**The JOBS Act: A Primer for the Private Company C-suite Executive**

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This article provides the reader with a broad overview of the Jumpstart Our Business Startups Act (the "JOBS Act") and how it may be of use to private issuers that are beyond the startup and development stages. This article also touches on why we think certain aspects of the JOBS Act will ultimately prove more transformative than others. Most notably, we believe that elimination of the ban on general solicitation and general advertising in certain private offerings is more likely to revolutionize the private capital markets than the much-hyped crowdfunding exemptions.

**Structure of the JOBS Act**

As a threshold matter, an uninitiated reader might best understand the JOBS Act by considering it section by section:

- Title I establishes an IPO on-ramp process for a new category of "emerging growth companies". This includes, affording such companies the opportunity to elect scaled disclosure requirements and imposing upon them fewer restrictions in investor and analyst communications.
- Title II directs the SEC to promulgate rules eliminating the long-standing prohibitions on "general solicitation" and "general advertising" (which we refer to collectively as "general solicitation") in certain private securities offerings.
- Title III establishes the crowdfunding exemptions and directs the SEC to promulgate rules to give effect to those exemptions.
- Title IV establishes and directs the SEC to promulgate rules to give effect to a new exemption which is similar in many regards to existing Regulation A (so much so that is often referred to as Regulation A+), but which allows for relatively larger offerings (up to $50 million dollars in a 12 month period).
- Titles V and VI both raise the holder of record thresholds for registration under the Securities Exchange Act of 1934 (the "Exchange Act"), with Title VI specifically addressing banks and bank holding companies.
- Title VII requires the SEC to conduct outreach to inform small and medium businesses, women owned businesses, veteran owned businesses and minority owned businesses of the changes made by the JOBS Act.

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**How the JOBS Act benefits issuers that are thinking about going public**

As noted above, Title I of the JOBS Act carves out a new category of filer under the federal securities laws: the "emerging growth company", with the intention of providing such companies with an on-ramp to ease their transition from private to public status.

The JOBS Act defines an emerging growth company as one having total annual gross revenues of less than $1 billion as of its most recently completed fiscal year, with the exception of those companies that have held an initial public offering on or before December 8, 2011.

There are a number of benefits that come along with being categorized as an emerging growth company, including the ability to submit a confidential IPO registration statement to the SEC for nonpublic review. Such registration statement only becomes publicly available 21 days in advance of a company's roadshow, thereby protecting an emerging growth company from public scrutiny until that time.

In addition, as a result of the JOBS Act, emerging growth companies:

- may elect to take advantage of a number of scaled corporate governance and financial disclosure requirements;
- may "test the waters" by engaging in oral or written communications with certain potential investors (qualified institutional buyers and institutional accredited investors) following the filing of a registration statement and prior to its effective date (*i.e.*, during the "quiet period"); and
- will benefit from less restrictive research analyst communication rules and rules allowing broker-dealers, including underwriters participating in an offering, to publish and distribute research reports while the emerging growth company is contemplating or in the process of registering common equity.

**How the JOBS Act benefits issuers that would like to remain private**

Prior to enactment of the JOBS Act, a company that had accumulated total assets in excess of $10 million dollars and a class of equity securities held of record by 500 or more shareholders, was required to register that class of equity securities under the Exchange Act and begin filing periodic reports.

As noted above, Title V of the JOBS Act increased the registration threshold from 500 shareholders of record to either 2,000 persons or 500 persons who are not accredited investors (excluding those persons who receive securities pursuant to an employee compensation plan in a transaction exempt from registration under the Securities Act of 1933 (the "Securities Act")). In the case of a bank or bank holding company, Title VI of the JOBS Act increased the registration threshold from 500 shareholders of record to 2,000 persons.

Consequently, a private company may now raise several rounds of capital while at the same time using equity incentives to compensate management and employees without triggering Exchange Act registration requirements or being compelled to go public.

