Client**Alert**

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JOBS Act: Impact and Open Questions

On March 27, 2012, Congress passed a statute that fundamentally reshapes the way private companies can raise capital and the way that a new category of companies—Emerging Growth Companies, or EGCs—conduct initial public and follow-on offerings, and provide disclosure to investors. President Obama is expected to sign the new statute into law on April 5, 2012.

The Jumpstart Our Business Startups Act (the "JOBS Act" or the "Act") was passed rapidly on a bipartisan basis by both houses of Congress. It was therefore not subject to the level of scrutiny that often accompanies such far-reaching legislation. As a result, while the general thrust of the legislation is clear, there are numerous ambiguities and questions regarding how it interacts with existing laws and regulations, some of which are fundamental to its implementation. We have highlighted these issues below.

I. What is an EGC?

The new law defines an Emerging Growth Company as an issuer that had "total annual gross revenues" of less than US$1 billion in its most recently completed fiscal year. An EGC will retain its status until the earlier of:

(1) the last day of the first fiscal year in which its total annual gross revenues exceed US$1 billion;

(2) the date on which the issuer is deemed to be a "large accelerated filer[1]";

(3) the date on which the issuer has issued US$1 billion or more of non-convertible debt during the previous three years; and

(4) the last day of the fiscal year following the fifth anniversary of its initial public offering of common equity.

A foreign company can be an EGC. A company cannot be an EGC if it sold its common equity securities on or before December 8, 2011 pursuant to an effective registration statement. The reference to gross revenues may be hard to determine with certainty in all instances and, in some cases, may not be the amount of revenues reported by the company under applicable accounting requirements[2].

1 A large accelerated filer is a company with an unaffiliated public float in excess of US$700 million as of the end of its most recent second fiscal quarter, that has been a publicly reporting company for at least one year and that has filed at least one annual report.

2 Take, for example, Groupon, Inc. which, after prolonged debate with the SEC, disclosed 2010 "revenues" of US$312 million and 2010 "gross billings" of US$745 million.

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Tests (1) through (3) relate to a company's "size," while test (4) terminates the benefits available to an EGC (most notably, the exemption from Section 404(b) of the Sarbanes-Oxley Act) after a five-year "phase in" period, irrespective of the EGC's size.

Test (3), which is triggered by the "issuance" of non-convertible debt, raises a number of interpretive issues. First, although not qualified with the word "securities," the word "issued" suggests that the test is intended to capture debt incurred by issuing non-convertible debt securities (e.g., bonds), and not other forms of debt, such as syndicated loans. Second, it appears to count both the issuance of debt securities and any new debt securities issued to refinance the original amount. Third, it is not clear whether an issuer should count both the initial issuance of Rule 144A debt securities and the securities issued in a customary registered exchange offer for those debt securities.

II. New IPO Process for EGCs

The new law effects significant changes in the IPO process for EGCs. The extent to which issuers and underwriters take advantage of these changes remains to be seen. Principally, the JOBS Act allows the following:

- **Confidential submission of IPO registration statements.** The SEC has historically allowed foreign private issuers conducting an IPO to file their registration statements confidentially (although on a more limited basis since January 2012 when the SEC limited this policy to foreign private issuers that are listed, or are listing concurrently, on a non-US securities exchange). Domestic issuers were not entitled to file confidentially. The Act now permits all EGCs—whether foreign or domestic—to submit to the SEC their IPO registration statements and amendments on a confidential basis, so long as they are all filed publicly at least 21 days before commencing a roadshow.[3] Confidentially-submitted registration statements are exempt from Freedom of Information Act (FOIA) requests prior to their public filing, and the wording of the Act extends that exemption to any other information provided to the SEC in connection therewith (e.g., responses to SEC comment letters). However, it seems likely that the SEC will continue to release publicly the comment and response letters after an IPO is completed, as it does under current policy.

- **EGCs and persons authorized to act on their behalf may engage in oral and written communication with Qualified Institutional Buyers ("QIBs") and Accredited Investors ("AIs"), both before and after the filing of a registration statement, to determine "their interest in a contemplated securities offering."** This provision applies both to IPOs and other offerings by EGCs. The Act excludes these communications from Section 5 of the Securities Act (other than the requirement to deliver a final prospectus) with the result that these communications do not result in a "gun-jumping" violation or constitute an illegal prospectus, each of which gives an investor the right to sue for return of the amount it paid for the security (essentially, a put right). Written communications by EGCs with QIBs and AIs can now be conducted freely without the requirement to file them as free writing prospectuses. However, the Act does not exclude these communications from the definition of "offer" in Section 2(a)(3) or "prospectus" in Section 2(a)(10). As a result, prospectus liability under Section 12(a)(2) still attaches to these communications, whether written or oral.

