

ALERT

APRIL 13, 2012

SECURITIES OFFERINGS AND REGULATION

News Concerning
Recent Securities Issues



COZEN
O'CONNOR
www.cozen.com

JOB ACT BECOMES LAW AND SEC ISSUES GUIDANCE: The JOBS Act Reforms the Regulatory Scheme Governing the Offering of Securities

Ralph V. De Martino • 202.912.4825 • rdemartino@cozen.com

Cavas S. Pavri • 215.665.5542 • cpavri@cozen.com

Eileen T. Salimbene • 215.665.4779 • esalimbene@cozen.com

The Jumpstart Our Business Startups Act, or JOBS Act, was enacted on April 5, 2012. The JOBS Act was a legislative response to the sharp decline in public offerings during the last decade. It is intended to reform the private and public offering processes to ease the regulatory burdens on smaller companies and facilitate capital formation. This legislation is meant to modernize the regulatory scheme and encourage more companies to pursue initial public offerings and to increase activity in the private markets. The JOBS Act makes it easier for private companies to raise capital through private and small public offerings, and it designates a new category of public company, the “emerging growth company” that is provided with the freedom to conduct an initial public offering of stock while being exempt from certain financial disclosure and governance requirements. The Securities and Exchange Commission (the Commission) is required to amend both Rule 506 and Rule 144A, as described below, no later than 90 days after the enactment of the JOBS Act, and is currently accepting comments from the public.

Private Market Reform

The JOBS Act modifies the capital formation process for private companies. The JOBS Act facilitates the private offering process by:

Permitting general solicitations or advertising in sales to accredited investors or qualified institutional buyers.

The JOBS Act directs the Commission to amend Rule 506 of Regulation D under the Securities Act of 1933 to eliminate the prohibition on general solicitation or advertising in

private offerings to accredited investors. The Commission must also amend Rule 144A to provide that securities sold under this exemption may be offered to persons other than qualified institutional buyers, including by means of general solicitation or general advertising. Such solicitation under Rule 506 or 144A is only permitted if the issuer or seller takes reasonable steps to verify the accredited investor or qualified institutional buyer status of the purchasers. Previously, the use of general solicitation or advertising in connection with a private offering conducted pursuant to either Rule 506 or Rule 144A would have vitiated the exemption from registration provided by those rules.

Facilitating crowdfunding.

The JOBS Act creates a new registration exemption for “crowdfunding,” which is a method of raising capital from a large pool of small investors (typically through the Internet). The JOBS Act allows a private company to use crowdfunding to raise up to \$1 million in any 12-month period. The amount of securities sold to each investor in any 12-month period is limited to (1) the greater of \$2,000 or 5 percent of the investor’s annual income or net worth, for investors with either an annual income or net worth of less than \$100,000 or (2) 10 percent of the investor’s annual income or net worth, subject to a limit of \$100,000, for investors with either an annual income or a net worth of \$100,000 or more. To qualify for the exemption, the issuer and any intermediary must meet certain disclosure, operational and filing requirements, including a requirement to conduct the transaction through a broker or funding portal that is registered with the Commission. Depending on the size of the offering, an issuer must file with the Commission and

disclose to potential investors certain financial information¹, as well as a description of its directors, officers and shareholders owning more than 20 percent, its business plan, the use of proceeds from the offering, the target offering amount, and its ownership and capital structure.

Raising the thresholds triggering public company reporting.

The JOBS Act makes it easier for private companies to raise capital without triggering the registration requirements under Section 12(g) of the Securities Exchange Act of 1934. Currently, an issuer is required to register securities once the issuer has \$10 million or more in assets and the securities are held by 500 or more shareholders of record. The JOBS Act amends Section 12(g) to raise the threshold to 2,000 shareholders of record, or 500 shareholders who are not accredited investors. In addition, the modified threshold excludes any employees who obtained securities through an employee compensation plan and investors who purchased securities pursuant to the crowdfunding exemption discussed above. Further, bank and bank holding companies will be permitted to have 2,000 shareholders, regardless of the amount of accredited investors.

Lifting the cap on Regulation A offerings.

The JOBS Act amends the small offering exemption under Regulation A to raise the cap on the amount of securities that can be issued over a 12 month period from \$5 million to \$50 million. However, unlike offerings subject to the crowdfunding exemption discussed above, these offerings would still be subject to state securities laws unless the securities are offered or sold only to qualified purchasers or on a national securities exchange.

