April 5, 2012

# Alert
# SEC Disclosure and Corporate Governance

## President Signs the JOBS Act

- **Facilitates private capital formation**
- **Enables private companies to remain private despite a larger shareholder base**
- **Eases IPO and post-IPO requirements for “emerging growth companies”**
- **Offers benefits for private investment funds**

Earlier today, President Obama signed into law the Jumpstart Our Business Startups Act (the JOBS Act).[1] The new legislation enlarges the menu of choices that private companies will have to raise capital while also reducing the burdens on “emerging growth companies” that ultimately resort to the public markets. Many aspects of the JOBS Act are effective immediately; others require rulemaking by the Securities and Exchange Commission (SEC), generally on an expedited basis.

The JOBS Act will give venture capital funds and private equity investors greater flexibility to incubate and nurture start-ups and other private companies as these companies will now have greater ability to raise capital and use equity rather than cash to compensate employees without becoming subject to the registration and reporting requirements of the Securities Exchange Act of 1934. Moreover, private funds relying on the Section 3(c)(7) exception under the Investment Company Act of 1940 will be able to increase the number of record holders to 1,999, well beyond the current 499-record holder limitation.

When access to public capital becomes desirable, the JOBS Act will streamline the initial public offering process for companies that qualify as “emerging growth companies” and then, after the IPO, give these companies a window of up to five years to ease into full Exchange Act reporting. The benefits of “emerging growth company” status can be enjoyed by companies of considerable size – with total annual revenues just short of $1 billion.

The JOBS Act also makes a particularly sweeping change to the Securities Act of 1933 – elimination of the prohibition on “general solicitation” and “general advertising” in issuer private placements made solely to accredited investors under Rule 506 of Regulation D and non-issuer resales made solely to qualified institutional buyers under Rule 144A.

The JOBS Act’s relaxation of long-standing requirements for capital-raising and reporting by smaller companies, coinciding with recent negative publicity surrounding accounting-related problems experienced by a prominent high-tech company during and after its IPO, have raised investor protection concerns on the part of federal and state regulators and investor advocates.[2] It remains to be seen whether the SEC and other regulators will use what latitude exists under the statute to impose conditions, through the rulemaking process, to reliance on the new exemptive provisions, and whether underwriters and other market participants will take a cautious approach.

## Key Provisions of the JOBS Act

- ***Relaxation of IPO process and post-IPO requirements for "emerging growth companies"***: Effective immediately, the Act creates a new category of issuer – the Emerging Growth Company (EGC) –that had less than $1 billion in total annual gross revenues during its last completed fiscal year and did not conduct an initial public offering of equity securities (IPO) on or before December 8, 2011. EGCs may take advantage of substantially reduced financial reporting and executive compensation disclosure requirements in connection with their IPOs and continue to enjoy these benefits during a post-IPO transition period of up to five years. SEC guidance may be necessary before some of the benefits can be fully realized, such as confidential SEC staff review of draft IPO registration statements.
- ***Expansion of permissible communications & analyst coverage and participation in EGC IPOs***: Effective immediately, the Act eliminates longstanding "gun-jumping" constraints on certain pre-IPO "testing the waters" communications by EGCs and their underwriters. These communications will now be allowed with qualified institutional buyers (QIBs) and institutional accredited investors. Also with immediate effect, but with SEC and/or Financial Industry Regulatory Authority (FINRA) guidance expected, the Act lifts significant restrictions on research analyst coverage and participation in EGC IPOs.
- ***Elimination of prohibition on "general solicitation" and "general advertising" in certain private offerings***: Subject to SEC rulemaking within 90 days, the Act permits general solicitation and general advertising in connection with issuer private placements where sales are made solely to accredited investors under Rule 506, as well as non-issuer resales made solely to QIBs under Rule 144A.
- ***New "crowdfunding" exemption for domestic private issuers***: Subject to SEC rulemaking within 270 days, the Act creates a new exemption from Securities Act registration requirements for "crowdfunding" capital-raising activities – essentially raising small amounts of money from a large number of investors – conducted by non-public domestic issuers through SEC-registered broker-dealers or a new category of intermediaries, SEC-registered portals. State "blue sky" laws are preempted.
- ***Expansion of Regulation A for private issuers***: Subject to SEC rulemaking (no deadline imposed), the Act expands the Regulation A exemption from Securities Act registration available for offerings by private companies to a cap of $50 million within a 12-month period. State blue sky laws are pre-empted if these offerings are made on a national securities exchange or exclusively to "qualified purchasers" as defined by the SEC.
- ***Increase for all issuers in trigger for Exchange Act registration***: Effective immediately, the Act raises the shareholder threshold for mandatory Exchange Act registration (and therefore reporting) from 500 record holders of any class of equity securities to 2,000 such holders (or a maximum of 500 who are not accredited investors), *not including in the record holder count* securities received by employees in exempt offerings under employee compensation plans, or by investors in exempt crowdfunding offerings. The increased trigger applies to all companies (including investment companies) other than banks and bank holding companies. For the latter, the Act raises the threshold to 2,000 record holders, with *no limit* on non-accredited investors.

