JOBS ACT REQUIRES LESS WORK: SCALED-DOWN COMPENSATION DISCLOSURE FOR "EMERGING GROWTH COMPANIES"

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To Our Clients and Friends:

The Jumpstart Our Business Startups Act (the "JOBS Act"), as signed by President Obama, reduces the amount of executive compensation disclosure that is required of "emerging growth companies" in their proxy statements. This Client Update, which may be of particular interest to private equity funds that are contemplating an initial public offering of their portfolio companies and to companies that have recently gone public, will briefly address the disclosure requirements that apply to "emerging growth companies." For a more general discussion of the JOBS Act, please see our Client Update "It's Raining 'JOBS' – President Signs the 'JOBS' Act into Law," available on our **website**.

Emerging Growth Companies: An "emerging growth company," or EGC, is a company that had total annual gross revenues of less than $1 billion dollars (indexed for inflation) during its most recently completed fiscal year, provided the company has not had an initial public offering (IPO) on or before December 8, 2011. A company that is an EGC on the first day of a fiscal year remains an EGC until the earliest of (i) the end of the fiscal year in which it has total annual gross revenues of at least $1 billion dollars (indexed for inflation), (ii) the end of the fiscal year in which falls the fifth anniversary of the company's IPO, (iii) the date on which the company has, during the prior three-year period, issued more than $1 billion dollars of non-convertible debt, or (iv) the date on which the company is deemed to be a "large accelerated filer."

Exemption from Say-on-Pay Vote: As a result of the recently enacted Dodd-Frank Act, not less frequently than once every three years, public companies must seek a separate resolution subject to a non-binding shareholder vote to approve the compensation of executives as disclosed in the company's proxy statement (the so-called "say-on-pay" vote). In addition, not less frequently than once every six years, the proxy statement must include a separate resolution subject to a non-binding shareholder vote to determine whether the say-on-pay votes will occur every one, two or three years (the so-called "frequency" vote). The JOBS Act exempts EGCs from the say-on-pay vote and the frequency vote requirements for so long as the company remains an EGC. A company that ceases to be an EGC within two years of its IPO must present its first say-on-pay vote by the end of the third year following its IPO, and a company that ceases to be an EGC later than two years following its IPO must present its first say-on-pay vote by the anniversary of the date on which it ceased to be an EGC. The JOBS Act is silent as to when a company that ceases to be an EGC must hold its first frequency vote, but it stands to reason that the first such vote should be held contemporaneously with the first say-on-pay vote.

Proxy Disclosure "Lite": Under the JOBS Act, an EGC "may comply" with the executive compensation disclosure requirements of Item 402 of Regulation S-K as though it were a "smaller reporting company." Accordingly:

- There is no requirement to include a Compensation Discussion and Analysis.
- Disclosure is required only for all individuals serving as the company's principal executive officer (the PEO) during the last completed fiscal year; the company's two most highly compensated executive officers other than the PEO who were serving as executive officers at the end of the last completed fiscal year; and up to two additional individuals for whom disclosure would have been provided but for the fact that the individual was not serving as an executive officer at the end of the last completed fiscal year.
- Disclosure is limited to a Summary Compensation Table covering only the last two completed fiscal years, an Outstanding Equity Award Table, and a Director Compensation Table, and accompanying narratives. The accompanying narratives require a description of employment agreement, equity awards and other compensation arrangements.

In addition to eliminating the CD&A, the JOBS Act eliminates the need to include a Grants of Plan-Based Awards Table, Options Exercises and Stock Vested Table, Nonqualified Deferred Compensation Table, Pensions Benefits Table, as well as the recently adopted rules requiring disclosure of the relationship between risk and compensation. In addition, the JOBS Act exempts EGCs from the requirements to disclose "information that shows the relationship between executive compensation actually paid and the financial performance of the issuer," and to disclose the median of annual total compensation of the company's employees other than the chief executive officer, the annual total compensation of the chief executive officer and the ratio of each of these medians to each other.

Practical Implications? The JOBS Act provides a welcome departure from the parade of disclosure rules that have been imposed on public companies in recent years. But even with the scaled back requirements, EGCs must still present the more limited executive compensation disclosure as described above. In addition, notwithstanding the JOBS Act, it would be advisable for a company undergoing an IPO to disclose sufficient information in respect of its performance-based compensation to enable the company to rely on the transition rules under Section 162(m) (which would otherwise prohibit the company from claiming a deduction for certain compensation paid to its senior executive officers). It should also be noted that proxy solicitation and shareholder advisors such as ISS have not, to our knowledge, weighed in with an "official" view of the lessened disclosure, and it is to be seen whether they will bring to bear any pressure on EGCs to "voluntarily" provide more extensive disclosure, and it is unclear whether the markets will have a negative view of companies that reduce disclosure based on EGC status.

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Please feel free to contact us if you would like to discuss any of the forgoing.

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