Lathrop GPM

Going Public Just Got Easier

April 9, 2012

The Jumpstart Our Business Startups Act (the "JOBS Act") passed by Congress and signed into law by the President on April 5, 2012, relaxes regulations on initial public offerings ("IPOs") and on reporting and governance for many newly public companies by creating an "IPO on-ramp" for a new class of "Emerging Growth Companies." Other Lathrop Gage Alerts discuss JOBS Act provisions relating to private offerings and private companies.

Emerging Growth Companies

The JOBS Act relaxes regulations on any Emerging Growth Company, defined as a public company:

- Whose IPO became effective after December 8, 2011;
- Whose last fiscal year ended **less than five years** after the date of its IPO;
- Whose annual gross revenues are **less than $1 billion** for its last fiscal year;
- That is not a "large accelerated filer" (with a public float of $700 million or more); and
- That has issued less than $1 billion in non-convertible debt in the past three years.

Reduced Restrictions on the IPO Process

Under the JOBS Act, an Emerging Growth Company undergoing an IPO is now permitted:

- To submit a draft registration statement to the Securities and Exchange Commission (the "SEC") for a confidential review prior to filing, but the initial submission and all amendments must be publicly filed at least 21 days before a road show (the SEC Staff is expected to provide guidance soon on how this confidential review process will work);
- To "test the waters" (i.e., to gauge investor interest in a contemplated offering) by communicating with qualified institutional buyers and institutional accredited investors before or after filing a registration statement, without being subject to quiet period gun-jumping restrictions on pre-offering communications;
- To omit information from its IPO prospectus by:
  - Including audited financial statements for the past two (instead of three) completed fiscal years;
  - Providing selected financial data (under Regulation S-K Item 301) and related management discussion and analysis ("MD&A") disclosures only for audited periods (instead of the past five

    years); and
  - Reducing the required disclosures on executive compensation; and
- To have its management communicate with securities analysts (which was previously prohibited), although securities analysts are still subject to the prohibitions of conflicts of interest in the Sarbanes-Oxley Act.

In addition, the JOBS Act permits a broker-dealer to publish or distribute a research report about an Emerging Growth Company with a registered offering that is proposed, in process, or effective, without the research report being deemed an "offer" of securities, even if the broker-dealer participates in the offering. The JOBS Act also removes certain restrictions on communications between securities analysts and potential investors in connection with IPOs of Emerging Growth Companies, although anti-fraud rules still apply.

Temporary Relief from Post-IPO Regulations

During the "grace period" of up to five years after its IPO, an Emerging Growth Company is now **exempt from several requirements** relating to financial accounting and executive compensation disclosures that otherwise apply to public companies, such as the requirements:

- That the company obtain its auditor's attestation regarding its internal control over financial reporting (which Section 404(b) of the Sarbanes-Oxley Act requires for public companies, other than smaller reporting companies with public floats under $75 million) – but the company must still establish, maintain, and assess internal control over financial reporting, and its CEO and CFO must still make Sarbanes-Oxley certifications;
- To comply with new or revised financial accounting standards under U.S. GAAP – however, an Emerging Growth Company must comply with such standards to the extent that they become generally applicable to private companies, and it may not selectively comply with such standards (i.e., it must comply with all such standards if it opts to comply with any of them);
- To implement mandatory audit firm rotation and to add a supplement to the auditor's report providing additional information about the audit and the company's financial statements (if the Public Company Accounting Oversight Board decides to add these requirements), unless the SEC determines that subjecting Emerging Growth Companies to these requirements is in the public interest;
- To hold "say-on-pay" votes, in which shareholders advise on whether they approve of executive compensation arrangements and decide on the frequency of such votes;
- To provide disclosure, and to hold a shareholder advisory vote, on golden parachute payments in connection with a merger or acquisition;
- To disclose the relationship between executive compensation and the company's financial performance;
- To disclose the ratio of the CEO's total compensation to the median compensation of all other employees, which is required by the Dodd-Frank Act but not yet implemented by SEC regulations;

- To make more detailed disclosures on executive compensation – instead, an Emerging Growth Company may comply with the reduced (or “scaled”) executive compensation disclosure requirements applicable to smaller reporting companies; and
- To provide a compensation discussion and analysis (“CD&A”) section in its proxy statement.

An Emerging Growth Company may choose to ignore any or all of the exemptions from regulatory requirements that the JOBS Act makes available to it, and instead to comply with the regulatory requirements applicable to public companies that are not Emerging Growth Companies – with the exception of the all-or-nothing exemption from compliance with new or revised financial accounting standards.

These provisions of the JOBS Act are self-effectuating, so they are effective immediately without requiring SEC regulations to implement them. To discuss this alert or any securities law matter, please contact your Lathrop Gage attorney or any of the attorneys listed on this alert.