## Relaxation of IPO Process and Post-IPO Requirements for EGCs

### *Definition of an EGC*

The JOBS Act defines an EGC, for purposes of both the Securities Act and the Exchange Act, as any issuer, domestic or foreign, that had less than $1 billion in total annual gross revenues for its most recently completed fiscal year, *as long as* that issuer did not first sell common equity securities in an IPO on or before December 8, 2011. An EGC will retain this status until the **earliest** of:

- the last day of the fiscal year during which it had total annual gross revenues of $1 billion or more;[3]
- the last day of the fiscal year following the fifth anniversary of its IPO;
- the date on which it has, over the previous three-year period, issued more than $1 billion in non-convertible debt (note that this is not a fiscal year-end test); and
- the date on which it is deemed to be a "large accelerated filer" (essentially, an issuer with a public float of $700 million or more that has been filing Exchange Act reports for at least one year).

### *IPO Process Reforms for EGCs*

The JOBS Act substantially eases the IPO process for EGCs in the following ways:

- *Reduced financial and MD&A disclosure*. An EGC will need to provide only two (rather than three) years of audited financial information and Management's Discussion and Analysis (MD&A) disclosure in its IPO registration statement and, in any other registration statement or Exchange Act report (for so long as it remains an EGC), will not have to provide selected financial data or MD&A for any earlier periods than those presented in the IPO registration statement (previously five years of selected financial data was required).[4]
- *Confidential SEC review of IPO registration statements*. An EGC will be entitled to submit its initial draft IPO registration statement, and subsequent amendments, to the SEC for staff review on a confidential basis, as long as the initial confidential submission and all amendments reviewed on a confidential basis are filed publicly at least 21 days prior to the first IPO roadshow.[5] The JOBS Act provides that all information provided to or obtained by the SEC pursuant to this confidential review process will not be subject to disclosure under the Freedom of Information Act (FOIA).
- *Expanded permissible communications*. An EGC and persons acting on its behalf (including underwriters) will be permitted to communicate, orally or in writing, with potential investors that are QIBs or institutional accredited investors, either prior to or following the filing of an IPO registration statement, to solicit potential interest (*i.e.*, "test the waters") in connection with the proposed offering.
- *Expanded research analyst coverage and participation in IPOs*. A research analyst employed by an investment bank will be permitted to initiate research coverage of an EGC, and to communicate with an EGC's management team without a "chaperone" from the bank's legal or compliance department, even if the investment bank is participating as an underwriter in the EGC's IPO.[6] The JOBS Act also bars the SEC and FINRA from restricting brokers, dealers

and/or FINRA members from publishing or distributing research or making a public appearance immediately after an EGC's IPO is priced or before expiration of any IPO lock-up period.

### *Post-IPO Disclosure and Governance Regime for EGCs*

The JOBS Act affords EGCs a transitional process (in effect, an "on-ramp") to shouldering the burdens of full public company (non-EGC) status. As discussed under "Practical Implications" below, EGCs need not rely on the full suite of EGC exemptions but instead have the flexibility to "pick and choose." With one exception for "financial accounting standards," moreover, they may change the extent to which they rely on the exemptions as they deem appropriate during their tenure as EGCs.

