THE U.S. JUMPSTART OUR BUSINESS STARTUPS ACT (THE JOBS ACT)

On April 5, 2012, U.S. President Barack Obama signed into law the U.S. Jumpstart Our Business Startups Act (the "JOBS Act"), which provides for a number of significant changes to U.S. federal securities laws.[1] Some of these changes are intended to facilitate initial public offerings ("IPOs") by small and medium-sized companies, and other changes are intended to make it easier for private companies to raise capital and remain private.

IPO ON-RAMP FOR "EMERGING GROWTH COMPANIES"

Title I creates an "IPO on-ramp" to phase in disclosure, accounting and auditing requirements for issuers that qualify as "emerging growth companies." The IPO on-ramp is intended to ease the process for qualifying small and medium-sized companies to transition into becoming public companies. Many companies that have recently conducted an IPO would have qualified as emerging growth companies. The definition of emerging growth company does not distinguish between U.S. and foreign companies. The provisions of Title I became immediately effective upon the enactment of the JOBS Act.

- An issuer qualifies as an emerging growth company if its total gross revenues were less than US$1 billion (subject to periodic inflation adjustments) during its most recently completed fiscal year.

- An issuer that recently conducted an IPO can retroactively qualify as an emerging growth company so long as the IPO occurred after December 8, 2011.

- An issuer will maintain its emerging growth company status until the earliest of:

  - the end of the fiscal year during which its total gross revenues exceed US$1 billion (subject to periodic inflation adjustments);

  - the end of the first fiscal year after the 5th anniversary of its IPO;

  - the date on which it has issued more than US$1 billion in non-convertible debt during the previous 3-year period; and

  - the date on which it becomes a "large accelerated filer."[2]

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[1] The text of the JOBS Act is available at: http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf.

[2] A "large accelerated filer" generally refers to an issuer that (as of the end of its fiscal year):

- had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of US$700 million or more, as of the last business day of its most recently completed 2nd fiscal quarter;
- has been subject to the requirements of section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months;
- has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and

- Relaxed disclosure, accounting and auditing requirements apply to an emerging growth company:

  - It is not required to hold a shareholder advisory vote on executive compensation (say-on-pay).

  - It is not required to hold a shareholder advisory vote on golden parachute compensation at any shareholders' meeting to approve a merger or similar transaction.

  - It will not be required to comply with the "pay-for-performance" and "CEO pay ratio" disclosure rules required to be adopted by the U.S. Securities and Exchange Commission (the "SEC") under Section 953 of the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act.[3]

  - In an IPO, it is only required to present 2 years (instead of 3 years) of audited financial statements in its IPO registration statement.

  - It is not required to present selected financial data as required by Item 301 of Regulation S-K in registration statements or periodic reports filed under the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), for any period prior to the earliest audited period presented in its IPO registration statement. [4]

  - It will not be required to comply with any new or revised financial accounting standard until a private company[5] would be required to comply with the standard.

  - It is only required to comply with the scaled executive compensation disclosure requirements that apply to "smaller reporting companies" under Item 402 of Regulation S-K.[6] For example, it is not required to include a Compensation Discussion and Analysis in its proxy statements.

  - It will be exempt from Public Company Accounting Oversight Board ("PCAOB") rules requiring mandatory audit firm rotation or the auditor's report to be supplemented by an auditor's discussion and analysis.[7]

  - is not eligible to use the requirements for "smaller reporting companies" for its annual and quarterly reports.

[3] The SEC has yet to propose and adopt the pay-for-performance and CEO pay ratio disclosure rules required by Section 953 of the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act.

[4] Item 301 of Regulation S-K requires presentation of selected financial data for the issuer's last 5 fiscal years (or, if the issuer has not been in existence for that long, since the issuer's date of inception).

[5] In this context, a private company means a company that is not an "issuer" as defined by Section 2(a) of the U.S. Sarbanes-Oxley Act of 2002.

[6] A "smaller reporting company" generally refers to an issuer that had a public float of less than US$75 million as of the last business day of its most recently completed second fiscal quarter.

[7] In August 2011, the PCAOB issued a concept release to solicit public comment on mandatory audit firm rotation, which would limit the number of consecutive years for which a registered public accounting firm could serve as a public company's auditor. In June 2011, the PCAOB issued a concept release to solicit public comment on

- It will not be required to comply with PCAOB rules adopted after the enactment of the JOBS Act, unless the SEC determines otherwise.

- Its independent registered public accounting firm is not required to provide an attestation report on the company's internal control over financial reporting as required by Section 404(b) of the U.S. Sarbanes-Oxley Act of 2002.