  The reference to "any person authorized to act on behalf of" an EGC will require technical changes to how issuers and underwriters work together since underwriters do not consider themselves authorized to act on behalf of issuers. Such changes may include revisions to standard form underwriting agreements because underwriting agreements typically state that the underwriters are not agents of the issuer. In addition, issuers typically do not sign engagement letters with investment banks for US equity offerings. We believe that this practice may change in order to give banks a limited, but formal, authorization to act on behalf of an issuer in this context, as well as to provide indemnification for investment banks as they engage more substantively with investors before an underwriting agreement is signed.

  We expect that the reference to determining "interest in a contemplated securities offering" will be broadly interpreted to include the ability to solicit indications of interest to participate based on particular prices, even though no price range is included in the company's prospectus (in fact, a prospectus may not even be on file) at the time of the discussion. The purpose of testing the waters is, in part, to help determine valuation and pricing.

3 The prohibition on conducting a roadshow until 21 days after the filing of the registration statement might be read to conflict with the ability of the issuer and persons authorized on its behalf to conduct meetings with QIBs and AIs if one considers that such meetings fall within the broad definition of roadshow under Rule 433 under the Securities Act. In order to avoid such a conflict and enable those meetings to be conducted before satisfying the 21-day public filing requirement, it seems best to read the 21-day requirement as applying to one roadshow, which would usually be the roadshow traditionally conducted at the end of the IPO process.

- **Research analysts, including those working for the underwriters, may publish research on the EGC starting before the filing of a registration statement, after its filing and following its effectiveness.**

- **Investment bankers may facilitate communications between research analysts and potential investors.** Underwriters participating in an IPO are currently prohibited from publishing research reports on an issuer prior to the offering and for 40 days (25 days in the case of an issuer that will be listed) following the IPO. Rule 139 under the Securities Act provides some relief in the case of seasoned issuers. A research report regarding an EGC is now excluded from the definition of "prospectus" and from the prohibition on offers before the filing of a registration statement contained in Section 5(c) of the Securities Act. This exclusion applies both to IPOs and other offering by EGCs. The result is that publication of research reports related to EGC offerings will not result in a "gun-jumping" violation or constitute an illegal prospectus. In addition, this research will not be subject to enhanced liability under Section 11 or Section 12(a)(2) of the Securities Act, but since such research reports are not excluded from the definition of "offer" in Section 2(a)(3), they will be subject to the antifraud provisions of Section 17 of the Securities Act and Rule 10b-5 under the Exchange Act.

  The Act also supersedes NASD Rule 2711(f), which prohibits research analysts associated with the underwriters of an IPO from publishing research reports for 40 days after an IPO and within 15 days of the termination of a lock-up agreement related to an IPO. It should be noted that the Act only addresses NASD Rule 2711(f) insofar as it applies to an IPO by an EGC and not the prohibition on publishing research within 10 days after an offering that is not an IPO (e.g., a secondary or follow-on offering) or within 15 days of the termination of a lock-up agreement related to such an offering. It remains to be seen whether FINRA will amend the rules related to such offerings.

  The combination of these changes means that research analysts may now publish research prior to an IPO (commonly known as "pre-deal research") and more quickly after an IPO. However, practical implementation is still subject to a number of potential hurdles.

  - First, it remains to be seen as a risk management matter whether underwriters will be willing to publish research reports prior to or soon after an offering in light of the potential liability issues associated with such research. One of the most vexing questions is how to address the potential "time of sale" liability associated with research reports. Research reports are defined in the JOBS Act to include oral and written statements and, while research reports are not subject to Section 12(a)(2) liability, Rule 159 under the Securities Act considers the information available to an investor at the time of sale to be relevant in determining liability under Section 12(a)(2). The liability regime for EGC research reports is therefore hard to discern with certainty.

