April 15, 2013

The JOBS Act: One Year Later

The Jumpstart Our Business Startups Act (the "**JOBS Act**") became law in April 2012, implementing sweeping changes to the rules governing IPOs and private capital formation in the United States by domestic and foreign issuers. The JOBS Act substantially reduces the regulatory burdens on "emerging growth companies" (companies with less than $1 billion in annual revenue) during and following an IPO, and also substantially relaxes restrictions on communications with potential investors in the context of both public and private offerings.

Many provisions of the JOBS Act, including the new relaxed standards for emerging growth companies ("**EGCs**"), were immediately effective and did not require further SEC rulemaking. Certain other provisions, including the elimination of restrictions under the Securities Act of 1933 (the "**Securities Act**") on publicity in connection with certain private offerings, would not become effective until the SEC adopts implementing rules. As noted last week in congressional testimony by the acting directors of the Division of Corporation Finance and of the Division of Trading and Markets, while the JOBS Act has made significant changes to the federal securities laws, much of that rulemaking has not yet been finalized. In addition to mandated rulemaking, over the past year, the SEC has issued guidance on various aspects of the JOBS Act. We summarize below the principal aspects of the JOBS Act, as qualified by SEC guidance.

Emerging Growth Companies

An "emerging growth company" is a company that has had total revenue of less than $1 billion during its most recent fiscal year.[1] This threshold will be indexed for inflation every five years. An EGC will retain its status as such until the earliest of:

- the first fiscal year after its total revenue as presented on its income statement exceeds $1 billion;
- the last day of the fiscal year during which the fifth anniversary of its IPO occurs;

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[1] If a private company exceeded the threshold in past fiscal years, it may still be able to qualify as an EGC since only the revenue for its most recently completed fiscal year is considered. The revenue is the total revenue as presented on the income statement under U.S. GAAP or IFRS as issued by the IASB. If the financial statements are presented in currencies other than the U.S. dollars, the revenue is calculated in U.S. dollars using the exchange rate as of the last day of the most recently completed fiscal year. A predecessor's revenue should be used for the calculation of revenue if the financial statements are those of the predecessor. Financial institutions should use the specific approach developed for the determination of smaller reporting company status and explained in Section 5110.2 of the SEC's Financial Reporting Manual to determine their EGC status.

- the date when the company has issued more than $1 billion in non-convertible debt securities, whether or not issued in a registered offering, over the previous rolling three-year period; and
- the first fiscal year in which the company becomes a large accelerated filer (meaning the company has been reporting for at least one year, has filed at least one annual report and the value of its common equity held by non-affiliates is at least $700 million).

An EGC that loses its status as such will not be able to regain it.

EGC status will need to be tested at various points during an IPO process. Specifically, a company must test its status each time it makes a confidential submission to the SEC of its IPO registration statement and amendments thereto; at the time of the first public filing of its IPO registration statement with the SEC; at the time of each test-the-waters communication (described below); and whenever a research report is issued. The SEC staff has clarified that the most recently completed fiscal year to which the revenue test would apply is the most recent annual period completed, regardless of whether financial statements for that period are presented in the IPO registration statement. If, for example, during the IPO process, an EGC starts a new fiscal year and during the preceding fiscal year the EGC's revenue increased to above $1 billion, it would no longer be able to rely on the accommodations for EGCs (whether or not the financial statements for that preceding year are included in its IPO registration statement). However, once an EGC files its registration statement publicly, it will retain its status as an EGC while it is in registration for the purpose of determining the contents of that registration statement.

A company (or its predecessor) that sold common equity securities under an effective registration statement on or before December 8, 2011 generally cannot qualify as an EGC[2], and a company that was not an EGC at the time of its IPO cannot become an EGC at a later date. However, a company that was previously (but is no longer) a reporting company under the Securities Exchange Act of 1934 (the "**Exchange Act**") that would otherwise qualify as an EGC (but for the fact that its IPO of common equity securities occurred on or before December 8, 2011) will be allowed to qualify as an EGC and use the EGC status accommodations for its next registered offering and thereafter until it otherwise no longer qualifies.[3] The SEC staff has advised that issuers with questions relating to taking advantage of the benefits of EGC status after ceasing to be an Exchange Act reporting company should contact the Division's Office of the Chief Counsel.

Public reporting companies that have not completed an IPO (and become reporting companies due to a large shareholder base or due to issuance of registered debt) may also qualify as EGCs and may remain so indefinitely to the extent that they do not sell common equity in a registered public offering.

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2 A public sale of debt on or prior to December 8, 2011 will not preclude a company from qualifying as an EGC.

3 Note that this position is not available to an issuer that has had the registration of a class of its securities revoked pursuant to Exchange Act Section 12(j), and the EGC status of an issuer may be questioned if it appears that the issuer ceased to be a reporting company for the purpose of conducting a registered offering as an EGC.

Issuers of asset-backed securities and investment companies registered under the Investment Company Act of 1940 (the "**Investment Company Act**") are not eligible to become EGCs. However, business development companies are eligible to become EGCs.

