

SECURITIES REGULATION AND COMPLIANCE ALERT

JUMPSTART OUR BUSINESS STARTUPS ACT (“JOBS ACT”)

The JOBS Act was signed by President Obama on April 5, 2012. The new law contains provisions intended (i) to encourage and assist the growth of startups and small businesses by relaxing restrictions on capital raising, and (ii) to make it easier and less expensive for more small businesses to go public by scaling back disclosure and providing additional exemptions for such companies. Some of the provisions are effective immediately, while others will require Securities and Exchange Commission (“SEC”) rulemaking before they have practical effect.

Public Solicitation Allowed in Certain Private Placements

This is the most useful portion of the JOBS Act for companies intending to stay private. Under current regulations, companies raising capital through private placements cannot publicly solicit investors, and generally must limit solicitation to prospective investors with which they, or brokers they engage, have a pre-existing relationship, or who have been previously determined to be “accredited investors.” Under the JOBS Act, the SEC must amend the regulations to allow general solicitation and advertising in connection with transactions otherwise complying with Rule 506 of the SEC’s Regulation D, provided that the ultimate purchasers are all accredited investors. The definition of accredited investors will not change. Generally, an accredited investor is an individual who meets one of the following tests

- Individual income of more than \$200,000 in the past 2 years and reasonably expected in the current year;
- Income together with spouse of more than \$300,000 in the past 2 years and reasonably expected in the current year;
- Net worth, with or without spouse, not including primary residence, in excess of \$1,000,000.

Organizations wholly owned by one or more accredited investors, and organizations with total assets of more than \$5,000,000, are also accredited investors.

Rule 506 allows an unlimited number of accredited investors and up to 35 investors who are not accredited. However, in order to accept even one non-accredited investor, the solicitation must be conducted privately and the company cannot take advantage of the new provisions.

The changes to the solicitation rules require amendment to current SEC rules. The JOBS Act directs the SEC to amend the rules within 90 days.

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“Crowdfunding”

The JOBS Act amends securities laws to allow non-public companies to sell up to \$1 million of securities in "crowdfunding" transactions within a 12-month period through a broker or registered funding portal, subject to certain restrictions on disclosure, limits on the amount an individual investor may invest, and reporting requirements. These provisions will require the company raising funds to provide specific information, including financial information, to prospective investors. The brokers or funding portals will be required to provide prospective investors with certain general information about investing in startups, emerging businesses and small companies, ensure that the companies seeking investment provide the required information, obtain background checks on the principals of the companies seeking funds and take other actions to help enforce compliance with the law and regulations.

The SEC is required to adopt substantial rules before the crowdfunding provisions can go into effect, including a set of rules for registration and regulation of the portals. The JOBS Act directs the SEC to adopt those regulations within 270 days.

Higher Threshold for Registration as a Reporting Company under the Securities Exchange Act

Prior to the JOBS Act, any company with at least 500 shareholders and \$10,000,000 in assets was required to register with the SEC under the Securities Exchange Act of 1934, and once registered, to file quarterly, annual and other reports with the SEC even if the company had never conducted a public offering and no trading market existed for its shares. After the JOBS Act, registration is not required until the company has either 2,000 shareholders or 500 shareholders who are not accredited investors. In addition, shareholders who received the shares under an employee compensation plan in a transaction exempt from registration are not counted toward these limits, and the SEC is directed to adopt regulations so that persons who purchased shares in a crowdfunding transaction are also not counted.

The JOBS Act does not affect the registration of companies already registered under the Securities Exchange Act. Once registered, companies will still need to have less than 300 shareholders of record to de-register and cease reporting to the SEC.

Small Public Offerings

The JOBS Act directs the SEC to adopt regulations allowing public offerings of up to \$50 million in any 12 month period without formal SEC registration. The company would still need to file an offering statement with the SEC, and file periodic financial statements with the SEC after the offering. Companies will be permitted to publicly solicit interest in the offering before filing the offering statement.

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Emerging Growth Company Registration

The JOBS Act creates a new category of “Emerging Growth Companies.” These are generally companies with less than \$1 billion in revenues and less than \$1 billion in non-convertible debt, until 5 years have elapsed since their IPO. Emerging Growth Companies will be subject to less stringent financial statement and other requirements in connection with public offerings and other filings they are required to make with the SEC.

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