    If investment banks decide to use research reports, they will need to develop detailed procedures, such as those currently used in Europe for "pre-deal research," to minimize liability risk for the investment banks and their issuer clients. For example, in Europe banks limit the distribution of pre-deal research to institutional investors (i.e., QIBs), although in the context of a public offering in the United States where retail and other non-QIB investors may participate as purchasers in the IPO, this raises potential issues concerning selective disclosure to different categories of investor, particularly if the research reports contain information not included in the registration statement.

  - Second, although the Act has substantially relaxed rules relating to the use of research reports before and immediately after an IPO, the Act does not supersede NASD Rule 2711(c)(5) prohibiting analysts from (1) participating in a roadshow, and (2) communicating with investors in the presence of investment bankers, or NASD Rule 2711(c)(6) prohibiting investment bankers from directing analysts to engage in sales or marketing efforts. Therefore, despite the clear intent of the Act to facilitate the distribution of pre-IPO and post-IPO research, the role of analysts will still be separate from investment bankers in the conduct of an IPO. Investment banks will likely seek confirmation from FINRA regarding, and possible amendments to, some of these existing rules to clarify the role that analysts can play.

  Subject to the foregoing considerations, see Appendix A for a summary of when syndicate members can publish research.

- **Research analysts may participate in meetings with management of an EGC at which investment bankers are also present.** NASD Rule 2711(c)(6) prohibits research analysts from meeting with issuers in the presence of investment bankers in connection with an investment banking transaction. The Act supersedes this rule and enables research analysts and investment bankers to participate in joint meetings with an EGC's management for any purpose. The SEC and FINRA are prohibited from promulgating rules that would otherwise restrict such activities. However, the Act does not supersede the Global Research Analyst Settlement that was entered into in 2003, and amended in 2010, among 12 investment banks and the SEC. The Global Settlement permits those investment banks that are party to it to conduct joint meetings with management for the purpose of conducting due diligence and only when chaperoned by internal legal or compliance staff or outside counsel.

What Are the Practical Implications of the New IPO Process?

The new IPO process for EGCs offers significant potential benefits that mirror many aspects of the IPO process in other jurisdictions, notably Europe. An EGC can commence an IPO process by submitting a registration statement confidentially to the SEC and, at or prior to the submission, it and its underwriters may "test the waters" by engaging directly with investors to obtain substantive feedback on how best to position the company for a successful offering and, presumably, concrete indications of valuation. We expect that such activities will become standard, although will likely be limited to oral communications with no materials left behind in order to minimize the risk of prospectus liability.[4] This process mirrors the "pilot fishing" process in UK offerings and other European jurisdictions that is facilitated by investment banks and involves meetings with a limited number of potential investors usually after the issuer's presentation to the banks' research analysts. The confidential filing enables an EGC to make substantive progress in preparing for its IPO without disclosing publicly its IPO intent, with the attendant reputational risk if the deal is not consummated, as well as public disclosure of important details about the company and its financial position.

As the time to launch the roadshow approaches, assuming the remaining regulatory hurdles and investment banks' concerns regarding liability can be addressed, the banks' research analysts will be able to publish research and meet with potential investors. This mirrors the "investor education" process in Europe, which involves syndicate analysts (1) distributing research reports to institutional investors several weeks before commencement of the roadshow and (2) subsequently meeting with potential investors during a one or two-week period prior to commencing the roadshow, raising the profile of the company and gauging investor appetite.

The JOBS Act effectively enables a new IPO process for EGCs that is fundamentally different from that conducted by non-EGCs. For non-EGCs, communication with potential investors after the commencement of an IPO process and before the initial filing of a registration statement is not permitted. After filing, oral communications with investors are generally confined to a carefully scripted roadshow and, subject to very limited exceptions, take place only after a price range is included in the prospectus. Limited written communications are permitted after the initial filing, but continue to be subject to numerous restrictions, including filing them with the SEC as a "free writing prospectus." Further, research analysts may not coordinate coverage or marketing with investment bankers and may not publish research before an IPO or until 40 days after completion of the IPO. As a result, the non-EGC process requires an issuer to take a leap of faith and file publicly with no subsequent meaningful contact with potential investors until the roadshow and, therefore, be subject to reduced or no assurance about the chances of a successful offering and its likely valuation.

While the fundamentally new IPO process for EGCs will not create more market-ready companies, we believe it will lead more companies to explore their suitability for an IPO and take initial steps towards one when they might not otherwise have done so. It may also motivate issuers to pursue IPOs sooner, when they are still below the US$1 billion threshold and can enjoy the benefits available to EGCs.

