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Sifting Through the JOBS Act: Who Benefits, How and When?

May 23, 2012

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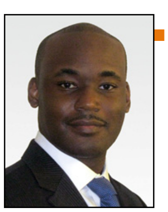

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Today’s Topics

- Purpose of the JOBS Act
- Summary Description of Titles I-VI
- Potential Beneficiaries and Potential Pitfalls
- Key Dates for Enactment of Specific Provisions

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Key Dates for Enactment of Specific Provisions

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Key Dates for Enactment of Specific Provisions

- Title I
  - Effective upon enactment of the JOBS Act
- Title II
  - SEC has up to 90 days following enactment of the JOBS Act to implement the provisions by regulation
- Title III
  - SEC has up to 270 days following enactment of the JOBS Act to implement the provisions by regulation
- Title IV
  - SEC to implement the provisions by regulation, but no timeframe was set for completion.
- Title V and VI
  - Effective upon enactment of the JOBS Act

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Purpose of the JOBS Act

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Purpose of the JOBS Act

- Encourage IPO growth
- Facilitate private capital raising
- Allow companies with large shareholder bases to conduct additional capital raises without requiring registration.

Purpose of the JOBS Act, cont'd.

- Encourages IPO growth by:
  - easing restrictions under the Securities Act relating to the IPO process for "emerging growth companies", and
  - providing relief from certain disclosure requirements.

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Purpose of the JOBS Act, cont'd.

- Facilitates private capital raising by:
  - creating a new "crowdfunding" exemption,
  - removing the general solicitation and general advertising restrictions for Rule 144A and Rule 506 offerings, and
  - expanding the Reg. A offering exemption.

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Purpose of the JOBS Act, cont'd.

- Allows companies with large shareholder bases to conduct additional capital raises without requiring registration by:
  - raising the shareholder threshold requiring registration; and
  - excluding from such shareholder count those shareholders who received their securities pursuant to an employee incentive plan or crowdfunding offering.

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Summary Description of Titles I-VI of the JOBS Act

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Summary Description of Titles I-VI

- Title I– Reopening American Capital Markets to Emerging Growth Companies
  - New class of reporting company – "Emerging Growth Company" ("EGC"), defined as an issuer that had total annual gross revenues of less than $1 billion in its most recently completed fiscal year.
  - Issuer remains an EGC until the earliest of the following:
    - the last day of the first fiscal year in which the EGC had total annual gross revenues of $1 billion or more;
    - the date on which the EGC is deemed to be a "large accelerated filer" under Exchange Act regulations;
    - the date on which the EGC has issued $1 billion or more of non-convertible debt during the prior three years; or
    - the last day of the fiscal year following the fifth anniversary of the EGC's IPO.

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Summary Description of Titles I-VI, cont'd.

- Title I – Emerging Growth Companies, cont'd.
  - New IPO Process for EGCs:
    - Confidential submission to the SEC of EGC's IPO registration statements; and
    - "Testing the waters" with qualified institutional buyers or accredited investors now permitted prior to the filing of the EGC's IPO registration statements.
  - Relaxation of disclosure obligations for EGCs:
    - Exemption from certain disclosure and voting requirements under Sarbanes Oxley and the Dodd-Frank Act;
    - Relaxation in requirements for audited financial statements in the EGC's IPO registration statement; and
    - Exemption from compliance with certain accounting rules
  - Relaxation on Restrictions of Research Reports

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Summary Description of Titles I-VI, cont'd.

- Title II – Access to Capital for Job Creators
  - Requires SEC to eliminate the general solicitation and general advertising prohibitions for Rule 506 and Rule 144A offerings, provided that the securities are sold only to accredited investors (Rule 506) or to qualified institutional buyers (Rule 144A).

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Summary Description of Titles I-VI, cont'd.

- Title III – Crowdfunding
  - Creates new registration exemption for offerings involving the aggregate sale by an issuer (over a 12-month period) of no more than $1,000,000, provided that the aggregate amount sold to any investor does not exceed:
    - the greater of $2,000, or 5% of the annual income or net worth of the investor, as applicable, if either the annual income or the net worth of the investor is less than $100,000; and
    - 10% of the annual income or net worth of such investor, as applicable, not to exceed a maximum aggregate amount sold of $100,000, if either the annual income or net worth of the investor is equal to or more than $100,000.

Summary Description of Titles I-VI, cont'd.

- Title III – Crowdfunding, cont'd.
  - Required Issuer Disclosures:
    - Name, legal status, physical address and website;
    - Names of directors, officers and significant shareholders;
    - Description of business, anticipated business plan, purpose of offering, use of proceeds and ownership/capital structure;
    - Scalable financial disclosure; and
    - Not less than annually, a report of the results of operations and financial statements as required by SEC regulations

Summary Description of Titles I-VI, cont'd.

