

JOBBS Act Aims to Revive Exemption for Limited Offerings Under Regulation A

April 30, 2012

The Jumpstart Our Business Startups Act (the “JOBS Act”) passed by Congress and signed into law by the President on April 5, 2012, requires the Securities and Exchange Commission (the “SEC”) to issue rules adding a new class of securities exempt from the registration requirement for offerings under the Securities Act of 1933. The new law gives the SEC no deadline for issuing these rules, which **will increase the maximum amount of securities that may be issued in a 12-month period under the Regulation A (“Reg A”) exemption, or a successor rule, from the current ceiling of \$5 million to \$50 million.**

Until now, Reg A “mini-offerings,” which require issuers to file offering statements with the SEC despite the limited offering size, have been relatively unused. The increased offering amount may make offerings under the new Reg A exemption a more attractive option for raising capital. On the other hand, it is also possible that additional requirements – such as audited financial statements, increased disclosures, and conditions on State-law preemption – may make the new Reg A exemption remain less appealing to issuers than alternatives such as private placements under Rule 506, for which the JOBS Act removed the ban on general solicitation, as discussed in another Lathrop Gage alert.

Securities Offered under the New Exemption

The JOBS Act provides that securities offered under the new Reg A exemption:

- May not exceed **\$50 million in a 12-month period**, as stated above;
- May be **offered and sold publicly** – whether directly by the issuer or through a broker or other placement agent – to an unlimited number of purchasers, who are not required to be accredited investors or to satisfy other criteria;
- Will **not be restricted securities**, so they may be freely resold (however, an issuer must file reports and be current in its reporting obligations under the Securities Exchange Act of 1934 (the “Exchange Act”) in order for its securities to be eligible for quotation on the OTC Bulletin Board);
- Must be equity securities, debt securities, or debt securities that are convertible into or exchangeable for equity interests (including any guaranties of those securities); and
- Will be deemed “covered” securities, so State “blue sky” registration or qualification (but not notice) requirements will be preempted, but only if the securities are offered or sold on a national securities exchange or to qualified purchasers.

Other Requirements for the New Exemption

In addition, several other requirements will apply to offerings under the new Reg A exemption:

- Before filing an offering statement, an issuer **may solicit interest** in the offering (i.e., “test the waters”), subject to any terms and conditions that the SEC may impose;
- An issuer must file **audited financial statements** with the SEC annually; and
- Any person offering or selling securities under this exemption is potentially subject to **civil liability** for material misstatements or omissions in any prospectus or oral communication.

SEC Authorized to Impose Additional Requirements

The JOBS Act empowers the SEC to impose additional requirements for the new exemption, if the SEC determines these requirements to be in the public interest and necessary for the protection of investors, including:

- An issuer of securities under the exemption would have to prepare and electronically file with the SEC and distribute to prospective investors an **offering statement** and any related documents, in the form and with the content prescribed by the SEC, including audited financial statements, a description of its business operations, financial condition, corporate governance, use of investor funds, etc. (currently, Reg A issuers must disclose current balance sheets, as well as income statements for its previous two fiscal years or for the period of its existence, if shorter, but audited financial statements do not need to be submitted unless the issuer has already prepared them);
- An issuer of securities under the exemption would have to file with the SEC **periodic disclosures** (the form and content of which is to be determined by the SEC) regarding the issuer and its business operations, financial condition, corporate governance, use of investor funds, etc.; and
- **Disqualification provisions** would make the exemption unavailable if the issuer or its affiliates, directors, officers, etc. are “bad actors” in various ways.

Some Open Questions

The JOBS Act is silent on several current aspects of Reg A, so SEC rules are needed to provide guidance on them.

- Reg A is currently available only to private companies that are not required to file reports under the Exchange Act. The SEC should clarify whether this will remain the case under the new Reg A exemption.
- Reg A currently limits the aggregate amount of securities selling shareholders may include in the offering to \$1.5 million, so SEC guidance is needed on whether this limitation will continue and, if so, at what level.
- Reg A is currently limited to issuers organized and with a principal place of business in the U.S. or Canada, and certain types of companies are ineligible to be Reg A issuers, so the SEC should clarify



whether this will remain the case.

- Reg A currently contains provisions on “integration” of Reg A offerings with other types of exempt offerings, which could result in loss of the exemptions for the integrated offerings, but the JOBS Act is silent on this as well.

Further details about the new Reg A exemption will eventually be forthcoming in rules to be proposed and, after a public comment period, issued in final form by the SEC.

Additional Lathrop Gage alerts discuss other important provisions of the JOBS Act. To discuss this alert or any securities law matter, please contact your Lathrop Gage attorney or any of the attorneys listed on this alert.