

# PUBLICATION

---

## JOBS Act: Raising Capital Through "Regulation A+"

May 16, 2012

(Part III of IV)

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act (JOBS Act). The intended purpose of the JOBS Act is to spur job creation by small companies and start-ups by relaxing the regulatory burdens of raising capital. This is the third in a four-part series of alerts we are issuing related to the JOBS Act.

The JOBS Act directs the Securities and Exchange Commission (SEC) to create a new exemption from registration for securities offerings of up to \$50 million. In this alert, we discuss the requirements of this new exemption and its practical implications for companies seeking alternative means of raising capital without undergoing the full-scale registration process.

### Pre-JOBS Act Public Offering Exemption

Section 3(b) of the Securities Act of 1933 (Securities Act) gave the SEC the power to create an exemption from registration for offerings of up to \$5 million. As a result, the SEC adopted Regulation A which sets forth offering requirements to satisfy this exemption. However, it has been infrequently used because securities issued in Regulation A offerings are not "covered securities," which would preempt state securities laws. Together with the low dollar amount threshold, the costs of compliance with state securities laws outweighed the benefits of Regulation A offerings.

### New Public Offering Exemption Under JOBS Act

In response to the inherent weaknesses of Regulation A, the JOBS Act requires the SEC to adopt a new exemption from registration for offerings of up to \$50 million in any 12-month period. The new exemption is intended to be an improved version of Regulation A, which is why commentators are now referring to it as "Regulation A+." While the exact contours of Regulation A+ are subject to SEC rulemaking, the JOBS Act sets forth minimum terms and conditions for Regulation A+ offerings:

- The securities may be equity, debt, convertible debt or guarantees of these securities.
- The securities may be offered and sold publicly.
- The issuer must file audited financial statements with the SEC every year.
- The issuer may solicit interest in the offering prior to filing an offering document with the SEC (which indicates that an offering document is contemplated, as was the case with Regulation A).
- Any person offering or selling the securities will be subject to liability under Section 12(a)(2) of the Securities Act for material misstatements or omissions.
- The securities are not "restricted" securities, which means there would be no holding period or similar restrictions for the resale of the securities.

The JOBS Act gives the SEC the discretion to set other terms and conditions for Regulation A+ offerings, including rules related to the content of the offering document, means of solicitation prior to filing an offering document and disqualification provisions for issuers. The SEC may also require that issuers file periodic

disclosures with respect to their business operations, financial conditions, corporate governance or use of investor funds. The JOBS Act also provides that Regulation A+ securities will be covered securities if they are sold on a national securities exchange or sold to “qualified purchasers” (a term to be defined by the SEC).

Ultimately, the usefulness of Regulation A+ and whether it offers a better alternative to Regulation A will depend on the nature of the offering conditions to be determined by the SEC. The JOBS Act does not set a deadline for SEC rulemaking, which makes it unlikely that the SEC will issue its rules related to Regulation A+ in the near future.

For more information related to these and other aspects of the JOBS Act, stay tuned for Part IV in this series or contact your Baker Donelson attorney.