count toward the new shareholder threshold • Upon adoption of SEC rules, holders of crowdfunded securities excluded from calculation

What the SEC's Chairman Thinks About the JOBS Act

In a letter, dated March 13, 2012, to Senator Johnson (D-SD), Chairman of the Senate Committee on Banking, Housing and Urban Affairs, and Senator Shelby (R-AL), the Ranking Member of the Committee, Mary L. Schapiro, Chairman of the SEC, identified a number of provisions in the JOBS Act that raised significant investor protection concerns. For example, Chairman Schapiro expressed concern with respect to:

- the broad definition of EGC and noted that "it would eliminate important protections for investors in even very large companies;"
- the "test the waters" provisions which, unlike existing "test the waters" provisions, contain no requirement to file with the SEC materials used to solicit interest in a securities offering, thereby creating the potential for uneven information among investors;

- confidential filings of IPO registration statements, which would "hamper the staff's ability to provide effective reviews, since the [SEC] staff benefits in its reviews from the perspectives and insights that the public provides on IPO filings;"

- the changes to research and research analyst rules, which could result in a return to practices and abuses seen in the "dot com" era and "cause real and significant damage to investors;"

- the exemption from the auditor attestation of internal controls during the five-year on-ramp period, which "has significantly improved the quality and reliability of financial reporting and provides important investor protections;" and

- the proposed crowdfunding provisions, which need "additional safeguards to protect investors from those who may seek to engage in fraudulent activities," such as providing for "oversight of the industry professionals that intermediate and facilitate these offerings."[5]

Chairman Schapiro also commented on other provisions in the JOBS Act, including the proposed changes to the Exchange Act Section 12(g) registration and reporting thresholds, which she stated she did not "have sufficient data or information to assess." Certain of these concerns seem to have been addressed in a substitute bill which was not approved by the Senate. Given that the Chairman's concerns largely were not addressed, it is reasonable to believe that the SEC will devote significant resources to ensure that the new accommodations applicable to capital formation do not come at the expense of its additional mandates related to investor protections and fair and orderly markets.

Conclusion

The JOBS Act seeks to increase the number of U.S. public offerings after a steady decline over the course of the last decade and to facilitate capital raising by smaller companies. Under the JOBS Act, many of the primary regulatory burdens imposed on private and public capital raising transactions conducted by smaller companies are substantially reduced, thereby potentially facilitating quicker and more cost efficient capital formation by these companies.

END NOTES

1 Under Exchange Act Rule 12b-2, a "large accelerated filer" includes an issuer with a worldwide public float of $700 million or more.

2 Although the JOBS Act does not make a company that conducts an offering under this exemption subject to the Exchange Act registration and reporting requirements, any such company would be required to file audited financial statements with the SEC annually, and other periodic disclosure would be required to the extent that the SEC directs.

3 The new thresholds under Titles V and VI would, upon adoption of SEC rules, exclude, conditionally or unconditionally, holders of securities acquired in crowdfunding transactions. See the discussion under "Title III - The Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012 or the 'CROWDFUND Act'" above.

4 Although Title VI does not include the provision relating to the exclusion of shareholders who received their shares pursuant to exempt transactions under an employee compensation plan from counting toward the shareholder registration and reporting thresholds with respect to banks and bank holding companies, the amendments set forth in Title V extend this exemption, as well as the related safe harbor, to banks and bank holding companies.

5 Chairman Schapiro's letter pre-dates the Senate's amendments to the crowdfunding provisions in the JOBS Act. The Senate amendments attempted to incorporate some investor protections, including some oversight of intermediaries.

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