



Regulatory: The JOBS Act and materiality determination in private placements *Companies should take extra precautions to ensure that potential investors have all relevant information*

June 13, 2012

By [Peter Fetzer](#)

As has been recently reported, the Jumpstart Our Business Startups (JOBS) Act has been signed into law. The JOBS Act is designed to encourage companies to create jobs by lowering hurdles to going public and complying with the laws governing public companies, and by facilitating the ability of companies to conduct private placements to finance their businesses.

One way in which the JOBS Act facilitates private placements is by requiring the Securities & Exchange Commission (SEC) to remove the current ban on general solicitation or advertisements, including social media, in private placements of securities, provided that all purchasers in the private placement are “accredited investors.” This change, when it becomes effective, will allow greater exposure to investments for a wider range of potential investors.

The ability to solicit a wider range of potential investors will bring with it some additional challenges for companies conducting private placements. In the past, companies conducting private placements often solicited investments from a small group of sophisticated investors who were well versed in making such investments.

As companies expand their solicitation efforts to investors who are potentially less sophisticated, extra care should be taken to ensure that all material information is available to potential investors, particularly by ensuring that the private placement memorandum contains the information material to investors’ decision-making process.

In a private placement with all accredited investors, there are no specific disclosure requirements under the securities law. However, companies conducting such a private placement must look to the anti-fraud provisions of the securities law, including related case law, and to SEC guidance. These sources indicate that in determining whether information is material and should be disclosed to potential investors, companies must look at what information a reasonable investor would need to make an informed decision.

In this regard, the applicable cases make it clear that companies must look at the total mix of the information, and consider what total mix of information, either through a disclosure document, the due diligence process, or just by general access to the information, the investor needs to make an informed decision. These same cases decline to provide any bright-line test.

So, it remains a matter of judgment as to what would be important to investors, but companies should be particularly careful to ensure that investors have access to information about material or recent developments regarding the issuer, and that the information is up-to-date at the time of the sale.

Companies also should exercise caution around the use of financial projections in conducting a private placement, as the desire or advisability of using financial projections will likely increase as companies act to solicit a broader range of investors. The use of financial projections subjects companies to increased risk because companies often fail to adequately disclose the assumptions related to the projections. Disclosing financial projections without robust disclosure of the assumptions could be misleading, and could create liability for companies and their directors and officers.

In short, companies should ensure that they disclose the material assumptions and include good risk factor disclosure. Good risk factor disclosure does not include risk factors that are merely boilerplate, but requires that companies include those risk factors that actually describe the issues that may undermine the financial projections.

While the JOBS Act brings with it enhanced opportunities for companies to access capital through private placements, companies will need to be extra vigilant in ensuring that they provide investors participating in the offering with the information they need to make a fully informed decision.

About the Author



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Article Link: <http://www.insidecounsel.com/2012/06/13/regulatory-the-jobs-act-and-materiality-determinat?ref=hp>

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