The SEC staff has clarified that all non-convertible debt securities, whether or not still outstanding, are to be counted against the $1 billion limit. However, debt securities issued in an A/B exchange offer will not be counted. The SEC staff has also clarified that "non-convertible debt" means any non-convertible debt *security*, whether or not issued in a registered offering, and would not include bank debt.

The SEC staff has provided guidance in respect of evaluating EGC status in connection with a merger by way of two examples, which we set forth below. In each case, the company's fiscal year is the calendar year, the transaction occurs on September 30, 2012 and the predecessor was eligible to be an EGC.

> **Example 1**: Company A acquires Company B for cash or stock, in a forward acquisition. Company A is both the legal acquiror and the accounting acquiror.
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> **Example 2**: Company C undertakes a reverse merger with Company D, an operating company. Company D is presented as the predecessor in the post-transaction financial statements.

	Example 1: Forward Acquisition	**Example 2: Reverse Merger**
$1b annual revenue test	In 2012, look to Company A's revenue for 2011. In 2013, look to Company A's revenue for 2012, which will include Company B's revenue from Oct. 1, 2012.	In 2012, look to Company D's revenue for 2011. In 2013, look to Company D's revenue for 2012, which will include Company C's revenue from Oct. 1, 2012.
Five-year anniversary test	Look to Company A's date of first sale.	Look to Company C's date of first sale.
$1B issued debt during previous three years test	Look to Company A's debt issuances, which will include Company B's debt issuances from Oct. 1, 2012.	Look to Company D's debt issuances, which will include Company C's debt issuances from Oct. 1, 2012.
Large accelerated filer test	At Dec. 31, 2012, look to Company A's market value at June 30, 2012. At Dec 31, 2013, look to Company A's market value (which will include Company B's) at June 30, 2013.	At Dec. 31, 2012, look to Company C's market value at June 30, 2012. At Dec 31, 2013, look to Company C's market value (which will include Company D's) at June 30, 2013.

The SEC staff has confirmed that, in general, the analysis to determine if an issuer is an EGC focuses on whether the issuer, and not its parent, meets the requirements of an EGC. By way of example, the SEC staff has confirmed that if a parent decides to (i) spin-off a wholly-owned subsidiary, (ii) register an offer and sale of a wholly-owned subsidiary's common stock for an IPO, or (iii) transfer a business into a newly-formed subsidiary for purposes of an IPO of that subsidiary's common stock, and such subsidiary's total annual gross revenues for its most recently completed fiscal year are less than $1 billion and it would not trigger any of the disqualification provisions, such subsidiary will qualify as an EGC even if the parent does not.

Note that the SEC staff has warned that the EGC status of an issuer may be questioned if it appears that the issuer or its parent is engaging in a transaction for the purpose of converting a non-EGC into an EGC, or for the purpose of obtaining the benefits of EGC status indirectly when not entitled to do so directly, and has specifically suggested that issuers with questions relating to taking advantage of the benefits of EGC status with respect to a transaction like the ones described above should contact the Division's Office of the Chief Counsel.

Disclosure of EGC Status

An EGC should identify itself as such on the cover page of its prospectus. Its registration statement should also include certain other EGC status-related disclosure, such as (i) a summary of exemptions available to EGCs (in the summary box), (ii) the requirements for qualifying as an EGC and when an EGC can lose its status (also in the summary box), and (iii) risks related to the use of EGC exemptions (in the risk factors section).

In addition, the SEC staff expects an EGC to declare whether it has elected to take advantage of the extended transition period for complying with new or revised accounting standards and, if so, (i) to explain the related risks (in the risk factors section) and (ii) to include a statement in its critical accounting policies disclosure explaining that its financial statements may not be comparable to financial statements of companies that comply with this requirement (in the MD&A section). If an EGC instead decides to opt out of the accommodation for the extended transition period, it should indicate that it has done so and acknowledge that such decision is irrevocable (in the summary box).

IPO-related Accommodations

EGCs benefit from the following IPO-related accommodations:

Confidential filings. An EGC is permitted to submit a draft registration statement prior to its "initial public offering date" for SEC review on a confidential basis, as long as a public filing is made at least 21 days prior to the roadshow for the offering. (The initial public offering date is the date of the first sale of common equity securities pursuant to an effective registration statement under the Securities Act.) The public filing must include the initial confidential submission and all amendments thereto.

As of October 1, 2012, EGCs could submit draft registration statements to the SEC staff for non-public and confidential review either via the existing secure email system (in searchable PDF format) or via a new EDGAR-based system. In the future, filing on EDGAR will become mandatory. To this end, the SEC will supply each EGC that has submitted a draft registration statement since April 5, 2012 but has not yet used EDGAR with instructions on how to transition to the new EDGAR-based system. Moreover, EGCs that use the new EDGAR-based system can also use EDGARLink to publicly file copies of previously submitted draft registration statements as individual documents on EDGAR, eliminating the need to attach such drafts as exhibits to their public filing.

SEC comment letters relating to the registration statement and the company's responses will be deemed confidential information and will not be made public through the SEC's EDGAR system until at least 20 business days following the effective date of the registration statement for the IPO.

