An overview of the JOBS Act

May 1, 2012

Introduction

On April 5, 2012, the President signed the Jumpstart our Business Startups (JOBS) Act into law. The objective of the legislation, as the name implies, is to stimulate the growth of small to midsized companies through facilitated access to capital and reduced regulatory reporting requirements. This, in turn, is expected to create jobs as businesses use this newly infused capital to expand operations.

The JOBS Act implementation period varies; for example, the provisions relating to a new class of reporting company - the Emerging Growth Company - are effective immediately as is the ability for companies (other than banks and bank holding companies) to have up to 2,000 shareholders, including up to 500 non-accredited investors, without triggering registration with the SEC. Banks and bank holding companies now also can have up to 2,000 shareholders but are not subject to the 500 non-accredited investor limit. Other provisions require the SEC to formulate rules and conduct studies to effect the provisions of the legislation.

> The SEC has requested public comment on certain provisions of the JOBS Act prior to the proposal of any rules. While this is not unprecedented, it is generally the case that rules are initially crafted and then exposed for public comment. Comments may be provided through the SEC website.

The actions required by the SEC are in addition to the significant effort required of the SEC with regard to the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In a recent oversight hearing, Mary Schapiro, Chairman of the SEC, in responding to a question regarding cost benefit analyses, commented on the need for additional resources. While the SEC has acted swiftly to issue frequently asked question documents with regard to the JOBS Act, it remains to be seen if the rules can be adopted in the timeframes specified.

As with most legislation, this Act is not without controversy. Regulators have expressed concern regarding the lessening of investor protections and the potential for an increase in fraudulent activity. The SEC's concerns prior to passage of the Act were well known, while others have viewed this as a game-changing update of securities regulations. What is certain is that the full ramifications of the JOBS Act on capital formation remain to be seen.

JOBS Act provisions at a glance

Title number and title name	Brief summary of title contents	Expected implementation timeframe
Title I - *Reopening American Capital Markets to Emerging Growth Companies*	Establishes the Emerging Growth Company IPO "on-ramp."	Effective immediately
Title II - *Access to Capital for Job Creators*	Lifts ban on general solicitation and advertising for Regulation D, Rule 506 offerings and Rule 144A offerings.	Certain rules required within 90 days of enactment of the Act
Title III - *Crowdfunding*	Registration exemption for limited-size offerings to be sold in small amounts to a large number of investors.	Certain rules required within 270 days of enactment of the Act
Title IV - *Small Company Capital Formation*	Increases the amount of capital that can be raised under Regulation A from $5 million to $50 million.	No deadline for rules
Title V - *Private Company Flexibility and Growth*	Raises the threshold for mandatory registration from 500 shareholders of record to 2,000 shareholders of record as long as there are less than 500 "non-accredited" investors.	Effective immediately
Title VI - *Capital Expansion*	Raises the threshold for mandatory registration from 500 shareholders of record to 2,000 shareholders of record and raises the thresholds for a non-listed bank or bank holding company to terminate its registration from 300 shareholders of record to 1,200 shareholders of record.	Rules required with one year of enactment of the Act

Title I - Reopening American Capital Markets to Emerging Growth Companies

The Emerging Growth Company

Title I of the JOBS Act creates a new class of company - the Emerging Growth Company (EGC) - effective immediately. A company may be considered an EGC if it had total annual gross revenues of less than $1 billion during its most recently completed fiscal year. An issuer that is an EGC as of the first day of that fiscal year may continue to be deemed an EGC until the earliest of:

- The last day of the fiscal year of the issuer during which it had total annual gross revenues of $1 billion or more;
- The last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under this title;
- The date on which such issuer has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or
- The date on which such issuer is deemed to be a large accelerated filer (generally an issuer with market capitalization greater than $700 million).

While the provisions regarding the EGC are effective immediately, a company that has sold equity securities in a registered offering prior to December 8, 2011 cannot be considered an EGC and, accordingly, would not be eligible for the exemptions afforded by the JOBS Act. A company that had completed an equity offering after December 8, 2011, but before the JOBS Act became law, may elect to avail itself of the new classification.

This new class of issuer is important as it enables a company deemed to be an EGC to avail itself of relief from certain aspects of both initial registration requirements in an equity offering and subsequent reporting requirements.

> For a company in the process of an IPO that identifies itself as an EGC, consideration should be given to the need for expanded disclosure within the registration statement. For example, a company may want to include disclosure with regard to how and why it may lose its status as an EGC. Additionally, the exemptions and elections available to an EGC in accordance with the Act should be assessed for disclosure and potential ramifications. The election by the EGC to avail itself of the extended adoption provision for new accounting standards, for example, may require a risk factor indicating that the financial statements of the EGC may not be comparable to other public companies.

Changes to the IPO Process for the Emerging Growth Company

The table below summarizes the changes to the IPO registration process for a company that is considered an EGC.

Pre JOBS Act	Emerging Growth Company
Three years of audited financial statements	Two years of audited financial statements
Five years of selected financial data	Two years of selected financial data
Comply with new accounting standards as an issuer	Comply with new accounting standards in the same timeframe for a private company
Registration statement publicly filed	Confidential treatment available

The confidential treatment option could enable a company to delay exposure of sensitive competitive information until the certainty of an offering is confirmed. Likewise, the confidential treatment option permits the EGC to resolve accounting or disclosure issues with the SEC privately. The initial confidential submission and all amendments to the registration statements must be publicly filed at least 21 days prior to the IPO roadshow.