III. Disclosure Relief for Newly Public EGCs (the "IPO On-Ramp")

The JOBS Act provides EGCs relief from many of the disclosure requirements that are perceived as cumbersome or expensive for new issuers. These include:

- **No auditor attestation of internal controls required by Section 404(b) of the Sarbanes-Oxley Act.** The JOBS Act fully exempts EGCs from the requirement for auditor attestation over internal controls under Section 404(b) of the Sarbanes-Oxley Act for as long as they retain EGC status. Historically, an IPO company that is not otherwise required to file periodic reports before its IPO would have to comply with this requirement by the time of its second annual report on Form 10-K, 20-F or 40-F. The JOBS Act leaves in place the obligations under Section 404(a) (requiring that management provide an assessment of the company's internal controls), which also start with the company's second annual report on Form 10-K, 20-F or 40-F. Note that that "smaller reporting companies" are permanently exempt from Section 404(b).[5]

- **No shareholder advisory votes on executive compensation ("say on pay") and golden parachutes as required by the Dodd-Frank Act.** Note that "smaller reporting companies" are currently exempt from this requirement until their first annual meeting after January 20, 2013. This provision of the Dodd-Frank Act does not apply to foreign private issuers.

- **Relief from the Dodd-Frank requirement to disclose the relationship between executive compensation and company performance and the ratio of CEO pay to median employee pay.** The Dodd-Frank Act requires the SEC to adopt rules requiring a company to include in its annual proxy

4 Where a non-US issuer that is already listed outside of the United States is conducting a US IPO, procedures will need to be put in place to bring potential investors "over the wall." In other words, investors who are made aware of the IPO prior to its public announcement will need to agree not to disclose that fact and also to refrain from trading the issuer's shares on its local exchange until such time as the IPO process in the United States is made public.

5 A smaller reporting company is a company with an unaffiliated public float of less US$75 million as of the end of its most recent second fiscal quarter or, in the case of an IPO, within 30 days following the IPO.

statement information that shows the relationship between executive compensation and the financial performance of the company, taking into account any change in the value of the shares of stock and dividends of the company and any distributions. The Dodd-Frank Act also requires the SEC to adopt rules mandating disclosure of (1) the median of the annual total compensation of all employees of an issuer, except the CEO; (2) the annual total compensation of the CEO; and (3) the ratio of its CEO's compensation to the median compensation of all other employees. The SEC has yet to promulgate rules implementing this requirement. These provisions of the Dodd-Frank Act do not apply to foreign private issuers.

- **Enjoyment of the same phase-in periods for new or revised accounting principles that apply to private companies.** New or revised accounting principles often state that they will apply first to public companies and later to private companies. For the purpose of new or revised US GAAP accounting standards that have different phase-in dates for private and public companies, EGCs will be permitted to adopt the standards on the same timeline as private companies.

- **Only having to provide the less detailed executive compensation disclosure required of smaller reporting companies.** In particular, EGCs will not be required to provide any compensation discussion & analysis (CD&A) section and may provide compensation tables that cover only two officers in addition to the CEO, rather than five additional officers. CD&A requirements do not apply to foreign private issuers.

- **Not having to comply with any PCAOB rules regarding "mandatory audit firm rotation" or provision of an "auditor discussion and analysis."** The prospect of audit firm rotation, never popular among companies or audit firms, was most recently addressed by the PCAOB in a concept release from August 2011. Following the JOBS Act's provision preventing any rules on audit firm rotation from applying to EGCs, it seems unlikely that implementation of this concept for non-EGCs will move forward.

- **Only having to provide two years of audited financial statements in connection with its IPO and two years of MD&A discussion.** In contrast to the three years of audited financial statements generally required, IPO registration statements of EGCs will be permitted to contain only two years and a related shorter MD&A discussion. Despite this, we expect that issuers with three years of audited financial statements will often elect to provide those and investment banks will favor that approach.

- **Only having to provide selected financial data beginning from the earliest period for which audited financial statements are presented in an EGC's first effective registration statement.** Current SEC rules still require issuers to include a table showing five years of selected financial data in public filings, notwithstanding the fact that audited financials are only required for a shorter period. Note that this relief uses the first effective registration statement as a benchmark, so for issuers whose earliest effective registration statement was not for an equity IPO (such as a debt exchange offer), the relief will only apply to the earliest audited period in that original registration statement.[6]

Through the foregoing provisions, the JOBS Act relieves a portion of the regulatory burden and administrative costs that have deterred some issuers from becoming public companies. The provisions become effective immediately and remain in place until the issuer is no longer an EGC, with the relief from the shareholder voting requirements remaining in place until the later of three years after an issuer's IPO or one year after a company ceases to be an EGC.

