The JOBS Act: General Solicitation and Advertising in Certain Private Placements and Exempt Offerings

On April 5, 2012, President Obama signed into law the Jumpstart Our Business Startups Act (the "**Act**"), a wide-ranging legislative response to the private sector which repeatedly voiced concerns regarding the existence of substantial burdens on the ability of issuers to engage in capital formation activities. As expected, the Act will have a significant impact upon federal securities laws and is intended, among other things, to provide increased access to debt and equity capital for issuers generally and "Emerging Growth Companies" specifically.

This Alert primarily addresses the Act's sanction of the use by all issuer's of general solicitation and general advertising in private placements of securities conducted pursuant to Rule 506 of Regulation D ("**Rule 506**") of the Securities Act of 1933, as amended (the "**Securities Act**"). In addition, this Alert also describes similar changes to Rule 144A(d)(1) of the Securities Act ("**Rule 144A**"). For additional information regarding the Act, please refer to The JOBS Act: Increase in and Division of Section 12(g) Registration Requirement, The JOBS Act: Crowdfunding, The JOBS Act: Emerging Growth Companies and the IPO On-Ramp and The JOBS Act Quick Reference Chart.

How Prevalent Are Private Placements In The Capital Markets?

Private Placements historically have been and continue to be an essential source of equity and debt capital for all issuers but have been particularly favored among private and non-listed issuers. On April 10, 2012, the Securities and Exchange Commission (the "**SEC**") released a report entitled "Capital Raising in the U.S.: The Significance of Unregistered Offerings Using the Regulation D Exemption" which (i) details the amount of capital raised in private placements which relied upon an exemption afforded by Regulation D as compared to capital raised from other unregistered and registered offering methods and (ii) provides a perspective on the state of competition and regulatory burden in the capital markets (the "**Report**"). In the Report, the SEC found, among other things, that:

- in 2010, private placements, which amounted to $905 billion, surpassed debt offerings as the dominant offering method in terms of dollars of capital raised in the United States;
- the median raise of private placements was approximately $1 million;
- there have been 37,000 unique private placements since 2009;
- public issuances decreased by 11% from 2009 to 2010 while private placements increased by 31% during the

same period of time;

- the average amount of non-accredited investors in private placements during the period 2009 to first quarter of 2011 was 0.1 while the median was 0. In approximately 90% of private placements, all investors were accredited; and
- approximately 10% of all public companies raised capital through private placements during the period 2009 to first quarter of 2011.

What Is The Safe Harbor of Regulation D Generally And Rule 506 Specifically?

Regulation D was intended to facilitate capital formation by providing issuers with a safe harbor from the registration requirements of the Securities Act. Rule 506, which is an integral component of Regulation D, permits the sale of an unlimited dollar amount of securities to an unlimited number of "accredited investors" and up to 35 "non-accredited investors," provided that certain conditions, such as the prohibition against general solicitations of interest and the provision of a sufficient amount of information to non-accredited investors, are satisfied. Because Regulation D provides a non-exclusive safe harbor from registration, an issuer that fails to satisfy the criteria of Regulation D may alternatively seek to rely upon the general exemption for private placements set forth in Section 4(2) of the Securities Act.

Does The Act Allow For General Solicitation And General Advertising In Connection With Certain Private Placements And Exempt Offerings?

Yes, provided that all investors in (i) a private placement conducted pursuant to Rule 506 must be "accredited investors" and (ii) an exempt offering conducted pursuant to Rule 144A must be qualified institutional buyers or "QIBs."

Will General Solicitation And General Advertising Be Allowed Immediately?

No. Within ninety (90) days of April 5, 2012, the SEC must revise Rule 506 and Rule 144A to permit the use of general solicitation or general advertising in private placements and exempt offerings, respectively. As of the date of this Alert, the SEC has not made such revisions; accordingly, issuers should refrain from using general advertising or general solicitation in connection with such private placements and exempt offerings until such revisions are made.

Does The Act Affect Organizations That Maintain Offering Platforms And Mechanisms?

Yes. The Act creates an exemption from the broker-dealer registration requirements (the "**Exemption**") of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), for organizations that seek to facilitate a private placement conducted pursuant to Rule 506 and that:

- maintain a platform or mechanism that permits offers, sales, general solicitations, general advertisements or other similar activities by issuers in connection with the private placement, regardless of whether such activities occur online, in person or through any other means;
- co-invest in the private placement; and
- provide ancillary services, such as the conduct of due diligence and the provision of standardized documentation to the issuer and investors, with respect to the private placement.

Organizations that seek to rely upon the Exemption must not:

- receive any compensation in connection with the private placement;
- be in possession of customer funds or securities in connection with the private placement; and
- be subject to a statutory disqualification pursuant to the Exchange Act.

Are There Any Potential Consequences?

Yes. The availability of issuers to generally solicit or advertise in connection with a Rule 506 private placement or a Rule 144A exempt offering will most likely have a significant impact upon the nature and conduct of such private placements and exempt offerings and those persons who participate in them, including the following:

- presuming that all investors are accredited, issuers will be able to (i) use previously prohibited media outlets, such as radio, television and Internet (e-mail, blogs, to advertise and (ii) disclose certain information, such as the identities of placement agents, regarding the private placement which previously could not be publicly disclosed;
- in anticipation of SEC guidance, issuers should begin reviewing their offering documentation to ascertain whether the representations and warranties contained in their subscription documents would likely be sufficient to satisfy the Act's mandate that issuers (i) undertake "reasonable steps" to verify that investors are accredited or (ii) formulate a reasonable belief that certain investors are QIBs;
- issuers that are conducting a public offering but that are in need of immediate capital should be able to simultaneously conduct a private placement without fear that the offerings may be integrated due to general solicitations or general advertising; and
- organizations that maintain offering platforms or mechanisms will have greater certainty regarding their operations and registration requirements which may likely result in an increased number of such organizations.