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Practice Group:
Corporate

Yes, Consumer, Real Estate, and Business Finance Companies, You Too Can Take the IPO On-Ramp

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Just as HOV lanes were created to ease the commuting burden for those who meet certain requirements, the recently enacted Jumpstart Our Business Startups (“JOBS”) Act created the “IPO On-Ramp” to ease the burden of becoming and being a public company. To hop on the ramp, all you have to do is meet certain requirements, and unlike HOV lane limitations, the requirements are not very restrictive. You just need to be an “Emerging Growth Company.”

In this alert, we explore what it means to be an “Emerging Growth Company”; the benefits of the “IPO On-Ramp”; and the benefits from the JOBS Act once you become a public company. The JOBS Act, however, does more than just create the “IPO On-Ramp” – it restructures much of the landscape for raising private capital as well. If you would like to learn more about the JOBS Act see our [Client Alert](#) dated April 5, 2012.

What is an “Emerging Growth Company”? Sounds like High-Tech, but it’s not

An emerging growth company (“EGC”) can be a high-tech company, a consulting company, a finance company (including consumer finance), or a real estate investment trust (“REIT”). An emerging growth company is not defined by its industry, its growth rate, or its prospects, but simply based on the size of its revenues. If your revenues for your most recently completed fiscal year are less than \$1 billion, you are an EGC: simple as that. And you remain an EGC (with full benefits) until the earliest of (i) the end of the fiscal year in which your revenues equal or exceed \$1 billion; (ii) the end of the fiscal year following the fifth anniversary of your IPO; (iii) the date on which you have issued more than \$1 billion in non-convertible debt over the prior three-year period; and (iv) the date on which you become a “large accelerated filer” under the Exchange Act (which means, among other things, your public float is at least \$700 million).

How does the “On-Ramp” help my IPO?

There are a couple of key reforms that could significantly reduce the burden of the IPO process: testing the waters coupled with confidential filing and reduced financial and compensation information. In addition, the restrictions on analyst reports have been eased, which may assist in getting information out to investors. Given the history of analyst reports and enforcement actions, however, it remains to be seen if, when, and to what extent broker-dealers take advantage of those eased restrictions.

Testing the Waters and Confidential Filing. One of the hallmarks of going public is public disclosure. You have to show the world your financial statements, compensation of certain executives, your business practices, and so forth. One issue many private companies face in deciding to go public is that you have to publicly disclose this information long before you can “go public,” and there is no

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guarantee that your efforts to go public will be successful. Now, as an EGC, you don't have to jump into the deep end of the pool without first getting acclimated.

First, in connection with a securities offering, you or any person authorized to act on your behalf (such as a potential underwriter) may, either before or after filing a registration statement with respect to the IPO, engage in oral or written communications with potential investors that are qualified institutional buyers ("QIBs") or accredited institutional investors. This "pre-road show" permits you to get a sense of the interest in your IPO.

Second, you may confidentially submit a draft of your registration statement to the Securities and Exchange Commission ("SEC") for review. The SEC will comment on the draft and you can file amendments in response to those comments just like any other IPO, except the comments and filings are not publicly available. The "world" does not get to see the information until at least 21 days before you start your "road show" to sell your securities. At that point, you will have to publicly file your registration statement and all the amendments with the SEC. But, the good news is that the confidential filing coupled with your ability to test the waters means you have gauged investor interest, and made an informed decision about the likely success of your IPO before you disclose your confidential information to the world.

Reduced Financial and Compensation Information. As an EGC, you will need to provide no more than two years of audited financial statements in your IPO registration statement rather than three years. In addition, you will need to disclose compensation information with respect to your CEO and the two highest paid executives for a total of three rather than five for non-EGCs, and disclosure of your CFO's compensation information is not mandatory (unless the CFO is one of the two highest paid executives).

How have the post-IPO burdens been reduced?

The burdens have been reduced in five key areas:

New Accounting Standards. As an EGC, the SEC may not require you to comply with any new or revised accounting standard unless and until that standard applies to companies that are not subject to the Exchange Act – i.e., private companies.

Auditor Attestation. As an EGC, you will not have to obtain an auditor attestation with respect to your internal controls as required by Section 404(b) of the Sarbanes-Oxley Act. Compliance with the auditor attestation requirements is a significant regulatory cost to public companies that are not EGCs. You will, however, be required to establish and maintain internal controls and include the CEO and CFO certifications required under Rules 13a-14 and 15d-14 under the Exchange Act.

Financial Information. As an EGC, in any registration statement, periodic, or other report filed with the SEC, you will not need to present selected financial data for any period before the earliest year you provided audited financial statements in your IPO.

Executive Compensation Disclosure. As an EGC, you may choose to comply with the executive compensation disclosure requirements applicable to smaller reporting companies, and you will not be subject to the pending requirement under the Dodd-Frank Act to disclose the ratio of CEO compensation to median employee compensation.

Say on Pay. As an EGC, you will not be required to conduct the shareholder vote on executive compensation mandated under the Dodd-Frank Act until, at a minimum, three years after the first sale of your common equity in a registered offering.

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Even though certain portions of the JOBS Act require further rule making before taking effect, now is the time to become familiar with the IPO On-Ramp. If you have any questions about the potential benefits of the Act, or any other matters related to raising capital in the public and private securities markets, please contact the authors listed below.

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