The SEC staff has indicated that EGCs can use the confidential filing process for pre-IPO offerings of debt securities, including a Form S-4/F-4 for an A/B exchange offer. The SEC staff has interpreted the definition of "initial public offering date" broadly, indicating that it can be triggered by an offering of common equity pursuant to an employee benefit plan registered on Form S-8, as well as selling shareholder secondary offerings registered on a resale registration statement.

The SEC staff has also indicated that EGCs can use the confidential filing process to submit draft registration statements for exchange offers or mergers that constitute an IPO of common equity securities. In respect of these types of confidential filings, if an EGC does not use or qualify for early commencement (*i.e.,* it does not commence its exchange offer before effectiveness of the registration statement), it must publicly file the registration statement at least 21 days before the earlier of the road show, if any, or the anticipated date of effectiveness of the registration statement. On the other hand, an EGC that commences its exchange offer early (before effectiveness of the registration statement pursuant to Securities Act Rule 162) must publicly file the registration statement at least 21 days before the earlier of the road show, if any, or the anticipated date of effectiveness of the registration statement, but no later than the date of commencement of the exchange offer. Similarly, for early commencement of exchange offers subject only to Regulation 14E, the registration statement would need to be filed at least 21 days before the earlier of the road show, if any, or the anticipated date of effectiveness of the registration statement, but no later than the date of commencement of the exchange offer.

Foreign private issuers ("**FPIs**") can use the EGC confidential submission process to the same extent as a domestic company if they otherwise qualify as an EGC. An FPI that is not an EGC may otherwise be able to qualify for confidential submission under the SEC's existing policies and procedures for FPIs. The confidential submission policy for FPIs has been changed as of May 30, 2012 to require FPIs to file publicly draft registration statements that were confidentially submitted and any related correspondence with the SEC, at the time they publicly file their registration statements.

Any confidential submissions must be substantially complete and must include a signed audit report covering the audited financial statements. As a confidential submission does not technically constitute a filing, (i) the draft registration statement need not be signed and need not include the consents of the auditors and other experts, nor does it later have to be updated to include such signatures for the purpose of Section 6(e)(i) of the Securities Act, and (ii) none of the provisions of Sarbanes-Oxley (such as the prohibition on loans to directors) will apply to an EGC that has submitted a confidential submission since Sarbanes-Oxley applies only to filed registration statements.

An EGC can announce that it has completed a confidential submission of a draft registration statement without violating the rules on pre-IPO communications under Section 5 of the Securities Act as long as it complies with Rule 135 of the Securities Act, which provides a safe harbor for a limited public announcement of a proposed registered offering.

The EGC confidential submission process is not available for any filings under the Exchange Act. FPIs will, therefore, be unable to use the confidential submission process established under the JOBS Act for a registration statement on Form 20-F or 40-F used in connection with a listing on a U.S. stock exchange.

As of early April 2013, the SEC staff had received 175 confidentially-submitted draft registration statements of EGCs for review.

Pre-IPO marketing. The JOBS Act permits an EGC or any person authorized to act on its behalf (including an underwriter) to communicate with potential investors prior to public filing of a registration statement, as long as the investors are either qualified institutional buyers ("**QIBs**") or institutional accredited investors. This will allow companies to "test the waters" and determine whether there is sufficient market interest before proceeding with a public offering. The SEC staff has provided guidance stating that a company will need to determine whether it qualifies as an EGC each time it makes any test-the-waters communication. If a company loses its EGC status by the time it publicly files its registration statement, the company would not retroactively lose the ability to have relied on EGC status for prior test-the-waters communications.

Test-the-waters communications that comply with the requirements of the JOBS Act will not be treated as roadshows by the SEC. However, as the SEC continues to provide further guidance on pre-IPO marketing, issuers and underwriters should proceed carefully to ensure that test-the-waters communications do not appear to constitute a formal roadshow (which, as noted above, cannot be commenced until 21 days after a public filing of the IPO registration statement). For example, in the absence of further guidance, issuers should avoid formal management presentations even if limited to QIBs and institutional accredited investors.

Test-the-waters communications are permitted in connection with public offerings other than IPOs; however, EGCs need to consider the requirements of Regulation FD post-IPO. The SEC staff may request copies of test-the-waters communications (as well as research reports) and may compare them against the registration statement for consistency. In the past year, the staff has expressed interest in viewing copies of materials distributed as part of test-the-waters communications. Any materials submitted to the SEC as part of such review will remain confidential. To ensure confidentiality, EGCs should submit any test-the waters communications to the SEC only in hard copy, include a confidential treatment requested legend on the relevant materials, and ask for return of the materials upon the completion of SEC review.

The SEC staff has confirmed that an EGC can use test-the-waters communications with QIBs and institutional accredited investors in connection with an exchange offer or merger, but an EGC must also continue to make all required filings under the Exchange Act.

