

# ALERT

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## The Potential Implications of the JOBS Act on D&O Coverage

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On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act, better known as the JOBS Act. The JOBS Act is intended to help smaller and new companies raise capital, and, to accomplish this goal, institutes fundamental changes to existing securities laws in the areas of fundraising and emerging growth companies (EGCs).

### **Changes to Laws Governing Fundraising**

The JOBS Act relaxes or entirely removes restrictions on private fundraising, including limitations concerning how and to whom private companies may market their Rule 144A securities offerings. It also raises the limit for securities offerings exempted under Rule 505 of Regulation D from \$5 million to \$50 million, thereby allowing for larger fundraising efforts. The JOBS Act broadly permits the previously limited allowance for “crowd funding,” that is, the use of online platforms to raise up to \$1 million in capital from numerous small investors over a 12-month period.

### **Changes to Laws Governing EGCs**

The JOBS Act also grants EGCs – defined in the Act as companies with annual revenues less than \$1 billion in the most recent fiscal year – greater flexibility to test the waters with both the Securities and Exchange Committee (SEC) and potential investors in regards to their initial public offering (IPO) prospects before they make their finances and other internal information available to the general public. Specifically, EGCs are relieved from certain regulatory and disclosure requirements in the registration statement that they originally file with the SEC when they go public and for a five-year period thereafter. Additionally, the JOBS

Act relieves EGCs from some of the more burdensome obligations imposed by Section 404 of the Sarbanes-Oxley Act and related rules and regulations.

### **Potential D&O Implications**

Although these changes are no doubt helpful for new and small business to raise capital more quickly and easily, they potentially open the floodgates to a host of D&O concerns. It is unclear at this early stage whether a company's D&O policy will cover claims stemming from the provisions of the JOBS Act. Indeed, Marsh USA, a leading insurance brokerage company, recently issued a report addressing this concern.

With regard to the changes in laws governing fundraising, it is imperative that a company first read and understand the language of its D&O liability insurance policy regarding public offerings before taking advantage of the new fundraising mechanisms provided for by the JOBS Act. Such language often varies greatly; some policies contain a public offering exclusion or limitation that specifically references Rule 144A, while other policies contain provisions that simply reference “private offerings.” Moreover, it is currently unclear whether a D&O policy would respond to claims stemming from crowd funding, since the provision in the JOBS Act that permits crowd funding (Section 302(c) of Title III) expressly imposes liability on issuers and their directors and officers for material misrepresentations and omissions made to investors in connection with a crowd funding offering. To help determine whether a particular policy would respond to such a claim, it is important to consider the policy's definition of “loss,” the policy's provisions regarding disgorgement, and any exclusion for, or limitation on, public offerings of securities. Specifically, one should

look to whether the policy defines the term “loss” with sufficient breadth to cover potential liability under Section 302(c) of Title III; whether a policy that contains a limitation or exclusion for disgorgement also contains language that sufficiently carves back Section 302(c) liability; and whether the policy’s exclusion for, or limitation on, public offerings or securities is potentially implicated by crowd funding.

With regard to changes in the laws governing EGCs, it remains to be seen whether a private company’s D&O policy will respond to claims arising out of the narrowed disclosure obligations or the broadened publicity. It also remains to be seen whether D&O underwriters will view the new limited SEC disclosure requirements as increasing or decreasing the risk of claims, and the corresponding impact this may have on premiums.

The implications of the JOBS Act on D&O insurance coverage are not yet known. Companies that take advantage of the provisions in the JOBS Act might be opening themselves to increased risk, and it is unclear whether their existing D&O policies will cover the resulting claims. Conversely, D&O insurers should identify the potential problems posed by the JOBS Act as well as whether and, if so, how they intend to cover claims arising from the JOBS Act. Such issues are best addressed when the policy is being underwritten rather than after a claim arises.

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*To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Andrea Cortland at [acortland@cozen.com](mailto:acortland@cozen.com) or 215.665.2751.*