

PUBLICATION

JOBS Act: Advertising Ban to Be Lifted in Certain Private Offerings and Resale Transactions

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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 second in a four-part series of alerts we will be issuing related to the JOBS Act.

In this alert, we focus on how the JOBS Act will impact access to potential investors in private offerings that are exempt from registration under Rule 506 of Regulation D and resale transactions that are exempt from registration under Rule 144A. The Securities and Exchange Commission (SEC) is required to revise its advertising rules related to Rule 506 and Rule 144A within 90 days after enactment of the JOBS Act (by July 4, 2012). We also discuss aspects of a new broker-dealer registration exemption available to those who facilitate Rule 506 offerings. This exemption is not subject to SEC rulemaking and became effective upon enactment of the JOBS Act.

Impact on Rule 506 Offerings

Rule 506 of Regulation D provides companies with a safe harbor from registration for private offerings of an unlimited dollar amount, provided that the offering meets certain requirements set forth in Regulation D. The Rule 506 exemption is the most commonly used private offering exemption. Prior to the JOBS Act, a company was prohibited from using general solicitation and advertising to market its private offering under Rule 506. For instance, a company could not post on its website about the private offering. The prohibition against general solicitation and advertising was also generally understood to mean that the company must have a pre-existing relationship with potential investors.

The JOBS Act directs the SEC to revise its rules to remove the ban against general solicitation and advertising in Rule 506 offerings. This is intended to give companies access to a larger pool of "accredited investors," as defined by SEC rules. A company engaged in a Rule 506 offering will be free to advertise its offering as long as the ultimate purchasers of the securities are accredited investors. The company will be required to take "reasonable steps" to verify that purchasers are actually accredited investors. The SEC, in its rulemaking, is expected to describe these "reasonable steps." In the meantime, companies should continue to conduct Rule 506 offerings in accordance with existing rules.

Impact on Rule 144A Resales

Rule 144A provides a safe harbor from registration for the resale of unregistered securities to "qualified institutional buyers," as defined by SEC rules. Prior to the JOBS Act, general solicitation and advertising in Rule 144A resales was prohibited. Consistent with changes to Rule 506 offerings, the JOBS Act directs the SEC to revise its rules to remove the ban against general solicitation and advertising in Rule 144A resales. In the case of Rule 144A resales, however, a seller will be able to advertise as long as it "reasonably believes" the ultimate purchasers of the securities are qualified institutional buyers. The SEC, in its rulemaking, may expand on the need for reasonable belief as to the status of the ultimate purchasers (rather than actual

knowledge) in the context of Rule 144A resales. Until the SEC adopts new rules, sellers should continue to conduct Rule 144A resales in accordance with existing rules.

New Broker-Dealer Registration Exemption for Rule 506 Offerings

The JOBS Act also exempts from broker-dealer registration those persons who maintain a platform or mechanism (whether online, in person or through any other means) to facilitate Rule 506 offerings. For example, the exemption would be available to incubators that match start-ups with potential investors. The exemption also extends to those who provide ancillary services, such as due diligence and standardized documents, in connection with Rule 506 offerings. The exemption is available as long as these persons: (i) do not receive any compensation in connection with the purchase and sale of the securities, (ii) do not possess customer funds, and (iii) are not subject to statutory disqualification.

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