Issuers and their advisors should also consider the applicability of Rule 15c2-8(e) under the Exchange Act in preparing test-the-waters communications. This rule requires brokers or dealers to take reasonable steps to make a preliminary prospectus available to any associated persons that will, prior to the effective date, "solicit customers' orders" before any such solicitation occurs. Therefore, if test-the-waters communications are construed as "solicitations" under Rule 15c2-8(e), then such communications would be prohibited by Rule 15c2-8(e) as no prospectus would be available. Although the SEC staff has confirmed that the JOBS Act has not changed the meaning of the term "solicit customers' orders" for purposes of Rule 15c2-8(e) and that whether an activity falls within the meaning of that term is based on the relevant facts and circumstances, it has provided assurance that an underwriter may request a non-binding indication of interest as part of testing-the-waters discussions. A non-binding indication of interest may not include any commitment to purchase securities, but may include the amount of shares that a customer might purchase at various price ranges. It is worth noting that this clarification in respect of non-binding indications of interest not triggering the prospectus delivery requirements of Rule 15c2-8(e) implies that underwriters should also be able to solicit non-binding indications of interest in offerings by companies that are not EGCs (post the filing of the registration statement).

Moreover, the SEC staff has confirmed that Rule 15c2-8(e) does not apply until an issuer files a registration statement, and a confidential submission of a draft registration statement will not be considered to be "filed" with the SEC for purposes of Rule 15c2-8(e).

Underwriters may be reluctant to engage in pre-IPO marketing because prospectus liability under Section 12(a)(2) of the Securities Act would still attach to any statements, whether written or oral. In addition, it may be difficult to draw the line between determining whether there is sufficient market interest (which is permitted) and the solicitation of orders (which is not permitted).

Financial statements. EGCs are permitted to include only two years of audited financial statements in an IPO registration statement for common equity securities rather than the three years previously required (and the related MD&A and selected financial data sections need only cover two years). Similarly, an EGC need not include in other registration statements audited financial statements for any period prior to the earliest audited period presented in its IPO registration statement. If, as a result of a significant acquisition, an EGC (that is not a shell company and is only presenting two years of its own audited financial statements) would otherwise be required under Regulation S-X to include three years of a target's audited financial statements in the EGC's registration statement, the SEC staff would not object if the EGC only included two years of the target's audited financial statements in the registration statement. Likewise, if an EGC (that is not a shell company and has presented only two years of its own financial statements in its registration statement) later acquires a smaller reporting company, the SEC staff would not object if the EGC only presented two years of the acquired business' financial statements in the related Form 8-K.

If an EGC would otherwise be required to present a ratio of earnings to fixed charges under Item 503(d) of Regulation S-K, the EGC may present that ratio for the same number of years for which it provides selected financial data disclosure, rather than the otherwise required five years. Further, the SEC staff has clarified that once an issuer loses its EGC status, it will not be required, in subsequently filed registration statements or periodic reports, to provide selected financial data or a ratio of earnings to fixed charges for any periods prior to the earliest audited period presented in its initial registration statement.

Once public, an EGC will need to include three years of audited financial statements in its Form 10-K or Form 20-F. As a practical matter, an EGC will not include in its first Form 10-K or Form 20-F audited financial statements for any period prior to the earliest audited period presented in its IPO registration statement.

An EGC that is not a smaller reporting company and that has not yet conducted an IPO of its equity securities will still be required to include three years of audited financial statements in its Form 10-K or Form 20-F to the extent it is required to file a registration statement under Section 12(g) of the Exchange Act (because it has more than $10 million in assets and 2,000 or more holders of record at the end of its most recent fiscal year).

Executive compensation. EGCs have the option of complying with disclosure requirements applicable to smaller reporting companies with respect to executive compensation. This means, among other things, that the compensation section in an IPO registration statement and annual proxy statement need not include a Compensation Discussion and Analysis ("**CD&A**") and need only disclose the compensation of three (rather than five) executives (the CEO plus the next two most highly paid executives). The tabular disclosure requirements are also significantly reduced for EGCs.

Reduced Reporting Requirements Post-IPO

Following an IPO, EGCs are exempt from a variety of requirements to which they would otherwise become subject as public companies.

Sarbanes-Oxley Section 404(b). EGCs are exempt from the requirement to obtain an auditor attestation report on internal controls under Section 404(b) of the Sarbanes-Oxley Act. EGCs are still required to disclose management's assessment and conclusions regarding the effectiveness of internal controls.

Say-on-pay. EGCs are exempt from the Dodd-Frank Act requirement to hold shareholder advisory votes on executive compensation and golden parachutes. Once a company loses its EGC status, it will be required to hold a say-on-pay vote no later than (i) three years after losing EGC status if it was an EGC for less than two years after completing its IPO or (ii) one year after losing EGC status for all other companies.

Executive compensation. As noted above, EGCs are permitted to comply only with the compensation disclosure requirements applicable to smaller reporting companies. In addition, they are exempt from the Dodd-Frank Act requirements to disclose (i) the relationship between executive compensation and company performance and (ii) the ratio between the CEO's compensation and the median compensation of all other employees (these new Dodd-Frank requirements have yet to be implemented by the SEC).

New accounting standards. EGCs are not required to comply with any new or revised financial accounting standard (meaning a standard issued after April 5, 2012) until private companies are also required to comply with that standard. For example, FPIs that reconcile their financial statements to U.S. GAAP may take advantage of the extended transition periods for complying with new or revised financial accounting standards in their U.S. GAAP reconciliation.

