CORPORATE

JUMPSTART YOUR BUSINESS WITH EASIER ACCESS TO CAPITAL MARKETS

by: Zan M. Nicolli

In April 2012, Congress, in a bipartisan effort, took a giant step to "jumpstart" businesses in the United States by enacting the JOBS Act (Jumpstart Our Business Startups Act). The JOBS Act is good news for entrepreneurs; it is intended to eliminate costly SEC regulatory barriers to accessing capital markets in order to make it easier for middle market, small and start-up companies to raise capital and grow. The plan is simple: with easier access to capital markets, businesses will grow and boost employment nationwide.

The JOBS Act will make it more efficient for "emerging growth companies" to raise capital in an initial public stock offering. An emerging growth company is a company with less than $1 billion in annual gross revenues. An emerging growth company that conducts an initial public offering of its equity securities will be able to "ramp up" to full SEC disclosure compliance over a five year period (or earlier if certain conditions are met, including its annual gross revenues reaching $1 billion). During this ramp up period, the company will not have to comply with all of the onerous financial public reporting requirements, Dodd-Frank executive compensation disclosure obligations, and Sarbanes-Oxley auditing and other compliance standards. Registration statements can be submitted to the SEC for pre-review on a confidential nonpublic basis, and the regulatory restrictions on publishing research reports and company information and engaging in communications with investors in anticipation of a public stock offering have been lessened--all in an effort to facilitate successful capital raising by emerging growth companies.

The JOBS Act also removes the prohibition on general solicitation and general advertising for offers and sales to accredited investors under Regulation D. Previously, companies could only offer and sell their securities privately to potential investors with whom they had a preexisting relationship. The JOBS Act raises the cap on the amount that a small issuer can raise in a Regulation A offering during a 12-month period from $5 million to $50 million, thereby expanding the availability of this small offering exemption. Significantly, it also raises the number of shareholders that a private company or community bank with total assets exceeding $10 million may have from 500 to 2,000 (but only 500 of which can be non-accredited investors) before having to comply with the costly and burdensome periodic reporting requirements of public companies.

Perhaps the most "game changing" and controversial provisions of the JOBS Act, the CROWDFUND Act (Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012) creates an altogether new exemption from the onerous and costly SEC registration requirements for securities offerings by small and start-up businesses. The crowdfunding exemption will allow companies to raise up to $1 million through certain registered "funding portals" or broker-dealer generated websites in limited amounts to less wealthy or "non-accredited" persons. Investors with an annual income or net worth of less than $100,000 can purchase up to the greater of 5% of their annual income or net worth or $2,000 in a 12-month period. Investors with an annual income or net worth of $100,000 or more can purchase up to 10% of their annual income or net worth, not to exceed a maximum aggregate amount of $100,000. The Act is intended to balance the needs of smaller businesses to have enhanced access to private capital against the need to protect investors, particularly unsophisticated investors, from fraud and misrepresentation. Therefore, the Act includes provisions to enhance accountability and accuracy of the company information provided to investors, including allowing an investor to bring a private action against the company and its directors and principal officers for fraud or misrepresentation to recover his or her investment or other damages.

The SEC has the task now of issuing final rules and regulations to implement the various provisions of the JOBS Act. Public comments have already been solicited and final rules are expected before the end of 2012. When the time is right for your business, Dickinson Wright can help you navigate through this new legal regulatory framework to access the capital markets.

FOR MORE INFORMATION CONTACT:

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