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# New Law Reduces Executive Compensation Disclosure Obligations and Eliminates Say-on-Pay Votes for Emerging Growth Companies

**On March 27, 2012, the US House of Representatives approved the Jumpstart Our Business Startups Act, also known as the JOBS Act (the Act), in the form previously approved by the Senate.[1] The Administration has indicated that the President will sign the Act into law this week.**

The Act significantly eases the initial public offering, or IPO, process in the United States for emerging growth companies, or EGCs. Under the Act, a company qualifies as an EGC if it has gross annual revenues of less than $1 billion (this includes non-US issuers) and has not conducted its IPO on or prior to December 8, 2011 . The vast majority of companies that have recently conducted IPOs would have fit that definition.[2]

The Act exempts EGCs from compliance with various requirements relating to executive compensation, many of which were recently adopted in 2010 pursuant to the Dodd-Frank Wall Street and Consumer Protection Act. In particular, the Act exempts EGCs from the following requirements:

- to hold a "say-on-pay" advisory stockholder vote on compensation of named executive officers (including the corresponding "say-on-pay frequency" vote);
- in connection with a merger or acquisition, (1) to provide disclosure on "golden parachute" payments payable to named executive officers and (2) to hold a nonbinding stockholder vote on such payments;
- to make "pay versus performance" disclosure comparing the compensation actually paid to the named executive officers and the issuer's financial performance; and

[1] The final text of the Act, as approved by the House on March 27, 2012, and the Senate on March 22, 2012, is available at: http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf.

[2] If you wish to review further information regarding all provisions of the Act, you may refer to our client publication dated March 30, 2012 entitled "Jobs Act Will Ease Rules for IPOs and Private Placements and Reduce Compliance Burdens Post IPO" at www.shearman.com/JOBS-Act-Will-Ease-Rules-for-IPOs-and-Private-Placements-and-Reduce-Compliance-Burdens-Post-IPO-03-2012.

- to provide "internal pay equity disclosure" showing the ratio between the median compensation of the issuer's employees and its CEO.

EGCs also are permitted to comply with the reduced compensation disclosure requirements that apply to small business issuers with a public float of less than $75 million. These modified disclosure rules:

- reduce the number of named executive officers from five to three (the CEO and two other most highly compensated executive officers);
- limit Summary Compensation Table disclosures to two years;
- eliminate the Compensation Discussion and Analysis, Grants of Plan-Based Awards Table, Option Exercises and Stock Vested Table, Non-qualified Deferred Compensation Table and Pension Benefits Table; and
- eliminate the disclosure of the relationship between compensation and risk, if required.

These reduced disclosure requirements continue in effect for so long as the issuer remains an EGC. Under the Act, an issuer will continue to qualify as an EGC until the earliest of (1) the last day of the fiscal year during which it has gross revenues of $1 billion or more, (2) the last day of the fiscal year following the fifth anniversary of its IPO, (3) the date on which it has issued (in registered and exempt offerings) more than $1 billion in non-convertible debt during the previous three years, or (4) when it becomes a "large accelerated filer," generally meaning that its public float is $700 million or more.

The timing of an issuer's first say-on-pay vote following the loss of EGC status depends upon the length of time during which the issuer qualified as an EGC. If the issuer qualified as an EGC for less than two years following its IPO, the first say-on-pay vote must be held within three years following the date of the IPO. All other issuers must hold their first say-on-pay vote within one year following the date on which they cease to be an EGC.

The Act does not modify other requirements of the Dodd-Frank Act, such as mandatory clawback policies, compensation committee and compensation committee advisor independence, and disclosure regarding hedging by employees and directors. Under the current rulemaking calendar, by June 2012 the Securities and Exchange Commission is expected to (1) identify independence standards for compensation advisers and consultants, (2) adopt rules directing the national securities exchanges and associations to adopt listing standards regarding compensation committee and compensation adviser independence, (3) adopt disclosure rules regarding compensation consultant conflicts, and (4) propose rules regarding clawbacks and the disclosure of pay-for-performance, pay ratios and hedging. In addition, during the second half of 2012, these additional disclosure rules, and the rules regarding clawbacks, are expected to be adopted.

## Conclusion

The Act would ease the IPO process for many companies by enabling them to ramp-up their disclosure obligations over a five-year period. In the process, the Act exempts EGCs from many of the compensation disclosure requirements implemented since the enactment of Sarbanes-Oxley in 2002. In taking action to provide small businesses with greater access to capital, Congress overrode arguments by some commentators and regulators (including SEC Chair Mary L. Schapiro and Commissioner Luis Aguilar) that the abridged disclosure and regulatory requirements for EGCs could harm investors and, potentially, impede access to capital if investors are not confident that they have access to all material information.

The enhanced compensation disclosure requirements that have been implemented since 2006 and the say-on-pay votes mandated by the Dodd-Frank Act have received overwhelming endorsement from shareholders and shareholder advisors, such as Institutional Shareholder Services. It remains to be seen whether EGCs will elect to voluntarily comply with certain provisions from which they are exempt.



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