EGCs are not permitted to selectively comply with new accounting standards in part but not in whole. Instead, an EGC must either avail itself of the exemption from, or be subject to, the application of all new accounting standards. EGCs should disclose that they are electing to delay complying with new accounting standards, the date on which the compliance with such standards becomes mandatory for companies that are not EGCs and the date that the EGC will adopt the accounting standards.

Once an EGC decides to opt-in, it must disclose this decision prominently in its first filing following the decision, and the decision is irrevocable. An EGC that has opted out of compliance with new accounting standards is always free to opt-in, but may not subsequently opt out.

New auditing standards. EGCs are exempt from any rules adopted by the Public Company Accounting Oversight Board ("**PCAOB**") requiring mandatory audit firm rotation or a supplemental auditor discussion and analysis. Any additional PCAOB rules adopted after April 5, 2012 will not automatically apply to the audit of an EGC unless the SEC determines that such requirements are in the public interest, considering both the protection of investors and the promotion of capital formation.

Practical Implications of IPO and Post-IPO Accommodations

In the past year, approximately 75% of U.S. IPOs have been by EGCs. The SEC staff provided guidance stating that EGCs may avail themselves of some or all of the scaled disclosure provisions (except that issuers cannot selectively comply with new accounting standards). For example, an EGC may choose to use the confidential filing option but not use the relaxed financial or compensation disclosure requirements. Additionally, so long as a company remains an EGC, it may change its approach to the scaled disclosure provisions from time to time. In the past year, over 90% of EGCs that filed a registration statement elected at least one of the EGCs accommodations offered under the JOBS Act. The accommodations allowing for the use of only two years of financial statements and the extended phase-in of internal controls audit have been particularly popular, with almost half of EGCs that publicly filed since the JOBS Act's entry into force providing two years of financial statements and nearly all EGCs indicating their intention to use the internal controls audit accommodation. It is also important to remember that EGCs remain subject to the general liability provisions of the federal securities laws, including the strict liability provisions of the Securities Act and Rule 10b-5 under the Exchange Act, and that disclosure decisions may be evaluated in light of these provisions. For example, the SEC staff has suggested that if an EGC chooses to omit financial information (for example, the earliest year of the last three years of audited financial statements) that shows a negative trend, it should consider whether disclosure regarding such trend would be material to an investor's understanding of the business and, therefore, should be addressed in the EGC's IPO registration statement (for example, in the risk factors or MD&A).

Furthermore, in respect of a merger or exchange offer that constitutes an IPO of common equity securities of an EGC, it is important to remember that EGCs must continue to make all required filings under Securities Act Rule 425 (unless relying on Section 5(d) provision for test-the-waters communications) and Exchange Act Rules 13e-4(c) and 14d-2(b) for pre-commencement tender offer communications. An EGC must also file a tender offer statement on Schedule TO on the date of commencement of an exchange offer under Exchange Act Rules 13e-4(b) and 14d-3(a) (as applicable). Also, in a merger where the target company is subject to Regulation 14A or 14C and the registration statement of an EGC acquiror includes a prospectus that also serves as the target company's proxy or information statement, the EGC acquiror must publicly file the registration statement at least 21 days before the earlier of the road show, if any, or the anticipated date of effectiveness of the registration statement, and the EGC acquiror must make the required filings under Securities Act Rule 425 (unless it is relying on Section 5(d) provision for test-the-waters communications) and Exchange Act Rule 14a-12(b) for any soliciting material (as applicable).

Typically, Rule 144A offerings follow disclosure standards of SEC-registered offerings. In light of the relaxation of the requirements in respect of EGCs, new market practice is likely to develop that tracks the standards applicable to EGCs in Rule 144A offerings, perhaps irrespective of whether or not the issuer could qualify as an EGC.

As there are consequences to losing EGC status, EGCs will need to monitor their status, including during the IPO process.

Finally, the JOBS Act provisions have had an impact on representations, warranties and covenants included in EGCs underwriting agreements. Such agreements will typically require EGCs to provide representations concerning their EGC status (that the issuer is an EGC and notifications of any change in such status), test-the-waters communications (most commonly that the issuer has not engaged in any such communications and has not authorized any person other than lead underwriters to engage in such communications) and the timely filing of the registration statement.

Foreign Private Issuers

The SEC staff has provided guidance stating that an FPI that qualifies as an EGC may avail itself of the scaled disclosure requirements to the extent relevant to the form requirements for FPIs. However, the SEC staff has also stated that an FPI that avails itself of any of the benefits available to an EGC will be treated as an EGC for all purposes. This means that an FPI that elects to be an EGC will not be entitled to make a confidential submission under the procedures applicable to FPIs and, instead, will be required to publicly file its confidential submission at least 21 days before its roadshow.

MJDS Issuers

The SEC staff has provided guidance stating that an MJDS-eligible Canadian issuer may avail itself of the test-the-waters amendments to the Securities Act and delayed compliance with the auditor attestation report on internal controls required under Section 404(b) of the Sarbanes-Oxley Act.