- Brokers and dealers, even if participating in an emerging growth company's registered equity offering, has greater flexibility to publish and distribute research reports about the company and its securities both before and after the filing of the registration statement without violating the gun-jumping rules under Section 5 of the Securities Act of 1933, as amended (the "Securities Act").

- There is greater flexibility for communications between securities analysts and potential investors and between securities analysts and the management of an emerging growth company.

- It has greater flexibility to communicate with potential investors that are qualified institutional buyers or accredited investors about a securities offering both before and after the filing of the registration statement so that the company can "test the waters" to determine investor interest in the securities offering.

- In an IPO, it is permitted to submit drafts of its IPO registration statement and amendments confidentially to the SEC so long as they are publicly filed 21 days before the company conducts a road show. Confidential treatment extends to all correspondence related to the SEC's review of the IPO registration statement and amendments.

➢ The JOBS Act directs the SEC to review Regulation S-K to determine how to simplify the registration process and reduce the burdens on emerging growth companies and to provide a report to U.S. Congress with specific recommendations on streamlining the registration process and reduce the burdens on emerging growth companies.

REMOVAL OF PROHIBITION AGAINST GENERAL SOLICITATION AND ADVERTISING

Title II directs the SEC to amend, within 90 days after the enactment of the JOBS Act:

➢ Rule 506 of Regulation D under the Securities Act to (i) remove the prohibition against general solicitation or advertising as long as all of the actual purchasers in the Rule 506 offering are accredited investors and (ii) adopt a requirement that the issuer take reasonable steps to verify

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alternatives for changing the auditor's reporting model, including requiring an auditor to supplement its audit report with an auditor's discussion and analysis, which would be a narrative report intended to provide investors and other financial statement users with a view of the audit and the financial statements "through the auditor's eyes."

that all actual purchasers in the Rule 506 offering are accredited investors using such methods as will be determined by the SEC;[8] and

- Rule 144A under the Securities Act to allow for issuers and their agents to solicit non-qualified institutional buyers (including through general solicitation and advertising) as long as all of the securities sold in the Rule 144A offering are only sold to persons that are reasonably believed to be qualified institutional buyers. [9]

NEW SECTION 4(6) SECURITIES ACT OFFERING EXEMPTION FOR CROWDFUNDING

Title III adds a new Section 4(6) to the Securities Act to establish a new offering exemption from the registration requirements of the Securities Act to make it easier for private companies to raise capital through "crowdfunding."[10] The implementation of Section 4(6) requires rulemaking by the SEC within 270 days after the enactment of the JOBS Act. The offering exemption under Section 4(6) will not be available to (i) a foreign issuer, (ii) an issuer that is required to file periodic reports with the SEC under the Exchange Act or (iii) an issuer that is an investment company (as defined in the U.S. Investment Company Act of 1940, as amended (the "Investment Company Act")) or excluded from the definition of investment company by Section 3(b) or Section 3(c) of the Investment Company Act.

- Under Section 4(6), an issuer will be permitted to offer and sell up to US$1 million of securities during a 12-month period without registering the offering under the Securities Act so long as the following conditions are met:

  - If an investor in the Section 4(6) offering has either an annual income or a net worth that is less than US$100,000, the total amount sold to the investor does not exceed the greater of US$2,000 or 5% of the investor's annual income or net worth.

  - If an investor in the Section 4(6) offering has either an annual income or a net worth that is equal to or more than US$100,000, the total amount sold to the investor does not exceed the lesser of 10% of the investor's annual income or net worth and US$100,000.

  - The intermediary through which the offering is conducted meets the following requirements:

    → It is registered as a broker or a funding portal with the SEC.

    → It is registered with an applicable self-regulatory organization.

    → It provides such disclosures (including those related to risks and investor education materials) as will be determined by the SEC.

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[8] Currently, an issuer seeking to sell securities in a private placement in reliance on the safe harbor provided by Rule 506 of Regulation D is not permitted to use any form of general solicitation or advertising.

[9] Currently, an issuer and any person acting on the issuer's behalf can only offer and sell to investors that are reasonably believed to be qualified institutional buyers.

[10] "Crowdfunding" generally refers to the use of the internet to raise capital by selling small amounts of securities to a large number of investors.

- → It ensures that each investor (i) reviews investor-education information, (ii) affirms that the investor understands the risk of loss of the entire investment and that the investor could bear that loss and (iii) answers questions demonstrating the investor's understanding of the risk associated with investing in startups, emerging businesses and small issuers, the risk of illiquidity and such other matters as will be determined by the SEC.

- → It takes such measures as will be determined by the SEC to reduce the risk of fraud, including background and other checks on the issuer's officers, directors and greater-than-20% stockholders.

