

FAIRFIELD AND WOODS, P.C.

The 2012 JOBS Act

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Overview

- The Jumpstart Our Business Startups Act was signed by President Obama on April 5, 2012
- Contains 7 Titles
 - Title I: Reopening American Capital Markets to Emerging Growth Companies
 - Title II: Access to Capital for Job Creators
 - Title III: Crowdfunding
 - Title IV: Small Company Capital Formation
 - Title V: Private Company Flexibility and Growth
 - Title VI: Capital Expansion
 - Title VII: Outreach to Changes to the Law

Title II: General Solicitation (Rule 506)

- Private placements made in accordance with Rule 506 of Regulation D
 - Issuers are currently not permitted to offer or sell securities by any form of general solicitation or general advertising
 - JOBS Act requires the SEC to modify Rule 506 by July 4, 2012, so that the restriction on general solicitation and general advertising will not apply to Rule 506 offerings, permitting general solicitation and general advertising as long as sales are to accredited investors only and issuers take steps to verify accredited status

Title II: General Solicitation (Rule 144A)

- Rule 144A private resales of securities
 - Owners are currently only permitted to make offers and sales to persons who are reasonably believed to be qualified institutional buyers
 - JOBS Act requires the SEC to modify Rule 144A by July 4, 2012 to permit a seller to *offer* by means of general solicitation or general advertising securities to non-qualified institutional buyer
- As long as *sales* under Rule 144A are restricted to persons reasonably believed to be qualified institutional buyers

Title II: Rule 506 Offerings via a Platform

- JOBS Act provides that, with respect to Rule 506 offerings, a person meeting certain qualifications will not be subject to registration as a broker or dealer solely because:
 1. that person maintains a platform or mechanism that permits the offer, sale, purchase or negotiation of securities, or permits general solicitations, general advertisements or similar activities by issuers;
 2. that person or anyone associated with that person co-invests in such securities; or
 3. that person or any person associated with that person provides “ancillary services” with respect to such securities.

Title II: Rule 506 Offerings via a Platform

Rule 506 “Safe Harbor” only applies if the person doesn’t receive compensation in connection with the sale of the securities, doesn’t have possession of customer funds or securities and is not subject to “statutory disqualification.”

Title IV: Regulation A+

- The SEC was directed to create a new class of exempt securities pursuant to Section 3(b) of the Securities Act of 1933 for issuances of up to \$50mm of securities in any 12-month period.
 - Securities can be offered and sold publicly, including by general solicitation
 - Securities sold would not be “restricted securities”
 - SEC may require the issuer to publicly file and distribute an offering statement to investors that includes required disclosures, such as audited financials and use of proceeds
 - Solicitation of interest by the issuer prior to any filing of the offering statement will be permitted (“test the waters”)
 - SEC will require the issuer to make annual filings of audited financials
 - SEC may require issuers to file periodic reports
 - If the securities are sold on a national exchange or to “qualified purchasers,” then states are preempted from regulating the offering

Registration under Section 12(g) of the Exchange Act of 1934

TITLE V:

- JOBS Act amends Section 12(g) of the Exchange Act to provide that an issuer must register a class of equity securities under the Exchange Act, if, on the last day of the preceding fiscal year, it had:
 - Total assets exceeding \$10mm; and
 - A class of equity securities held by record by either (up from 500 total):
 - 2,000 persons, or
 - More than 500 persons who are not accredited investors.
 - Employees receiving company securities under employee benefit plans are excluded when calculating the number of record holders for this purpose.

Registration under Section 12(g) of the Exchange Act of 1934

TITLE VI

- Registered banks or bank holding companies whose class of equity securities are held of record by more than 300 but less than 1,200 persons may terminate their Section 12(g) registration.

Title III: Crowdfunding

- JOBS Act creates an exemption from registration for “crowdfunding.”
- Crowdfunding is a method where small aggregate amounts of securities of an issuer are sold through brokers or funding portals or platforms to investors in small individual amounts.
- Restrictions on crowdfunding:
 - Aggregate amount sold by an issuer, when added to the amount of securities previously sold by the issuer in reliance on the crowdfunding exemption, must not exceed \$1mm in previous 12 months
 - Aggregate amount sold in previous 12 months to an individual investor by an issuer is limited to
 - \$2,000 or 5% of the annual income/net worth of the investor, whichever is greater, assuming the annual income/net worth of the investor is less than \$100,000
 - 10% of the annual income/net worth of the investor, not to exceed a maximum aggregate amount sold of \$100,000, assuming the annual income/net worth of the investor is more than \$100,000
 - Transaction must be conducted through a broker or funding portal
 - Not available to foreign issuers
 - Issuers and intermediaries must fulfill a number of other requirements, including SEC filing, recordkeeping, disclosure and investor education

Title I: Emerging Growth Companies

- JOBS Act creates a new category of issuer, “Emerging Growth Company,” a company that had total annual gross revenue of less than \$1B during the most recently completed FY (indexed for inflation) that completes its 1st registered sale of common equity securities after 12/8/2011

- EGCs are granted the following with regard to their IPOs and subsequent disclosure filings:
 - No requirement for “say on pay” or “golden parachute” votes
 - Reduced executive compensation disclosure requirements
 - Reduced audited financial statement, selected financial data and MD&A requirements
 - Delayed implementation of new accounting standards
 - No auditor rotation and exemption from certain PCAOB requirements
 - Delayed requirement for Sarbanes-Oxley 404 Audit
 - Exemptions from “gun jumping” prohibitions for “testing the waters” communications with certain investors
 - Confidential submission of draft IPO registration statements

- Variety of reasons why using the ECG rules and regulations may be, at this point, premature

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John A. Eckstein has been a securities attorney in the private practice of law, and active in corporate finance since 1975. During the last 37 years, John has worked on many hundreds of transactions and financings in the United States capital markets, including initial public offerings, other primary and secondary offerings of securities, exchange offers, tender offers and private and limited offerings. He has also assisted clients in preparing disclosure and regulatory reports for businesses regulated under federal and state securities laws. He is considered an expert on the topic of the existence or non existence of a security, and has often lectured on securities law issues. John reviews the securities transactions in which Fairfield and Woods, P.C. provides non litigation and non regulatory securities advice and he approves all written legal opinions delivered in transactions on subjects involving securities law. John focuses upon the general representation of technology-based companies and venture capital funds, investors, investment bankers, financial advisors, and financial institutions. John attended the University of Iowa for his undergraduate education, Johns Hopkins for his economics masters and the University of Virginia for law school.

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Gil B. Selinger counsels clients on a wide range of business transactions and legal matters. He works on securities, corporate and real estate transactions, mergers and acquisitions, changes of ownership, and cases involving corporate finance and capital. Gil has experience in both general corporate matters and securities matters. In addition to counseling clients regarding the effects of federal and state securities laws upon their transactions, he routinely drafts private placement memorandums, corporate documents, including operating agreements, by-laws, shareholder agreements, buy/sell agreements, and asset/stock purchase agreements. Prior to studying law, Gil gained a vantage of the consumer side of the financial industry while working as a financial analyst at Goldman Sachs & Co. in New York City. Gil attended Columbia University for his undergraduate education and the University of Colorado Law School thereafter.

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