Research

The JOBS Act liberalizes, in several significant ways, the current regulatory restrictions on research analysts and research reports. Investment banks will now be permitted to publish research reports relating to an EGC at any time before or during a public offering of the EGC's securities, including its IPO, even if the banks are participating in the offering. Under pre-JOBS Act rules, banks participating in an IPO could not publish research in advance of the IPO. Section 105 of the JOBS Act specifically provides that the publication by a broker-dealer of a research report relating to an EGC that is offering equity securities will not "constitute an offer for sale or an offer to sell a security" even if the broker-dealer is participating in the offering. In addition, the SEC and FINRA are prohibited from maintaining or adopting any rule restricting the publication of research on an EGC within any time period after an IPO or before the expiration of any related lock-up arrangement.

Despite the enactment of the JOBS Act, the SEC staff has confirmed that the settlement reached in respect of the 2003 and 2004 enforcement actions instituted by the SEC, self-regulatory organizations ("**SROs**"), and other regulators against a number of broker-dealers to address conflicts of interest between the firms' research and investment banking functions (the "**Global Settlement**"), was not affected. Accordingly, any restrictions applicable to a bank because of the Global Settlement (including the need to create and enforce fire walls between research and investment banking personnel) will continue to apply, unless such a bank procures a court order amending the terms of the Global Settlement in respect of such bank.

In the past year, the SEC has asked EGCs preparing for an IPO to provide it with copies of any pre-deal research reports published by a broker-dealer participating in the offering. The extent of comments and treatment of any such research by the SEC staff still remains to be seen as it appears that to date no such reports have been published in reliance on the exception provided by Section 105(a) of the JOBS Act.

Arranging activity. Under Section 105(b) of the JOBS Act ("**Section 105(b)**"), an associated person of a broker-dealer, including investment banking personnel, may arrange communications between analysts and investors, and the SEC or a national securities association is prohibited from adopting or maintaining any rule or regulation in connection with an IPO of common equity of an EGC restricting, based on a functional role, which associated persons of a broker, dealer, or member may arrange for communications between an analyst and a potential investor. The SEC staff has confirmed that it would not consider such arranging activity, without more, as a method for investment banking personnel to direct a research analyst to engage in marketing, which is directly prohibited under SRO rules. Further, the SEC staff has clarified that (i) an investment banker may provide an analyst with a list of clients that the analyst could, at his or her own discretion and with appropriate controls, contact; (ii) an analyst could forward a list of potential clients that it intends to communicate with to an investment banker as a means to facilitate scheduling; and (iii) investment bankers can arrange, but not participate in, calls between analysts and clients. However, the SEC staff also reminded firms to be mindful that other provisions of the Exchange Act and the SEC and SRO rules were not changed by the JOBS Act and that firms continue to need to have appropriate policies and procedures to ensure compliance with the federal securities laws and SRO rules.

Analysts' participation in meetings with management. Under Section 105(b), research analysts will also be permitted to participate in meetings with EGC management concerning an IPO even if such meetings are 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 an analyst or investment banking personnel. However, analysts and investment bankers must not engage in otherwise prohibited conduct and should remain mindful of the SRO and SEC rules that limit their involvement, the antifraud provisions of the federal securities laws, the Global Settlement, and any other SEC or SRO rule that governs research analyst conflicts. For example, among other things: (i) when attending such meetings, analysts may not solicit investment banking business, change research as a result of a communication in an effort to obtain investment banking business, give "tacit acquiescence" to overtures from company management that they expect favorable research in exchange for investment banking business, or provide views that are inconsistent with personal views or make misleading statements; and (ii) investment banking personnel may not direct a research analyst directly or indirectly to engage in sales or marketing efforts related to an investment banking services transaction, and firms must institute and enforce appropriate controls to prevent prohibited conduct. The expectation is that current practices will not change significantly and firms will be cautious in allowing analysts to attend meetings with EGC management.

Moreover, Section 105(b)(2) of the JOBS Act does not address communications where investors are present together with company management, analysts and investment banking personnel. For example, the existing SRO rules that prohibit analysts from participating in roadshows or otherwise engaging in communications with customers about an investment banking transaction in the presence of investment bankers or the company's management remain in effect.

Quiet periods and lock-ups. SRO rules existing prior to the enactment of the JOBS Act impose quiet periods before and after the expiration, termination or waiver of lock-up agreements and also in connection with secondary offerings. Section 105(d) of the JOBS Act ("**Section 105(d)**") permits the publication or distribution of a research report or public appearance with respect to EGCs' securities at any time after an IPO or prior to the expiration date of any lock up agreements. The SEC staff has stated that it believes that Congress' intent was to fully address quiet periods imposed by the SRO rules on research relating to EGCs prior to the end of a lock-up agreement, and has interpreted Section 105(d) to apply equally to the relevant NASD and NYSE rules no matter by which method the lock-up agreement ends – by termination, expiration, or waiver. Further, the SEC staff has also clarified that it believes that the policies underlying the change in Section 105(d) are equally applicable to quiet periods after a secondary offering of an EGC's securities.

