

The JOBS Act: What It Means for Pre-IPO and Public Companies

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Today's Speakers



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JOB Act: Overview

- Title I: Reopening American Capital Markets to Emerging Growth Companies
- Title II: Access to Capital for Job Creators
- Title III: Crowdfunding
- Title IV: Small Company Capital Formation
- Title V: Private Company Flexibility and Growth
- Title VI: Capital Expansion
- Title VII: Outreach to Changes on the Law



JOB Act: Overview

- Intended to create jobs and jumpstart economic growth
- Streamlines IPO process for emerging growth companies
- Gives startups and other private companies new opportunities to raise funds and stay private longer
- Many practical questions yet to be answered



JOBs Act: Who Is Interested?

- Startups, pre-IPO companies, some recently public companies and market participants are interested in at least some of its provisions
- Most IPO-related provisions and new shareholder registration thresholds took effect automatically
- Crowdfunding and private placement provisions subject to SEC rulemaking
- All provisions, except crowdfunding, are available to foreign issuers

JOB Act: “Emerging Growth Company”

- An “emerging growth company” (EGC) is any issuer that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year
 - An issuer that completed its IPO on or before December 8, 2011 does not qualify as an EGC
- EGCs have up to five years following their IPO to achieve full compliance with certain public company disclosure, accounting and auditing requirements



JOBES Act: Termination of EGC Status

- A company that is an EGC on the first day of its fiscal year will no longer qualify as an EGC upon the earliest of:
 - the last day of the fiscal year during which it had total annual gross revenues of \$1 billion (indexed for inflation);
 - the last day of its fiscal year following the fifth anniversary of the first sale of its common equity securities in a public offering;
 - the date on which it has, during the previous three-year period, issued more than \$1 billion in non-convertible debt; and
 - the date on which it is deemed to be a "large accelerated filer" under SEC rules



JOBES Act: Reduced Financial Statement and MD&A Requirements

- Audited financial statements for two years (instead of three)
- No selected financial data for any period prior to the earliest audited period
- MD&A would cover only the fiscal periods presented in the financial statements



JOB Act: Relaxed Compensation Disclosure Requirements

- EGCs are permitted to provide the “scaled” executive compensation disclosures applicable to issuers with a market value of outstanding voting and nonvoting common equity held by non-affiliates of less than \$75 million
 - No CD&A and fewer compensation tables
 - 2 years (instead of 3) of historical compensation disclosure
 - Compensation disclosure for 3 executive officers (instead of 5)



JOB Act: Relaxed Disclosure Requirements

- EGCs are exempt from several Dodd-Frank executive compensation requirements
 - say-on-pay, say-when-on-pay and say-on-parachute votes
 - CEO-to-worker pay ratio disclosures (still subject to SEC rulemaking)
 - pay-for-performance compensation disclosure (still subject to SEC rulemaking)



JOB Act: Exemption from Audit Requirements

- No requirement for auditor to attest to management's assessment of internal control over financial reporting
- Exempt from mandatory audit firm rotation requirement (if adopted by the PCAOB) and other new PCAOB auditing standards unless the SEC determines that application of the new rules to audits of EGCs is necessary or appropriate in the public interest



JOBES Act: Exemption from Accounting Requirements

- Not subject to new or revised accounting standards unless and until these standards are applied to “non-issuers” (companies that have not filed Form S-1)
 - an EGC must choose whether it will avail itself of this exemption at the time the EGC is first required to file a registration statement, periodic report or other report with the SEC
 - an EGC is not permitted to choose to comply with some but not all of the non-issuer accounting standards



JOB Act: “Opt-In” for Exemptions

- Except for the exemption from new and revised accounting standards (which must be adopted on an “all or nothing” basis), an EGC may pick and choose among the exemptions and relaxed standards available to EGCs



JOBES Act: Confidential Registration Statement

- Can submit draft registration statement to the SEC for confidential review
- EGCs can maintain plans and disclosures in confidence, preserving flexibility
- Must file publicly at least 21 days before any road show
- SEC issued guidance on procedures (PDF on CD or paper) and released an FAQ on April 10 providing additional guidance on implementation of confidential submission process