IV. New Capital-Raising Options

At the same time as the JOBS Act lessens the burdens of the IPO process and of being a public company, it also provides new options and flexibility around capital-raising. While most of these provisions were drafted primarily with private companies in mind, many will benefit smaller public companies as well. The Act also provides important relief for companies seeking to avoid having to register as a public company because they have exceeded the current maximum number of shareholders.

New Hybrid Public/Private Exemption—"Regulation A+"

The Act requires the SEC to add a new Securities Act exemption for issuances of up to US$50 million of securities in any 12-month period. The SEC is expected to achieve this by modifying the exemption under Regulation A, which currently has a US$5 million limit. The Act does not set any time limit for the SEC to promulgate the new rules.

The new "Regulation A+" exemption would involve the following requirements and characteristics:

- The offering can involve equity, debt or convertible securities.
- The securities can be offered and sold publicly, including by general solicitation.

6 As a technical matter, for a foreign issuer to benefit from the ability to provide fewer than five years of selected financial data, the SEC will have to make conforming changes to the rules contained in Form 20-F, which are applicable to foreign private issuers.

- The securities sold would not be "restricted securities."
- The SEC may require the issuer to publicly file and distribute to investors an offering statement that includes required disclosure such as audited financials, a description of the business and use of proceeds.
- The prospectus liability provisions of Section 12(a)(2) under the Securities Act will apply to these offerings.
- A solicitation of interest by the issuer prior to any filing of the offering statement will be permitted on terms and conditions to be established by the SEC.
- The SEC will require the issuer to make annual filings of audited financial statements.
- The SEC may require issuers to file periodic reports.
- If the securities are sold on a national securities exchange or to "qualified purchasers" (which is to be defined by the SEC), then they are exempt from state Blue Sky laws.

"Regulation A+" is unlike any other exemption under the Securities Act. As described above, in return for being able to sell unrestricted securities to any potential purchaser by means of a general solicitation, issuers may be required to prepare and publicly file an offering document and may also become subject to periodic reporting requirements. One of the most striking aspects of the exemption is the imposition of prospectus liability pursuant to Section 12(a)(2) of the Securities Act. This is distinct from private placements conducted pursuant to Section 4(2) under the Securities Act or Regulation D thereunder, which are subject only to antifraud liability pursuant to Section 17 of the Securities Act and Rule 10b-5 under the Exchange Act.

We expect that "Regulation A+" will be of limited interest to private companies that are capable of raising money in traditional private placements from purchasers that qualify as "accredited investors." This is because the requirements of public filings—potentially for both the initial offering and on an ongoing basis—are likely to be a significant deterrent. Furthermore, if private companies seek to use an investment bank as a placement agent for such a transaction, we expect that investment banks will be wary of the risk liability under Section 12(a)(2) and that, accordingly, will seek to obtain comfort and negative assurance opinions from the issuer and possibly their own counsel. This would significantly raise the cost of undertaking these transactions.

Conversely, small to medium-cap public companies may appreciate the flexibility to engage in smaller placements of debt or equity without the need to engage in the full public registration process. In addition, the exemption is likely to appeal to companies that would not be able to raise capital in a traditional private placement and are prepared to accept the more onerous disclosure obligations. In addition, because companies can generally solicit and sell securities to members of the public, there is more room for companies to execute capital raises without the assistance of a financial institution. Notwithstanding the panoply of requirements that apply to such offerings, the ultimate protection appears to be the issuer's potential liability for misleading statements in its offering materials. As such, there is room for concern that this hybrid public/private offering exemption may provide private companies that currently cannot raise capital a route that is essentially a less regulated version of a public offering.

New Exemption for "Crowdfunding"

The JOBS Act adds a new exemption in the Securities Act for "crowdfunding"—the offer and sale of a relatively low aggregate value of securities in small amounts to a large number of investors. Such financings might often be considered an "angel" or "seed" financing round. The crowdfunding exemption is an outgrowth of the Internet social networking phenomenon that would enable issuers to contact large numbers of potential investors without any financial intermediary were it not for current securities law restrictions, such as the prohibition on general solicitation and the requirement that investors be "accredited investors." The crowdfunding exemption is not effective until the SEC promulgates new regulations within 270 days of the enactment of the JOBS Act.

