ALERTS

The JOBS Act: Provisions Relating to Private Funds and Facilitating Access to Capital

March 28, 2012

On March 27, 2012, the U.S. House of Representatives adopted the Jumpstart Our Business Startups (JOBS) Act (H.R. 3606). President Obama is expected to sign the JOBS Act into law.

Provisions Relating to Private Funds

Of particular interest to private funds and their managers are the provisions of the JOBS Act which: (1) eliminate the ban on general solicitation and general advertising under Regulation D in connection with sales to accredited investors; and (2) increase the threshold for becoming a reporting company under Section 12(g) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), from 500 shareholders of record to either: (a) 2,000 shareholders of record; or (b) 500 shareholders of record that are not accredited investors.

The JOBS Act directs the Securities and Exchange Commission (the "SEC") to amend Regulation D, within 90 days after its enactment, to provide that the prohibitions against general solicitation or general advertising shall not apply to offers and sales of securities pursuant to Rule 506 of Regulation D, provided all purchasers are accredited investors. It also amends Section 4 of the Securities Act of 1933, as amended (the "Securities Act") to provide that offers and sales pursuant to Rule 506 (as amended) shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation.

The Act also directs the SEC to amend Rule 144A, within 90 days after the enactment of the Act, to provide that securities sold thereunder may be offered to persons other than qualified institutional buyers, including by means of general solicitation or general advertising, so long as they are sold only to persons reasonably believed to be qualified institutional buyers.

Provisions Relating to Facilitating Access to Capital

The JOBS Act is intended to stimulate job creation by facilitating access to capital markets for emerging growth companies (defined as a company with total annual gross revenues of less than $1 billion during its most recently completed fiscal year). The Act streamlines the initial public offering ("IPO") process for emerging growth companies by permitting such companies to confidentially submit to the SEC a draft registration statement prior to public filing, and by exempting emerging growth companies from certain of the disclosure requirements that are applicable to issuers registering securities with the SEC in an IPO. Also, following the completion of an IPO, emerging growth companies are exempt from certain of the reporting and disclosure requirements imposed on public companies (including the requirement under Section 404(b) of the Sarbanes-Oxley Act of 2002 that an issuer's independent auditor provide an attestation relating to internal controls).

The Act also includes provisions which provide an exemption from registration under the Securities Act for "crowdfunding," which refers to raising small amounts of capital from large numbers of investors, and an expansion of the exemption provided in Section 3(b) of the Securities Act (which is most often used by small businesses) by increasing the dollar value of securities that may be sold by an issuer pursuant to such exemption from $5 million to $50 million. The SEC is directed by the legislation to issue rules to carry out the crowdfunding provisions within 270 days after enactment.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel.

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