Currently, there is no electronic process available for filing a registration statement utilizing the confidential treatment option. On April 10, 2012, the SEC's Division of Corporation Finance (CorpFin) issued a frequently asked questions (FAQ) document regarding the confidential submission process as well as other matters.

Additionally, the JOBS Act has made certain changes to the communications an EGC may make with qualified institutional investors, and permits investment banks to publish research reports on the EGC even if the investment bank is a party to the offering.

Post-IPO Changes for the Emerging Growth Company

The table below summarizes post-IPO changes for a company that is considered an EGC.

Pre JOBS Act	Emerging Growth Company
Comply with new accounting standards as an issuer	Comply with new accounting standards in the same timeframe for a private company
Five years of selected financial data	Selected financial data is only required for those years starting with the earliest audited period included in the EGC's initial registration statement

Pre JOBS Act	Emerging Growth Company
Compliance with Section 404 (b) of the Sarbanes-Oxley Act of 2002 (auditor attestation on internal control over financial reporting) for accelerated filers	No auditor attestation required
Compliance with future PCAOB regulations	Exemption from prospective PCAOB regulations regarding auditor rotation and changes in auditor reporting as well as future regulations unless the SEC determines it is in the best interest of the public that the EGC comply
Compliance with current and future compensation disclosures	Compliance with the more limited compensation disclosure requirements available to a smaller reporting company (generally, less than $75 million in market capitalization). Exemption from certain current and prospective compensation disclosures such as advisory votes on say-on-pay and golden parachute provisions, among others

While the EGC is not required to have an auditor attest to its internal control over financial reporting, this does not relieve management of its responsibilities with regard to its report on internal control over financial reporting required by Section 404(a) of the Sarbanes-Oxley Act of 2002.

Title I also requires the SEC to, within 90 days of enactment of the Act, study the effects that trading and quoting securities in $.01 increments (known as decimalization) has had on IPOs and the liquidity of small- and mid-capitalization company securities. Further, within 180 days of enactment of the Act, the SEC must review its non-financial statement disclosure requirements included in Regulation S-K to determine how the registration process can be simplified and how costs associated with these requirements can be reduced for the EGC.

Title II - Access to Capital for Job Creators

The Securities Act of 1933 requires that all offerings of securities be registered unless there is an applicable exemption from registration. Regulation D is an exemption used for small private offerings with, among others, limits on the size of the offering and the number of investors. Title II of the JOBS Act requires the SEC to eliminate its ban on general solicitation/advertising in offerings that are exempt from registration under Rule 506 of Regulation D if all investors are accredited or under Rule 144A so long as all investors are qualified institutional buyers. Issuers must take “reasonable steps” to determine if an issuer is accredited. The SEC is required to issue rules in this regard within 90 days.

Title III - Crowdfunding

In addition to the existing exemptions from registration, the JOBS Act would provide a registration exemption for limited-size offerings to be sold in small amounts to a large number of investors, for example, through the internet. This is commonly referred to as “crowdfunding” and, while this practice previously existed, the return to investors was generally in the form of a good or service. The crowdfunding limitations include:

- An issuer is permitted to sell up to $1 million of securities in any rolling 12-month period, provided the issuer has met certain requirements, such as initial and periodic disclosures to the SEC; and
- Each investor may not purchase securities in excess of $2,000 or a percentage of such investor's annual income or net worth, up to a maximum of $100,000.

The SEC has numerous rules to formulate within 270 days with regard to Title III of the JOBS Act.

Title IV - Small Company Capital Formation

Regulation A is an exemption that allows a small company to offer shares to the public in a general solicitation, without satisfying all requirements of an initial public offering. Title IV increases the amount of capital that can be raised under Regulation A from $5 million to $50 million. The implementation of this part of the JOBS Act will require further action and rulemaking by the SEC.

Additionally, Title IV requires the U.S. Comptroller General, within 90 days of enactment of the Act, to study the impact of state securities regulations (sometimes referred to as "Blue Sky Laws") on public offerings by private companies under Regulation A.

Title V - Private Company Flexibility and Growth

Prior to the JOBS Act, the 1934 Securities Act required an issuer with more than $10 million in assets and with securities held by 500 or more holders to register with the SEC. Title V of the JOBS Act raises the threshold for mandatory registration from 500 shareholders of record to 2,000 shareholders of record as long as there are less than 500 non-accredited investors. Investors who purchased their shares in a crowdfunding transaction and investors who received their shares through employee compensation plans generally would be excluded from the counts.

Title VI - Capital Expansion

Title VI of the Jobs Act raises the threshold for mandatory registration from 500 shareholders of record to 2,000 shareholders of record (with no limitation on the number of non-accredited investors) for a bank or bank holding company and raises the threshold for a bank or bank holding company to terminate its registration from 300 shareholders of record to 1,200 shareholders of record. There were no changes to the threshold for terminating the registration for an issuer that is not a bank or bank holding company.

On April 11, 2012, CorpFin issued an FAQ to address issues with regard to the registration of equity securities as well as the deregistration or suspension of reporting requirements for bank holding companies.

800.274.3978
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