In late October 2012, the SEC approved changes to NASD Rule 2711. As a result of these rule changes, research analysts may attend meetings with EGC management that are also attended by investment banking personnel as long as they do not "engage in otherwise prohibited conduct in such meetings" aimed at soliciting investment banking business. Research analysts attending a pitch meeting or a road show can introduce themselves, outline their research program and explain the types of factors that they would consider in their analysis of the issuer, as well as ask follow-up questions regarding the factual statements made by management, without risking having these activities be perceived as soliciting investment banking business.

In addition, the following quiet periods for EGCs have been eliminated:

- the 40-day quiet period after an IPO on a member that acts a manager or co-manager of such IPO under NASD Rule 2711(f)(1)(A);
- the 25-day quiet period after an IPO on a member that participates as an underwriter or dealer of such an IPO under NASD Rule 2711(f)(2);
- the 15-day quiet period applicable to IPO managers and co-managers prior to the expiration, waiver or termination of a lock-up agreement under NASD Rule 2711(f)(4);
- the 10-day quiet period on manager and co-managers following a secondary offering under NASD Rule 7211(f)(1)(B); and
- the 15-day quiet period after the expiration, termination or waiver of lock-up agreement under NASD Rule 7211(f)(4).

In spite of the elimination of quiet periods for EGCs, underwriters in EGC IPOs have begun to use contractual provisions to impose research quiet periods on the members of the underwriting syndicate. Such periods usually last 25 days from the IPO effective date and are imposed to ensure that the post-IPO research is as complete as possible (that is, that it covers information from the final prospectus as well as post-IPO developments).

Practical implications. Former SEC Chairman Mary Schapiro had criticized the research provisions of the JOBS Act and it remains to be seen how the current practices of research analysts will change. The SEC staff has reminded firms contemplating new activities based on the research provisions of the JOBS Act to review and update their policies and procedures, as well as their educational and training efforts, to make corresponding changes to promote compliance with the SEC and SRO rules that are designed to minimize conflicts of interest and facilitate the objectivity and reliability of research.

It is worth noting that a number of other existing restrictions on analysts are not impacted by the JOBS Act, including the restriction on solicitation of investment banking business and the requirement that research analysts certify that the views they express in their research reports accurately reflect their personal views. In addition, the SEC staff has confirmed that the JOBS Act does not affect the application of SRO rules regarding the supervision, compensation or evaluation of analysts; the pre-publication review of research reports by non-research personnel or EGCs; the prohibition on firms of offering favorable research in exchange for the business of, or compensation from, an EGC; the requirements related to the content, filing and approval of communications with the public; or the analysis of what types of communications constitute a research report for the purposes of Regulation Analyst Certification (or any other aspects of that regulation).

Publicity in Private Offerings

Title II of the JOBS Act substantially eases the current restrictions on publicity in private offerings. These changes will become effective only after the SEC adopts implementing rules.

Regulation D offerings. The JOBS Act directs the SEC to modify Rule 506 of Regulation D under the Securities Act to eliminate the prohibition on "general solicitation and general advertising," so long as all purchasers in the offering are accredited investors. Issuers will be required to take reasonable steps to verify that purchasers are accredited investors using methods prescribed by SEC rulemaking. The new rules will apply to investment funds relying on Sections 3(c)(1) and 3(c)(7) of the Investment Company Act and will allow such funds to attract investor interest by means of broad-based advertising. Such funds will still be restricted under the Investment Company Act from making a "public offering;" however, the JOBS Act explicitly provides that general advertising or general solicitation under amended Rule 506 will not constitute a public offering for purposes of the federal securities laws.

The JOBS Act also creates an exemption from broker-dealer registration for certain persons in connection with the issuance of

securities in compliance with Rule 506. Persons who facilitate offers, sales, purchases or negotiations with respect to securities issued in compliance with Rule 506, persons who permit general solicitations or general advertisements by issuers of such securities, persons who co-invest in such securities and persons who provide ancillary services with respect to such securities will not be required to register as broker-dealers. However, compensation may not be paid, and such persons may not be in possession of customer funds or securities, in connection with the purchase and sale of the securities.

Rule 144A offerings. The JOBS Act similarly directs the SEC to modify Rule 144A under the Securities Act to provide that securities sold under Rule 144A may be offered to persons other than QIBs, including by means of general solicitation and advertising, so long as the securities are only sold to persons reasonably believed to be QIBs. While the JOBS Act makes no reference to "directed selling efforts" under Regulation S, which would call into question the ability to undertake a Rule 144A offering in the United States while engaging in general solicitation or general advertising concurrently with a Regulation S placement offshore, the SEC staff has stated informally that it believes that footnote 64 to the Regulation S adopting release should permit an issuer to take advantage of Rule 144A as modified without losing the benefit of Regulation S for the offshore tranche. That footnote provides that legitimate selling activities made in connection with the sale of securities in compliance with Rule 144A will not result in directed selling efforts.

