JOBS Act, Tax Relief May Facilitate Access to Capital

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Because of its critical importance to job creation and economic growth, the small business community is a prized constituency in Washington, D.C. This election year is no different. Following a January 2012 survey of small business owners which ranked access to capital and tax relief as the top policy priorities of the small business community, both issues took on added importance as the 2012 election-year legislative agenda unfolded.

Responding to the adverse impact on hiring and business expansion caused by the ongoing credit crunch, the bipartisan Jumpstart Our Business Startups Act (JOBS Act) (Pub. L. No. 112-106) was signed into law on April 5. The purpose of the JOBS Act is to make it easier for emerging companies to raise capital by easing SEC registration and disclosure requirements. Additionally, the House and the Senate hope to reconcile their respective approaches to small business tax relief before adjourning for the election, although differences between the two chambers are significant.

JOBS Act. The JOBS Act could give small long term care companies an additional source of start-up funding and expansion at a time of market uncertainty. This uncertainty was caused by Centers for Medicare & Medicaid Services (CMS) policy changes and MedPAC policy recommendations regarding reimbursement of skilled nursing facilities (SNFs), the Long Term Care Hospital (LTCH) moratoria imposed by 2007 legislation and changes made by the Affordable Care Act to home health policy. Although MedPAC's March 2012 report states that SNF operators "will be able to mitigate the effects of the payment reductions and policy changes by diversifying their portfolios and increasing their private pay mix," MedPAC concludes that lending to SNFs will remain constrained in 2012. MedPAC further notes that the 2007 legislative moratoria on LTCHs may reduce "opportunities in the near future and the need for capital." And, for home health operators, MedPAC concludes that several factors "have weakened investor outlook…and made lenders more cautious in the terms they offer home health firms seeking capital."[1]

Below are some of the JOBS Act provisions that might help offset these market conditions by facilitating greater access to capital:

- **IPO "On Ramp" Rules.** Title I would make it easier for so-called "Emerging Growth Companies" to go public by exempting them from certain regulatory requirements for either five years from the initial public offering (IPO) issue date, the date it has earned $1 billion in annual gross revenue, or the date it has a worldwide public float of at least $700 million.
- **Changes to Regulation D's Rule 506.** Title II would modify existing SEC rules seen as artificially limiting access of small companies to accredited investors.
- **Crowdfunding.** Title III would allow small companies to issue in aggregate $1 million shares during the previous 12-month period to an unlimited number of individual investors (whether or not accredited) through an online "funding portal" registered with the SEC. Individual investor income limits apply and companies would be required to comply with special SEC "crowdfunding" requirements designed to be less onerous than those that apply to large offerings.
- **Small Company Capital Formation.** Title IV would increase, from $5 million to $50 million, the securities offering threshold for companies exempted from SEC registration under Regulation A if certain conditions are met. Because the existing $5 million threshold has been too low to justify the

cost of going public under Regulation A, the provision is intended to help small issuers gain access to funding without the costs and delays associated with the full-scale securities registration process.

JOBS Act Rulemaking Process. Before taking advantage of various provisions in the JOBS Act, the SEC must first issue final implementing regulations. Depending on the title or section of the Act, the regulatory deadlines range anywhere from three to 12 months from the date of enactment (April 5, 2012). However, the SEC has yet to complete its rulemaking obligations under the Dodd- Frank Act, thus putting the JOBS Act rulemaking deadlines at risk. The SEC's Division of Corporation Finance recently stated that the agency has added more staff and resources for JOBS Act rulemaking, but that Dodd-Frank remains a top priority. In the interim, the SEC has published detailed guidance and FAQs on its website.

Small Business Tax Relief Legislation. The fate of small business tax relief legislation is far less certain because of different approaches taken by the House and Senate. The Republican-controlled House is taking a broad approach that would allow companies discretion in how the tax relief can be spent (hiring, wage increase or equipment purchases). The House-passed bill (H.R. 9) would allow companies with fewer than 500 workers in either 2010 or 2011 to deduct 20 percent of their profits in 2012. In contrast, Senate Democrats — with the backing of President Obama — support a more targeted approach (S. 2237), which would extend 100 percent depreciation on purchased equipment and provide a 10 percent tax credit for increased wages or new hires.

As the November election approaches, the prospects for compromise dim because neither party believes it to be in their best interest to make concessions when both think their respective candidates will win the White House. But with budget "sequestration" and expiration of the Bush-era tax cuts looming at year's end, some form of small business tax relief is expected to be thrown into the mix of whatever final tax and spending compromise Washington will have to reach to avoid the impending fiscal crisis.

[1] Report to the Congress: Medicare Payment Policy, Medicare Payment Advisory Commission, March 15, 2012.