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The Registration Superhighway: The Ultimate "Holiday Road" After the JOBS Act?

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Similar to Pacific Coast Highway 1 in the Summer, which is backed up with traffic and crowded with tourists, the process of filing registration statements with the SEC is also known as the "registration superhighway." While it leads to increased capital and access to institutional investors, the capital market "holiday" often includes significant delays and inefficiencies that deter even the most spirited and patient entrepreneurs. In response to the economic crisis that hampered small businesses throughout the United States, on April 5, 2012, President Obama signed the Jumpstart Our Business Startups Act (the JOBS Act) into law, attempting to make it easier for Main Street companies to raise private and public capital.

The many provisions of the JOBS Act impact private companies, broker-dealers, private funds and the continued operations of public entities. Perhaps most notably, Title I of the JOBS Act creates an entire new category of issuer, the Emerging Growth Company (EGC). The establishment of a new type of issuer, coupled with the lax registration requirements being applied to EGCs, highlights the sweeping reform by the JOBS Act, resulting in a significant change to U.S. securities laws. These changes allow access to a less burdensome and more efficient registration highway, allowing a wide array of companies to raise capital, specifically including banks and bank holding companies.

The creation of EGCs as a category of entity, in addition to the reduced registration requirements applicable to EGCs, is one of the key aspects of the JOBS Act. Title I of the JOBS Act, which amends the Securities Act of 1933 (the Securities Act) and the Securities Exchange Act of 1934 (the Exchange Act), defines an EGC as "an issuer with total annual gross revenues of less than $1 billion during its most recently completed fiscal year," excluding entities that sold common equity pursuant to a registration statement filed with the Securities and Exchange Commission (SEC) on or before December 8, 2011.

The EGC designation can remain with a company for quite some time. Title I of the JOBS Act provides that a company remains an EGC until the earlier of the following: (a) the last day of the fiscal year in which its annual gross revenue exceeds $1 billion, as modified by inflation; (b) the last day of the fiscal year following the fifth anniversary of its initial public offering of common securities; (c) the date on which it has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or (d) the date on which the issuer is deemed to be a "large accelerated filer." The JOBS Act creates a proverbial "on ramp" to raising capital, an eased transitional process designed to allow EGCs to take advantage of significantly less burdensome regulations normally associated with offerings.

Title I of the JOBS Act provides exemptions and/or reduces the regulatory restrictions applicable to EGCs, thereby decreasing the obstacles that prevent many small

businesses from raising capital, or at least impede the process of doing so. Several of the rules promulgated by the JOBS Act provide EGCs with added support with respect to initial public offerings, including providing assistance with registration statements and opportunities to gauge investor interest. Specifically, EGCs are permitted to submit draft registration statements to the SEC for an initial public offering for "confidential, non-public review," provided that a public filing is made at least 21 days prior to a "road show." Additionally, the JOBS Act amends the Securities Act by allowing EGCs to "test the waters" by communicating and meeting with investors to evaluate interest in an upcoming initial public offering (IPO). The foregoing exceptions to traditional burdens associated with an IPO are in addition to the relaxed reporting and disclosure requirements applicable to EGCs.

As a result of the JOBS Act, EGCs benefit from reductions in the regulatory burden associated with becoming and remaining a public company. Specifically, EGCs are only required to present two years of audited financial data and selected financial information in a registration statement for an initial public offering. Additionally, among other relaxed accounting requirements, EGCs are exempt from the auditor attestation requirements of Section 404(b) of the Sarbanes-Oxley Act of 2002. Further, EGCs are exempt from many requirements relating to executive compensation, including shareholder advisory votes on compensation and certain disclosure obligations. In addition to the reduction in rules applicable to EGCs, the JOBS Act has also eased the restrictions applicable to investment bankers and other professionals involved in securities offerings relating to EGCs.

The JOBS Act prevents laws that restrict the ease with which broker/dealers provide analyst reports and communicate with issuers. Title I of the Jobs Act bars the Securities Act from prohibiting broker/dealers from publishing and distributing research reports regarding an EGC, even if such broker/dealer is involved in a registered offering concerning the EGC. As a result of the JOBS Act, the Exchange Act cannot preclude broker/dealers from preparing and issuing analyst reports relating to an EGCs stock during blackout periods that surround an IPO. Further, the JOBS Act allows analysts to communicate with EGC staff even if the analyst's company is acting as the underwriter for the EGC's securities. In addition to Title I, other provisions of the JOBS Act reflect a legislative intent to limit the number and type of companies that will be hampered by the regulatory requirements associated with classification as a public reporting company.

Title VI of the JOBS Act eases the regulations applicable to financial institutions, specifically providing favorable thresholds relating to prompting the commencement and termination of registration under Section 12(g) of the Exchange Act. Banks and bank holding companies must have more than 2,000 shareholders of record in order to trigger a registration requirement, rather than the previous threshold of 500. Additionally, banks and bank holding companies that file reports with the SEC may terminate registration when the number of shareholders is reduced to fewer than 1,200, rather than the previous requirement of 300. This change in securities laws provides financial institutions that are not listed on an exchange such as NASDAQ or NYSE, but previously exceeded the old Section 12(g) thresholds, with an increased ability to avoid registration. Similarly, for companies with filing obligations under Section 15(d) that stem from an effective registration statement, should their shareholders of record be reduced to fewer than 1,200, the reporting obligations under Section 15(d) of the Exchange Act may be suspended. These changes provide financial institutions seeking to take advantage of the "on ramp" to capital with a well-paved "off ramp" off of the registration superhighway.

In addition to the foregoing, the JOBS Act includes a vast set of provisions that modify U.S. Securities Laws, reducing and sometimes eliminating, many deterrents to raising capital. As a result, banks and bank holding companies will be able to take advantage of

the registration superhighway by way of the JOBS Act's "on ramp." This will allow eased access to capital, the financial market equivalent to the "holiday" destinations that the legendary PCH may lead to on a clear, California day.

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