

PUBLICATION

JOBS Act: IPO "On-Ramp" Rules for Emerging Growth Companies

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On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act (JOBS Act). The intended purpose of the JOBS Act is to spur job creation by small companies and start-ups by relaxing the regulatory burdens of capital raising. This is the first in a series of alerts we will issue related to the JOBS Act. In this alert, we focus on "emerging growth companies," a newly created category of issuers, and the means by which the JOBS Act facilitates raising capital by these issuers.

The JOBS Act creates a new category of issuer called an "emerging growth company" (EGC). An EGC is defined as an issuer that has annual gross revenues of less than \$1 billion during its most recently completed fiscal year. A company is eligible to be an EGC if its first public sale of common equity occurred after December 8, 2011. A company may retain its status as an EGC until the earliest of:

- Five years following its initial public offering (IPO);
- The date its annual gross revenues exceed \$1 billion;
- The date it becomes a large accelerated filer; or
- The date it issues over \$1 billion of non-convertible debt over a three-year period.

EGCs may take advantage of IPO "on-ramp" rules created by the JOBS Act, which are designed to ease disclosure requirements and compliance burdens. Some of the benefits of the IPO on-ramp rules include:

- *Shorter Period for Financial Statements.* Only two years of audited financial statements are required in the registration statement (rather than the three years otherwise required).
- *Scaled Disclosures on Executive Compensation.* EGCs may provide scaled disclosures on executive compensation equivalent to those of a smaller reporting company. An EGC may omit a Compensation Discussion & Analysis in its filings.
- *Confidential Submission of Draft Registration Statement.* EGCs may submit a draft of their registration statement confidentially to the Securities and Exchange Commission (SEC) for review and comment prior to publicly filing the registration statement. The SEC may reject the confidential submission of a draft if it is materially deficient. The draft registration statement must be publicly filed at least 21 days prior to conducting a roadshow.
- *"Testing the Waters" Communications.* EGCs may "test the waters" either before or after filing a registration statement by communicating with qualified institutional buyers or institutional accredited investors to determine interest in the IPO.
- *Research Reports.* A broker-dealer may publish research reports about an EGC involved in an IPO, even if the broker-dealer participates in the IPO.
- *Communications with Securities Analysts.* Securities analysts may participate in meetings with an EGC in connection with the IPO, even if broker-dealers are present. A broker-dealer may also arrange for communications between securities analysts and potential investors in the IPO.
- *Exemptions from Other Disclosure Requirements.* An EGC is not required to provide an auditor's attestation report on internal controls in its periodic reports. The EGC must still maintain internal controls and the CEO and CFO must continue to certify the EGC's financial statements. In addition, an EGC is exempt from holding shareholder advisory votes on executive compensation ("say on pay") and golden parachute compensation.

The creation of the EGC category and the IPO on-ramp rules became effective immediately upon enactment of the JOBS Act. EGCs have already begun taking advantage of the relaxed rules afforded by the JOBS Act in connection with their IPOs. While the rules are designed to facilitate IPOs, it remains to be seen whether they will change the IPO market or whether the number of IPOs each year will grow.

For more information related to these and other aspects of the JOBS Act, stay tuned for the other alerts in this series or contact your Baker Donelson attorney.