JOB Act: Issuing Research

- Participants in an EGC IPO have much more latitude to publish research reports, both pre-launch and post-launch
- Research report means any written, electronic or oral communication that includes opinions or recommendations with respect to securities of an issuer or analysis of a security or issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision



JOB Act: Liberalizations of Interactions with Research

Neither the SEC nor any national securities association (e.g., FINRA) may “adopt or maintain” any rule or regulation that, in connection with an EGC’s IPO would:

- Restrict which associated persons of a broker-dealer (e.g., bankers) may arrange for communications between research analysts and potential investors; or
- Restrict research analysts from participating in any communications with the management of an EGC that is also attended by any other associated persons of the broker-dealer (e.g., bankers)



JOB Act: Liberalizations of Communications

- EGCs have more freedom to communicate with potential investors that are “qualified institutional buyers” or “institutional accredited investors” both before and after the filing of a registration statement to determine whether these investors might have an interest in a contemplated offering
- Research analysts have greater ability to communicate with investors and with the EGC's management



JOB Act: Impact on Marketability?

- Although the overwhelming majority of all IPO companies will qualify as EGCs, market impact is uncertain
- An EGC should discuss with its IPO underwriters the impact of adopting EGC standards on marketability of the offering

JOBES Act: SEC Reports & Rulemaking

- SEC report on Regulation S-K with recommendations for streamlining the registration process (within 180 days)
- SEC study on decimalization following IPOs (within 90 days)
 - SEC must propose a rule designating larger increment (within 180 days) if it decides that EGCs should be quoted and traded at minimum increments of greater than \$0.01



JOBES Act: Private Placements

- SEC to modify Regulation D (within 90 days) to permit general solicitation and general advertising in Rule 506 placements, provided that all purchasers in those transactions are “accredited investors”
- SEC to eliminate the prohibitions in Rule 144A on general solicitation, general advertising and offers to investors who are not qualified institutional buyers (QIBS) as long as all purchasers are QIBS



JOB Act: Broker-Dealer Registration in Private Placements

- Persons will not be required to register as a broker-dealer *solely* because they or their associated persons maintain a “platform or mechanism” that facilitates Rule 506 offerings, co-invest in such offerings or provide ancillary services in connection with such offerings (subject to certain requirements)

JOB Act: Exchange Act Registration Thresholds

- The JOB Act amends Section 12(g) of the Exchange Act of 1934 by
 - Increasing the shareholder threshold to either (i) 2,000 persons or (ii) 500 persons who are not accredited investors
 - Exempts securities received pursuant to an employee compensation plan from being considered held of record
 - Exempts securities purchased in a crowdfunding transaction from being considered held of record



JOB Act: Liability

- Securities Act 12(a)(2) liability for misstatements or omissions applies to any issuer offering or selling securities pursuant to the Regulation A exemption
- Brokers and funding portals are subject to Rule 10b-5 liability



JOB Act: Conclusion



JOB Act: Questions



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Erika Robinson is a partner in the Corporate Practice Group and the Securities Department. She joined the firm in 1995. Ms. Robinson serves as co-chair of the Capital Markets Group. She has a general corporate and securities practice, with particular emphasis on public company counseling, capital markets transactions and commercial finance.

Ms. Robinson has managed a wide range of capital markets transactions, including public and private equity and debt offerings (representing issuers and underwriters), tender and exchange offers, and other corporate restructurings. She handles various types of commercial finance transactions, such as credit facilities and commercial paper programs. She also advises public and private companies on corporate governance and other compliance matters, as well as SEC reports and filings.



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Brian Johnson is a partner in the Corporate Practice Group. He joined the firm in 2004. Mr. Johnson serves as co-chair of the Capital Markets Group.

Mr. Johnson has extensive experience representing public and private companies and financial institutions, including investment banking clients, in a wide variety of corporate finance and merger and acquisition transactions. He also advises clients on a regular basis on general corporate and securities law and governance matters. He represents clients in a range of industries and has a particular focus on emerging growth companies in the life sciences and technology industries.



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Ms. Nicolas works with major investment banking firms, broker-dealers and other financial institutions to develop comprehensive compliance and supervisory procedures for a range of broker-dealer activities, including research activities (analyst conflicts of interest), firm-wide supervision, information barriers ("Chinese Walls") and surveillance procedures, trading issues and sales practice issues.



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