Among other things, the exemption requires that:

- the aggregate amount of securities sold within any 12-month period not exceed US$1 million;
- the aggregate amount sold to any investor by an issuer in any 12-month period not exceed (a) for investors whose annual income or net worth is less than US$100,000, the greater of US$2,000 and 5% of annual income or net worth, or (b) for investors whose annual income or net worth is US$100,000 or greater, 10% of the investor's annual income or net worth, up to a maximum investment of US$100,000;
- the transaction is conducted through an intermediary, either a broker or funding portal, that meets a lengthy list of requirements regarding disclosure and mitigation of risk to investors; and
- the issuer meets a similar list of disclosure and risk mitigation requirements.

The crowdfunding exemption is not available to foreign private issuers, public companies or investment companies. The provisions include issuer liability for material misstatements and omissions pursuant to Section 12(a)(2) under the Securities Act

(i.e., prospectus liability). The definition of "issuer" for liability purposes is very broad and encompasses directors, partners, the principal executive officer or officers, the principal financial officer, the controller or principal accounting officer, and any other person who offers or sells the security in the transaction.

Securities acquired in a crowdfunding transaction may not be resold for one year, except to the issuer or an accredited investor or in a registered offering.

General Solicitation Under Reg D and 144A

The JOBS Act requires the SEC to amend Regulation D within 90 days to eliminate the prohibition against general solicitation or general advertising, provided that all purchasers are AIs and that the issuer takes reasonable steps, based on methods determined by the SEC, to verify AI status. We expect that this change to Regulation D will result in more companies raising capital pursuant to this safe harbor rather than relying on Section 4(2) under the Securities Act. This is because it remains unclear whether general solicitation is prohibited under Section 4(2). It remains to be seen whether companies seeking to raise capital pursuant to Regulation D will openly advertise that fact.

The JOBS Act similarly requires the SEC to amend Rule 144A within 90 days to allow offers to be made to investors other than QIBs, including by general solicitation or general advertising, so long as sales are only made to investors that the issuer and its representatives reasonably believe are QIBs. The impact on Rule 144A offerings is discussed below.

New 12(g) Thresholds and Exemptions

The JOBS Act establishes new, higher shareholder thresholds for triggering the obligation to register as a public company under Section 12(g) of the Exchange Act. The previous trigger of 500 record holders is changed to either 2,000 record holders or 500 record holders that are not AIs.

The Act creates two exemptions from the new limits set forth in Section 12(g).

- The SEC is required to promulgate new regulations within 270 days of the enactment of the JOBS Act excluding any securities sold pursuant to the new crowdfunding exemption from the limits contained in Section 12(g). The exemption applies to the securities themselves rather than the specific purchasers in a crowdfunding transaction. As a result, issuers will need to track securities issued in a crowdfunding transactions (e.g., via legending of stock certificates). The tracking requirement will make the establishment of an over-the-counter trading market difficult unless a separate CUSIP number is maintained for the crowdfunded securities.
- The Act exempts from the definition of "held of record" securities received under an employee compensation plan in transactions exempt from registration under the Securities Act . It should be noted that this exception applies only while the shares are held by the person who received them under the plan, so plans that permit employees to sell the securities could quickly exceed the thresholds. The SEC is instructed to revise the applicable definition of "held of record" and adopt safe harbors to enable companies to determine whether their securities were issued in transactions exempt from registration under the Securities Act. As a result, the SEC still retains some ability to impose restrictions on the general exemption contained in the Act.

The JOBS Act also requires the SEC to examine whether it needs new enforcement tools to enforce the anti-evasion clause in Rule 12g5-1. This is the provision that deems beneficial holders to be record holders if the form of holding is used primarily to circumvent the Section 12(g) thresholds. The requirement is directed at the fact that the basic method for counting record holders does not generally require an issuer to look through a securities intermediary to the beneficial holders.

