The JOBS Act: Potential Benefits for Foreign Private Issuers

Introduction

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act ("**JOBS Act**" or "**Act**"). The JOBS Act eases the SEC-registered IPO process for "emerging growth companies" ("**EGCs**") and will alter the private offering process under Rule 144A and Regulation D of the U.S. Securities Act of 1933, as amended ("**Securities Act**"). For more information on the specifics of the Act's changes and a number of the matters discussed herein, please see our other memos on the subject at www.davispolk.com/jobs-act/ The JOBS Act contains a number of key changes that will facilitate U.S. IPOs by foreign private issuers ("**FPIs**") that are EGCs in the SEC-registered deal context and offerings by FPIs generally in the non-SEC-registered deal context. Such benefits should add to the attractiveness of the U.S. capital markets.

The JOBS Act is a broad statute that relaxes restrictions operative in each phase of the offering process in connection with an IPO to be registered with the U.S. Securities and Exchange Commission ("**SEC**"), including: preparation of the offering and pre-marketing, registration statement disclosure requirements, marketing of the offering and post-offering reporting requirements. Specifically, we will focus on how the JOBS Act:

- *in the "pre-marketing period,"* allows for "testing-the-waters" communications to gauge investor interest in an EGC's securities through communications with qualifying investors and relaxes rules regarding broker-dealer research and participation throughout the IPO process;
- *with regard to offering materials*, reduces the financial information that must be included by an EGC in its registration statement and mandates the SEC to review the applicable disclosure requirements and report to Congress on how the registration process could be streamlined for EGCs; and
- *for public reporting requirements*, provides for a delay of up to five years in imposing the Sarbanes-Oxley Act Section 404(b) requirements for EGCs (auditor assessment of internal controls over financial reporting), along with exempting EGCs from other continuing reporting requirements.

In addition to facilitating the IPO process and reducing reporting obligations for EGCs, the SEC is required by the JOBS Act, within 90 days, to relax the general advertising and general solicitation prohibitions in Rule 144A and Regulation D offerings. These amendments, when made, will generally apply to FPIs.

What is an Emerging Growth Company?

The primary focus of the JOBS Act is on smaller companies and their access to U.S. public equity markets. To effect this goal, the JOBS Act amends both the Securities Act and the Securities Exchange Act of 1934, as amended ("**Exchange Act**"), to define an EGC as a company that conducts an IPO after December 8, 2011, and had less than U.S.$1 billion in "total annual gross revenue"—which the SEC staff has indicated means total revenues under U.S. GAAP (or IFRS if used as the basis of reporting)—during its most recently completed fiscal year.[1] For prospective EGCs that report in a currency other than U.S.

[1] For purposes of registration statement disclosure, a company should test whether it qualifies as an EGC (1) at the time of its initial confidential submission and (2) at the time of its first public filing. If a company qualifies as an EGC at the time of its first public filing, (*cont.*)

dollars, the company would use the exchange rate for its reporting currency as of the last day of the preceding fiscal year to determine whether it meets the threshold.

A company continues to be an EGC until the earliest of (1) the last day of the fiscal year during which it had total annual gross revenues of U.S.$1 billion or more; (2) the last day of the fiscal year following the fifth anniversary of its IPO,[2] (3) the date on which the company has, during the previous three-year period, issued more than U.S. $1 billion in nonconvertible debt or (4) the date on which the company becomes a "large accelerated filer" (basically, a company with $700 million of public equity float that has been reporting for at least one year). An issuer must be an EGC to avail itself of the IPO process and disclosure changes implemented by the Act.

"Pre-Marketing" an Offering, Investor Meetings and Research Reports

"Testing the Waters"

A common practice in non-U.S. deals is to hold investor meetings with sophisticated, prospective investors to try and gauge interest in a proposed offering. These "anchor marketing," "pilot-fishing" or "cornerstone" meetings help companies meet investors outside the U.S. in a "pre-marketing" process to determine investor appetite and possible terms under which the proposed offering may proceed. These meetings take place prior to completion of the prospectus and often before a registration statement has been filed with the SEC, in the case of deals with a registered U.S. component.