- *Reduced financial and MD&A disclosure*. An EGC will not be required to provide audited financial statements, selected financial data or MD&A disclosure for periods prior to those presented in its IPO registration statement. Thus, EGCs are afforded an additional year to transition to providing a three full fiscal years of audited financial information.
- *Auditor's internal control report exemption*. An EGC will not be required to file, with its annual report on Form 10-K (or presumably Form 20-F), an auditor's report attesting to the effectiveness of the company's internal control over financial reporting (ICFR) as mandated by Section 404(b) of the Sarbanes-Oxley Act of 2002 (SOX). This effectively means that the company is not subject to an ICFR audit as part of the financial statement audit, even though public accounting firms are likely to have certain minimum expectations of management in connection with the latter's compliance with SOX Section 404(a). Management still must provide, as part of an EGC's annual report on Form 10-K (or 20-F), its Section 404(a) ICFR report. In addition, full CEO and CFO certifications – addressing, among other things, the establishment, maintenance and effectiveness of ICFR – still must be filed as exhibits to periodic reports.
- *Public company "financial accounting standards" exemption*. An EGC will not be required to comply with any new or revised financial accounting standard unless and until the standard becomes applicable to companies that are not "issuers" under SOX (meaning non-reporting companies). However, in contrast with the other EGC exemptions, an EGC does not have the latitude to pick and choose which non-EGC financial accounting standards it may wish to apply during the period in which it may claim EGC status; rather, it must decide whether or not to elect full EGC exemptive treatment at the outset and may not change its election while an EGC.
- *Public company auditing standards exemption*. An EGC will not be required to comply with certain auditing standards promulgated by the Public Company Accounting Oversight Board (PCAOB), including any that might result from the pending rulemaking relating to audit firm rotation and an auditor discussion and analysis. Nor will an EGC have to comply with any subsequent auditing standards adopted by the PCAOB, unless the SEC otherwise determines that such requirements are necessary or appropriate in the public interest. Note that this provision does not require a one-time, initial election to opt in or out, unlike the financial accounting standards provision.
- *Reduced executive compensation disclosure*. An EGC will be able to provide the same reduced, or "scaled," executive compensation disclosure that Item 402 of Regulation S-K allows "smaller reporting companies" (companies with a public float of less than $75 million) to provide. As a

result, an EGC will be able to omit the Compensation Discussion and Analysis (CD&A) and four of six executive compensation tables, disclose two (rather than three) years of executive compensation in the Summary Compensation Table, and provide executive compensation information for three (rather than five) named executive officers, including the CEO.[7] An EGC will also be exempt from providing the pay-versus-performance and CEO-to-worker pay ratio disclosures required (but not yet proposed) under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).

- *No Say-on-Pay/Say-on-Frequency/Say-on-Parachutes.* An EGC will be exempt from the say-on-pay, say-when-on-pay and say-on-golden-parachute advisory vote requirements of Dodd-Frank. Once an EGC loses this status, it must conduct a say-on-pay vote within one year of such loss, with one exception – if the EGC ceases to be such after fewer than two years, it may wait to hold this vote until the end of the three-year period following its IPO.
- *More to come?* Title I of the JOBS Act also mandates that the SEC "comprehensively analyze" the current registration requirements of Regulation S-K, determine how such requirements can be modernized and simplified to reduce the costs and other burdens imposed upon EGCs, and report its findings to Congress not later than 180 days after the date of enactment.

***Effectiveness***: Title I is self-executing and effective immediately upon the enactment of the JOBS Act. However, it is likely that the SEC or its staff will need time to implement procedures for the receipt and review of confidential IPO filings. Moreover, with respect to the lifting of certain SEC and FINRA restrictions on the use of research reports and analyst involvement in the IPO marketing process, the wiser course may be to await near-term guidance from the SEC or its staff, and possibly FINRA, on these matters.

## Private Capital Formation

The JOBS Act includes a number of provisions aimed at increasing the opportunities for pre-IPO companies to raise capital without triggering Securities Act registration requirements. In addition, EGCs and non-EGCs alike will benefit substantially from the statutory de-regulation of "offers" under the Securities Act that will permit the use of general solicitation and general advertising in certain private offerings in which the securities are sold only to eligible purchasers who are deemed able to "fend for themselves" for purposes of the Securities Act.

