

SEC Flash Report

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On March 27, 2012, the House of Representatives passed the Jumpstart Our Business Startups (JOBS) Act. The Act was previously approved by the Senate on March 22, 2012. The Act now goes to the President, who has verbally indicated his support of the Act's provisions in recent weeks. A primary goal of the JOBS Act is to improve small companies' access to public capital markets. The Act's provisions amend a number of securities laws to ease the process and costs associated with raising capital from the public.

To encourage private companies to complete initial public offerings of their equity, the Act creates a new category of filers called "emerging growth" companies who are entitled to certain reporting reliefs. Emerging growth companies are defined as companies with less than \$1 billion of revenue in their most recently completed fiscal year.¹ Filers will maintain their emerging growth status for five years following their IPO unless they have annual fiscal revenues that exceed \$1 billion, become a large accelerated filer (market value of stock held by non-affiliates of at least \$700 million), or issue \$1 billion or more of non-convertible debt in a three-year period.

The emerging growth company status permits reduced disclosures in an IPO registration statement and provides temporary exemption from certain financial reporting and governance requirements thereafter. These reporting reliefs would allow emerging growth companies to:

- Submit an IPO registration statement with two years of audited financial statements and selected financial data (in lieu of the three years of audited financial statements and five years of selected financial data usually required).
- Submit the IPO registration statement confidentially to the SEC. The initial registration statement and subsequent amendments would then be made public no later than three weeks prior to the IPO roadshow.
- Exclude selected financial data from periodic filings for periods prior to the earliest period audited in the initial registration statement.
- Exclude a report on the auditor's attestation of the company's internal controls over financial reporting (management's report on internal controls would still be required).
- Adopt new accounting standards using the effective dates applicable to nonpublic companies (if the standard is applicable to nonpublic companies).
- Disregard certain governance requirements related to executive compensation (i.e. say-on-pay and say-on-golden parachute compensation).
- Comply with smaller reporting company requirements for all other executive compensation disclosures.
- Disregard any future PCAOB rules related to mandatory audit firm rotation or auditor discussion and analysis. Emerging growth companies would also be exempt

¹ Companies who first sold their common equity in an initial public offering prior to December 8, 2011 would not be eligible for emerging growth company status.

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from other PCAOB rules enacted after the effective date of the Act unless the SEC determines such rules to be critical to investor protection.

Other significant changes to securities laws included in the JOBS Act would:

- Eliminate an SEC ban on general solicitation and advertising in Regulation D offerings if all of the participating investors are accredited.
- Raise the offering limit on Regulation A offerings (i.e., an offering process in which a private company can make a public offering and remain a private company) from \$5 million to \$50 million. Regulation A offerings still require audited financial statements, but allow for a downsized offering circular.
- Authorize “crowd-funding” by exempting companies raising \$1 million per year or less from the standard SEC registration process. Certain filing requirements would still apply. The intent is to allow limited-size offerings, principally on the internet, to enable small amounts to be sold to a large number of investors. Participating investors need not be accredited and would be subject to specific contribution limits.
- Raise the number of shareholders of record of nonpublic companies from 500 to 2,000 before SEC registration is required as long as there are less than 500 unaccredited investors. Nonpublic banks and bank holding companies would not be subject to the 500 unaccredited investor threshold.
- Raise the maximum number of shareholders of record for a nonpublic bank or bank holding company to terminate its SEC registration from 300 to 1,200.
- Require the SEC to conduct a number of studies, most notably one which reviews the disclosure requirements of Regulation S-K to determine how the registration process can be simplified and costs reduced for emerging growth companies.
- Require the Comptroller General to conduct a study on the impact of State Securities Laws (i.e. Blue Sky Laws) on Regulation A offerings.
- Remove specific restrictions placed on brokers and analysts to communicate with potential investors and emerging growth companies even if they are participating in the offering.