

Congress Passes JOBS Act – Legislation Seeks to Aid Issuers in Raising Private and Public Capital

March 30, 2012

On March 27, 2012, the U.S. Congress passed the Jumpstart Our Business Startups Act, or "JOBS" Act, with strong bipartisan support. President Obama has indicated that he will sign the legislation. The JOBS Act seeks to increase job creation and economic growth by making it easier for funds and their portfolio companies to raise capital through private offerings of securities and for many portfolio companies to embark on initial public offerings.

General Solicitation by Private Fund Managers No Longer Prohibited

Of key importance to private fund managers engaging in fundraising, the JOBS Act directs the Securities and Exchange Commission ("SEC") to eliminate the prohibition on general solicitation and advertising applicable to private offerings of securities to "accredited investors" under Rule 506 of Regulation D under the U.S. Securities Act of 1933 (the "Securities Act"). Most private investment fund managers (as well as their nonpublic portfolio companies) rely on Rule 506 to offer securities that might otherwise be subject to SEC registration under the Securities Act. Currently to qualify for the Rule 506 exemption, managers cannot market fund interests using any form of general solicitation or advertising, which includes advertising in print or broadcast media, press releases and media interviews and even discussions in industry seminars or meetings when attendees are invited by a general solicitation. The JOBS Act directs the SEC to lift this restriction.

The JOBS Act specifies that offerings under Rule 506 will not be deemed public offerings under "federal securities laws" if the issuer engages in general solicitation or advertising so long as the only investors in such offerings are accredited investors. As a result, private fund managers should be able to engage in previously prohibited general solicitation and advertising when raising a fund. The SEC may specifically address the impact of the JOBS Act on private funds in subsequent rule making. Although most managers are unlikely to source private fund investors solely by advertising or press coverage, lifting current general solicitation restrictions will remove the legal uncertainty that information released to the press or on a manager's Web site during fundraising could jeopardize the availability of a Rule 506 exemption.

Because of the preemption of federal securities laws over state securities laws, the JOBS Act is not expected to affect the availability of state "blue sky" law registration exemptions for Rule 506 offerings. However, an issuer that does engage in general solicitation or advertising could lose the benefit of other potential state "blue sky" registration exemptions, which could be preferable to Rule 506 exemptions because of lower fees or no filing requirements.

In addition, it is unclear whether engaging in general solicitation or advertising within the United States could result in the loss of a foreign private adviser exemption from registration under the Investment Advisers Act of 1940. This exemption is available to foreign private advisers with no place of business in the United States, fewer than 15 clients in the United States and less than \$25 million in aggregate assets under management attributable to U.S. clients. To claim this exemption, an adviser also cannot hold itself out to the public generally in the United States as an investment adviser. The SEC has construed advisers engaging in advertising or making information publicly available on the Internet (or even having their names in telephone books and building directories) as holding themselves out to the public. Absent further SEC guidance to the contrary, a non-U.S. fund manager would need to implement measures reasonably designed to prevent general solicitation or advertising from reaching the United States if it did not want to risk losing the availability of the foreign private adviser exemption.

Finally, the JOBS Act does not address the potential effect of general solicitation or advertising by an issuer when an offshore offering made under Regulation S under the Securities Act (which prohibits "directed selling efforts" into the United States) is conducted in conjunction with a Regulation D offering in the United States.

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