### *General solicitation and general advertising for Regulation D and 144A offerings*

Title II of the JOBS Act removes the prohibition against general solicitation and general advertising in connection with issuer private placements made to accredited investors pursuant to Rule 506 of Regulation D, as well as non-issuer resales made to QIBs under Rule 144A. The issuer in a Rule 506 offering will be required to take "reasonable steps to verify" – in accordance with procedures to be identified by the SEC via rulemaking – that all purchasers are "accredited investors" (as defined in Rule 501 of Regulation D). Sellers relying on Rule 144A must "reasonably believe" that all buyers are QIBs. Private placements made directly under Section 4(2) or other provisions of Regulation D will remain subject to the prohibition against general solicitation and general advertising.

- *Applicability to private funds.* Private funds (including private equity, hedge funds and venture capital funds) rely on two primary exceptions to registration under the Investment Company Act

Section 3(c)(1) for private funds with fewer than 100 beneficial owners and Section 3(c)(7) for private funds whose beneficial owners are "qualified purchasers." Both of these exceptions are contingent upon the private fund not engaging or proposing to engage in a public offering of its securities. While the JOBS Act does not expressly address the interrelationship between Rule 506, as it will be amended, and Sections 3(c)(1) and 3(c)(7), it appears to afford comfort to issuers relying on Sections 3(c)(1) and 3(c)(7) by providing that a Rule 506 offering utilizing general solicitation and/or general advertising will not be deemed to be a public offering "under the Federal securities laws."[8] Under this interpretation, private funds will be able to engage in general solicitation and general advertising during fund-raising as long as the only investors permitted to purchase interests and ultimately admitted to such funds are accredited investors or "qualified purchasers." It remains to be seen whether, through the rulemaking process, the SEC will seek to impose additional conditions on or limits to a private fund's ability to engage in general solicitation and general advertising.

Persons who maintain private online platforms or other mechanisms to effect Rule 506-exempt private placements will not be required to register as a broker or dealer under the Exchange Act, so long as they satisfy certain conditions. These conditions include, but are not confined to, compliance with a prohibition against the receipt of customer funds or securities and certain "bad actor" disqualification provisions.

***Effectiveness:*** Title II requires SEC implementing rules. The SEC has 90 days from the enactment of the JOBS Act to revise its rules in order to implement the Regulation D and 144A amendments**.**

### *Crowdfunding exemption*

Title III of the JOBS Act amends the Securities Act to add an exemption for "crowdfunding" activities (new Section 4(a)(6) with further implementation directives in new Section 4A). Crowdfunding is a financing technique that may be employed to raise capital, often via the internet, from a large network of small investors. Once this exemption is implemented by the SEC, an eligible non-public issuer will be able to raise, in the aggregate, up to $1 million during any 12-month period either through brokers registered with the SEC and FINRA or a new SEC-registered crowdfunding portal. (The SEC and self-regulatory organizations must create an alternative regulatory regime for funding portals, an entirely new variety of "gatekeeper.") The aggregate amount of securities that can be sold to any individual investor in a 12-month period in reliance on this exemption is limited to:

- $2,000 or 5% of the investor's annual income or net worth, if either the investor's annual income or net worth is less than $100,000; and
- 10% of the investor's annual income or net worth, not to exceed $100,000, if either the investor's annual income or net worth is $100,000 or more.

The issuer (or its registered intermediary) will be required to provide investors with such information as the SEC, by rule, determines to be appropriate, including risk factor disclosures warning of the speculative nature generally of investment in private startups and emerging businesses and the illiquidity of securities acquired in a crowdfunding transaction (as explained below). The issuer will also be required to provide information concerning its financial condition, including audited financial statements if the aggregate 12-month target offering amount exceeds $500,000 (or such other amount established by the SEC), and may not receive any offering proceeds until the specific offering's target amount is reached or exceeded (allowing for any prospective buyer's cancellation of an investment commitment). Additionally, for the one-year period beginning from the date of purchase, purchasers of crowdfunding securities may only transfer those securities to the issuer, to an accredited investor, to a family member, in connection with death or divorce, or pursuant to a registered offering.

Note that public domestic companies, foreign issuers and investment companies may not use this exemption, and certain "bad actor" disqualifications will also apply. A new private right of action for negligence-based liability for oral or written communications containing material misrepresentations or omissions may be brought against the issuer, which is defined broadly to include any director, partner, principal executive or financial officer, and certain other officers, as well as any person who offers and sells securities on behalf of the issuer in a crowdfunding transaction. By the same token, securities offered and sold via exempt crowdfunding will not be subject to state blue-sky laws (although state antifraud enforcement authority is preserved).

