

Client Alert

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House Passes JOBS Act

On March 8, 2012, the House of Representatives (the “House”) passed H.R. 3606, the Jumpstart Our Business Startups (JOBS) Act (the “Bill”), by a vote of 390 to 23. The Bill consists of a collection of bills that have been introduced in the House over the past year, including four that had already passed the House by wide margins. The Bill is intended to help smaller companies access the U.S. capital markets by relaxing certain regulatory compliance and disclosure requirements and easing the capital formation process for private companies.

The key measures included in the Bill are:

Title I—Reopening American Capital Markets to Emerging Growth Companies. The Bill would amend the Securities Act of 1933, as amended (the “Securities Act”), and the Securities Exchange Act of 1934, as amended (the “Exchange Act”), to create a new category of issuer referred to as an “emerging growth company,” which is an issuer with total annual gross revenues of less than \$1 billion, but specifically excludes an issuer if the first sale of common equity securities of such issuer pursuant to an effective registration statement under the Securities Act occurred on or before December 8, 2011. An emerging growth company would maintain this status until the earliest of (i) the last day of the fiscal year in which the issuer had \$1 billion in annual gross revenues or more; (ii) the last day of the fiscal year following the fifth anniversary of the issuer’s initial public offering; (iii) the date on which the issuer issues more than \$1 billion in non-convertible debt; and (iv) the date when the issuer is deemed to be a “large accelerated filer,” as defined by the Securities and Exchange Commission (the “SEC”). The Bill would provide for scaled regulation to be applied to the emerging growth company for up to five years following its initial public offering, including compliance with registered public accounting firm attestation rules under Section 404(b) of the Sarbanes-Oxley Act and the “say-on-pay,” frequency-on-pay and chief executive officer pay ratio rules required by the Dodd-Frank Wall Street Reform and Consumer Protection Act. With respect to registration of securities under the Securities Act, the Bill would permit greater pre-filing communications, would allow for providing expanded research at the time of the initial public offering by offering participants and would provide for pre-filing confidential review of draft registration statements by the SEC.

Title II—Access to Capital for Job Creators. The Bill would remove the prohibition against general solicitation and general advertising in private offerings under Regulation D of the Securities Act, provided that all the purchasers of securities are accredited investors. Similarly, general solicitation and general advertising would not be prohibited in secondary offerings so long as the only purchasers in the offering are qualified institutional buyers. In addition, the Bill would exempt entities and individuals that maintain a platform (on- and offline) that brings issuers and investors together from treatment as broker-dealers under Regulation D unless they receive transaction-based fees for these activities.

Title III—Entrepreneur Access to Capital. The Bill would provide an exemption for “crowdfunding,” by permitting offerings of up to \$1 million or \$2 million, depending on whether audited financial statements are provided, so long as investor contributions do not exceed the lesser of \$10,000 or 10% of an investor’s annual income. The term “crowdfunding” generally refers to a method of raising capital in small amounts from a large group of people, usually using the Internet and social media. Requirements targeted at investor protection, including warning investors of the speculative nature generally applicable to investments in startups and requiring potential investors to answer questions demonstrating an

understanding of the level of risks associated with startups, would be imposed on the intermediary involved, if any, or the issuer, if no intermediary, in the crowdfunding effort.

Title IV—Small Company Capital Formation. The Bill would raise the limit for Regulation A offerings from \$5 million to \$50 million. More importantly, the Bill would exempt Regulation A offerings from state securities laws when securities in a Regulation A transaction are offered or sold on a national securities exchange or sold to a qualified purchaser, as defined by the SEC.

Title V—Private Company Flexibility and Growth. The Bill would increase the threshold requiring registration by issuers under the Exchange Act from \$1 million to \$10 million in such issuers' total assets and from 750 to 2,000 shareholders of record (only 500 of which could be non-accredited investors). Employees receiving securities under employee compensation plans would be excluded from the shareholders of record calculation.

Title VI—Capital Expansion. The Bill would increase the threshold requiring registration by banks and bank holding companies under the Exchange Act from \$1 million to \$10 million in such issuers' total assets and from between 500 and 750 to 2,000 shareholders of record. The Bill also would provide that the duty file under Section 15 of the Exchange Act would be automatically suspended if, at the beginning of such fiscal year (other than the year of registration), the number of holders of record for such bank or bank holding company were to fall to less than 1,200.

Title VII—Outreach on Changes to the Law. The Bill would require the SEC to reach out to small and medium-sized businesses, as well as women-, veteran- and minority-owned businesses, informing them of the effect of the Bill, so that these businesses would be made fully aware of the benefits of the legislation.

Open Issues

Concerns about this new legislation have been expressed by such varied individuals and groups as SEC Commissioners Chairman Mary Shapiro and Luis Aguilar, the Council of Institutional Investors, the Consumer Federation of America and the AFL-CIO. One issue is whether these modifications to the securities laws will actually have any impact on employment. Another is whether the investor protections that the original laws were designed to preserve will be compromised by some of the initiatives proposed in the Bill.

Next Steps

The Obama administration issued a statement supporting the JOBS Act. The Senate plans to proceed with its own legislation, most likely consolidating a number of the companion bills that have been introduced in the Senate over the last year; however, it is difficult to say if and when a Senate bill can be reconciled with the House Bill and if and when the resulting legislation will become law.

Contacts

J. Steven Patterson
spatterson@hunton.com

Olga Khvatskaya
okhvatskaya@hunton.com

W. Lake Taylor, Jr.
tlake@hunton.com