SEC-Registered Offerings
Prior to the JOBS Act, such meetings, if held in the United States, would have constituted offers in violation of Section 5 of the Securities Act, exposing the company (and its underwriters) to potential liability. The JOBS Act relieves many of these concerns by amending Section 5 to permit an EGC to engage in oral and written communications with potential investors that are qualified institutional buyers ("**QIBs**") or "accredited investors" to determine whether such investors might have an interest in a contemplated securities offering. We do not expect bookbuilding or the formal solicitation of orders to occur during pre-filing meetings due to Rule 15c2-8(e) under the Exchange Act, which requires broker dealers to make a preliminary prospectus available before the solicitation of customer orders.

Non-SEC-Registered Offerings
In non-SEC-registered deals, such as Rule 144A offerings, a market practice has developed of limiting these meetings in the United States, based on liability, rather than statutory, concerns. Nevertheless, the Act's changes for EGCs in the SEC-registered offering process could, by analogy, affect market practice regarding these meetings in the Rule 144A/Reg S process. That is, FPIs in a Rule 144A deal may feel more comfortable meeting with sophisticated U.S. investors in the "pre-marketing period." We do not, however, expect any immediate changes in current practice, as it remains to be seen whether similar meetings become common in the EGC, SEC-registered IPO process.

Analysts and Research Reports

Prior to the JOBS Act, broker-dealers were prohibited from publishing research for distribution in the United States relating to an issuer prior to its IPO and during certain post-IPO blackout periods. The JOBS Act changes this regime to permit research analysts to participate in additional communications

---

(*cont.*)

it will retain EGC status for disclosure purposes through the effectiveness of the registration statement, even if it would otherwise lose EGC status if tested again during registration. For purposes of the testing-the-waters and research provisions, a company should test whether it qualifies as an EGC at the time that it would engage in these communications.

[2] For example, assuming no other triggers, an EGC with a fiscal year ending on December 31 that sells shares in its IPO on *June 1, 2012* would have the fifth anniversary of its IPO on *June 1, 2017* and continue as an EGC until *December 31, 2017*.

with management of the EGC in connection with an IPO and allow research reports relating to the EGC to be published or distributed by broker-dealers (including those participating in the offering) both prior to the proposed offering and following its completion, even during former blackout periods.[3] Rule 10b-5 liability for knowingly (or at least recklessly) misleading research remains, however. As a result, we do not currently expect any immediate changes in market practice with respect to the delivery of pre-deal research in either SEC registered EGC IPOs or non-SEC registered offerings.

The Offering Document and its Contents

The JOBS Act also reduces a number of requirements related to an EGC's IPO registration statement. Among other changes, an EGC may (1) provide two years of audited financial statements instead of the currently required three years; (2) omit selected financial data for any period prior to the earliest audit period (in effect, requiring only two years of selected financials); and (3) limit its MD&A/OFR to periods covered by its audited financial statements plus interim periods. Although these requirements have not yet been included in the Form 20-F which governs the disclosure requirements for FPIs, the SEC staff has issued guidance confirming that these reduced requirements also apply to FPIs. Further, the Act directs the SEC to study Reg S-K and report to Congress on how the IPO process could be further streamlined for EGCs. We expect that any further changes would also apply to FPIs.

Under the JOBS Act, an EGC is permitted to make confidential submissions of its IPO registration statements with the SEC, provided that the confidential submission and related amendments are filed publicly at least 21 days before the EGC conducts a road show. A dual-listed FPI that qualifies as an EGC and takes advantage of the EGC benefits under the Act must comply with all of the confidential submission requirements applicable to EGCs when submitting a registration statement confidentially. Other foreign private issuers may submit confidentially under the SEC staff's historical policy on non-public submissions.[4]

The reduction in required financial information, coupled with the confidential registration statement submission options, may encourage FPI EGCs to list in the United States. Indeed, the Act could encourage certain companies to consider just a single U.S. listing because in a typical dual listing (in the United States and, e.g., the FPI's home jurisdiction), the issuer will usually be required to present three years of financial information under the non-U.S. jurisdiction's rules. Therefore, if the FPI EGC does a dual listing, it will need to comply with the requirements of the most restrictive jurisdiction.[5]

The Offering Process: General Advertising and General Solicitation

Currently, in private offerings under Regulation D and Rule 144A, offering and publicity restrictions are implemented to ensure that these "private" offerings are not construed as "public" offerings under Section 5 of the Securities Act. In a typical FPI Rule 144A/Reg S offering, great care is taken to ensure that any "public offering" made outside the United States through distribution of offering materials and press

---

[3] For further details on these changes and the potential implications for broker-dealers and their participation in an offering, including an examination of existing rules and settlements that are likely still applicable to brokers dealers, please see DAVIS POLK, *The JOBS Act: Implications for Broker-Dealers*, March 28, 2012.