- → At least 21 days prior to the first sale of securities, it makes available to the SEC and potential investors certain information required to be provided by the issuer in the Section 4(6) offering.

- → It ensures that the offering proceeds are only provided to the issuer after the target offering amount has been met and allows investors to cancel their commitments to invest as the SEC determines to be appropriate.

- → It ensures that no single investor exceeds the single investor investment limits described above.

- → It takes such steps as will be determined by the SEC to protect the privacy of information collected from investors.

- → It does not compensate promoters, finders, or lead generators for identifying potential investors.

- → It prohibits its directors, officers or partners from having any financial interest in the issuer.

- → It meets such other requirements as will be determined by the SEC.

- The issuer meets the following requirements:

  - → It files with the SEC and provides to investors and the intermediary certain information, including (i) basic corporate information, (ii) the names of officers, directors and greater-than-20% stockholders, (iii) the issuer's business and business plan, (iv) the issuer's financial condition (including financial statements that are certified by the issuer's principal executive officer for offerings of US$100,000 or less, financial statements reviewed by an independent accountant for offerings over US$100,000 but less than US$500,000 and audited financial statements for offerings over US$500,000, (v) the purpose of the offering and the intended use of proceeds, (vi) the target offering amount, including the deadline to reach this amount and regular updates on the progress of

reaching this amount, (vii) offering price to the public or method for determining the price with the final price provided in writing to the investor prior to the sale and with a reasonable opportunity given to the investor to rescind the investor's commitment to purchase and (viii) the issuer's ownership and capital structure.

- → It does not advertise the terms of the offering (other than notices directing investors to the applicable broker or funding portal).
- → It does not compensate any person to promote its offerings without taking such steps as will be determined by the SEC to ensure disclosure of such compensation with each promotional communication.
- → It files with the SEC and provides to investors such reports of its results of operations and financial statements as will be determined by the SEC.
- → It complies with such other requirements as will be determined by the SEC.

Issuers will be subject to liability for material misstatements or omissions in a Section 4(6) offering. An investor will generally not be able to transfer securities acquired in a Section 4(6) offering for 1 year from the date of purchase unless the transfer is (i) to the issuer, (ii) to an accredited investor, (iii) part of an offering registered with the SEC or (iv) to a family member of the purchaser or in connection with the death or divorce of the purchaser. Securities that are sold under a Section 4(6) offering will be exempt from state blue sky registration requirements, but subject to state enforcement actions.

NEW SMALL ISSUER EXEMPTION

Title IV directs the SEC to establish a new exemption for securities of small issuers for offerings of US$50 million or less of securities. This exemption will supplement existing Regulation A under the Securities Act. However, the small issuer (i) will be required to file audited financial statements with the SEC, (ii) will be subject to liability under Section 12(a)(2) for material misstatements and omissions and (iii) may be subject to additional periodic reporting requirements as determined by the SEC.

INCREASED THRESHOLDS REQUIRING REGISTRATION UNDER SECTION 12(G) OF THE EXCHANGE ACT

Title V amends Section 12(g)(1)(A) of the Exchange Act to increase the shareholder threshold under Section 12(g) requiring registration of a class of equity securities under the Exchange Act. Currently, the shareholder threshold is 500 holders of record (whether or not they are accredited investors). Title V amends the shareholder threshold to be 2,000 holders of record (whether or not they are accredited investors) or 500 holders of record who are not accredited investors. This amendment became immediately effective upon the enactment of the JOBS Act.

Securities held under an employee compensation plan and securities acquired in a Section 4(6) offering will be excluded for purposes of determining the number of holders of record under Section 12(g). Title V also directs the SEC, within 120 days after the enactment of the JOBS Act, to examine its ability to

enforce Rule 12g5-1 under the Exchange Act and evaluate whether new tools are necessary to enforce the anti-evasion provision of Rule 12g5-1.[11]

In the case of banks and bank holding companies, Title VI amends (i) Section 12(g)(1) of the Exchange Act to increase the shareholder threshold for registration under Section 12(g) to 2,000 holders of record and (ii) Section 12(g)(4) of the Exchange Act to increase the shareholder threshold for termination of registration under the Exchange Act from 300 holders of record to 1,200 holders of record. These amendments became immediately effective upon the enactment of the JOBS Act.

ABOUT CURTIS

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[11] The anti-evasion provision of Rule 12g5-1 provides that if the issuer knows or has reason to know that the form of holding securities of record is used primarily to circumvent the provisions of Section 12(g) or 15(d) of the Exchange Act, the issuer is required to "look through" the holders of record and treat the beneficial owners of such securities as the holders of record for purposes of determining the number of holders of record under Section 12(g).