***Effectiveness:*** Title III requires SEC implementing rules. The SEC has 270 days from the date of enactment of the JOBS Act to promulgate such rules as it determines to be necessary or appropriate for the protection of investors to enable eligible private domestic issuers to carry out crowdfunding activities.

### *Expansion of Regulation A*

In the past, the $5 million offering ceiling, coupled with the lack of corresponding state "blue sky" exemptions, have made the Regulation A exemption from Securities Act registration requirements adopted by the SEC under Section 3(b) a somewhat impractical capital-raising alternative for small businesses. Title IV of the JOBS Act directs the SEC to amend Regulation A (or adopt a new similar exemption) that makes two key changes that may increase the usefulness of this "small issue" exemption. First, the Act raises to $50 million the amount of securities that may be offered and sold within any 12-month period in reliance on this exemption. Equally important, it exempts these "super" Regulation A offerings from state blue sky laws (but not state antifraud laws), provided that the securities are offered and sold by an eligible private company on a national securities exchange or to a "qualified purchaser" as such term will be defined by the SEC. Consistent with their treatment pre-JOBS Act, the securities offered and sold in a super Regulation A offering will not be deemed "restricted" for Rule 144 resale purposes.

Issuers relying on the exemption, as revised by the JOBS Act, will be required to file with the SEC an offering statement containing disclosures specified by the SEC, annual audited financial statements and such other periodic disclosures as the SEC may require. In addition, certain "bad actor" disqualification provisions will apply and Section 12(a)(2) liability will attach to sellers in these "public" exempt offerings. The JOBS Act leaves in place certain other useful elements of Regulation A: the absence of any limitation on the types of securities that may be offered or the types of investors that may participate, the ability to "test the waters" and the "unrestricted" character of the securities issued. Completion of a Regulation A offering will not, in and of itself, subject the issuer to Exchange Act reporting obligations; however, as noted above, the SEC may impose an obligation to file and send to investors an audited annual financial statement and possibly other periodic disclosures.

> ***Effectiveness:*** Title IV requires SEC implementing rules; however, the statute does not establish a deadline.

## Increased Triggers for Exchange Act Registration and Reporting

Titles V and VI of the JOBS Act postpone the day on which any private company (including banks and bank holding companies) must register a class of equity securities under the Exchange Act and thereby subject itself to periodic reporting and other requirements. In the case of banks and bank holding companies, the Act also lowers the barrier to Exchange Act deregistration (under Section 12(g)) and suspension (under Section 15(d)).

### *Registration Triggers*

Until now, a company has been required to register a class of equity securities under Section 12(g) of the Exchange Act – and thereby become subject to the full panoply of Exchange Act reporting requirements – within 120 days after the last day of any fiscal year on which it had total assets exceeding $10 million dollars and a class of equity securities held by 500 or more shareholders of record.[9] Title V of the JOBS Act amends the Exchange Act to increase the record holder threshold for Section 12(g) registration to 2,000 persons (or a maximum of 500 persons who are not accredited investors) for all companies (including investment companies), other than banks and banking holding companies. For the latter, Title VI of the Act provides even more favorable treatment – it increases the record holder threshold to 2,000 without regard to the number of non-accredited investors.

These increases are even more significant for companies than may appear at first glance because the Act excludes equity securities held of record by persons who received the securities either as part of an exempt crowdfunding offering, or in exempt transactions pursuant to an employee compensation plan. In addition, private funds relying on the Section 3(c)(7) exception under the Investment Company Act will be able to increase the number of record holders well beyond the current 499-record holder limitation. It is possible, however, that the SEC may propose during the rulemaking process that certain limitations be imposed on the number of record holders in an unregistered investment company as a condition to reliance on Section 3(c)(7).

### *Exit requirements*

Title VI of the JOBS Act relaxes the “exit” requirements of both Section 12(g)(4) (termination) and Section 15(d) (suspension) of the Exchange Act for banks and bank holding companies – these companies may exit the Exchange Act reporting system if the number of record holders drops below 1,200. However, the JOBS Act does not change the “exit” requirements for other domestic US companies or foreign private issuers, which means that non-bank domestic companies can only exit the Exchange Act reporting system if the number of record holders falls below 300 (allowing both termination under Section 12(g) and suspension under Section 15(d)).