[4] *See Non-Public Submissions from Foreign Private Issuers*, December 8, 2011, generally limiting FPI confidential submissions to situations where the FPI (1) is a foreign government registering its debt securities, (2) is listed or is concurrently listing its securities on a non-U.S. securities exchange; (3) is being privatized by a foreign government or (4) can demonstrate that the public submission of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.

[5] We expect, however, that if an issuer had or could easily prepare three years of audited financial statements, from a marketing perspective, it will remain preferable to present a three-year historical record.

releases and other offering materials is not extended to the United States such that there is a "general solicitation."

Under the JOBS Act, the SEC is directed, within 90 days, to revise Rule 144A (and in a comparable fashion Rule 506 of Regulation D) to provide that securities sold under such revised exemptions may be broadly offered, including by means of general solicitation or general advertising, *provided* that securities are ***sold*** only to persons reasonably believed to be QIBs in the case of Rule 144A and "accredited investors" in the case of Rule 506 of Regulation D. This change applies to all issuers regardless of EGC status and significantly reduces the risk of a Rule 144A or Reg D offering being deemed a "public offering" due to communications made to non-QIBs. This is an initial step away from regulating "offers" under the Securities Act to regulating only "sales."

SEC rulemaking and interpretation will undoubtedly influence the scope of these changes. Consistent with past practice, the SEC may revise analogous statutory provisions, including restrictions relating to "directed selling efforts" under Regulation S in order to ensure consistency in applying similar principles and to avoid undoing the easing of general solicitation and offering restrictions. In any event, FPIs and underwriters participating in Rule 144A deals following the adoption of the new rules will be able to take comfort that communications with a wider group of U.S. investors will not result in the requirement to register the securities so long as the eventual sales of the securities are made solely to QIBs.

Indeed, the implications for Rule 144A/Reg S deal process mechanics could be pervasive, including the potential for widespread marketing through Internet, TV and print ads in the United States. Nevertheless, issuers and their advisors will remain subject to potential Rule 10b-5 liability, which will still apply to these offerings (and offering materials). We expect that such potential liability will limit the appeal of many actions that might otherwise be permitted under the new rules.

In terms of immediate practical consequences, we expect that underwriters will now be able to be named in press releases for a Rule 144A deal and a company conducting a public offering abroad will be able to conduct a concurrent private placement in the United States with generally reduced publicity restrictions. It remains to be seen, though, whether, in lieu of publicity restrictions focusing on, for example, destination of offering materials or website filters to prevent U.S. access, further steps will be taken to ensure and monitor that only QIBs are sold securities in the case of Rule 144A offerings.

Reporting Requirements as a Public Company

The JOBS Act provides for a number of reduced public company reporting requirements for EGCs. Most notably for FPIs, under the JOBS Act, EGCs are exempt from the Sarbanes-Oxley Act Section 404(b) requirement that the company's auditor attest to and report on management's assessment of the company's internal controls over financial reporting. In effect, this change provides for up to a five-year transition period for EGCs versus the current one-year transition period for new registrants. As such, the JOBS Act ameliorates one of the most burdensome requirements of the Sarbanes-Oxley Act for EGCs and may thus encourage certain FPIs to reconsider whether the U.S. capital markets are an attractive place for an IPO.

Conclusion

The JOBS Act is the most significant revision to the U.S. securities regulatory regime in years, and its changes to several aspects of the offering process and reporting requirements leave many questions as to how precisely the JOBS Act will affect market practice. But one can safely say that these changes mean that FPIs that are potentially EGCs should again consider the attractiveness of a SEC-registered IPO and listing on a major U.S. stock exchange. Moreover, these changes to the U.S. securities process will likely also affect the practice of FPIs and their advisors in the non-SEC-registered context. We will continue to monitor these developments and update you with regard to significant changes.

Davis Polk

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

John Banes	+44 20 7418 1317	john.banes@davispolk.com
Andrés V. Gil	+33 1 56 59 36 30	andres.gil@davispolk.com
Michael Kaplan	212 450 4111	michael.kaplan@davispolk.com
Paul Etienne Kumleben	+44 20 7418 1360	paul.kumleben@davispolk.com
Jeffrey M. Oakes	+44 20 7418 1386	jeffrey.oakes@davispolk.com
Michael J. Willisch	+34 91 768 9610	michael.willisch@davispolk.com