¹ If the aggregate target offering amount is \$100,000 or less, the issuer must file with the Commission and disclose to investors its income tax returns for the most recent year and financial statements certified by its principal executive officer. If the aggregate target offering amount is more than \$100,000 but less than \$500,000, the issuer must also file and disclose financial statements reviewed by an independent public accountant. If the aggregate target offering amount is greater than \$500,000, the issuer must file and disclose audited financial statements.

Public Market Reform

The JOBS Act creates a new category of issuer known as an “emerging growth company,” which is defined as any issuer with less than \$1 billion in revenues in its last fiscal year. A company will continue to qualify as an emerging growth company until the earliest of (1) the end of the fiscal year in which its revenues exceed \$1 billion, (2) the date that the company becomes a large accelerated filer (issuers with a worldwide public float of \$700 million or more and 12-months of reporting history), (3) five years from the company’s IPO, or (4) the date on which it has issued more than \$1 billion in non-convertible debt during the previous three year period.

The JOBS Act makes it easier for emerging growth companies to raise funds in the public capital markets by relaxing the IPO process and public reporting requirements. Emerging growth companies will initially be subject to reduced compliance and disclosure obligations and then transition to full compliance with the Commission regulations, also known as an “IPO on-ramp.” Reforms aimed at making the IPO process easier permit emerging growth companies to:

Provide reduced financial information.

An emerging growth company will only be required to give two, rather than three years of audited financial statements or selected financial data in the registration statement for its IPO.

Obtain confidential SEC review.

An emerging growth company will be entitled to file a registration statement with the Commission on a confidential basis and maintain a confidential registration process until 21 days prior to the start of its roadshow.

Increased communications with institutional investors.

An emerging growth company or its authorized representative will be permitted to engage in oral and written communications with qualified institutional buyers and institutional accredited investors to solicit interest in the company’s potential securities offering.

Broader analyst coverage.

The JOBS Act permits analysts to publish and distribute research reports about an emerging growth company subject to a proposed offering before, during and after the offering. The JOBS Act allows analysts to communicate more freely with issuers and institutional investors by removing restrictions on who may arrange for communications and to permit analysts to partake in communications with company's management.

The JOBS Act also relieves emerging growth companies from certain disclosure and financial reporting obligations:

Auditor Attestations and Rules.

Auditors of an emerging growth company will be exempt from attesting to its internal controls under Section 404(b) of the Sarbanes Oxley Act. This exemption will be available for up to five years after the company's IPO if the issuer continues to qualify as an emerging growth company. Additionally, any rules adopted by the Commission or the Public Company Accounting Oversight Board that require mandatory audit firm rotation and auditor discussion and analysis will not apply to emerging growth companies.

Exemption from Say-on-Pay Votes and Executive Compensation Disclosure.

An emerging growth company will not be required to hold a shareholder vote on executive compensation, including golden parachutes. Further, the company will not be required to disclose a comparison of executive compensation to company performance and the ratio of CEO to worker pay compensation under the Dodd-Frank Act.

Decimalization.

The JOBS Act also requires that the Commission conduct a study examining the transition to trading and quoting securities in one-penny increments. The Commission will examine the impact that decimalization would have on liquidity for small and middle capitalization company securities and determine whether there is significant economic incentive to support trading these securities in penny increments.

The JOBS Act and General Solicitation: Impact on Private Offerings During the Period Prior to SEC Rulemaking – 14 Law Firm Consensus Report concluded that until the Commission amends Rule 506 and Rule 144A as required by the JOBS Act, market participants relying on these safe harbors should continue to implement customary procedures for these offerings. The report further concludes that market participants must continue to satisfy the applicable conditions of safe harbors such as Rules 135c, 152 and 155, as well as comply with applicable Commission interpretative guidance. Additionally, the Division of Corporation Finance released responses to frequently asked questions in order to provide guidance on the implementation and application of the JOBS Act. A copy of that release is available [here](#).

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact:

Ralph V. De Martino at 202.912.4825 or rdemartino@cozen.com

Cavas S. Pavri at 215.665.5542 or cpavri@cozen.com.

Eileen T. Salimbene at 215.665.4779 or esalimbene@cozen.com