***Effectiveness***: Titles V and VI are effective immediately. The SEC is required (without a deadline) to revise the "holder of record" definition under Section 12(g)(5) of the Exchange Act, as now set forth in Rule 12g5-1, and to adopt safe harbor provisions that issuers can follow when determining whether holders received their securities pursuant to an employee compensation plan in transactions exempt from Securities Act registration. SEC rulemaking also is needed to implement a similar exclusion in Title III, which is mirrored in Titles V and VI, for securities acquired by investors in a crowdfunding transaction. The SEC is required to review the scope and effectiveness of its "anti-evasion" enforcement power codified in Exchange Act Rule 12g5-1(b)(3), and to make recommendations to Congress in this regard, within 120 days of enactment. The SEC has one year to adopt implementing "exit" rules with respect to the Sections 12(g) and 15(d) amendments applicable solely to banks and bank holding companies.

## Practical Implications

The following are among the practical implications that will be explored and debated as we await the SEC rulemaking process and the development of adaptive market practices.

- ***Increased flexibility for private companies to remain private***: The enhanced menu of capital-raising alternatives available to private companies – Rule 506 private placements, crowdfunding and "super" Regulation A offerings – in combination with the heightened Section 12(g) registration and reporting thresholds should encourage private companies to flourish and grow under the regulatory "radar screen." The carve-outs from the Exchange Act "holder of record" definition for equity securities issued to crowdfunding investors and employees who receive equity-based compensation pursuant to exempt offerings under the Securities Act will be particularly beneficial to cash-hungry start-ups and emerging growth companies.

  It remains to be seen whether venture capital and other large "angel" investors will tolerate the dilution of their pre-IPO equity stakes via portfolio companies' sale of large amounts of equity to unsophisticated, non-accredited investors pursuant to the use of crowdfunding and "super" Regulation A offerings. Nor is it clear that pre-IPO companies will be in a position effectively to limit transferability of either restricted or unrestricted securities as required, for example, under the new crowdfunding exemption, considering the recent experience of pre-IPO companies such as Facebook, Linked-In and others. In this regard, we expect the use of online "Section 4(1-1/2)" trading platforms for restricted and unrestricted securities of private issuers to evolve and perhaps expand, subject to SEC guidance on such open questions as whether a registered broker-dealer must operate such secondary market platforms, now that Congress has indicated that online platform operators need not register with the SEC as brokers or dealers if their platforms are used by issuers to make Rule 506 offerings involving general solicitation and general advertising.[10]

- ***The IPO process for EGCs***: We will have to wait and see whether investment banks are willing to initiate research on – or underwrite IPOs of – EGCs that take full advantage of the disclosure exemptions, particularly smaller cap EGCs outside the "hot" high tech, energy and biotech sectors. Moreover, we anticipate that EGCs and/or their underwriters may take a generally cautious approach to using the streamlined IPO process pending the SEC's publication of guidance on such still-unanswered questions as: (1) the process for confidential SEC staff review of draft IPO submissions; (2) the degree to which EGC management can engage in pre-pricing soliciting activities, unless limited to QIBs and institutional accredited investors (assuming such communications do not constitute a "roadshow"), during the period that the company's IPO registration statement remains subject to confidential staff review; and (3) the implications for investment bank compliance policies and procedures of the lifting of some SEC and FINRA restrictions on the publication and dissemination by underwriters of analyst research reports and direct analyst communications with EGC management and IPO investors. Investment banks that are bound by the 2003 court-approved Global Settlement Agreement may have to evaluate whether to request judicial relief, with the support of the SEC, from certain provisions of this agreement in order to take full advantage of the relevant provisions of the JOBS Act.