V. Implications for High Yield and Other Rule 144A Offerings

While the JOBS Act's main focus was expanding the opportunities for companies to raise equity capital, its provisions have implications for other offerings, particularly Rule 144A debt offerings, including offerings of high yield debt, which are typically undertaken pursuant to Rule 144A, as well as IPOs by foreign companies who list abroad but seek access to US institutional investors through a Rule 144A tranche. While Rule 144A contains minimal specific disclosure requirements, it is market practice for offering memoranda used in Rule 144A offerings to comply to the extent possible with the disclosure requirements applicable to SEC-registered offerings. Accordingly, the changes implemented by the JOBS Act may also impact market practice in Rule 144A offerings where the issuer meets the definition of an EGC. That said, the ability to confidentially submit a registration statement and the relaxed requirement for two years of audited financial statements only apply to registration statements for equity IPOs, not to initial registration statements that relate to high yield or other debt offerings.

The following are some of the questions and implications the JOBS Act raises for Rule 144A offerings:

- The removal of the prohibition on general solicitation will enable a debt offering pursuant to Rule 144A to be conducted alongside an IPO or other registered securities offering with greater ease than is currently the case (although issues of "integration" will still need to be addressed).

- Will the Rule 144A market embrace the reduced standard of two years of audited financials and selected financials that will apply to most IPOs? Or will it continue to require the additional periods required for a registered exchange offer?
- A significant number of companies that subsequently conduct IPOs were acquired in leveraged acquisitions using high yield debt that is subsequently subject to a registered exchange offer. These issuers are technically required to provide a full three years of audited financial statements and five years of selected financial data in their exchange offer registration statement and subsequent public filings. Later, these companies may qualify as EGCs in connection with their IPOs. Will this affect the potential timing of registered exchange offers for high yield notes or the willingness of high yield issuers to provide registration rights?
- Will the end of the prohibition on general solicitations in Rule 144A offerings change marketing and publicity practices for high yield debt? Will existing safeguards to ensure sales are limited to QIBs suffice in light of the ability to market more broadly?
- Will issuers use the new "Regulation A+" small issue exemption to place debt securities that would not require a subsequent exchange offer to be freely tradable? This could be attractive despite the limited liquidity of a US$50 million issue, and would certainly be an attractive option for a smaller "tack-on" offering.
- Companies that issue US$1 billion in non-convertible debt in a three-year period lose their EGC status. Will highly leveraged companies take this into consideration as they construct their capital structure, perhaps by reducing bond issuances in favor of bank loans?
- It is current practice in foreign issuer Rule 144A offerings to distribute pre-deal research outside the United States only and not to distribute such research to QIBs. This market practice has developed due to liability concerns in the United States. In light of the JOBS Act, will investment banks revisit this policy and allow pre-deal research to be sent to US investors in Rule 144A offerings?

VI. Are More Changes Coming?

The JOBS Act includes several mandates for the SEC to conduct further studies involving potential reforms.

In particular, the SEC is required to "comprehensively analyze the current registration requirements" of Regulation S-K and determine how they can be "updated to modernize and simplify the registration process and reduce the cost and other burdens" to EGCs. The SEC is required to report back to Congress with specific recommendations within 180 days. This could lead to further changes to the disclosure required from issuers and public companies.

In addition, the SEC is required to examine the impact that decimalization—the transition to trading stocks in one penny increments—has had on IPO and small and mid-cap companies. The SEC is required to report back to Congress within 90 days, and the SEC may adopt rules within 180 days if it determines that EGC securities should be traded using an increment greater than one penny.

Appendix A

Prohibition of Publication of Research by Syndicate Members

The timing of the publication of research reports is governed by prohibitions under (1) the Securities Act of 1933, as recently modified by the JOBS Act with respect to Emerging Growth Companies, and (2) FINRA rules, as recently modified by the JOBS Act with respect to IPOs by Emerging Growth Companies. Numerous restrictions under FINRA rules remain regarding interactions between investment bankers and research analysts and, additionally, publication of pre-deal research raises significant liability concerns. Subject to those issues, the following table sets forth the time-based restrictions on the publication of research reports following the JOBS Act:

Timing of Publication of Research by Syndicate Members	EGC IPO	Non-EGC IPO	EGC Follow-On Offering	Non-EGC Follow-On Offering
Before Offering	Permitted	Prohibited	Permitted	Prohibited once the company is "in registration" and a particular syndicate member has been engaged
After Offering	Permitted	Prohibited for 40 days	Prohibited for 10 days	Prohibited for 10 days
Within 15 Days of the Termination of a Lock-Up Agreement	Permitted	Prohibited	Prohibited	Prohibited

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