

UPDATE

News of Developments in the Financial Sector and Related Areas

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The JOBS Act

The JOBS Act (Good News for Banks)

On April 5, 2012, the President signed into law the Jumpstart Our Business Startups Act that is commonly referred to as the JOBS Act which is good news for community banks having or desiring to have a larger base of shareholders without having to comply with the expense of being publicly traded and complying with Securities and Exchange Commission ("SEC") regulations. The purpose of the JOBS Act is to create a new class of registered company to be known as "Emerging Growth Company" to permit small companies to have less expense in going public in raising capital and using the money raised to create more jobs. A company would qualify to be an Emerging Growth Company under the following: (i) have less than \$1 billion in annual revenue, (ii) have been publicly traded for less than five years, and (iii) not have issued more than \$1 billion of non-convertible debt in the prior three year period.

Section 201 of the JOBS Act requires the SEC to eliminate the prohibitions on general solicitation and general advertising contained in SEC Rule 506 and SEC Rule 144A offerings so long as securities were sold to accredited investors and qualified institutional investors. Accredited investors

include business entities with at least \$5 million in assets, and individuals with a net worth of not less than \$1 million (excluding the individual's primary residence) or an annual income in excess of \$200,000 (or \$300,000 with the individual's spouse). A qualified institutional buyer includes, among others, certain entities that invest on a discretionary basis at least \$100 million in other issuers. The SEC is required to make these changes within ninety (90) days after the JOBS Act is signed into law.

Emerging Growth Companies are not required to comply with certain current SEC regulations including (i) the requirement to obtain an auditor attestation report on management's assessment of internal control over financial reporting, (ii) obtaining shareholder advisory vote on "say-on-pay", "say-on-frequency" and "say-on-golden parachute", (iii) having only two years of audited financial statements instead of three years, (iv) the requirement to provide five years of audited "select financial data", and (v) having to periodically change its independent auditor firm.

The JOBS Act also creates a new Section 4(6) exemption of the Securities Act of 1933 to permit an issuer to issue up to \$1 million (or \$2 million if audited financial statements are provided to investors) in any twelve (12) month period permitting small businesses to "crowd-fund" their business by raising monies from pools of small investors. The aggregate amount purchased by any one investor may not exceed certain limits. For an investor whose annual income or net worth is less than \$100,000,

the limit is the greater of \$2,000 or 5 percent of the annual income or net worth of such investor. For an investor whose annual income or net worth is equal to or greater than \$100,000, the limit is 10 percent of the annual income or net worth of such investor up to a maximum \$100,000. Sales with investors must be conducted through a registered broker or "funding portal" (a new financial intermediary with simpler registration requirements). The issuer must also comply with certain SEC reporting and disclosure requirements. The new exemption will be helpful to banks needing to raise additional capital without substantial legal costs and without needing to limit the sales to accredited investors.

Prior to passage of the JOBS Act, the existing Regulation A exemption from certain SEC requirements for small businesses seeking to raise less than \$5 million was seldom used. The JOBS Act will raise this threshold to \$50 million and preempts state law registration of Regulation A offerings if the securities are offered and sold on a national securities exchange, offered or sold through a registered broker, or offered or sold to "qualified purchasers" as defined by the SEC.

Sections 501 and 601 of the JOBS Act amends the law related to the number of shareholders of record at which a company must register and when a company is permitted to register with the Securities and Exchange Commission. Although these two statutory changes are effective upon the JOBS Act being signed into law, the SEC must adopt regulations in accordance with these provisions.

Section 501 and 601(a) of the JOBS Act amends Section 12(g)(1) of the Securities Exchange Act of 1934 to provide that every issuer shall register with the SEC within

one-hundred twenty (120) days after the last day of its first fiscal year ended on which the issuer has total assets exceeding \$10 million and a class of equity security held by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors.

However, in the case where the issuer is a bank or bank holding company, no registration would be required unless its total assets exceeded \$10 million, and it had a class of equity security held of record by 2,000 or more persons. This is good news for banks and bank holding companies that are not currently registered with the SEC since they will now be able to go up to 2,000 shareholders without having to register with the SEC. Under current law, the number of shareholders of record were limited to 500, and issuers had to repurchase shares from its shareholders from time to time in order to keep from having to register with the SEC and incurring the expense to comply with the SEC reporting requirements. The end result of the JOBS Act is to permit community banks to have up to 2,000 shareholders without having to register with the SEC. The JOBS Act also revises the definition of "held of record" to exclude securities held by persons who receive securities from an employee compensation plan in transactions exempt from registration.

Sections 601 and 602 of the JOBS Act amend the Securities Exchange Act of 1934 to allow companies to terminate their registration with the SEC so long as they have less than 1,200 shareholders of record. This is good news for those publicly traded banks or bank holding companies by eliminating overhead costs associated with SEC reporting requirements.

Our firm is available to answer questions regarding the benefits of raising capital and the placement of securities under the JOBS Act.