**How the JOB Act's elimination of the ban on general solicitation will help issuers to raise capital**

September 23, 2013 marks a sea change of precedent going back decades. It is the date on which it became permissible for issuers to generally solicit and publicly advertise in connection with certain private offerings of securities made in reliance on new subsection (c) of Rule 506 of Regulation D, promulgated under Section 4(a)(2) of the Securities Act. Rule 506 is by far the most popular of all private offering exemptions.

In its original state, Rule 506 (which will be retained in subsection (b) of the amended Rule 506) allows an issuer to offer and sell an unlimited amount of securities to an unlimited number of accredited investors and up to 35 non-accredited investors who either alone or with a purchaser representative meet certain sophistication requirements. While there are a number of conditions associated with Rule 506 offerings, perhaps the most limiting was that an issuer could not offer or sell securities through any form of general solicitation.

Under newly adopted Rule 506(c), an issuer will still be able to offer and sell an unlimited amount of securities but can now use general solicitation to do so (subject to the requirement that reasonable steps are taken to verify that all purchasers are accredited investors). This, in and of itself, has the potential to transform private capital markets.

First, and more obviously, it permits an issuer to make a much broader appeal: no longer will issuers be limited to reaching out to people with whom they (or their intermediaries) have pre-existing relationships.

Secondly and somewhat overlooked by many commentators, we believe the demand for such investments will increase over the next several years, with more and more accredited investors of all types entering the private capital markets. By some estimates there are upwards of ten million individual accredited investors in the United States.[2] Yet historically, only a small fraction of that number has participated in a private placement. Why? We believe one of the major reasons is due to a lack of access. Simply stated, there are millions of individual accredited investors who do not have the kind of pre-existing relationships that would expose them to private investment opportunities. The ban on general solicitation has kept those investors in the dark about the private capital markets.[3]

For these reasons, Rule 506(c) has the potential to transform the private capital markets and make private offerings a viable alternative to registered public offerings for both private and public issuers.

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[2] See http://www.accreditedinvestormarkets.com/ai-basics/ai-definition/.

[3] See http://www.accreditedinvestormarkets.com/ai-basics/the-jobs-act-and-the-accredited-investor-about-bob/about-bob-installment-1/.

**Why Title III crowdfunding will be of limited use to all but the smallest of private companies**

While the rules have yet to be proposed and, therefore, much remains to be seen regarding the actual mechanics of crowdfunding, enough is known for us to conclude that crowdfunding will be of very limited utility.

First, an issuer is limited (by the language of the JOBS Act itself) to raising a maximum of $1 million in any 12-month from all exempt offerings if it utilizes Title III crowdfunding. Second, investors will be limited in how much money they can invest through Title III crowdfunding. Those whose income and net worth are not at least $100,000 will be limited to the greater of $2,000 or 5% of such their annual income or net worth. Those who meet the $100,000 thresholds will be limited to 10% of their annual income or net worth, but not to exceed $100,000.

These are significant limitations. For all but the smallest of issuers $1 million dollars over a 12-month period is not a great deal of money, especially when raising that $1 million could potentially require an issuer to take on *hundreds* of new investors. What's more, in addition to the potential for corporate governance and investor relations difficulties, a Title III crowdfunding offering may have limiting effects on the future capital raising prospects of many issuers.

One point of clarification here: earlier we stated that the crowdfunding rules have yet to be proposed, and that remains true, but even now you may find platforms that appear to be operating as crowdfunding portals. These are not, however, Title III crowdfunding "portals". Rather, they are "platforms" operating in reliance on a series of SEC no-action letters and, following September 23, 2013, in reliance on an exemption established by Title II of the JOBS Act. These platforms are limited to accredited investors and are not subject to the same constraints as Title III crowdfunding portals will be. Our views as expressed in the preceding paragraph are limited solely to Title III crowdfunding portals.

**Conclusion**

The enactment of the JOBS Act marks a transformative period for the private capital markets, as it has made significant changes to the landscape of the federal securities laws. While you may have come to associate the JOBS Act with startups, or even just crowdfunding, we hope that you now recognize many of the provisions of the JOBS Act are universal in nature and have the potential to benefit to all manner of issuers.