Practical impact. These amendments could radically change the way private companies and private funds communicate with investors and raise capital, with broad-based advertisements in print, radio, television and online now permissible. As a practical matter, the impact may be less dramatic, at least in the near term. Issuers of securities will remain subject to the general antifraud provisions of the federal securities laws, including Rule 10b-5, and may be reluctant to assume the additional risk that broad-based advertising implies. In addition, given that the ultimate participants in an offering must all be accredited investors or QIBs, it may not be cost-effective for funds and private companies to engage in broad-based advertising and solicitation for offerings.

Other Private Capital Reforms

Increased shareholder threshold for Exchange Act registration. The JOBS Act has raised the threshold that triggers Exchange Act registration under Section 12(g) based on the number of shareholders. In lieu of the previous threshold of 500 holders of record, companies will now be required to register under the Exchange Act only when they have more than $10 million in assets and a class of their equity securities is held of record either by 2,000 persons or by 500 persons who are not accredited investors. The higher threshold will also apply to private funds relying on Section 3(c)(7) of the Investment Company Act.

In addition, the definition of "held of record" was modified to exclude securities held by persons who received such securities pursuant to an employee compensation plan in transactions that were exempt from registration (with the SEC directed to adopt safe harbor provisions to assist companies in determining whether they may exclude the securities). Securities purchased under the so-called "crowdfunding" provisions (discussed below) are also excluded from the definition of "held of record."

For banks and bank holding companies, the registration threshold is 2,000 persons and the threshold that permits deregistration (under both Section 12(g) and Section 15(d) of the Exchange Act) has changed from 300 persons to 1,200 persons. The threshold that permits deregistration for all other companies remains 300 persons.

The SEC staff has clarified that an issuer is not required to register under the Exchange Act if it does not meet the higher shareholder threshold under the JOBS Act, even if the requirement to register was triggered prior to the enactment of the legislation on April 5, 2012. The SEC staff has also clarified that the amendments to the Exchange Act registration threshold are immediately effective, notwithstanding that the JOBS Act directs the SEC staff to adopt by rulemaking "safe harbor" provisions with respect to the exclusion for securities received pursuant to employee compensation plans.

Crowdfunding. The term "crowdfunding" refers to accessing small amounts of capital, principally through online platforms. The JOBS Act creates a new crowdfunding registration exemption for private companies selling securities, provided that not more than $1 million of securities are sold in a rolling 12-month period and the aggregate amount sold to any one investor during that period is capped at a specified level based on the annual income or net worth of the investor. If an investor's annual income or net worth is less than $100,000, then the aggregate amount sold to the investor cannot exceed the greater of $2,000 or 5% of the investor's net worth or annual income. If an investor's annual income or net worth is $100,000 or more, then the aggregate amount sold to the investor cannot exceed the lesser of $100,000 or 10% of the investor's net worth or annual income. These amounts will be indexed for inflation every five years.

The crowdfunding exemption has other conditions as well, including some that apply to intermediaries and others that apply to issuers. Among other conditions, intermediaries will have to be registered with the SEC as brokers or as "funding portals," the latter being a new type of intermediary that performs limited functions. Intermediaries will be tasked with a variety of duties and obligations. For example, intermediaries will be required to provide investors with certain information (such as disclosures related to risks and other investor education materials); ensure that investors review the disclosures provided, affirm their understanding of the risks and answer questions demonstrating an understanding of the risks; take measures to reduce the risk of fraud, including conducting background checks on officers, directors and holders of more than 20% of the shares of issuers; make available to the SEC and potential investors the disclosure required to be provided by issuers at least 21 days prior to any sale; undertake such efforts as the SEC determines appropriate to ensure that no investor has exceeded its cap on the aggregate amount of securities purchased; and provide proceeds to the issuer only when the target offering amount is reached or exceeded.

Issuers will be required to provide a limited amount of information to the SEC, investors and the relevant brokers or funding portals. Issuers will be unable to advertise the terms of the offering except through notices that direct investors to the broker or funding portal. Compensation of intermediaries will be subject to rules designed to ensure that they disclose receipt of compensation. Issuers will also be subject to requirements to provide information at least annually covering their results of operations and financial statements, as may be determined by the SEC.

The JOBS Act also addresses liability for misstatements and omissions in crowdfunding offerings and imposes a one-year lock-up on the securities sold, subject to certain limited exceptions.

The crowdfunding exemption is not available to foreign companies (note the term "foreign private issuer" is not used), SEC reporting companies, investment companies and companies excluded from the definition of investment company by virtue of Section 3(b) or Section 3(c) of the Investment Company Act.

Securities acquired pursuant to the crowdfunding exemption will be exempt from registration or qualification under state blue sky laws.

The SEC is directed to promulgate disqualification provisions and will need to promulgate other rules to address various aspects of the crowdfunding exemption.

Regulation A. The JOBS Act requires the SEC to add a new Securities Act exemption for the issuance of up to $50 million of securities in any rolling 12-month period. It is expected that the SEC will comply with this requirement by increasing the threshold for offerings under Regulation A (small offerings) from $5 million in a rolling 12-month period to $50 million during that period. Issuers using the revised Regulation A to offer securities will be required to file annually audited financial statements with the SEC. The SEC, through its rulemaking, may also choose to require issuers to provide periodic disclosures about the issuer, its business operations, its financial condition and other matters.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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