

## JOB S Act Becoming Law

### Key Points

The JOBS Act:

- reduces for companies with annual revenues of less than \$1 billion the requirements for IPOs and eases the post-IPO regulatory burden for up to five years;
- permits general solicitations in Regulation D private placements limited to accredited investors and in 144A offerings;
- authorizes "crowdfunding," or raising equity capital from accredited and non-accredited investors, without registration with the SEC;
- reduces other regulatory restrictions on private offerings; and
- increases the number of stockholders of record a company may have before being required to register with the SEC.

The Jumpstart Our Business Startups Act, or the JOBS Act, has been overwhelmingly passed by the House and Senate, and President Obama has said he will sign it. Here is a summary of the changes the Act will effect.

### Reopening American Capital Markets to Emerging Growth Companies Act

Title I of the JOBS Act, which becomes operative as soon as the legislation is signed into law, creates a new category of issuer under federal securities laws: an emerging growth company. The Title is designed to provide a lower "on ramp" to public capital for smaller businesses by reducing the disclosure burdens otherwise

imposed on companies conducting an initial public offering (IPO).

An emerging growth company is defined as a company that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year — a standard that would have been met by a majority of companies conducting an IPO in the last several years. An issuer that is an emerging growth company on the first day of that fiscal year continues to be an emerging growth company until the earliest of:

- the last day of the fiscal year in which gross revenues exceeded \$1 billion;
- the fifth anniversary of the effective date of the company's registration statement;
- the date on which the company has, during the previous three-year period, issued non-convertible debt securities exceeding \$1 billion in the aggregate; or
- the date on which the company qualifies as a large accelerated filer (which currently includes seasoned issuers with a worldwide public float of \$700 million or more).

The Title exempts emerging growth companies from a number of requirements otherwise imposed in connection with an IPO:

- Emerging growth companies may go public with only two years of audited financial statements rather than three.

- Emerging growth companies may have the SEC review their registration statements for IPOs on a confidential, nonpublic basis, although the registration statement must be publicly filed at least 21 days before the roadshow.
- The communications restrictions in connection with an IPO are eased to allow any person authorized to act on behalf of an emerging growth company to engage in oral or written communications with qualified institutional buyers or institutional accredited investors to “test the waters” for the IPO.
- The Title removes the ban on the distribution of research reports by brokers or dealers in connection with the emerging growth company’s IPO. The legislation also removes restrictions on who may arrange for communications between securities analysts and investors, and permits securities analysts to participate in communications with an emerging growth company’s management along with other representatives of a broker or dealer.

The Act also exempts emerging growth companies from a number of requirements otherwise imposed on public companies: mandatory audit firm rotation will not apply; less disclosure of executive compensation will be required; auditors will not need to attest to the company’s internal controls under the Sarbanes-Oxley Act of 2002 (the Sarbanes-Oxley Act); companies need not comply with public company accounting standards until they are generally applicable to companies that are not “issuers” under the Sarbanes-Oxley Act;<sup>1</sup> and a stockholder vote on executive compensation (say-on-pay) will not be required until one to three years after it is no longer an emerging growth company.

### Access to Capital for Job Creators Act

Title II of the JOBS Act removes the ban on soliciting investors through advertising, allowing “general solicitation” and “general advertising” in private issuances under Rule 506 of Regulation D, provided that all

<sup>1</sup> Sarbanes-Oxley defines an “issuer” as an issuer, the securities of which are registered under section 12 of the Securities Exchange Act, or that files or has filed a registration statement that has not yet become effective under the Securities Act, and that it has not withdrawn.

purchasers are accredited investors,<sup>2</sup> or exclusively to qualified institutional investors under Rule 144A financings. The SEC must implement these provisions by rules within 90 days of the Act’s enactment.

### Crowdfunding Act

Title III of the JOBS Act authorizes “crowdfunding,” allowing businesses to raise equity capital from both accredited and non-accredited investors without registration with the SEC. The Title is intended to allow entrepreneurs to solicit small investments directly from the general public through a “crowdfunding intermediary,” a broker or a funding portal registered with the SEC and any applicable self-regulatory organization.

A private company may issue up to \$1 million of restricted securities in any twelve-month period in reliance upon the crowdfunding exemption. Investors having an annual income under \$100,000 may only invest up to the greater of \$2,000 or 5% of their income. Investors with an annual income over \$100,000 may invest up to 10% of their annual income in any offering, up to a maximum of \$100,000. These investor limits apply in the aggregate to all investments made, regardless of issuer.

Securities purchased through crowdfunding may not be sold for one year from the date of purchase, other than to the issuer, accredited investors, as part of a registered public offering or to a family member. A person who purchases securities under this exemption may bring an action against the issuer, directors and executives for a full refund or damages based on any material misstatements or omissions. Securities issued under the crowdfunding exemption are exempt from state blue-sky laws. The SEC must adopt rules to implement the crowdfunding exemption within 270 days.

<sup>2</sup> The following *DechertOnPoint* describes relatively recent changes to the definition of “accredited investor”: [http://www.dechert.com/SEC\\_Acknowledges\\_Exclusion\\_of\\_the\\_Value\\_of\\_a\\_Principal\\_Residence\\_in\\_Determining\\_Accredited\\_Investor\\_Status\\_01-09-2012/](http://www.dechert.com/SEC_Acknowledges_Exclusion_of_the_Value_of_a_Principal_Residence_in_Determining_Accredited_Investor_Status_01-09-2012/).

## Small Company Capital Formation Act

Title IV of the JOBS Act requires the SEC to increase the current \$5 million limit on Regulation A exempt securities offerings to \$50 million in any twelve-month period. As is currently the case, these exempt securities may be resold freely without registration or a transaction exemption. Unlike crowdfunding provisions discussed above, these offerings will be subject to state securities laws unless they are listed on a national securities exchange or sold only to qualified investors.

The Title provides that issuers of exempt securities must file with the SEC an offering statement and audited financial statements. Annually thereafter the issuer must file such disclosures as the SEC may require, including audited financial statements. The Title also directs the SEC to prescribe terms and conditions of such offerings and under which the issuer may solicit investor interest prior to filing any offering statement. This Title will require implementing SEC rulemaking before it becomes operative.

## Private Company Flexibility and Growth Act

Title V of the JOBS Act increases from 500 to 2,000 the number of stockholders of record that a company may have before it must register with the SEC (and become subject to reporting and other requirements under the Securities Exchange Act), so long as the company has no more than 499 stockholders who are not accredited investors. Under current law a company is required to register once it has at least 500 stockholders of record and \$10 million in assets. The new limit excludes stockholders who obtained stock under an employee compensation plan and securities issued in a crowdfunding will be exempt. These provisions will become operative as soon as the legislation is signed into law.

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## Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at [www.dechert.com/corporate\\_finance](http://www.dechert.com/corporate_finance).

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