- Title III – Crowdfunding, cont'd.

  Manner of Offering
  - Crowdfunding offerings must be conducted through a broker or funding portal that:
    - is registered (i) with the SEC and (ii) with an applicable self-regulatory organization; and
    - provides investors with such disclosures as the SEC, by rule, will determine as appropriate.
  - Issuers shall not compensate, directly or indirectly, any person to promote its offerings through communication channels, without taking such steps as required by rule by the SEC.

Summary Description of Titles I-VI, cont'd.

- Title III – Crowdfunding, cont'd.

  Manner of Offering, cont'd.

  - Brokers and funding portals :
    - Cannot compensate promoters for providing the broker or funding portal with the personal identifying information of any potential investor;
    - Cannot allow their officers, directors or partners from having any financial interest in an issuer using the intermediary's services;
    - Shall take certain measures (as established by SEC rule) to reduce the risk of fraud, including background checks and securities enforcement regulatory checks;
    - Shall provide to the SEC and to potential investors (no later than 21 days prior to the first day the securities are sold to any investor) the issuer-required disclosures (as discussed above);
    - Shall ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount, and allow all investors to cancel their commitments to invest, as the SEC shall, by rule, determine appropriate

Summary Description of Titles I-VI, cont'd.

- Title IV – Small Company Capital Formation
  - Changes in Regulation A:
    - Increases the maximum offering amount permissible under Regulation A from $5,000,000 to $50,000,000 (during any 12 consecutive month period); and
    - Securities offered in Regulation A offering are now "covered securities", provided such securities are:
      - offered or sold on a national securities exchange or
      - offered or sold only to "qualified purchasers" (a term to be defined by SEC regulation).

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Summary Description of Titles I-VI, cont'd.

- Title IV – Small Company Capital Formation, cont'd.
  - Features of Regulation A Offerings:
    - Securities issued are not restricted from resale;
    - Issuer is required to annually file its audited financial statements with the SEC; and
    - SEC, by rule, may require the issuer to file periodic disclosures with the SEC.

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Summary Description of Titles I-VI, cont'd.

- Title V – Private Company Flexibility and Growth
  - Raises the record holders registration trigger for issuers (other than banks and bank holding companies) from 500 or more persons to either:
    - 2,000 or more persons, or
    - 500 or more persons who are not accredited investors.
  - Persons who received their securities pursuant to employee benefit plans in exempt transactions or pursuant to an exempt crowdfunding offering are not counted in determining the number of record holders.

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Summary Description of Titles I-VI, cont'd.

- Title VI – Capital Expansion
  - Raises the record holders registration trigger for banks and bank holding companies from 500 or more persons, to 2,000 or more persons; and
  - Raises the deregistration shareholder trigger from 300 or fewer persons, to 1,200 or fewer persons (thus allowing for suspension of reporting obligations).

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Potential Beneficiaries and Potential Pitfalls

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Potential Beneficiaries and Potential Pitfalls

- Who Benefits?
  - Issuers that were not conducting offerings to new prospective shareholders in order to avoid becoming a reporting company under the Exchange Act can now conduct additional offerings to attract additional shareholders up to the new number of shareholders allowed before the public reporting requirements kick in (i.e., 2,000 shareholders of record or 500 shareholders who are not accredited investors).
  - Those public reporting companies whose shareholder base is below the new shareholder standard may choose to withdraw from being a public reporting company and avoid the associated costs.

Potential Beneficiaries and Potential Pitfalls, cont'd.

- Who Benefits?
  - Issuers that qualify as EGCS should realize reduced costs in connection with registration of their securities and enjoy a streamlined registration process with less red tape and lower overall IPO costs.
  - Issuers who are willing to restrict purchasers of their securities to accredited investors (Rule 506 offering), or qualified purchasers (Rule 144A offering) can sell an unlimited amount of their securities during any period of time through public advertising and general solicitation.
  - Issuers who take advantage of the new crowdfunding exemption will no longer be limited to relying on accredited investors to meet capital raising targets and can reach an unlimited number of prospective investors through the use of registered brokers or portals.

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Potential Beneficiaries and Potential Pitfalls, cont'd.

- Pitfalls for the Unwary
  - Legal and regulatory hurdles for crowdfunding offerings
  - Individual liability for officers and directors for material misrepresentations in crowdfunding offerings
  - Loss of registration exemption for an issuer if there is any general solicitation or general advertising <u>and</u> any purchaser is not an "accredited investor
  - Current uncertainty with respect to market treatment of EGC issuers versus non-EGC issuers

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Questions & Answers

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