- ***Use of general solicitation and general advertising***: The continued applicability of the antifraud provisions of Exchange Act Section 10(b) and Rule 10b-5 to offerings made under all of the new or expanded Securities Act exemptions (as well as SEC enforcement actions under Section 17(a) of the Securities Act), along with the continued applicability of bans on the use of general solicitation and general advertising in private placements under Section 4(a)(2) and the non-preemption of state laws with respect to such private placements and Rule 144A resale transactions (although similar private resale exemptions may be available under such laws), may have a restraining influence on whether market participants ultimately become comfortable with the unfettered use of publicity to offer and sell securities to accredited investors and/or QIBS. The threat of private and governmental antifraud liability, as well as negligence-based Section 12(a)(2) liability that may attach to public exempt offerings under the new crowdfunding and super Regulation A exemptive provisions, may deter widespread offerings to non-accredited investors. Moreover, the new statute leaves untouched the Regulation S concept of "directed selling efforts," suggesting that marketing restrictions will continue to attach to global combined offerings conducted abroad under Regulation S, and in the United States under Section 4(2)(and/or Rule 506)/Rule 144A.

  On the other hand, the Title II-induced demise of the prohibitions on general solicitation and general advertising in connection with Rule 506 offerings, as well as QIB-only Rule 144A transactions, may ameliorate certain risks of integration of consecutive and/or concurrent registered and private exempt offerings. At the same time, however, sellers must still "verify" (for Rule 506 purposes) or "reasonably believe" (for Rule 144A purposes) that all their buyers are eligible purchasers. Thus, for example, a Rule 506 offering accompanied by substantial publicity could heighten the risk of prohibited sales to non-accredited investors, and also jeopardize the availability of the Section 4(2) exemption – either for that offering, or for a subsequent or prior private placement occurring within six months and reliant solely on Section 4(2). For answers to these and other open questions regarding the full implications of Title II for private offering practices, we must await the required SEC rulemaking.

- ***Voluntary "big company" disclosure***: Nothing in the JOBS Act compels an EGC to rely on all EGC exemptive provisions. To the contrary, an EGC has the freedom to choose whether to comply with any non-EGC disclosure or other requirement (permitting what amounts to an "a la carte" approach).[11] For example, an EGC might elect to opt out of this privileged category to supply more comprehensive, non-EGC issuer disclosures in some areas, such as executive compensation, while electing to rely on the exemption permitting scaled-down financial reporting. Moreover, an EGC can change its approach over time and increase the level of "big company" disclosure (or, theoretically if not practically, revert back). There is one important caveat – an EGC must decide up front, when filing its first registration statement or Exchange Act report, whether it will adhere to new or revised "financial accounting standards" to which non-EGCs are subject and, if so, it must notify the SEC of this election and continue to comply with non-EGC financial accounting standards for as long as the company is an EGC. It remains to be seen whether, in response to shareholder or proxy advisory firm pressure, underwriters' or lenders' risk-mitigation demands or simply board or management views of the appropriate level of transparency, EGCs will disclose on a voluntary basis more governance and/or financial information than is required.

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If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or to any of the following:

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## Endnotes

[1] H.R. 3606, *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf. President Obama's remarks at the JOBS Act bill signing are *available at* http://www.whitehouse.gov/the-press-office/2012/04/05/remarks-president-jobs-act-bill-signing.

[2] *See* Shayndi Raice & Jean Eaglesham, *SEC Probes Groupon*, Wall St. J., Apr. 3, 2012.

[3] The $1 billion ceiling will be indexed for inflation every five years to reflect the change in the Consumer Price Index for all Urban Consumers published by the Bureau of Labor Statistics.

[4] *See* Items 301 and 303 of Regulation S-K.

[5] Though the SEC will still need to implement procedures for the receipt of confidential submission, the process may be similar to the initial confidential submission process that was available to foreign private issuers until December 2011, when the SEC staff opted to limit significantly the circumstances under which it would permit such confidential submissions. *See* "Non-Public Submissions from Foreign Private Issuers" (Dec. 8, 2011) *available at* http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm.

[6] Note, however, that the JOBS Act does not change the obligations of 12 investment banks subject to the Global Research Analyst Settlement Agreement with the SEC, state securities regulators, NASD and NYSE that were imposed by court order in 2003.

[7] *See* Item 402(l) of Regulation S-K.

[8] *See* Section 201 of the JOBS Act. In addition, there is pre-JOBS Act precedent that a Rule 506 offering is not a "public offering" for purposes of Sections 3(c)(1) and 3(c)(7) of the Investment Company Act.

[9] *See* Exchange Act Rule 12g-1.

[10] *See In the Matter of SharesPost Inc. and Greg Brogger*, *available at* http://www.sec.gov/litigation/admin/2012/34-66594.pdf.

[11] *See* Section 107 of the JOBS Act.